THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME XXIII.

THE ENGLISH AND EMPIRE DIGEST

COMPLETE AND EXHAUSTIVE

ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXIII.

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MUNICIPAL CORPORATIONS.

See LOCAL GOVERNMENT; METROPOLIS.

MUNICIPAL ELECTIONS.

See ELECTIONS.

MURDER.

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MUSEUMS.

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MUSICAL COPYRIGHT.

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See THEATRES AND OTHER PLACES OF ENTERTAINMENT.

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See SHIPPING AND NAVIGATION.

NAVY.
See ROYAL FORCES.

NECESSARIES.
See ADMIRALTY; HUSBAND AND WIFE; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND; SHIPPING AND NAVIGATION.

NE EXEAT REGNO.
See EQUITY; PRACTICE AND PROCEDURE.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.*, [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (*e.g.*, [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch.	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw.	Beawes's Lex Mercatoria	Eng.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol. ...	Eng.
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben.	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm.	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com.	Blackstone's Commentaries	Eng.
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C.	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca.	Bombay Reports, Crown Cases	Ind.
Bom. O. C.	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R. ...	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott.	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827 ...	Eng.
Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas. ...	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir R. Brooke's Abridgement	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800 ...	Eng.
Bro. Supp. to Mor. ...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Brown. & Lush. ...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.

Buch.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A.	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B.	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. B. R.	Canadian Bankruptcy Reports Annotated, 1920—(current)	Can.
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—1913	Eng.
C. L. Ch.	Common Law Chambers	Can.
C. L. J.	Cape Law Journal	S. Af.
C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R.	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R.	Commonwealth Law Reports	Aus.
C. L. R.	Calcutta Law Reporter	Ind.
C. L. T.	Canadian Law Times	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	Can.
C. P.	Upper Canada Common Pleas	Can.
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D.	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases	Can.
C. T. R.	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N.	Calcutta Weekly Notes	Ind.
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas.	Cameron's Supreme Court Cases	Can.
Cam. Prac.	Cameron's Supreme Court Practice	Can.
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas.	Commercial Law Reports of Canada, 4 vols., 1901—1905	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated, 1898—(current)	Can.
Can. Gaz.	Canadian Gazette	Can.
Can. Ry. Cas.	Canadian Railway Cases	Can.
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Car. C. L.	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann.	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
Carl.	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Cart.	Cases on British North America Act (Cartwright)	Can.
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. *temp.* Finch	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. *temp.* King	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig.	Cassells' Digest	Can.
Ch. (preceded by date)	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)	Eng.
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch.	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch.	Upper Canada Chancery Chambers Reports	Can.
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip.	New Brunswick Reports (Chipman)	Can.

Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ...	Eng.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas. ...	Clark and Scully's Drainage Cases	Can.
Clay.	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent.	Coke's Entries	Eng.
Co. Inst.	Coke's Institutes	Eng.
Co. L. J.	Colonial Law Journal	N.Z.
Co. Litt.	Coke on Littleton (1 Inst.)	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	Eng.
Coch.	Nova Scotia Reports (Cochran)	Can.
Cockb. & Rowe ...	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas.	Commercial Cases, 1895—(current)	Eng.
Com. Dig.	Comyns' Digest	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig.	Congdon's Digest	Can.
Const	Const's edition of Bott's Poor Laws, 3 vols., 1807	Eng.
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg. ...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. *temp.* Brough. ...	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. *temp.* Cott. ...	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor.	Coryton's Reports	Ind.
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud. ...	Correspondances Judiciaires	Can.
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
Cout.	Coutlees' Unreported Cases	Can.
Cout. Dig.	Coutlees' Digest	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	Eng.
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ...	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C. ...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas. ...	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas. ...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng.
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
D.	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A.	Dorion's Queen's Bench Reports	Can.
D. L. R.	Dominion Law Reports	Can.

Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	Eng.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	Scot.
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	Eng.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	Eng.
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	Eng.
Dav. Ir.	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	Ir.
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816	Eng.
Day	Day's Election Cases, 1 vol., 1892—1893	Eng.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	Eng.
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B.	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
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Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	Scot.
De G.	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	Eng.
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Drury *temp.* Sug.	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844	Ir.
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Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	Scot.
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Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812	Eng.
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Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744 ...	Eng.
Eq. Rep.	Equity Reports, 3 vols., 1853—1855	Eng.
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F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
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Fac. Coll.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 37 vols., 1752—1841	Scot.
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	Scot.
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	Eng.
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Fitz. Nat. Brev. ...	Fitzherbert's Natura Brevium	Eng.
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
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Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852 ...	Eng.
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
Forb.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	Scot.
Fort. De Laud. ...	Fortesque, De Laudibus Legum Angliæ	Eng.
Fortes. Rep.	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
Fost.	Foster's Crown Cases, 1 vol., 1708—1760	Eng.
Fount.	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	Scot.
Fox & S. Ir.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
Fox & S. Reg.	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	Eng.
Fras.	Fraser (Simon), Election Cases, 2 vols., 1793	Eng.
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G. W. D.	South African Law Reports, Griqualand West Local Division	S. Af.
G. W. L.	South African Law Reports, Griqualand West Local Division	S. Af.
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	Eng.
Gale	Gale's Reports, Exchequer, 2 vols., 1835—1836	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports	N.Z.
Geld. Dig.	Geldert's Digest	Can.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Giff.	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
Gilb.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714 ...	Eng.
Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas	Eng.
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Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	Scot.
Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
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Godb.	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb.	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
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H.	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
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H. C.	Reports of the High Court of Griqualand West	S. Af.
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Hailes	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L.	Hale's Common Law	Eng.
Hale, P. C.	Hale's Pleas of the Crown, 2 vols.	Eng.
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Harc.	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard.	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669... ...	Eng.
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Hay & Marr.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779 ...	Eng.
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Home, Ct. of Sess. ...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
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John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur.	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K.	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862 ...	Eng.
K. & J.	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858 ...	Eng.
K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 (*e.g.*, [1901] 2 K. B.)	Eng.
Kames, Dict. Dec. ...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec. ...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec. ...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Keb.	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578 ...	Eng.
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734...	Eng.
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759 ...	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr	New Brunswick Reports (Kerr)	Can.

Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835 ...	Eng.
Knapp	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Knox	Knox's Reports	Aus.
Konst. & W. Rat. App.	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
Konst. Rat. App. ...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908 ...	Eng.
L. & G. *temp.* Plunk. ...	Lloyd and Goold's Reports *temp.* Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. *temp.* Sugd. ...	Lloyd and Goold's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz. ...	Local Courts and Municipal Gazette	Can.
L. C. J.	Lower Canada Jurist	Can.
L. C. L. J.	Lower Canada Law Journal	Can.
L. C. R.	Lower Canada Reports	Can.
L. G. R.	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	Law Journal (County Courts Reporter), 1912—(current) ...	Eng.
L. J. C. P.	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B. ...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A. ...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	Leader Law Reports	S. Af.
L. M. & P.	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	Legal News	Can.
L. R. A. & E.	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875 ...	Eng.
L. R. C. P.	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	Law Reports, Exchequer, 10 vols., 1865—1875...	Eng.
L. R. H. L.	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App. ...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	Law Reports, Probate and Divorce, 3 vols., 1865—1875 ...	Eng.
L. R. P. C.	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div. ...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T.	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	La Themis	Can.
Lane	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628 ...	Eng.
Laws. Reg. Cas. ...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865 ...	Eng.
Leach	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758 ...	Eng.
Lee *temp.* Hard. ...	T. Lee's Cases *temp.* Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.

Leg. Rep.	Legal Reporter	Ir.
Legge	Legge's Reports	Aus.
Leon.	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
Lev.	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	Eng.
Lew. C. C.	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
Ley	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	Eng.
Lib. Ass.	Liber Assisarum, Year Books, 1—51 Edw. III.	Eng.
Lilly	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	Eng.
Litt.	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Lloyd, L. R.	Lloyd's List Law Reports, 1919—(current)	Eng.
Lloyd, Pr. Cas.	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	Eng.
Lofft	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	Eng.
Long. & T.	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	Ir.
Lords Journals	Journals of the House of Lords	Eng.
Lud. E. C.	Luder's Election Cases, 3 vols., 1784—1787	Eng.
Lumley, P. L. C.	Lumley's Poor Law Cases, 2 vols., 1834—1842	Eng.
Lush.	Lushington's Reports, Admiralty, 1 vol., 1859—1862	Eng.
Lut.	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	Eng.
Lut. Reg. Cas.	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	Eng.
Lynd.	Lyndwood, Provinciale, fol., 1 vol.	Eng.
M.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
M. & S.	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	Eng.
M. & W.	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	Eng.
M. C. C.	Mining Commissioner's Cases	Can.
M. C. R.	Montreal Condensed Reports	Can.
M. H. C. R.	Madras High Court Reports	Ind.
M. L. R. (Vol.) K. B. or Q. B.	Montreal Law Reports, King's Bench or Queen's Bench	Can.
M. L. R. (Vol.) S. C.	Montreal Law Reports, Superior Court	Can.
M. M. Cas.	Martin's Reports of Mining Cases	Can.
Mac.	Macassey's New Zealand Reports	N.Z.
Mac. & G.	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	Eng.
Mac. & H.	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	Eng.
M'Cle.	M'Cleland's Reports, Exchequer, 1 vol., 1824	Eng.
M'Cle. & Yo.	M'Cleland and Younge's Reports, Exchequer, 1 vol., 1824—1825	Eng.
Macfarlane	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	Scot.
Macl. & Rob.	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	Scot.
Macph. (Ct. of Sess.)	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	Scot.
Macq.	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	Scot.
Macr.	Macrory's Patent Cases, 2 parts, 1847—1856	Eng.
Mad.	Madras High Court Reports	Ind.
Madd.	Maddock's Reports, Chancery, 6 vols., 1815—1822	Eng.
Madd. & G.	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	Eng.
Madox	Madox's Formulare Anglicanum	Eng.
Madox, Exch.	Madox's History and Antiquities of the Exchequer, 2 vols.	Eng.
Mag.	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	Eng.
Man. & G.	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	Eng.
Man. & Ry. K. B.	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	Eng.
Man. & Ry. M. C.	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	Eng.
Man. L. J.	Manitoba Law Journal	Can.
Man. L. R.	Manitoba Law Reports	Can.
Man. R. *temp.* Wood	Manitoba Reports *temp.* Wood	Can.
Mans.	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	Eng.
Mar. L. C.	Maritime Law Reports (Crockford), 3 vols., 1860—1871	Eng.
March	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	Eng.
Marr.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Marsh.	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	Eng.
Marsh.	Marshall's Reports	Ind.
Mayn.	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	Eng.
Meg.	Megone's Companies Acts Cases, 2 vols., 1889—1891	Eng.

Men.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer.	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw.	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep.	Modern Reports, 12 vols., 1669—1755	Eng.
Mol.	Molloy's Report's, Chancery (Ireland), 3 vols., 1808—1831	Ir.
Mont.	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
Mont. & A.	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	Eng.
Mont. & B.	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch.	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M.	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G.	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P.	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S.	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App.	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C.	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S.	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M.	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R.	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C.	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P.	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B.	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict.	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr.	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos.	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep.	Municipal Reports	Can.
Murd. Epit.	Murdoch's Epitome	Can.
Murp. & H.	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr.	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr.	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K.	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. (preceded by date)	Northern Ireland Law Reports, 1925—(current) (*e.g.*, [1925] N.)	Ir.
N. A. C.	Native Appeal Cases	S. Af.
N. & S.	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig.	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep.	New Brunswick Equity Reports	Can.
N. B. R.	New Brunswick Reports	Can.
N. B. R. (All.)	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.)	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.)	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.)	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.)	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr)	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.)	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.)	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.)	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.)	New Brunswick Reports (Trueman)	Can.
N. L. R.	Natal Law Reports	S. Af.
N. P. D.	South African Law Reports, Natal Provincial Division	S. Af.
N. S. R.	Nova Scotia Reports	Can.
N. S. R. (Coch.)	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & O.)	Nova Scotia Reports (Geldert and Oxley)	Can.
N. S. R. (G. & R.)	Nova Scotia Reports (Geldert and Russell)	Can.
N. S. R. (James)	Nova Scotia Reports (James)	Can.
N. S. R. (Old.)	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.)	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.)	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.)	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad.	New South Wales Reports, Admiralty	Aus.
N. S. W. B.	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas.	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq.	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtn. Cas.	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R.	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts.	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.)	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.)	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S.	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N.	New South Wales Weekly Notes	Aus.
N. W.	North-Western Provinces High Court Reports	Ind.
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N. Z. Jur. Mining Law	New Zealand Jurist Mining Law	N.Z.

N. Z. Jur. N. S.	...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R.	...	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A.	...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels.	...	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B.	...	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C.	...	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	...	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C.	...	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas.	...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.
New Pract. Cas.	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep. ...	...	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas. ...	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R. ...	...	Newfoundland Reports	Nfld.
Nolan	...	Nolan's Magistrates' Cases, 1 vol., 1791—1798	Eng.
Notes of Cases ...	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
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Ont. Dig. ...	...	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date) ...		Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (*e.g.*, [1891] P.)	Eng.
P. & B.	...	New Brunswick Reports (Pugsley and Burbidge)	Can.
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Palm.	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
Park.	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pat. App. ...	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App. ...	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Peake, Add. Cas.	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
Peck.	...	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham	...	Pelham (S. A.) Reports	Aus.
Per. & Dav. ...	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn. ...	...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S. ...	...	Perrault's Counseil Superieur	Can.
Per. P.	...	Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph.	...	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas. ...	...	Philipps' Election Cases, 1 vol., 1780	Eng.
Phillim.	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud.	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	...	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R. ...	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Pitc.	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd.	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll.	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph.	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D. ...	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.

Pratt	Pratt's Supplement to Bott's Poor Laws, 1833	Eng.
Prec. Ch.	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	Price's Mining Commissioners' Cases	Can.
Pug.	New Brunswick Reports (Pugsley)	Can.
Py. R.	Pykes' Lower Canada Reports	Can.
Q. B.	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 (*e.g.*, [1891] 1 Q. B.)	Eng.
Q. B. D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	Eng.
Q. J. P.	Queensland Justice of Peace Reports	Aus.
Q. L. J.	Queensland Law Journal and Reports, 11 vols., 1879—1901	Aus.
Q. L. R.	Quebec Law Reports	Can.
Q. L. R. (Beor)	Queensland Law Reports by Beor, 1876—1878	Aus.
Q. P. R.	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaries de Québec, Cour du Banc du Roi, 1892—(current)	Can.
Q. R. (Vol.) S. C.	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
Q. S. C. R.	Queensland Supreme Court Reports, 5 vols., 1860—1881	Aus.
Q. S. R.	Queensland State Reports, 6 vols., 1902—1906	Aus.
Q. W. N.	Weekly Notes, Queensland	Aus.
R.	The Reports, 15 vols., 1893—1895	Eng.
R.	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	S. Af.
R. (Ct. of Sess.)	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
R. A. C.	Ramsay, Appeal Cases	Can.
R. & C.	Nova Scotia Reports (Russell & Chesley)	Can.
R. & G.	Nova Scotia Reports (Russell and Geldert)	Can.
R. C.	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de J.	Revue de Jurisprudence	Can.
R. de L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	Aus.
R. E. D.	Ritchie's Equity Decisions (Russell)	Can.
R. J. R. Q.	Quebec Revised Reports	Can.
R. L. N. S.	Revue Légale, New Series, 1895—(current)	Can.
R. L. O. S.	Revue Légale, Old Series, 21 vols., 1869—1892	Can.
R. P. C.	Reports of Patent Cases, 1884—(current)	Eng.
R. R.	Revised Reports	Eng.
Rast.	Rastell's Entries	Eng.
Rayn.	Rayner's Tithe Cases, 3 vols., 1575—1782	Eng.
Real Prop. Cas.	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. Ch.	Reports in Chancery, fol., 3 vols., 1615—1710	Eng.
Rep. in C. of A.	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud.	New South Wales Reserved and Equity Judgments	Aus.
Reserv. Cas.	Reserved Cases	Ir.
Rick. & M.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Rick. & S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
Ridg. L. & S.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
Ridg. Parl. Rep.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	Ir.
Ridg. *temp.* H.	Ridgeway's Reports *temp.* Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Ritch. Eq. Rep.	Ritchie's Equity Reports	Can.
Rob. Eccl.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	Eng.
Rob. L. & W.	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	Eng.
Robert. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
Robin. App.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Abr.	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Roll. Rep.	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	Eng.
Rom.	Romilly's *Notes of Cases in Equity*, 1 part, 1772—1787	Eng.
Roscoe's B. C.	Roscoe, Digest of Building Cases	Eng.
Rose	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
Ross, L. C.	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
Rowe	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	Eng.
Rul. Cas.	Campbell's Ruling Cases, 25 vols.	Eng.
Russ.	Russell's Reports, Chancery, 5 vols., 1824—1829	Eng.
Russ. & M.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	Eng.

Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	Russell's Election Reports	Can.
Ry. & Can. Cas.	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas.	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.
Ryde & K. Rat. App.	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (*e.g.*, [1921] S. A. S. R.)	Aus.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (*e.g.*, [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (*e.g.*, [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 (*e.g.*, [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
S. W. A.	South-West Africa Law Reports	S.-W. Af.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
Salk.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	Eng.
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	Scottish Law Reporter, 1865—1924	Scot.
Sc. R. R.	Scots Revised Reports	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	Eng.
Sca. & Sm.	Seanle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P.	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem.	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & Macl.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded by date)	Queensland State Reports, since 1902 (*e.g.*, [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	Eng.
Sw.	Swabey's Report, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law Reports, Transvaal Provincial Division	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports *temp.* Wood	Can
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Town St. Tr.	Townsend, Modern State Trials	Eng.
Trem. P. C.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tru.	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.

U. C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.)	Victorian Reports (Equity)	Aus.
V. R. (Law)	Victorian Reports (Law)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	Eng.
Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W.	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	S. Af.
W. A. L. R.	West Australian Law Reports	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & W.	Wyatt and Webb	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
W. H. C.	South African Law Reports, Witwatersrand High Court	S. Af.
W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division	S. Af.
W. L. R.	Western Law Reporter	Can.
W. L. T.	Western Law Times	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) (*e.g.*, [1866] W. N.)	Eng.
W. N.	Calcutta Weekly Notes	Ind.
W. R.	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. R.	Sutherland's Weekly Reporter	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. W. & A'B.	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	Western Weekly Reports	Can.
Wallis by Lyne	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	Ir.
Web. Pat. Cas.	Webster's Patent Cases, 2 vols., 1602—1855	Eng.
Welsh, Reg. Cas.	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
Went. Off. Ex.	Wentworth's Office and Duty of Executors	Eng.
West	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West *temp.* Hard.	West's Reports *temp.* Hardwicke, Chancery, 1 vol., 1736—1740	Eng.
West. Tithe Cas.	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	Scot.
White & Tud. L. C.	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
Wight	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
Will. Woll. & Dav.	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
Will. Woll. & H.	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
Wils. & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	Eng.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	Eng.
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	Eng.
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y. A. D.	Young's Vice-Admiralty Reports	Can.

Y. & C. Ch. Cas.	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & C. Ex. ...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J.	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ...	Eng.
Y. B.	...	Year Books	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series)	Eng.
Y B. (Sel. Soc.)...	...	Year Books (Selden Society)	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
Yo".	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xv—xxxi, *ante*.)

A.-G.	for Attorney-General.
Act.	„ Actiengesellschaft.
Admlty.	„ Admiralty.
Affd.	„ Affirmed.
Affg.	„ Affirming.
Akt.	„ Aktiengesellschaft; Aktiebolaget; Aktieselskabet.
Alta.	„ Alberta.
Anon.	„ Anonymous.
Apld.	„ Applied.
Appct.	„ Applicant.
Appln.	„ Application.
Appln.	„ Application to Register a Trade Mark.
Applt.	„ Appellant.
Apprvd.	„ Approved.
Arbn.	„ Arbitration.
Archbp.	„ Archbishop.
Art.	„ Article.
Ass. Tax Case	„ Assessed Tax Case.
Assce.	„ Assurance.
Assocn.	„ Association.
B. C.	„ Borough Council.
B. C.	„ British Columbia.
Bkpcy.	„ Bankruptcy.
Bkpt.	„ Bankrupt.
Bldg. Soc.	„ Building Society.
Bp.	„ Bishop.
C. A.	„ Court of Appeal.
C. & S. L. Ry. Co.	„ City & South London Railway Co.
C. C. A.	„ Court of Criminal Appeal.
C. C. R.	„ County Court Rules.
C. C. R.	„ Court of Crown Cases Reserved.
C. L. P. Act.	„ Common Law Procedure Act.
C. L. Ry. Co.	„ Central London Railway Co.
C. O. R.	„ Crown Office Rules.
C. S. U. C.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	„ *Capias ad satisfaciandum.*
Cale. Ry. Co.	„ Caledonian Railway Co.
Ch.	„ Chancery.
Ch. Div.	„ Chancery Division.
Co.	„ Company.
Co-op. Assocn.	„ Co-operative Supply Association.
Comrs.	„ Commissioners.
Consd.	„ Considered.
Corpn.	„ Corporation.
Ct.	„ Court.
Ct. of Ch.	„ Court of Chancery.
Ct. of Eq.	„ Court of Equity.
Ct. of R.	„ Court of Review.
D. C.	„ Divisional Court.
Dbtd.	„ Doubted.

Deft.	for Defendant.
Distd.	„ Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
Ex p.	„ *Ex parte.*
Exch.	„ Exchequer.
Exor.	„ Executor.
Exorship.	„ Executorship.
Expld.	„ Explained.
Extd.	„ Extended.
Extrix.	„ Executrix.
Fi. fa.	„ *Fieri facias.*
Folld.	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insce.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L.J.	„ Lord Justice.
L.JJ.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Man.	„ Manitoba.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B.	„ New Brunswick.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.

N. S.	for Nova Scotia.
N. W. P.	,, North-West Provinces.
N. W. T.	,, North-West Territories.
Ont.	,, Ontario.
Ord.	,, Order.
Overd.	,, Overruled.
P. C.	,, Privy Council.
P. E. I.	,, Prince Edward Island.
Petn.	,, Petition or Election Petition.
Pltf.	,, Plaintiff.
Q. B. Div.	,, Queen's Bench Division.
Qu.	,, *Quære.*
Que.	,, Quebec.
R. C.	,, Rural Council.
R. D. C.	,, Rural District Council.
R. S. A.	,, Rural Sanitary Authority.
R. S. C.	,, Revised Statutes of Canada.
R. S. C.	,, Rules of the Supreme Court, 1883.
Refd.	,, Referred.
Regn. of Trade Mk.	,, Registration of Trade Mark.
Regr. of Trade Mks.	,, Registrar of Trade Marks.
Resp.	,, Respondent.
Restg.	,, Restoring.
Revsd.	,, Reversed.
Revsg.	,, Reversing.
Ry. Co.	,, Rail. Co. or Railway Co.
S. C.	,, Same Case.
S. C. (name of colony following)	,, Supreme Court of a Colony.
S. E.	,, Settled Estates.
S. E. & C. Ry. Co.	,, South Eastern & Chatham Railway Co.
S. E. Ry. Co.	,, South Eastern Railway Co.
S. P.	,, Same Point.
S.S.	,, Steamship.
Sask.	,, Saskatchewan.
Sched.	,, Schedule.
Scr. fa.	,, *Scire facias.*
Sect.	,, Section.
Set. Land Act	,, Settled Land Act.
Settlmt.	,, Settlement.
Soc.	,, Society.
Soc. Anon.	,, Société Anonyme, etc.
Solr.	,, Solicitor.
Trade Mk.	,, Trade Mark.
Tram. Co.	,, Tramways Company.
U. C.	,, Urban Council.
U. D. C.	,, Urban District Council.
U. S. A.	,, United States of America.
Union Assmt. Com.	,, Union Assessment Committee.
Urban S. A.	,, Urban Sanitary Authority.
V.-C.	,, Vice-Chancellor.
Workmen's Comp. Act	,, Workmen's Compensation Act.
Y. T.	,, Yukon Territory.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as " Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as " Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as " Mentioned " arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows :—

" APPLIED " (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

" APPROVED " (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

" CONSIDERED " (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

" DISTINGUISHED " (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

" DOUBTED " (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

" EXPLAINED " (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

" EXTENDED " (Extd.).—Compare " APPLIED," *supra*.

" FOLLOWED " (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

" NOT FOLLOWED " (N.F.).—Compare " FOLLOWED," *supra*, to which it is the adverse.

" OVERRULED " (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

" REFERRED " (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

" MENTIONED " (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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NOTE.—*This title deals only with the general principles of the law of misrepresentation & fraud; for particular cases reference must be made to particular titles passim.*

Part I.—Representations Generally.

SECT. 1.—IN GENERAL.

1. Representation defined.]—(1) A representation is a statement or assertion, made by one party to the other, before or at the time of a contract, of some matter or circumstance relating to it.

(2) Although a representation is sometimes contained in the written instrument, it is not an integral part of the contract; &, consequently the contract is not broken though the representation proves to be untrue; nor, with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing, is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly with a reckless ignorance whether it was true or untrue.

(3) Whether a descriptive statement in a written instrument is a mere representation or a substantive part of the contract is a question of construction which the ct., & not the jury, must determine.

(4) With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine is that, generally speaking, if the descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, & so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, & becomes a warranty in the narrower sense of the word—viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in dama[illegible].

(5) The representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue (WILLIAMS, J.).—BEHN *v.* BURNESS (1863), 3 B. & S. 751; 2 New Rep. 184; 32 L. J. Q. B. 204; 8 L. T. 207; 9 Jur. N. S. 620; 11 W. R. 496; 1 Mar. L. C. 229; 122 E. R. 281, Ex. Ch.

Annotations:—As to (3) **Reld.** *Re* Comptoir Commercial Anversois & Power, [1920] 1 K. B. 868. *As to* (4) **Consd.** Wallis & Wells *v.* Pratt & Haynes, [1910] 2 K. B. 1003. **Reld.** Neill *v.* Whitworth (1865), 18 C. B. N. S. 435; Pust *v.* Dowie (1865), 5 B. & S. 20; MacAndrew *v.* Chapple (1866), Har. & Ruth. 745; Corkling *v.* Massey (1873), L. R. 8 C. P. 395; Sheffield Nickel Co. *v.* Unwin (1877), 2 Q. B. D. 214; Westacott *v.* Hahn, [1918] 1 K. B. 495; Meyrick *v.* Dyson (1925), 41 T. L. R. 368. *Generally*, **Reld.** Lodwick *v.* Perth (1884), 1 T. L. R. 76. **Mentd.** Carr *v.* Montefiore (1864), 5 B. & S. 408; Mallan *v.* Radloff (1864), 17 C. B. N. S. 589; Heilbutt *v.* Hickson (1872), L. R. 7 C. P. 438; Bettini *v.* Gye (1875), 24 W. R. 551; Oppenheim *v.* Fraser (1876), 34 L. T. 524; The Resolven (1892), 9 T. L. R. 75; Bentsen *v.* Taylor (2), [1893] 2 Q. B. 274; Vergottis *v.* Ford (1918), 34 T. L. R. 233; Aron (Incorporated) *v.* Comptoir Wegimont, [1921] 3 K. B. 435; British American Continental Bank *v.* British Bank for Foreign Trade, [1926] 1 K. B. 328.

2. Must be of fact present & existing.]—Ordinarily fraud lies in the wilful misrepresentation of any material matter of fact present & existing; not in a promise, the breach of which is something future. It is not enough even that there has been fraud, unless the party upon whom it was practised was deceived by it into making the contract (CROMPTON, J.).—CAVALEIRO *v.* PUGET (1865), 4 F. & F. 537.

—— **Whether intention of representor a fact.**]—*See* Sect. 2, *post.*

—— **Mere promise distinguished.**]—*See* Sect. 2, sub-sect. 3, *post.*

3. Must be clear—& not ambiguous.]—A representation on the faith of which others have acted must be clear & unambiguous to fix the party making it with liability upon it.—*Re* UNIVERSAL BANKING CO., BARTLETT'S CASE (1868), 19 L. T. 628; 17 W. R. 131.

4. Question for judge—Whether written statement amounts to representation—Or substantive part of contract.]—BEHN *v.* BURNESS, No. 1, *ante.*

5. —— —— As being statement of fact or mere expectation.]—BELLAIRS *v.* TUCKER, No. 431, *post.*

6. Not an integral part of contract—Though sometimes part of written instrument.]—BEHN *v.* BURNESS, No. 1, *ante.*

7. Representation proving untrue—Not a breach of contract.]—BEHN *v.* BURNESS, No. 1, *ante.*

Representation also amounting to contract.]—*See* No. 179, *post.*

SECT. 2.—STATEMENTS DE FUTURO.

SUB-SECT. 1.—REPRESENTOR'S INTENTION.

A. In General.

8. Whether amounting to representation of fact.]—The subject of the representations was not a future project contemplated by a third person. If that had been the case, pltf. might have held out the expectations with a degree of uncertainty as to whether they would be fulfilled. If he had said merely that a plan was in contemplation, that would not have been an undertaking to do anything himself; it would only be holding out a hope as to the future conduct of a third person, not under his control; & it would be the fault of the bidder if he relied on so loose & vague a report. But here the representation went to induce a belief that the plan was in contemplation by

PART I. SECT. 2, SUB-SECT. 1.—A.

1. *Whether amounting to representation of fact.*]—In the case of a contract entered into on the faith of a representation a statement of intention may be a statement of fact.—*Re* NEW BRIGHTON RECREATION GROUND CO., LTD. (1889), 10 N. S. W. Eq. 66.

—AUS.

a. *Representation as to future event.*]—In an action of deceit it is not sufficient for pltf. to allege a mis-

himself; we must take it as a statement of what he intended to do himself (PLUMER, M.R.).—BEAUMONT *v.* DUKES (1822), Jac. 422; 37 E. R. 910.

9. ——.]—There is no misrepresentation of any existing fact, but only an intention at the time of the contract to depart from it, which intention is not alleged to have been carried into effect. That does not vitiate the contract (PARKE, B.).—HEMINGWAY *v.* HAMILTON (1838), 4 M. & W. 115; 150 E. R. 1366.

10. ——.]—GERHARD *v.* BATES, No. 554, *post*.

11. ——.]—(1) Where a person possesses a legal right, a ct. of equity will not interfere to restrain him from enforcing it, though, between the time of its creation & that of his attempt to enforce it, he has made representations of his intention to abandon it. Nor will equity interfere even though the parties to whom these representations were made have acted on them, & have in full belief in them, entered into irrevocable engagements. To raise an equity in such a case; there must be a misrepresentation of existing facts, & not of mere intention.

(2) A., holding a bond of B. often told B. & others that he, A., would never enforce it against B.; but, on being asked to give it up, said, "I will not give it up, for I will be trusted"; & B. married on the faith of the bond never being enforced against him:—*Held:* this was a representation, not of a fact, but merely of an intention, & so not binding upon A.—JORDEN *v.* MONEY (1854), 5 H. L. Cas. 185; 23 L. J. Ch. 865; 24 L. T. O. S. 160; 10 E. R. 868, H. L.; *revsg.* S. C. *sub nom.* MONEY *v.* JORDEN (1852), 2 De G. M. & G. 318, L. JJ.

Annotations:—As to (1) **Apld.** Hutton *v.* Rossiter (1855), 7 De G. M. & G. 9. **Distd.** Piggott *v.* Stratton (1859), 1 De G. F. & J. 33. **Consd.** Loffus *v.* Maw (1862), 3 Giff. 592. **Apprvd.** Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (1873), L. R. 6 H. L. 352. **Apld.** Balkis Consolidated Co. *v.* Tomkinson, [1893] A. C. 396. **Apprvd.** Chadwick *v.* Manning, [1896] A. C. 231. **Reld.** Whitmore *v.* Mackeson (1852), 16 Beav. 126; Bushby *v.* Ellis (1853), 17 Beav. 279; Pulsford *v.* Richards (1853), 17 Beav. 87; Stone *v.* Godfrey (1854), 5 De G. M. & G. 76; Warden *v.* Jones (1857), 23 Beav. 487; Monypenny *v.* Monypenny (1858), 4 K. & J.. 174; Smith *v.* Kay (1859), 7 H. L. Cas. 750; Goldicutt *v.* Townsend (1860), 28 Beav. 445; Stephens *v.* Venables (No. 2) (1862), 31 Beav. 124; M'Askie *v.* McCay (1868), 16 W. R. 1187; Williams *v.* Williams (1868), 37 L. J. Ch. 854; Maddison *v.* Alderson (1883), 8 App. Cas. 467; Mills *v.* Fox (1887), 37 Ch. D. 153; Gillman & Spencer *v.* Carbutt (1889), 37 W. R. 437; Cave *v.* Crew (1893), 68 L. T. 254; Licenses Insce. Corpn. & Guarantee Fund *v.* Lawson (1896), 12 T. L. R. 501; *Re* Fickus, Farina *v.* Fickus, [1900] 1 Ch. 331; Whitechurch *v.* Cavanagh, [1902] A. C. 117; Cresswell *v.* Jeffreys (1912), 28 T. L. R. 413; *Re* A Bankruptcy Notice, [1924] 2 Ch. 76.

12. ——.]—I apprehend that nothing can be more certain than this, that the doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, & certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract, & without reliance upon which, or without the statement of which, the party would not enter into the contract, & which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a ct of equity, extend, be treated as if the representations were true, & shall be compelled to make them good. But those must be representations concerning existing facts (LORD SELBORNE, C.).—CITIZENS' BANK OF LOUISIANA *v.* FIRST NATIONAL BANK OF NEW ORLEANS (1873), L. R. 6 H. L. 352; 43 L. J. Ch. 269; 22 W. R. 194, H. L.

*Annotations:—***Consd.** Mills *v.* Fox (1887), 37 Ch. D. 153; Lovett *v.* Lovett, [1898] 1 Ch. 82. **Reld.** Williams *v.* Pinckney (1897), 67 L. J. Ch. 34; Coleman *v.* North (1898), 47 W. R. 57; Rainford *v.* Keith & Blackman Co., [1905] 1 Ch. 296; Gresham Life Assce. Soc. *v.* Crowther, [1914] 2 Ch. 219; Ratner *v.* London Joint City & Midland Bank (1922), 38 T. L. R. 253. **Mentd.** Coxon *v.* Gorst, [1891] 2 Ch. 73.

13. ——.]—MATHIAS *v.* YETTS, No. 358, *post*.

14. ——.]—(1) A misstatement of the intention of deft. in doing a particular act may be a misstatement of fact & if pltf. was misled by it an action of deceit may be founded on it.

(2) Pltf. says: I had two inducements, one my own mistake, the other the false statement of defts. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced pltf., defts. are liable, even though pltf. may have been also influenced by other motives (FRY, L.J.).—EDGINGTON *v.* FITZMAURICE (1885), 29 Ch. D. 459, 476; 55 L. J. Ch. 650; 53 L. T. 369, 375; 50 J. P. 52; 33 W. R. 911; 1 T. L. R. 326, C. A.

Annotations:—As to (1) **Reld.** Derry *v.* Peek (1889), 14 App. Cas. 337; Yorkshire Insce. *v.* Craine, [1922] 2 A. C. 541. *As to* (2) **Reld.** *Re* London & Leeds Bank, *Ex p.* Carling, Carling *v.* London & Leeds Bank (1887), 56 L. J. Ch. 321; Oliver *v.* Bank of England, [1902] 1 Ch. 610. *Generally*, **Mentd.** Short *v.* Poole Corpn., [1926] Ch. 66.

15. ——.]—ANGUS *v.* CLIFFORD, No. 488, *post*.

16. ——.]—(1) In an action to enforce a contract in which deft. sets up the plea that he was induced by fraud to enter into the contract, it is not necessary for deft. expressly to repudiate the contract.

(2) A prospectus which merely specifies the dates of & names of the parties to contracts in compliance with the Companies Act, 1867 (c. 131), s. 38, does not give notice of circumstances contained in the contracts, which are material to be known & the omission of which causes the prospectus to give a false impression.

(3) But I must protest against it being supposed that in order to prove a case of this character of fraud, & that a certain course of conduct was induced by it, a person is bound to be able to explain with exact precision what was the mental process by which he was induced to act. It is a question for the jury. If a man said he was induced by such & such an inducement held out in the prospectus, I should not think that conclusive. It must be for the jury to say what they believed upon the evidence (LORD HALSBURY, C.).

(4) When I look at the language in which this prospectus is couched, & see that it speaks of a property which requires only the erection of machinery to be either at once or shortly in a condition to do work so as to obtain all this valuable metal from the mine, it seems to me that, although it is put in ambidextrous language, it means as plainly as can be that this is now the condition of the mine, that such & such additions to it will enable it shortly to produce all those

representation by deft. as to something to take place in the future.—SMYTHE *v.* MILLS (1908), 17 Man. L. R. 349.—CAN.

b. *Mixed fact & intention.*]—When the representation relied upon is partly a statement of existing fact & partly an expression of future intent, & the two are indissolubly united in a single statement, it may form a ground of action, though the whole value of the statement arose from the promissory part.—SMITH *v.* MCKENZIE (1881), 3 N. Z. L. R. C. A. 1.

Sect. 2.—*Statements de futuro: Sub-sect.* 1, *A. & B.; sub-sects.* 2 & 3. *Sect.* 3: *Sub-sect.* 1, *A.*]

great results, & that that is a representation of an actually existing fact. I should quite agree with the proposition that the Lord Chancellor of Ireland & the Master of the Rolls put forward; if you are looking to the language as only the language of hope, expectation, & confident belief, that is one thing; but it does not seem to have been in the minds of the learned judges that you may use language in such a way as, although in the form of hope & expectation, it may become a representation as to existing facts; & if so, & if it is brought to your knowledge that these facts are false, it is a fraud (LORD HALSBURY, C.).

(5) But the statement of a portion of the truth, accompanied by suggestions & inferences which would be possible & credible if it contained the whole truth, but becomes neither possible nor credible whenever the whole truth is divulged, is, to my mind, neither more nor less than a false statement (LORD WATSON)

(6) The question to be determined was what idea would be conveyed to an ordinary man by a perusal of this prospectus, viewing each statement contained in it in the light of the other statements to be found there (LORD HERSCHELL).—AARON'S REEFS *v.* TWISS, [1896] A. C. 273; 65 L. J. P. C. 54; 74 L. T. 794, H. L.

Annotations:—*As to* (1) **Consd.** First National Reinsurance *v.* Greenfield, [1921] 2 K. B. 260. **Refd.** Merino *v.* Mutual Reserve Life Insce. (1904), 21 T. L. R. 167; United Shoe Machinery Co. of Canada *v.* Brunet, [1909] A. C. 330. *As to* (2) **Consd.** *Re* Olympia, [1898] 2 Ch. 153. *As to* (3) **Refd.** McConnel *v.* Wright, [1905] 1 Ch. 546; Moody *v.* Cox & Hatt, [1917] 2 Ch. 71. *As to* (4) **Consd.** *Re* Pacaya Rubber & Produce Co., Burn's Appln., [1914] 1 Ch. 542. *Generally*, **Mentd.** *Re* Dunlop-Truffault Cycle & Tube Manufacturing Co., *Ex p.* Shearman (1896), 66 L. J. Ch. 25; Ladies Dress Assocn. *v.* Pulbrook (1899), 68 L. J. Q. B. 871.

17. ——.]—(1) With regard to the fourth representation, I will assume that it may be read as a representation of a fact. I have myself considerable doubt, whether in the form in which it is alleged, being an allegation of an intention & not of a fact, it is not giving too benevolent a construction to the pleadings so to read it (LORD DAVEY).

(2) That which is in form a promise may be in another aspect a representation (LORD HERSCHELL).—CLYDESDALE BANK *v.* PATON, [1896] A. C. 381; 65 L. J. P. C. 73; 74 L. T. 738, H. L.

Annotation:—*Generally*, **Refd.** Banbury *v.* Bank of Montreal, [1918] A. C. 626.

——.]—*See* COMPANIES, Vol. IX., pp. 123, 124, Nos. 632–635.

Representation giving rise to estoppel.]—*See* ESTOPPEL, Vol. XXI., pp. 294, 310, Nos. 1044–1051, 1136–1138.

See, also, Part VII., Sect. 3, *post*; INSURANCE, Vol. XXIX., pp. 51, 52, 61–63, 160, 162, 411, 412, Nos. 144–151, 207–218, 1164–1178, 3233, 3234.

B. Particular Instances.

See particular titles *passim*.

To honour cheque.]—*See* BANKERS, Vol. III., p. 161, No. 239.

Not to use acceptances to extinguish debt.]—*See* BANKERS, Vol. III., p. 164, No. 253.

Not to enforce bond.]—*See* No. 11, *ante*.

To use money for development of business.]—*See* No. 14, *ante*.

To pay legacy.]—*See* No. 499, *post*.

To release debtor from debt.]—*See* CONTRACT, Vol. XII., p. 502, No. 4115.

To pay on default of another.]—*See* GUARANTEE, Vol. XXVI., p. 98, Nos. 677, 678.

To use power to stop sale under an execution.]—*See* GUARANTEE, Vol. XXVI., p. 216, No. 1708.

To relinquish business.]—*See* INFANTS, Vol. XXVIII., p. 221, No. 805.

To retain part of risk insured.]—*See* INSURANCE, Vol. XXIX., pp. 50, 51, No. 141.

To use house only as residence.]—*See* LANDLORD & TENANT, Vol. XXX., p. 479, No. 1410.

To carry on lawful trade.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 150, No. 2855.

To execute repairs.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 348, No. 4900.

To pay over proceeds of sale.]—*See* PAWNS & PLEDGES.

SUB-SECT. 2.—INTENTION OF THIRD PARTY.

18. Intention to bring action.]—A mere false assertion by which another person is misled to his injury is no ground of action. But if such false asertion is made knowingly & wilfully, & with the view to the advantage of the party who makes it, in consequence of the person to whom it is made believing it, such person acting upon it, & suffering damage, may sue in case for false representation.

Declaration in case stated, that pltf. was a dealer in printed silk goods, & had sent deft. divers lots of such goods, the last of which contained handkerchiefs, which had been printed by pltf. with a certain ornamental pattern, & that he was about to print others in the same manner for profit; all which was known to deft.; yet deft., contriving to defraud pltf., & to induce him to desist from so printing same & deprive him of the profits, & to acquire same for his sole use & benefit, falsely represented to pltf., of & concerning the last lot & the handkerchiefs, that in the last lot there was a copy of a registered pattern, & that the parties intended to proceed against pltf. in the most expensive manner, by injunction, thereby meaning that the pattern was a copy of a pattern registered according to the Statute, whereas in fact no such pattern had been registered, & no parties did so intend, as deft. well knew:—*Held:* the declaration disclosed a good cause of action; & an innuendo was unnecessary.

Deft. has no right to say pltf. was wrong in giving him credit for the truth of what he said (LORD DENMAN, C.J.).—BARLEY *v.* WALFORD (1846), 9 Q. B. 197; 15 L. J. Q. B. 369; 10 Jur. 917; 115 E. R. 1249; *sub nom.* BAILEY *v.* WALFORD, 7 L. T. O. S. 252.

Annotations:—**Refd.** Wren *v.* Wield (1869), 20 L. T. 1007; Richardson *v.* Silvester (1873), L. R. 9 Q. B. 34; Low *v.* Bouverie, [1891] 3 Ch. 82.

SUB-SECT. 3.—MERE PROMISE.

19. Distinguished from representation.]—CAVALEIRO *v.* PUGET, No. 2, *ante*.

20. ——.]—It is always necessary to distinguish, when an alleged ground of false representation is set up, between a representation of an existing fact, which is untrue, & a promise to do something in the future, & to consider what the bargain is (MELLISH, L.J.).—*Re* ROBINSON, *Ex p.* BURRELL (1876), 1 Ch. D. 537; 45 L. J. Bcy. 68; 34 L. T. 198; 24 W. R. 353, C. A.

Annotations:—**Mentd.** *Re* Kearley & Clayton's Contract (1878), 7 Ch. D 615; *Re* Simons, *Ex p.* Allard (1881), 16 Ch. D. 505.

21. Words in form a mere promise—May amoun to representation.]—CLYDESDALE BANK *v.* PATON No. 17, *ante*.

Statements inducing marriage.]—*See* SETTLEMENTS.

See, also, CONTRACT, Vol. XII., pp. 53–55, Nos 299–307.

SECT. 3.—STATEMENT OF OPINION.

SUB-SECT. 1.—REPRESENTOR'S OPINION.

A. Stated as a Fact.

22. General rule.]—A representation of fact may be inherent in a statement of opinion; in any case the existence of the opinion in the person expressing it is a question of fact. When it is sought to rescind a contract on the ground of the falseness of a statement of opinion by which it was induced, it must be inquired what was the meaning of the statement made, & whether it was true. Relevant to those inquiries are, the material facts of the transaction, the knowledge of the parties, the words used, & the actual condition of the subject-matter.—BISSET *v.* WILKINSON, [1927] A. C. 177; 96 L. J. P. C. 12; 136 L. T. 97; 42 T. L. R. 727. P. C.

23. Positive statement—Based on information from another.]—(1) In 1843 a grant of an annuity was made by the Comrs. for the Reduction of the National Debt, under 10 Geo. 4, c. 24, to a life assurance co. on the life of C., who was certified by the co. to be of the age of sixty-four years. After the death of C. in 1869, it was discovered that a misrepresentation of his age had been made by the co.:—*Held:* the Comrs. were entitled to have the contract declared void *ab initio*, although the misrepresentation was not intentional; & the money paid on both sides was ordered to be repaid with simple interest at 4 per cent.

(2) 10 Geo. 4, c. 24, contained a clause empowering the Comrs. to rectify any contract in case of the discovery of an accidental error:—*Held:* this clause was not compulsory, & the ct. had no jurisdiction to interfere with the discretion of the Comrs. if they declined to exercise their power of rectification, & claimed to have the contract set aside.

(3) If a man makes a statement based upon the information which he has received from another, & the information is wrong, he is answerable for it, but he has his remedy over against the person who has deceived him. Here there was positive representation: the contract was based upon it (JAMES, L.J.).—A.-G. *v.* RAY (1874), 9 Ch. App. 397; 43 L. J. Ch. 478; 30 L. T. 373; 22 W. R. 498, L. JJ.

Annotations:—As to (1) **Refd.** Schofield *v.* Clough (1913), 6 B. W. C. C. 67. *As to* (3) **Refd.** Dawsons *v.* Bonnin, [1922] 2 A. C. 413.

24. —— Recollection faulty.] — (1) When a statement or representation has been made in the *bonâ fide* belief that it is true, & the party who has made it afterwards comes to find out that it is untrue, & discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, & still more, inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in (LORD BLACKBURN).

(2) If the fact be that he does not recollect, then by saying that the fact was so, or by saying that the fact was not so, he takes upon himself the responsibility of a positive statement, upon the faith of which he knows that the other man is going to deal for valuable consideration (LORD SELBORNE, C.).—BROWNLIE *v.* CAMPBELL (1880), 5 App. Cas. 925, H. L.

Annotations:—As to (1) **Refd.** Barrow *v.* Isaacs, [1891] 1 Q. B. 417; Joel *v.* Law Union & Crown Insce., [1908] 2 K. B. 863; Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. 452. *As to* (2) **Refd.** Nocton *v.* Ashburton, [1914] A. C. 932. *Generally*, **Refd.** Derry *v.* Peek (1889), 14 App. Cas. 337. **Mentd.** Mathias *v.* Yetts (1882), 46 L. T. 497; Smith *v.* Chadwick (1882), 20 Ch. D. 27; Nash *v.* Wooderson (1884), 52 L. T. 49; Cavendish-Bentinck *v.* Fenn (1887), 57 L. T. 773; Soper *v.* Arnold (1887), 37 Ch. D. 96; Low *v.* Bouverie, [1891] 3 Ch. 82; Thisdon *v.* Tindall (1891), 40 W. R. 141; *Re* Metropolitan Coal Consumers' Assocn., Karberg's Case (1892), 66 L. T. 700; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; May *v.* Platt, [1900] 1 Ch. 616; Whittington *v.* Seale-Hayne (1900), 82 L. T. 49; Debenham *v.* Sawbridge, [1901] 2 Ch. 98; Seddon *v.* North Eastern Salt Co., [1905] 1 Ch. 326; Pearson *v.* Dublin Corpn., [1907] A. C. 351; Hood of Avalon *v.* Mackinnon, [1909] 1 Ch. 476; Angel *v.* Jay (1910), 80 L. J. K. B. 458; Heilbut, Symons *v.* Buckleton, [1913] A. C. 30; Yorke *v.* Yorkshire Insce., [1918] 1 K. B. 662; Holt *v.* Markham (1922), 92 L. J. K. B. 406.

25. —— Made recklessly.]—Deft., a professional water-finder, undertook for reward to indicate a spot upon pltf.'s land where a supply of water might be found. He came to pltf.'s land, marked out a spot, & stated definitely that water would be found there at a particular depth from the surface. Pltf., on the faith of this statement, bored to a depth exceeding that named by deft., but found no water. Pltf. brought an action in the county court to recover the expense of boring. The county court judge found deft. made the statement recklessly, but did not find he made it fraudulently:—*Held:* the contractual relation between the parties imposed upon deft. the duty to refrain from making reckless statements; deft. had committed a breach of this duty, & was therefore liable in an action for damages.

Deft., knowing he could not tell at what depth water could be found, said definitely that it could be found at a particular depth, that is, he asserted the fact that it would be found & his knowledge of the fact, well knowing that he had no such knowledge. In that view the county ct. judge might have found that the statement was fraudulent (CHANNELL, J.).—PRITTY *v.* CHILD (1902), 71 L. J. K. B. 512; 18 T. L. R. 460; 46 Sol. Jo. 395, D. C.

26. Expressed as being true from representor's knowledge—Not from hearsay.]—To an inquiry concerning the credit of another, who was recommended to deal with pltf., a representation by deft. that the party might safely be credited, & that he spoke this from his own knowledge, & not from hearsay, will not sustain an action on the case for damages on account of a loss sustained by the default of the party, who turned out to be a person of no credit; if it appear that such representation were made by deft. *bonâ fide*, & with a belief of the truth of it; for the foundation of the action is fraud & deceit in deft. & damage to pltf. by means thereof, & taking the assertion of knowledge *secundum subjectam materiam*, viz. the credit of another, it meant no other than a strong belief founded on what appeared to deft. to be reasonable & certain grounds.

Deft. affirmed that to be true within his own knowledge, which he did not know to be true. This is fraudulent (KENYON, C.J.).—HAYCRAFT *v.* CREASY (1801), 2 East, 92; 102 E. R. 303.

*Annotations:—***Consd.** Nash *v.* Palmer (1816), 5 M. & S. 374; Collins *v.* Evans (1844), 5 Q. B. 820; Wilde *v.* Gibson (1848), 1 H. L. Cas. 605; Joliffe *v.* Baker (1883), 11 Q. B. D. 255; Derry *v.* Peek (1889), 14 App. Cas. 337. **Refd.** Tapp *v.* Lee (1803), 3 Bos. & P. 367; Clifford *v.* Brooke (1806), 13 Ves. 131; Ashlin *v.* White (1816), Holt, N. P. 387; Ames *v.* Millward (1818), 2 Moore, C. P.

Sect. 3.—Statement of opinion: Sub-sect. 1, A. & B.; sub-sect. 2. Sects. 4 & 5.]

713; R. v. Harvey (1823), 3 Dow. & Ry. K. B. 464; Adamson v. Jarvis (1827), 4 Bing. 66; Foster v. Charles (1830), 6 Bing. 396; Freeman v. Baker (1833), 2 Nev. & M. K.B. 446; Devaux v. Steinkeller (1839), 3 Jur. 1053; Pontifex v. Bignold (1841), 3 Scott, N. R. 390; Shrewsbury v. Blount (1841), 2 Man. & G. 475; Taylor v. Ashton (1843), 11 M. & W. 401; Wilson v. Fuller (1843), 3 Q. B. 68; Childers v. Wooler (1859), 2 E. & E. 287; Leddell v. McDougal (1881), 29 W. R. 403.

27. Statement by party in possession of facts Not equally known to both sides.]—(1) It is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. If the facts are not equally known to both sides, then a statement of opinion by one who knows the facts best, involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion (BOWEN, L.J.).

(2) In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what that opinion is (BOWEN, L.J.).

(3) It appears to me that it is in every case a question of fact whether a person is induced to buy by a particular representation (BOWEN, L.J.).—SMITH v. LAND & HOUSE PROPERTY CORPN. (1884), 28 Ch. D. 7; 51 L. T. 718; 49 J. P. 182, C. A.

Annotations:—*As to* (1) & (2) **Consd.** Bisset v. Wilkinson, [1927] A. C. 177. *Generally*, **Reid.** Hughes v. Twisden (1886), 55 L. J. Ch. 481.

See, also, INSURANCE, Vol. XXIX., pp. 161, 162, Nos. 1172–1178.

B. Stated as Opinion.

28. Does not amount to representation.]—SMITH v. PRICE, No. 272, *post*.

29. —— Communication of third party adopted —Without addition or exaggeration.]—Reading the letter fairly, & supplying all that subsequent evidence enables me to supply, it comes to this, that the communications between P., K. & others, having given P. certain information, he adopts that information without any sort of exaggeration or addition of his own, & puts the information into that letter which pltf. says induced him to take these shares. If the case stood upon that letter alone, in my opinion there is nothing from which I can impute to P. any intention to deceive (BACON, V.-C.).—CRAIG v. PHILLIPS (1876), 3 Ch. D. 722; 46 L. J. Ch. 49; 35 L. T. 198.

Annotation:—**Consd.** Twycross v. Grant (1877), 2 C. P. D. 469.

30. —— Where facts known to both sides.]—SMITH v. LAND & HOUSE PROPERTY CORPN., No. 27, *ante*.

Exaggeration or puffing.]—*See* Sect. 8, *post*.

Statement as to value.]—*See* Sect. 7, *post*.

SUB-SECT. 2.—OPINION OF THIRD PARTY.

31. Does not amount to representation.]—An insurance on chartered freight "from Belize to Rendezvous Point & at & from thence, etc.," was effected by pltf. with defts. on reading to them a letter from the master of the ship stating "Rendezvous Point is considered by the pilot here a good & safe anchorage & well sheltered. I have been out, & think it quite safe." Rendezvous Point was a place not known to defts.:—*Held:* the reading of the letter was only a statement of opinion, & not such an adoption of its contents as to amount to an averment of their truth in fact; & consequently, if Rendezvous Point was not a good anchorage there was no such misrepresentation as to vitiate the policy.—ANDERSON v. PACIFIC FIRE & MARINE INSURANCE CO. (1872), L. R. 7 C. P. 65; 26 L. T. 130; 20 W. R. 280; 1 Asp. M. L. C. 220.

See, also, Nos. 23, 29, *ante*.

SECT. 4.—STATEMENT OF LAW.

32. General rule—Representor not responsible.]—LANSDOWNE v. LANSDOWNE (1730), 2 Jac. & W. App. IV. 205; Mos. 364; 37 E. R. 605, L. C.

Annotations:—**Expld.** Stewart v. Stewart (1839), 6 Cl. & Fin. 911. **Reid.** Orrell v. Coppock (1856), 26 L. J. Ch. 269.

33. —— ——.]—A. agreed to take a lease of a house, the lease to contain all usual covenants. B. contracted with A. for the assignment of the lease, when granted, & had a copy of the agreement forwarded to him. B. inquired of A. whether the lessee would have to do substantial repairs, & A. answered that he would not:—*Held:* this was a misrepresentation of a matter of law, & not of fact; & A. was not affected by it.—KENDALL v. HILL (1860), 2 L. T. 717; 6 Jur. N. S. 968.

34. —— ——.]—If the ground alleged for rescinding a contract, executed, to become a shareholder in a co., is a representation that the co. had a good title to certain land, whereas it was not a good title but a defeasible title, the opinion of the ct., that the title was doubtful, is not sufficient to warrant the ct. to interfere with regard to such a contract (LORD CRANWORTH).—NEW BRUNSWICK & CANADA RAILWAY & LAND CO. v. CONYBEARE (1862), 9 H. L. Cas. 711; 31 L. J. Ch. 297; 6 L. T. 109; 8 Jur. N. S. 575; 10 W. R. 305; 11 E. R. 907, H. L.; *revsg.* S. C. *sub nom.* CONYBEARE v. NEW BRUNSWICK & CANADA RAILWAY & LAND CO. (1860), 1 De G. F. & J. 578, L. JJ.

Annotations:—**Reid.** Kisch v. Central Ry. of Venezuela (1865), 3 De G. J. & Sm. 122; *Re* Leeds Banking Co., *Ex p.* Barritt (1865), 5 New Rep. 460; Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145; A.-G. v. Ray (1874), 9 Ch. App. 402, n.; *Re* Coal Economising Gas Co., Gover's Case (1875), L. R. 20 Eq. 114; Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317; McKeown v. Boudard Peverill Gear Co. (1896), 74 L. T. 310. **Mentd.** Hambro v. Burnand, [1903] 2 K. B. 399.

35. —— ——.]—Pltf. alleged, that being desirous of advancing money on debentures, he applied to a secretary of a railway co. who wrote, offering him a bond of the co. for £1,500, & stating that the co. were not yet in a position to issue permanent debentures, but that they expected

PART I. SECT. 3, SUB-SECT. 1.—B.

c. Does not amount to representation—Communication of third party adopted.]—A vendor of property, which he had not seen, made certain incorrect representations to his purchaser, who knew that the vendor was relying for his knowledge on a report as to the property made to him:—*Held:* stating his information or opinion merely as such, he made no representation of its correctness or of anything except that he had such opinion or information.—CROMWELL v. MORRIS (1915), 32 W. L. R. 289; 9 W. W. R. 35; 23 D. L. R. 888.—**CAN.**

PART I. SECT. 4.

32 i. *General rule—Representor not responsible.*]—SHET MANIBHAI PREMABHAI v. BAI RUPALIBA (1899), I. L. R. 24 Bom. 166.—**IND.**

d. Exception to rule—Representations as to construction of contract.]—HART-PARR CO. v. EBERLE (1910), 13 W. L. R. 263; 3 Sask. L. R. 34; *affd.*, 15 W. L. R. 564.—**CAN.**

to be able to do so in four or five months' time. With the letter was sent a prospectus, from which it appeared that the co. was incorporated by Act of Parliament, & that three persons named were directors. Pltf. advanced the money, & received in return a Lloyd's bond, signed by the secretary, whereby the co. purported to acknowledge the debt, & to covenant to pay same with interest at 6 per cent. The co. having ceased to pay interest, & being in difficulties, pltf. filed a bill against two of the three directors, & the representatives of the third, praying that they might be decreed to pay the amount advanced by pltf. with interest:—*Held:* the principle of relief on the ground of misrepresentation by third persons did not extend to an incorrect statement of a matter of law, & demurrer by the representatives of the third director allowed.—RASHDALL *v.* FORD (1866), L. R. 2 Eq. 750; 35 L. J. Ch. 769; 14 L. T. 790; 14 W. R. 950.

Annotations:—**Apprvd.** Beattie *v.* Ebury (1872), 7 Ch. App. 777. **Distd.** West London Commercial Bank *v.* Kitson (1884), 13 Q. B. D. 360. **Refd.** Weeks *v.* Propert (1873), L. R. 8 C. P. 427; Hirschfeld *v.* L. B. & S. C. Ry. (1876), 2 Q. B. D. 1. **Mentd.** Yorkshire Railway Waggon Co. *v.* Maclure & Cornwall Minerals Railway Co. (1881), 45 L. T. 747.

36. —— ——.]—The rule that an agent who induces persons to deal with his principal by means of false representations is personally liable to make good his representations, does not extend to an incorrect statement of a matter of law.—BEATTIE *v.* EBURY (LORD) (1872), 7 Ch. App. 777; 41 L. J. Ch. 804; 27 L. T. 398; 20 W. R. 994, L. JJ.; *on appeal* (1874), L. R. 7 H. L. 102, H. L.

Annotations:—**Consd.** Weeks *v.* Propert (1873), L. R. 8 C. P. 427; West London Commercial Bank *v.* Kitson (1884), 13 Q. B. D. 360; Halbot *v.* Lens, [1901] 1 Ch. 344. **Refd.** McCollin *v.* Gilpin (1880), 5 Q. B. D. 390; Oliver *v.* Bank of England, Starkey, Leveson & Cooke, Third Parties, [1901] 1 Ch. 652; Rainford *v.* Keith & Blackman Co., [1905] 1 Ch. 296. **Mentd.** Yorkshire Railway Waggon Co. *v.* Maclure & Cornwall Minerals Railway Co. (1881), 45 L. T. 747; Robertson *v.* Harris, [1900] 2 Q. B. 117.

37. —— ——.] — *Semble:* the ct. will not impute fraud where the misrepresentation is one of law & not of fact.—GREEN *v.* LYON (1873), 21 W. R. 830, L. JJ.

38. —— ——.]—Where there is a representation made as to a mere matter of law it is, in nineteen cases out of twenty, made by a person who does not know the law better than the person to whom it is made, & at whose risk it is taken & acted upon. Still I am not prepared to say, & I doubt whether, if a man who wilfully misrepresented the law, would be allowed in equity to retain any benefit he got by such representation. . . . In the present case it is not a representation of a matter of law. It is a representation as to the powers of a co. to accept bills, & that depends on their private Acts of Parliament. Suppose I were to say I have a private Act of Parliament which gives me power to do so & so. Is not that an assertion that I have such an Act of Parliament? It appears to me to be as much a representation of a matter of fact as if I had said I have a particular bound copy of "Johnson's Dictionary" (BOWEN, L.J.).—WEST LONDON COMMERCIAL BANK *v.* KITSON (1884), 13 Q. B. D. 360; 53 L. J. Q. B. 345; 50 L. T. 656; 32 W. R. 757, C. A.

Annotation:—**Mentd.** Atkins *v.* Wardle (1889), 58 L. J. Q. B. 377.

39. Exceptions to rule—Wilful misrepresentation.]—WEST LONDON COMMERCIAL BANK *v.* KITSON, No. 38, *ante*.

40. —— **Representation to ignorant person—By skilled person.**]—Resp. effected an insurance with applts. on a life in which he had no insurable interest, the insurance, therefore, being void. The insurance was effected through an agent of applt.'s who represented, without any fraud, to resp. that the policy would be valid & effective in law, & resp. relying upon that representation, effected the policy & paid the premium. Resp. subsequently ascertained that the policy was invalid & immediately demanded back the premium:—*Held:* as the representation, though an innocent one, was made by a man skilled in insurance matters to a person ignorant of the law, the premium could be recovered back.—BRITISH WORKMAN'S & GENERAL ASSURANCE CO., LTD. *v.* CUNLIFFE (1902), 18 T. L. R. 502, C. A.

Annotations:—**Distd.** Harse *v.* Pearl Life Assce., [1904] 1 K. B. 558. **Apld.** Kettlewell *v.* Refuge Assce., [1908] 1 K. B. 545. **Expld.** Evanson *v.* Crooks (1911), 106 L. T. 264; Phillips *v.* Royal London Mutual Insce. (1911), 105 L. T. 136; Hughes *v.* Liverpool Victoria Legal Friendly Soc., [1916] 2 K. B. 482. **Refd.** London, Edinburgh & Glasgow Assce. *v.* Partington (1903), 88 L. T. 732.

41. What amounts to statement of law—Lessee's liability under covenant—For repairs.]—KENDALL *v.* HILL, No. 33, *ante*.

42. —— —— **Restraining user.**]—WAUTON *v.* COPPARD, No. 630, *post*.

43. —— **Validity of Lloyd's bond.**]—RASHDALL *v.* FORD, No. 35, *ante*.

44. —— **Facts with legal conclusion—Facts & law distinguished.**]—(1) A misrepresentation of law is this: when you state the facts & state a conclusion of law, so as to distinguish between facts & law. The man who knows the facts is taken to know the law; but when you state that as a fact, which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact & not a statement of law (JESSEL, M.R.).

(2) It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it (JESSEL, M.R.).

It is not the less a statement of fact that in order to arrive at it you must know more or less of the law (JESSEL, M.R.).—EAGLESFIELD *v.* LONDONDERRY (MARQUIS) (1875), 4 Ch. D. 693; 34 L. T. 113; 24 W. R. 568; *on appeal* (1876), 4 Ch. D. p. 708, C. A.; (1878), 38 L. T. 303, H. L.

Annotations:—*Generally,* **Refd.** Cargill *v.* Bower (1878), 10 Ch. D. 502; Deeley *v.* Lloyds Bank, [1912] A. C. 756. **Mentd.** Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394; Yorkshire Railway Waggon Co. *v.* Maclure & Cornwall Minerals Railway Co. (1881), 45 L. T. 747.

45. —— **Provisions of private Act.**] — WEST LONDON COMMERCIAL BANK *v.* KITSON, No. 38, *ante*.

Legal effect of document.]—*See* Sect. 6, *post*.

Representation giving rise to estoppel.] — *See* ESTOPPEL, Vol. XXI., pp. 294, 295, Nos. 1052–1054.

SECT. 5.—STATEMENT OF MIXED LAW AND FACT.

46. Statement based on erroneous view of law—Effect of private Act.]—WEST LONDON COMMERCIAL BANK *v.* KITSON, No. 38, *ante*.

Effect of covenant in lease.]—*See* AUCTION & AUCTIONEERS, Vol. III., p. 26, No. 190.

47. Fact involving knowledge of law.]—EAGLESFIELD *v.* LONDONDERRY (MARQUIS), No. 44, *ante*.

Legal effect of document.]—*See* Sect. 6, *post*.

SECT. 6.—STATEMENTS AS TO NATURE OR EFFECT OF DOCUMENTS.

48. Nature — Voluntary assignment described as sale—False recitals.]—A young lady, a few months after she came of age, & on the eve of her marriage, with her father's concurrence, but without the knowledge of her intended husband, made an absolute assignment of her reversionary interest in a sum of stock to the trustee thereof, by a deed, which recited a contract for sale of such stock to the trustee, & the payment of the purchase-money, & upon this deed was indorsed a receipt for the purchase-money, signed by the lady, no purchase-money having been in fact paid :—*Held :* the falsehood of the recitals in the deed alone would have been sufficient to prevent the ct. from supporting it as a security, to the amount of the consideration expressed, for a larger sum due from the lady's father to the trustee for money advanced for her education.—LEWELLIN *v.* COBBOLD (1853), 1 Sm. & G. 376 ; 17 Jur. 448 ; 1 W. R. 211 ; 65 E. R. 165.

49. —— Mortgage described as renewal.]—Where A., a solr., induced B. to execute a mtge. of her estate to C., under the representation that it was necessary to raise money to pay off an old mtge. of her sister's on their common estate, & that the thing was a mere renewal, & would not cause her to incur liability :—*Held :* the deed was void.—LEE *v.* ANGUS (1866), 15 L. T. 380 ; 15 W. R. 119.

50. —— Conveyance described as payment off of mortgage.]—On Jan. 18, 1883, A., a solr., obtained from his sisters, B. & C., their signatures to two deeds, by which, in alleged consideration in each case of the release of a debt of £400 & payment to them of £300, they conveyed their shares of freehold property, which was subject to a mtge. to K., to A. in fee. No money was at the time due from B. & C. to A., nor was any payment whatever made to them. The deeds were not read over or explained to B. & C., who had no idea that they were thereby conveying their property, & signed in full reliance on A.'s statement that he was going to clear off the mtge. & wanted to send the deeds to K. On the next day A. deposited the deeds with a bank as security for an advance. In applying for the advance before the execution of the deeds, A. had told the managers that B. & C., who were joint owners with himself of the property, were going to convey & "were assisting with the deeds," but that nothing would be paid to them as consideration money, as the money was to be invested in a colliery in which A. was interested. The manager handed over the deeds to the solr. of the bank & merely told him that he was to exercise great care & diligence in investigating the title. The solr. being dead, it did not appear what inquiries were made by him, but the advance was made to A. A. having absconded, the property was claimed by the bank as equitable mtgees., & the claim was resisted by B. & C. on the ground that the conveyances, having been obtained by fraud & misrepresentation, were void as against them. They also relied on deeds which purported to be reconveyances of the property by A. to B. & C., of Jan. 18, 1883, which were attested but did not bear a seal, & which only had been discovered amongst A.'s papers after he absconded :—*Held :* inasmuch as B. & C., though they might not understand the nature of the deeds, knew they were executing something which dealt in some way with their property, the deeds of Jan. 18, 1883, were not void but voidable only. But as the statements made by A. to the bank manager were such as to have clearly put the bank upon inquiry, which would, if made, have led to the detection of the fraud & to a refusal of the advance, & therefore to have affected the bank with constructive notice of the fraud, the equity of the bank must, on the ground of their negligence, be postponed to that of B. & C.—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* JACKSON (1886), 33 Ch. D. 1 ; 55 L. T. 458 ; 34 W. R. 597, C. A.

Annotations :—**Consd.** Farrand *v.* Yorkshire Banking Co. (1888), 40 Ch. D. 182. **Apld.** Lloyds Bank *v.* Bullock, [1896] 2 Ch. 192. **Consd.** Bagot *v.* Chapman, [1907] 2 Ch. 222 ; Howatson *v.* Webb, [1907] 1 Ch. 537. **Mentd.** *Re* Smith, Oswell *v.* Shepherd (1892), 67 L. T. 64.

51. —— Mortgage described as power of attorney.]—A married woman entitled to a reversionary interest was induced by her husband to execute a document which he represented to be a power of attorney enabling him to raise money at some future time. It was in fact a mtge. of a reversionary interest to which she was entitled for £12,000, containing a personal covenant for payment by the wife. The wife knew that if her husband did eventually raise money under the document it would be raised out of her reversionary interest. She did not intend to create a present charge or incur any personal liability. The mtgees. brought this action against the husband & wife for foreclosure & judgment in their covenants. The wife pleaded, among other defences, *non est factum* :—*Held :* the husband's misrepresentation was as to the nature & character of the deed, & the plea was good as to the whole deed, &, even if the charge on the wife's reversionary interest were valid, the defence ought to prevail as to her covenant to pay principal & interest.—BAGOT *v.* CHAPMAN, [1907] 2 Ch. 222 ; 76 L. J. Ch. 523 ; 23 T. L. R. 562.

Annotation :—**Consd.** Howatson *v.* Webb, [1908] 1 Ch. 1.

52. —— Guarantee described as insurance paper.]—Deft. signed a document purporting to be a continuing guarantee up to a certain amount by him to cover the payment by R. of all moneys due from him to pltfs. on the general balance of his account with them. The signature of deft. had been obtained by the fraudulent misrepresentation of R. that it was merely an insurance paper of a kind deft. had signed before. Deft. did not read the document, neither did he know the nature of it. Subsequently, R. forged the signature of an attesting witness, & handed the document thus completed to pltfs. In an action brought by pltfs. against deft. as guarantor of R.'s current banking account, the jury found (*inter alia*) deft. was negligent in signing the document :—*Held :* the fact that the jury had found deft. was negligent did not raise such an estoppel as would prevent him from setting up the defence *non est factum*, & the proximate cause of the loss sustained by pltfs. was not the negligence of deft., but was the fraudulent act of R.—CARLISLE & CUMBERLAND BANKING CO. *v.* BRAGG, [1911] 1 K. B. 489 ; 80 L. J. K. B. 472 ; 104 L. T. 121, C. A.

—— Bill of Exchange misdescribed.] — *See* BILLS OF EXCHANGE, Vol. VI., p. 166, Nos. 1053–1057.

PART I. SECT. 6.

e. Nature—Guarantee described as application for licence.]—It is a good defence to an action on a guarantee that it was executed by the guarantor in the belief induced by the fraudulent misrepresentations of the principal debtor that it is a document of another nature.—WATKINS CO. *v.* HANNAH (Sask.), [1926] 4 D. L. R. 93 ; [1926] 2 W. W. R. 800.—CAN.

53. Effect — Contents misdescribed — To one unable to read.]—ANON. (1506), Keil. 70; 72 E. R. 231.

Annotation:—**Consd.** Foster *v.* Mackinnon (1869), L. R. 4 C. P. 704.

54. —— —— ——.]—THOROUGHGOOD'S CASE, THOROUGHGOOD *v.* COLE, No. 675, *post.*

55. —— —— **To one able to read.**] — ANON. (1684), Skin. 159; 90 E. R. 74.

56. —— —— ——.] — HOWATSON *v.* WEBB, No. 686, *post.*

57. —— **Legal construction — Bond.**] — Where a party who executes a bond is at the time competent to execute it, he cannot, under the plea of *non est factum*, show that he was misled as to the legal effect of the bond.

I agree that, whatever shows that the bond never was the deed of deft. may be given in evidence upon *non est factum*. But if the party actually executes it, & was competent at the time to execute it, & was not deceived as to the actual contents of the bond, though he might be misled as to the legal effect, & though he might have been entitled to avoid the bond by stating that he was so misled, it nevertheless became, by the execution, the deed of deft., & he is not at liberty, upon the plea of *non est factum* to say it was not (BAYLEY, B.).—EDWARDS *v.* BROWN (1831), 1 Cr. & J. 307; 1 Tyr. 182; 9 L. J. O. S. Ex. 84; 148 E. R. 1436.

Annotations:—**Consd.** Favell *v.* Wright (1891), 64 L. T. 85. **Refd.** Lee *v.* Angas (1866), 15 W. R. 119; Foster *v.* Mackinnon (1869), L. R. 4 C. P. 704; Hirschfeld *v* L. B. & S. C. Ry. (1876), 2 Q. B. D. 1.

58. —— —— **Will.**] — (1) Where one contracting party has intentionally misled the other, by describing his rights [under a will] as being different from what he knew them really to be, it is no answer to the charge of fraud to say, that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other.

(2) Where one of the parties to a negotiation induces the other to contract on the faith of representations, any one of which has been untrue, the whole contract is to be considered as having been obtained fraudulently; nor is the case varied by the circumstance that the untrue representation was in the first instance the result of innocent error, if, after the discovery of the error, the party who made the representation suffer the other to continue in that error.—REYNELL *v.* SPRYE, SPRYE *v.* REYNELL (1852), 1 De G. M. & G. 660; 21 L. J. Ch. 633; 42 E. R. 710, L. JJ.

Annotations:—*As to* (1) **Refd.** Parkinson *v.* College of Ambulance & Harrison, [1925] 2 K. B. 1. *As to* (2) **Consd.** Traill *v.* Baring (1864), 4 De G. J. & Sm. 318. **Refd.** Arkwright *v.* Newbold (1881), 17 Ch. D. 301. *Generally*, **Refd.** Parr *v.* Jewell (1855), 1 K. & J. 671; Parker *v.* Clarke (1861), 7 Jur. N. S. 1267. **Mentd.** *Re* Tratt, *Ex p.* James (1853), 3 De G. M. & G. 493; Hilton *v.* Woods (1867), L. R. 4 Eq. 432; Rees *v.* Bernhardy, [1896] 2 Ch. 437; Hermann *v.* Charlesworth (1905), 74 L. J. K. B. 620.

59. —— —— **Lease.**] — KENDALL *v.* HILL, No. 33, *ante.*

60. —— —— **Release.**] — *Semble:* a fraudulent representation as to the effect of a deed [of release] may be relied upon as a defence to an action upon the deed.—HIRSCHFELD *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO. (1876), 2 Q. B. D. 1; 46 L. J. Q. B. 94; 35 L. T. 473.

61. —— —— **Contract of sale.**] — An error entertained by one of the parties to a contract of sale as to the legal meaning of the contract is not by itself sufficient to invalidate his consent to the contract.

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, will not be sufficient to give him the right [to rescind] unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract (LORD WATSON).—STEWART *v.* KENNEDY (No. 2) (1890), 15 App. Cas. 108, H. L.

Annotations:—**Mentd.** Wilding *v.* Sanderson, [1897] 2 Ch. 534; Shrager *v.* Dighton (1923), 130 L. T. 642.

62. —— —— **Family arrangement.**]—A compromise between members of a family of their supposed rights under a will or other document, made after a joint consultation with the family solr., he acting as the common agent, is, in general, binding upon all the parties, even though it may not be quite in accordance with their exact legal rights, provided the solr. has first fully explained to the parties what those rights are. But if any one of the parties has entered into the compromise in consequence of what afterwards proves to have been an erroneous view taken by the solr. of the facts or of the law, or merely because the solr. may have considered a compromise would be for the advantage of all parties irrespective of their legal rights, that party may have the compromise set aside.—*Re* ROBERTS, ROBERTS *v.* ROBERTS, [1905] 1 Ch. 704; 74 L. J. Ch. 483; 93 L. T. 253, C. A.

63. —— **Translation of proclamation.**] — MAHOMED KALA MEA *v.* HARPERINK (1908), 25 T. L. R. 180, P. C.

—— **Insurance policy.**]—*See* INSURANCE, Vol. XXIX., pp. 57, 58, No. 187.

SECT. 7.—STATEMENTS AS TO VALUE.

64. Whether amounting to representation — Apart from warranty.]—HARVEY *v.* YOUNG (1602), Yelv. 21; 80 E. R. 15.

Annotations:—**Apld.** Leakins *v.* Clissel (1663), 1 Sid. 146. **Consd.** Pasley *v.* Freeman (1789), 3 Term Rep. 51. **Refd.** Cross *v.* Gardner (1688), 1 Show. 68; Lysney *v.* Selby (1704), 2 Ld. Raym. 1118.

·——.]—*See, also*, Sect. 9, *post.*

65. —— **Where value certain.**] — LEAKINS *v.* CLISSEL (1663), 1 Sid. 146; 1 Keb. 522; 82 E. R. 1022; *sub nom.* EKINS *v.* TRESHAM, 1 Lev. 102.

Annotations:—**Apld.** Lysney *v.* Selby (1704), 2 Ld. Raym. 1118. **Consd.** Pasley *v.* Freeman (1789), 3 Term Rep. 51. **Refd.** Crosse *v.* Gardner (1688), Comb. 142; Attwood *v.* Small (1840), 6 Cl. & Fin. 232.

66. —— ——.] — Deceit lies for affirming to a purchaser, that the rent is more than in fact it is, but not for saying S. would have given so much.—RISNEY *v.* SELBY (1704), 1 Salk. 211; 91 E. R. 189; *sub nom.* LYSNEY *v.* SELBY, 2 Ld. Raym. 1118.

Annotations:—**Consd.** Pasley *v.* Freeman (1789), 3 Term Rep. 51. **Apld.** Dobell *v.* Stevens (1825), 3 B. & C. 623. **Consd.** Attwood *v.* Small (1838), 6 Cl. & Fin. 232. **Apld.** Price *v.* Macaulay (1852), 2 De G. M. & G. 339. **Refd.** Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542; Ingram *v.* Thorp (1848), 7 Hare, 67; Derry *v.* Peek (1889), 14 App. Cas. 337.

PART I. SECT. 7.

1. General rule.]—COPE *v.* SCOTTISH UNION & NATIONAL INSURANCE CO. (1897), 5 B. C. R. 329.—CAN.

5. ——.]—A representation as to value, is a matter of opinion, & should not be placed upon the same footing in all respects as a representation as to actual facts, which cannot be matters of opinion.—BRAUCHLE *v.* LLOYD (1915), 30 W. L. R. 659; 21 D. L. R. 321; 7 W. W. R. 1343.—CAN.

Sect. 7.—*Statements as to value. Sects.* 8, 9, 10, 11, 12 & 13. *Part II. Sect.* 1: *Sub-sects.* 1 & 2. *Sect.* 2: *Sub-sect.* 1, *A.*]

67. —— Conjectural estimate.] — IRVINE (OR DOUGLAS) *v.* KIRKPATRICK, No. 380, *post.*

68. —— ——.] — Misrepresentations, to constitute sufficient grounds for setting aside a purchase, must be material, as being of such a nature as, if true, to add to the value, must not be evidently merely conjectural statements, & must be made without a belief in their truth or without reasonable grounds for such a belief.—JENNINGS *v.* BROUGHTON (1854), 5 De G. M. & G. 126; 23 L. J. Ch. 999; 43 E. R. 818, L. JJ.

Annotations:—**Apld.** Higgins *v.* Samels (1862), 2 John. & H. 460. **Distd.** Kisch *v.* Central Ry. of Venezuela (1865), 3 De G. J. & Sm. 122. **Consd.** Smith *v.* Chadwick (1882), 20 Ch. D. 27. **Reld.** Hart *v.* Clarke (1854), 19 Beav. 349; Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485; McKeown *v.* Boudard-Peveril Gear Co. (1896), 65 L. J. Ch. 735.

69. —— Statements approximately correct.] — DEMPSTER *v.* DEMPSTER (1887), 3 T. L. R. 299.

Exaggeration or puffing.]—*See* Sect. 8, *post.*

SECT. 8.—EXAGGERATION OR PUFFING.

70. Indefinite representation — Leasehold land described as "Nearly equal to freehold."]—The representation as to the small fine is indefinite: so is the representation that the estate is nearly equal to freehold. All these representations ought to put the party upon inquiry. Connected with certain circumstances, such representations may, however, be fraudulent (GRANT, M.R.).—FENTON *v.* BROWNE (1807), 14 Ves. 144; 33 E. R. 476.

Annotations:—**Reld.** Brooke *v.* Rounthwaite (1846), 5 Hare, 298. **Mentd.** Smith *v.* Jackson & Lloyd (1816), 1 Madd. 618.

71. "Uncommonly rich water meadow" — Land imperfectly watered.]—If land, generally reputed to be water meadow, is sold by the assignees of a bkpt. by the description of uncommonly rich water meadow, whereas in fact it is very imperfectly watered, this is not such a misrepresentation as will avoid the sale.—SCOTT *v.* HANSON (1829), 1 Russ. & M. 128; 39 E. R. 49, L. C.

Annotations:—**Distd.** Higgins *v.* Samels (1862), 2 John. & H. 460. **Reld.** Smith *v.* Land & House Property Corpn. (1884), 28 Ch. D. 7; *Re* Fawcett & Holmes' Contract (1889), 42 Ch. D. 150.

72. General commendation.] — Mere general commendation of the business is nothing, & even as to a representation that it is of a particular amount per week, there must be some proof that it was fraudulent (WILLES, J.).—COLLINS *v.* GRIPPER (1858), 1 F. & F. 332.

73. Overstatement of ability to procure appointment.]—NEELEY *v.* LOCK, No. 193, *post.*

74. Negligent or careless.] — HUNTINGFORD *v.* MASSEY, No. 317, *post.*

75. Laudatory terms — No warranty.] — There may be a warranty without the use of the word warrant; but then there must be words used tantamount to it, & such as men of business would recognise as importing a warranty. A mere representation is not a ground of action unless it is wilfully false & fraudulent. A warranty imports an absolute liability on an undertaking, & it is not because traders use laudatory terms when speaking of the articles they sell, that, therefore, they are to be rendered liable, apart from fraud. . . . It is not because the seller represented that this safe was secure against burglars, or used other eulogistic language about it, whether in prospectuses or otherwise, that, therefore, he is to be held liable as for a warranty (COCKBURN, C.J.).—WALKER *v.* MILNER (1866), 4 F. & F. 745.

See also, Sect. 8, *post.*

76. By purchaser—For purpose of reducing price.]—VERNON *v.* KEYS, No. 543, *post.*

Statements as to value.]—*See*, Sect. 7, *ante.*

Company prospectus.]—*See* COMPANIES, Vol. IX., pp. 115, 119, Nos. 553, 586–588.

Claim on insurance company.]—*See* INSURANCE, Vol. XXIX., pp. 317, 318, Nos. 2618–2624.

Disparagement of another's goods—Whether trade libel.]—*See* TRADE & TRADE UNIONS.

Employment of puffer at auction.]—*See* AUCTION & AUCTIONEERS, Vol. III., pp. 12–15, Nos. 83–110.

SECT. 9.—REPRESENTATION DISTINGUISHED FROM WARRANTY.

77. General rule.]—BEHN *v.* BURNESS, No. 1, *ante.*

78. ——.] — HEILBUT, SYMONS & CO. *v.* BUCKLETON, No. 486, *post.*

79. ——.]—What constitutes a warranty in law, or a mere representation? To create a warranty no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, & must be given during the course of the dealing which leads to the bargain, & should then enter into the bargain as part of it. It was laid down by BULLER, J., as long ago as 1789 in *Pasley* v. *Freeman*, No. 163, *post:* "It was rightly held by HOLT, C.J." in *Crosse* v. *Gardner*, No. 203, *post*, & *Medina* v. *Stoughton*, No. 204, *post*, "& has been uniformly adopted ever since that an affirmation at the time of sale is a warranty provided it appear on evidence to have been so intended." In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, & on which the buyer may be expected also to have an opinion & to exercise his judgment. In the former case it is a warranty, in the latter not (A. L. SMITH, M.R.).—DE LASSALLE *v.* GUILDFORD, [1901] 2 K. B. 215; 70 L. J. K. B. 533; 84 L. T. 549; 49 W. R. 467; 17 T. L. R. 384, C. A.

Annotations:—**Dbtd.** Heilbut, Symons *v.* Buckleton, [1913] A. C. 30. **Reld.** Milch *v.* Coburn (1910), 27 T. L. R. 170; Collins *v.* Hopkins, [1923] 2 K. B. 617. **Mentd.** Lloyd *v.* Sturgeon Falls Pulp Co. (1901), 85 L. T. 162.

80. Contract of service of ship's surgeon—Ship stated to be A.1.]—Where a contract [of service of ship's surgeon] is to be collected out of a variety of letters between the parties, it is a question for the jury, & not the ct., to decide its nature, & to say whether it is complete. It is also for the jury to determine which parts of the correspondence form portion of the contract, & which of them contain mere collateral information.

It is said that the declaration should have stated as part of the contract that the *Orissa* was a ship that was A.1. It appears to me that this was a mere matter of representation not

PART I. SECT. 8.

h. *Whether amounting to representation.*]—The question whether a statement is to be regarded as a representation of fact or as mere extravagance commendation depends on the circumstances, & among these circumstances are to be considered the position in life, experience, & skill of the person to whom the representation is made.—EASTERBROOK *v.* HOPKINS, [1918] N. Z. L. R. 428.—N.Z.

k. ——.]—GELDENHUYS & NEETHLING *v.* BEUTHIN, [1918] App. D. 426.—S. AF.

amounting to a warranty (TINDAL, C.J.).—RICHARDS *v.* HAYWARD (1841), 2 Man. & G. 574; Drinkwater, 136; 2 Scott, N. R. 670; 10 L. J. C. P. 108; 133 E. R. 875.

On sale of animals.]—*See* ANIMALS, Vol. II., pp. 260, 261, Nos. 392–401.

Policies of insurance—Guarantee policies.]—*See* GUARANTEE, Vol. XXVI., pp. 188, 189, Nos. 1455–1459; INSURANCE, Vol. XXIX., pp. 411, 412, Nos. 3233, 3234.

——.]—*See* INSURANCE, Vol. XXIX., pp. 46, 47, 353, Nos. 86–103, 2856.

On sale of goods.]—*See* SALE OF GOODS.

In charterparty.]—*See* SHIPPING.

See, also, Part VII., Sect. 3, sub-sect. 2, C., *post.*

SECT. 10.—**REPRESENTATION AMOUNTING TO FALSE PRETENCE.**

See CRIMINAL LAW, Vol. XV., pp. 989–1004, Nos. 11,068–11,259.

SECT. 11.—**REPRESENTATION AMOUNTING TO ESTOPPEL.**

See ESTOPPEL, Vol. XXI., pp. 276, 277, 283–286, 290–398, Nos. 931–944, 993–1009, 1032–1594.

SECT. 12.—**IN CASE OF COMPANY.**

In prospectus.]—*See* COMPANIES, Vol. IX., pp. 112–114, 116, 117, 119, 123, 124, Nos. 530–548, 569, 570, 586–588, 630–635.

Contract to take shares.]—*See* COMPANIES, Vol. IX., pp. 247–251, Nos. 1552–1565.

SECT. 13.—**FAMILY ARRANGEMENTS.**

See FAMILY ARRANGEMENTS, Vol. XXIV., pp. 957–959, Nos. 110–126.

Part II.—How Representations may be made.

SECT. 1.—**EXPRESS REPRESENTATIONS.**

SUB-SECT. 1.—IN GENERAL.

81. Single word sufficient.]—TURNER *v.* HARVEY, No. 101, *post.*

82. ——.]—WALTERS *v.* MORGAN, No. 137, *post.*

SUB-SECT. 2.—PLANS, PICTURES, ETC.

83. Plan.]—A party to a contract cannot escape liability for fraudulent statements made by himself or his agent by inserting in the contract a clause that the other party shall not rely upon them.

Applts. contracted to execute certain works for resps., & resps.' engineers prepared plans which showed certain things as existing which did not in fact exist, & thereby induced applts. to tender for the work at a lower price than they would otherwise have done, & caused them considerable additional expense. The contract contained a clause to the effect that the contractor was to satisfy himself as to the nature of all existing works, etc., & to obtain his own information on all matters. The contractors brought an action to recover the additional expenses, alleging fraud: —*Held:* the clause was intended to apply to inaccuracies, errors & mistakes, but not to fraud, & the contractors were entitled to have the question of fraud left to the jury.—PEARSON (S.) & SON, LTD. *v.* DUBLIN CORPN., [1907] A. C. 351; 77 L. J. P. C. 1; 97 L. T. 645, H. L.

Annotation:—**Mentd.** Myers *v.* Bradford Corpn., [1915] 1 K. B. 417.

—— **Sale of land.**]—*See* SALE OF LAND.

84. Pictorial design on cigar boxes.]—Pltfs., who were manufacturers of & dealers in cigars in England, imported from Germany cigars made of Havannah tobacco. There was no direct evidence as to the place where they were manufactured, but the ct. found as a fact that they were also manufactured in Germany. Pltfs. sold these cigars in England in boxes on which was a label containing their trade mark, registered under the Trade Marks Registration Act, 1875 (c. 91), which consisted of the words "La Pureza," & a pictorial representation of an Indian woman in a state of semi-nudity holding up a bundle of cigars, two winged boys each holding a shield, & a background representing a portion of some tropical country. On one shield was depicted the arms of Spain, & on the other those of Havannah. In the trade mark as registered the shields were blank. A smaller label contained what was apparently the lithographed signature of "Ramon Romnedo." On each box were branded the words "La Pureza" & "Habana." It was proved that "La Pureza" was an old brand, long disused, of Havannah cigars, & that there was no known existing person of the name of "Ramon Romnedo":—*Held:* as the trade mark & other marks on pltfs.' boxes together amounted to a "dressing-up" of pltfs.' cigars, & a misrepresentation that they were cigars manufactured in the Havannah, the action must be dismissed, but without costs, defts. being entitled only to the costs of the appeal.—NEWMAN *v.* PINTO (1887), 57 L. T. 31; 3 T. L. R. 685; 4 R. P. C. 508, C. A.

Annotations:—**Consd.** Lewis's *v.* Goodbody (1892), 67 L. T. 194; Jamieson *v.* Jamieson (1898), 15 R. P. C. 169. **Apld.** Baschet *v.* London Illustrated Standard Co., [1900] 1 Ch. 73. **Consd.** Warsop *v.* Warsop (1904), 21 R. P. C. 481. **Reld.** Jay *v.* Ladler (1888), 40 Ch. D. 649; Hargreave *v.* Freeman (1891), 7 T. L. R. 535; Bile Bean Manufacturing Co. *v.* Davidson (1905), 22 R. P. C. 553; Plotzker *v.* Lucas (1907), 24 R. P. C. 551.

85. Illustrations in catalogue.]—SLINGSBY *v.* BRADFORD PATENT TRUCK & TROLLEY CO., [1900] W. N. 51, C. A.

Annotation:—**Reld.** British Oxygen Co. *v.* Liquid Air, [1925] Ch. 383.

SECT. 2.—**IMPLIED REPRESENTATIONS.**

SUB-SECT. 1.—ACTS OR CONDUCT.

A. In General.

See, generally, ESTOPPEL, Vol. XXI., pp. 328–398, Nos. 1221–1594.

86. Concealment by conduct sufficient.]—SAVERY *v.* KING, No. 758, *post.*

87. Slightest gesture sufficient.]—WALTERS *v.* MORGAN, No. 137, *post.*

Sect. 2.—Implied representations: Sub-sect. 1, A., B. & C.; sub-sects. 2, 3 & 4.]

88. Demonstration of invention — Representation of genuineness.]—Agreement for the purchase of part of the profits of a patent, which turned out to be a mere bubble, set aside as having been obtained by fraud & misrepresentation, & so much of the purchase-money as had been paid under the agreement ordered to be repaid.

It is not unfair to conclude that these were in truth the circumstances which induced pltf. to enter into that agreement. What, then, are these circumstances? . . . A performance of experiments in pltf.'s presence, by which he is induced to believe that such representations are in substance true (ALDERSON, B.).—LOVELL *v.* HICKS (1836), 2 Y. & C. Ex. 46; 5 L. J. Ex. Eq. 101; 160 E. R. 306.

89. Production of document—Whether representation of genuineness—Books.]—It is said & on that the whole case rests that M. must be taken to have represented to D. that the books handed to him for inspection were genuine & properly kept books; but it is impossible to say that there is any evidence of any representation made by D. to the co. which can be treated as a representation, that the books tendered by M. were in fact genuine. It is rational enough to hold that as against M., that is the effect of his handing over the books; but when D. informs those to whom he is selling, as he obviously did by showing them the contract, that the books to be examined by the accountants are the books handed over by M., & when he hands to them the result of the accountants' inspection of these books, the utmost representation which he can be taken to have made is this, there is the report of the accountants whom I have employed as to what is shown by the books which M. handed over to those accountants as the books of the business. Beyond that, it seems to me to be impossible to say that any representation was made by D. to the co. (LORD HERSCHELL, C.).—EDINBURGH UNITED BREWERIES *v.* MOLLESON, [1894] A. C. 96; 58 J. P. 364, H. L.

Annotation:—**Refd.** Abram S.S. Co. *v.* Westville Shipping Co., [1923] A. C. 773.

90. —— —— Lease.]—(1) M. was fraudulently induced to advance money on mtge. to W. on the security of certain leases, which were subsequently proved to be fictitious. The leases had been previously mortgaged to C., who was paid off by M. when the latter advanced the money to W. At this date C. had become aware that the leases were fictitious, & that he had been defrauded by W., but he made no disclosure of this fact to M. & executed a reassignment to him of the so called leasehold premises as if they had been genuine.

In an action by M. against W. & C., claiming damages against the latter for assisting in the fraud by which M. was induced to advance his money on the security of the fictitious leases, the personal security of W., who was now undergoing penal servitude, being valueless:—*Held:* under the circumstances C. was liable to M. for the loss & damage so suffered by him.

Pltf. undoubtedly was induced to advance his money upon the security of documents which were represented to be leases of certain premises granted by Walters to Weaver. These so-called leases were fictitious. Walters was the same person as Weaver (ROMER, L.J.).

(2) Though a person may be deceived by another with the knowledge of a third person, if that third person is not party to the deceit, & has no legal duty or obligation to the person deceived, & does nothing but preserve silence, then, however morally blameworthy he may be in standing by & not preventing the deed being carried into effect, he cannot be held liable in an action for damages at the instance of the party deceived (ROMER, L.J.).—MARNHAM *v.* WEAVER (1899). 80 L. T. 412.

91. Bringing action by next friend—Representation that next friend of age.]—In an action brought by an infant against G. & his wife the father & mother of pltf. were co-defts. The co-defts. were told to select a competent next friend of full age & pltfs.'s mother suggested a next friend, himself under twenty-one at the date of the writ:—*Held:* by instituting the action pltf.'s solrs. represented to defts. that the infant's next friend was qualified by age.—FERNÉE *v.* GORLITZ, [1915] 1 Ch. 177; 84 L. J. Ch. 404; 112 L. T. 283.

Contracts by infant—Representation of age.]—*See* INFANTS, Vol. XXVIII., pp. 140, 174, 176–178, Nos. 13, 345–347, 367–380.

Representation amounting to criminal offence.]—*See* CRIMINAL LAW, Vol. XV., pp. 764, 765, 1015–1018, Nos. 8199–8208, 11401–11435.

B. In Sales or Purchases.

Sale of land.]—*See* SALE OF LAND.

Sale of goods.]—*See, generally,* SALE OF GOODS.

—— Acts amounting to passing off.]—*See* TRADE MARKS.

Transfer of shares in company.]—*See* COMPANIES, Vol. IX., pp. 354, 355, Nos. 2237–2244.

Sale of animals in public market.]—*See* ANIMALS, Vol. II., p. 261, Nos. 400, 401.

Sale of food & drugs.]—*See* FOOD & DRUGS, Vol. XXV., pp. 80 *et seq.*

C. As to Character of Representor.

See, generally, ESTOPPEL, Vol. XXI., pp. 359–366, Nos. 1391–1432.

92. General rule.]—If a man allows his name to be held out to the public as being the person responsible for the transaction in question, he may be held liable in consequence of such holding out, or in consequence of his conduct, although he may not be liable because he has not taken steps which he should take to stop the unauthorised use of his name. I apprehend that would apply as well in the case of allowing a name to be held out by a man representing himself as agent or as principal in a particular transaction, all forming part of the general principle of estoppel by acts (BYRNE, J.).—WALTER *v.* ASHTON, [1902] 2 Ch. 282; 71 L. J. Ch. 839; 87 L. T. 196; 51 W. R. 131; 18 T. L. R. 445.

Annotations:—**Apld.** Clerk *v.* Motor Car Co. (1905), Ltd. & Ford (1905), 49 Sol. Jo. 418. **Refd.** Dutton, Massey, Liverpool *v.* Dutton, Massey (1923), 40 R. P. C. 413; Harrods *v.* Harrod (1924), 40 T. L. R. 195. **Mentd.** Wertheimer *v.* Stewart, Cooper (1906), 23 R. P. C. 481; Motor Manufacturers' & Traders' Soc. *v.* Motor Manufacturers' & Traders' Mutual Insce., [1925] Ch. 675.

93. Agent acting as principal—Son carrying on father's business — Liability for contracts.]—Where a son had ostensibly appeared as the proprietor & conductor of the business in a trade, not an extensive one, & the father, to whom the business really belonged, was superannuated & incapable of conducting it:—*Held:* the son was liable on contracts connected with the business.—TURREL *v.* COLLET (1795), 1 Esp. 319.

94. —— Delivery of bought notes—Whether representation of interest of buyer.]—A. & co. brokers in the City of London, were authorised by B., at two several times, to purchase for him,

3,000 tons of iron. A. & co. shortly afterwards delivered to B. "bought notes," which expressed that they had bought the iron for him at the prices & upon the terms therein named, & specified their charges for brokerage & commission, but which did not name any person, as the seller. B. thereupon paid to A. & co. the brokerage, etc., & made the deposits according to the terms of the bought notes. Pltfs. being about to advance money to B. upon the security of the bought notes, inquired of A. & co. whether they might safely rely upon the fulfilment of the contracts; & A. & co. thereupon indorsed on the contracts a memorandum, that in consideration of the payment of their brokerage, etc., they personally guaranteed the performance of the contracts. The advance was made, & the bought notes deposited, by way of mtge. with pltfs.; A. & co. undertaking to hold the iron & deposits for the benefit of pltfs. A considerable fall afterwards took place in the price of iron; & pltfs., having discovered that there were no other sellers but A. & co., filed their bill against A. & co. & B. to have the contracts cancelled, & for a return of the deposits:—*Held:* A. & co. having failed to prove that pltfs. knew the real facts at the time of their advance to B., must be taken to have represented to them that B.'s interest in the contracts was such as the documents represented it; & the decree must be for a return of the deposits, with interest & costs. —WILSON *v.* SHORT (1848), 6 Hare, 366; 17 L. J. Ch. 289; 10 L. T. O. S. 519; 12 Jur. 301; 67 E. R. 1207.

Annotation:—**Mentd.** Overend, Gurney *v.* Gurney (1869), 17 W. R. 1115.

95. —— Clerk acting as member of firm.]—Pltf., having had no previous dealings with the firm, & knowing them only by reputation, applied at the place of business of "Gondell & Co." for orders for goods; the firm then consisting of T. Gondell only & being managed by E. Gondell, a clerk. On pltf. asking to see Messrs. Gondell E. Gondell presented himself & so conducted himself as to lead pltf. to suppose he was one of the firm of Gondell & Co. & had authority to order goods on their behalf which was not the fact. Pltf. sent goods, according to E. Gondell's order, to the place of business of Gondell & Co., an invoice being made out by E. Gondell's direction to the name of "E. Gondell & Co." E. Gondell, unknown to pltf., carried on business with one Todd at another place; & the goods were, within three or four days of their delivery, pledged with deft., with a power of sale to secure advances *bonâ fide* made by him to Gondell & Todd & he sold them under the power without notice from pltf.:—*Held:* (1) there was no contract of sale, inasmuch as pltf. intended to contract with Gondell & Co. & not with E. Gondell personally & Gondell & Co. were not contracting parties; (2) no property passed & pltf. was entitled to recover value of goods from deft.—HARDMAN *v.* BOOTH (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L. J. Ex. 105; 7 L. T. 638; 9 Jur. N. S. 81; 11 W. R. 239; 158 E. R. 1107.

Annotations:—*As to* (1) **Folld.** Cundy *v.* Lindsay (1878), 3 App. Cas. 459. **Reld.** Whitehorn *v.* Davison, [1911] 1 K. B. 463; Phillips *v.* Brooks, [1919] 2 K. B. 243; Folkes *v.* King, [1923] 1 K. B. 282. *As to* (2) **Folld.** Hollins *v.* Fowler (1875), L. R. 7 H. L. 757. **Reld.** Lake *v.* Simmons, [1926] 1 K. B. 366. *Generally,* **Mentd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578; G. W. Ry. *v.* London & County Bank (1901), 85 L. T. 152; Oppenheimer *v.* Frazer & Wyatt, [1907] 2 K. B. 50.

96. —— Delivery of invoice—Whether representation that shippers & sellers distinct parties—Question for jury.]—A collateral statement, made at the time of entering into a contract, but not embodied in it, must, in order to invalidate the contract on the ground of its being a fraudulent statement be shown not only to have been false, but to have been known to be so by the party making it, & that the other party was thereby induced to enter into the contract.

A cargo of coffee was sold by a broker, for H. P. & co., of Liverpool; & the words "invoiced to the sellers as of first shipping quality," were introduced into the bought & sold notes. At the same time the invoice was shown to the buyers, which stated the cargo to be shipped by H., Brothers & co. consigned to H. P & co. for sale on account & risk of whom it may concern—3,150 bags "first shipping quality." H. Brothers & co. were a branch house at Rio de Janeiro, composed of the same partners as the firm of H. P. & co. In an action on the case against H. P. & co. for deceit:—*Held:* it was a proper question for the jury, whether the invoice imported that the coffee was invoiced to defts. by distinct parties as the sellers thereof.

The only inference of fraud in the present case arises from the peculiar forms of the instrument; that is a part of the case which seems fit for a jury, the question being, whether the invoice would necessarily be understood by mercantile men as an invoice usually passing from one house to another (PARKE, B.).

The fraud which vitiates a contract, & gives the party a right to recover, does not in all cases necessarily imply moral turpitude (LORD ABINGER, C.B.).

If a person makes a representation or takes an oath of that which is true, if he intend that the party to whom the representation is made should not believe it to be true, that is a false representation (ALDERSON, B.).—MOENS *v.* HEYWORTH (1842), 10 M. & W. 147; H. & W. 138; 10 L. J. Ex. 177.

Annotations:—**Reld.** Udell *v.* Atherton (1861), 7 H. & N. 172; Derry *v.* Peek (1889), 14 App. Cas. 337. **Mentd.** Gorsuch *v.* Croe (1860), 2 L. T. 567; Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; London Assco. *v.* Mansel (1879), 11 Ch. D. 363; Joel *v.* Law Union & Crown Insce., [1908] 2 K. B. 431; Yorke *v.* Yorkshire Insce., [1918] 1 K. B. 662.

—.]—*See, generally,* AGENCY, Vol. I., pp. 624 *et seq.*

Assumption of character of parties.] — *See* PARTNERSHIP.

Criminal personation.]—*See* CRIMINAL LAW, Vol. XV., pp. 1056, 1057, No. 11,932.

Personation in elections.]—*See* ELECTIONS, Vol. XX., pp. 97, 98, Nos. 764-773.

SUB-SECT. 2.—STATEMENTS OF INTENTION.

See Part I., Sect. 2, *ante.*

SUB-SECT. 3.—STATEMENTS OF OPINION OR BELIEF.

See Part I., Sect. 3, *ante.*

SUB-SECT. 4.—OMISSION, SILENCE OR INACTION.

See Part III., Sect. 2, *post.*

Part III.—What Constitutes Misrepresentation.

SECT. 1.—FALSITY.

SUB-SECT. 1.—IN GENERAL.

97. Representation in fact true—Intention that representee should believe it false.]—MOENS *v.* HEYWORTH, No. 96, *ante*.

What constitutes falsity.]—*See* Sub-sect. 2, *post*.

What constitutes fraud.]—*See* Part IV., Sect. 1, *post*.

SUB-SECT. 2.—WHAT AMOUNTS TO FALSITY.

A. Statements Substantially Accurate.

98. Non-material misdescription not sufficient—Statement by agent of company.]—A co., of which applts. were directors, was in negotiation with resps. for an advance upon the security of sheep & wool, the property of the co.; L., an agent of the co., wrote in answer to a question of resps., "The mtge. to N. is the only incumbrance on the sheep & wool"; in fact there were two other outstanding incumbrances, but at the time of writing L. had them both in his possession on behalf of the co., under an agreement that they should be paid off out of the advance to be made by resps., which was in fact done:—*Held*: under these circumstances there was no evidence that L. was guilty of making a false representation of the position of the co.—BEAR *v.* STEVENSON (1874), 30 L. T. 177, P. C.

Exaggeration or puffing.]—*See* Part I., Sect. 8, *ante*.

Contracts for sale of land.]—*See* SALE OF LAND.

Contracts of insurance.]—*See* INSURANCE, Vol. XXIX., pp 51, 52, Nos. 144–151.

Contracts of guarantee.]—*See* GUARANTEE, Vol. XXVI., p. 210, Nos. 1649–1656.

B. Ambiguous Statements.

99. How interpreted—Intention of representor to be considered.]—Moralists & jurists tell us that words are to be understood in Cts. of Justice in the sense in which the person using them asked or believed that they should be understood by the person to whom they were addressed (LORD CAMPBELL, C.).—PIGGOTT *v.* STRATTON (1859), 1 De G. F. & J. 33; 29 L. J. Ch. 1; 1 L. T. 111; 24 J. P. 69; 6 Jur. N. S. 129; 8 W. R. 13; 45 E. R. 271, L. C. & L. JJ.

Annotations:—**Refd.** Kendall *v.* Hill (1860), 2 L. T. 717; Martin *v.* Douglas (1867), 16 W. R. 268; Spicer *v.* Martin (1888), 14 App. Cas. 12; Low *v.* Bouverie, [1891] 3 Ch. 82; Kennard *v.* Ashman (1894), 10 T. L. R. 213. **Mentd.** Traill *v.* Baring (1864), 3 New Rep. 362; Brabant *v.* Wilson (1865), 35 L. J. Q. B. 49; Tulk *v.* Metropolitan Board of Works (1867), 8 B. & S. 777; Maddison *v.* Alderson (1883), 8 App. Cas. 467; Mackenzie *v.* Childers (1889), 43 Ch. D. 265; Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614; Wheaton *v.* Maple, [1893] 3 Ch. 48; Wilkes *v.* Spooner, [1911] 2 K. B. 473.

100. Whether deemed a false statement—Question for jury.]—An action for false representation, contained in the prospectus of a co., of which deft. is a director, is maintainable, although such representation may be capable of a meaning in which it would not be literally false. In such a case it is for the jury to say whether the representation was made in the sense necessary to maintain the action.—CLARKE *v.* DICKSON (1859), 6 C. B. N. S. 453; 28 L. J. C. P. 225; 33 L. T. O. S. 136; 23 J. P. 326; 5 Jur. N. S. 1029; 7 W. R. 443: 141 E. R. 533.

Annotations:—**Mentd.** Nicholson *v.* Ricketts (1860), 2 E. & E. 497; Edgington *v.* Fitzmaurice (1885), 29 Ch. D. 459.

101. —— When misleading to representee.]—Relief given against a contract where the purchaser knew that the vendors, the assignees of a bkpt. were ignorant of a circumstance considerably increasing the value.

If an estate is offered for sale & I treat for it, knowing that there is a mine under it, & the other party makes no inquiry, I am not bound to give him any information of it. . . . But a very little is sufficient to affect the application of that principle. . . . . If a word, a single word be dropped, which tends to mislead the vendor, the principle will not be allowed to operate (LORD ELDON, C.).

If one man understands an expression in one sense, & another in a different sense, though the ct. might impute to both that they understood it in the right sense, yet if there has been any mistake, & especially if the expression used by one party has at all misled the other, it is always material in considering what a ct. of equity will do with the case (LORD ELDON, C.).—TURNER *v.* HARVEY (1821), Jac. 169; 37 E. R. 814, L. C.

Annotations:—**Consd.** Walters *v.* Morgan (1861), 3 De G. F. & J. 718. **Apld.** Thompson *v.* Lambert (1868), 17 W. R. 111. **Consd.** Davies *v.* London & Provincial Marine Insce. (1878), 8 Ch. D. 469. **Refd.** Davis *v.* Ohrly (1898), 14 T. L. R. 260. **Mentd.** Shrewsbury & Birmingham Ry. *v.* L. & N. W. Ry. (1853), 4 De G. M. & G. 115.

102. —— ——.]—If the words are susceptible of different meanings he is deceived, not by the words used, but by his construction of them (LORD CHELMSFORD, C.).—HALLOWS *v.* FERNIE (1868), 3 Ch. App. 467; 18 L. T. 340; 16 W. R. 873, L. C.

Annotations:—**Refd.** Bellairs *v.* Tucker (1884), 13 Q. B. D. 562. **Mentd.** Sharpley *v.* Louth & East Coast Ry. (1876), 2 Ch. D. 663; York Tram. Co. *v.* Willows (1882), 51 L. J. Q. B. 257; *Re* Scottish Petroleum Co. (1883), 23 Ch. D. 413; *Re* Medical Attendance Assocn., Onslow's Case (1886), 55 L. T. 612; *Re* Great Northern Salt & Chemical Works, *Ex p.* Kennedy (1890), 44 Ch. D. 472.

103. —— ——.]—CAPEL & CO. *v.* SIM'S SHIPS COMPOSITIONS CO., LTD., No. 432, *post*.

104. —— —— Fraudulent intent.]—To constitute a fraudulent misrepresentation, it need not be made in terms expressly stating the existence of some untrue fact; but, if a statement be made by one party, in such terms as would naturally lead the other party to suppose the existence of such state of facts, &, if such statement be so made designedly & fraudulently, it is as much a fraudulent misrepresentation, as if the statement of the untrue facts were made in express terms (CROMPTON, J.).—LEE *v.* JONES (1864), 17 C. B. N. S. 482; 34 L. J. C. P. 131; 12 L. T. 122; 11 Jur. N. S. 81; 13 W. R. 318; 144 E. R. 194, Ex. Ch.

Annotations:—**Refd.** Phillips *v.* Foxall (1872), L. R. 7 Q. B. 666; Welton *v.* Somes (1888), 5 T. L. R. 46; London General Omnibus Co. *v.* Holloway, [1912] 2 K. B. 72. **Mentd.** Fletcher *v.* Krell (1873), 42 L. J. Q. B. 55; Lawder *v.* Simpson (1873), 21 W. R. 439; Mackreth *v.* Walmesley (1884), 51 L. T. 19.

105. —— —— ——.]—MOORE *v.* BURKE, No. 403, *post*.

106. —— —— ——.]—(1) The prospectus of a co., which was being formed to take over ironworks contained a statement that "the present

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PART III. SECT. 1, SUB-SECT. 2.—A.

1. *Indication of doubt—When certainty exists.*]—It is a misrepresentation to say that a ship "is reported to have sailed" when it is positively known that she has sailed.—KINLOCH *v.* DUGUID (1813), 17 Fac. Coll. 108.—SCOT.

value of the turnover or output of the entire works is over £1,000,000 sterling *per annum*." If that statement meant that the works had actually in one year turned out produce worth at present prices more than a million, or at that rate per year it was untrue. If it meant only that the works were capable of turning out that amount of produce it was true. In an action of deceit for fraudulent misrepresentation whereby pltf. was induced to take shares he swore in answer to interrogatories that he "understood the meaning" of the statement "to be that which the words obviously conveyed" & at the trial was not asked either in examination or cross-examination what interpretation he had put upon the words:—*Held:* the statement taken in connection with the context was ambiguous & capable of the two meanings; it lay on pltf. to prove that he had interpreted the words in the sense in which they were false & had in fact been deceived by them into taking the shares & that as he had as a matter of fact failed to prove this the action could not be maintained.

(2) In an action of deceit pltf. cannot recover unless he proves that the representation made to him was false in a material particular, that the intention to deceive must necessarily be implied, & that he incurred damage by acting on the faith of the false representation.

If, in the context in which it stands, it could not be honestly intended or reasonably understood in any other sense, I should think that applt.'s case was made out, although he has contented himself with swearing in answer to deft.'s interrogatories, that he understood the meaning of the words to be "that which they obviously convey," & has professed to be unable to express in other words what he understood to be the meaning thereof. . . . But it is otherwise, in my opinion, if the words in the context in which they stand may have been honestly intended to bear another sense, in which they would be true, & might reasonably have been so understood by an intelligent man of business (LORD SELBORNE, C.).

(3) If with intent to lead pltf. to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, & thereby pltf. putting that meaning on it is misled, I do not think they can escape by saying he ought to have put the other (LORD BLACKBURN).

(4) The motive of the person saying that which he knows not to be true to another with the intention to lead him to act on the faith of the statement is immaterial. Defts. might honestly believe that the shares were a capital investment, & that they were doing him a kindness by tricking him into buying them. If they did trick him into doing so, they are civilly responsible as for a deceit (LORD BLACKBURN).

(5) He (pltf.) must establish that this fraud was an inducing cause to the contract; for which purpose it must be material, & it must have produced in his mind an erroneous belief, influencing his conduct (LORD SELBORNE, C.).

(6) I think the tribunal which has to decide the fact should remember that now, & for some years past, pltf. can be called as a witness on his own behalf, & that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one. I do not say it is conclusive (LORD BLACKBURN).

(7) I think if it is proved that defts. with a view to induce pltf. to enter into a contract made a statement to pltf. of such a nature as would be likely to induce a person to enter into a contract & it is proved that pltf. did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement (LORD BLACKBURN).

(8) I agree in what is said by COTTON, L.J., in *Arkwright* v. *Newbold*, No. 114, *post*, "An action of deceit is a common law action & must be decided on the same principles, whether it be brought in the Ch. Div. or any of the common law Divs.; there being in my opinion no such thing as an equitable action for deceit" (LORD BLACKBURN).—SMITH *v.* CHADWICK (1884), 9 App. Cas. 187; 53 L. J. Ch. 873; 50 L. T. 697; 48 J. P. 644; 32 W. R. 687, H. L.

Annotations:—As to (1) **Apld.** Bellairs *v.* Tucker (1884), 13 Q. B. D. 562; Moore *v.* Explosives Co. (1887), 56 L. J. Q. B. 235; Derry *v.* Peek (1889), 14 App. Cas. 337. **Consd.** McKeown *v.* Boudard-Peverill Gear Co. (1896), 65 L. J. Ch. 735; Bisset *v.* Wilkinson, [1927] A. C. 177. *As to* (2) **Consd.** *Re* London & Leeds Bank, *Ex p.* Carling; Carling *v.* London & Leeds Bank (1887), 56 L. J. Ch. 321; Nash *v.* Calthorpe, [1905] 2 Ch. 237. **Reld.** Capel *v.* Sim's Ships Compositions Co. (1888), 57 L. J. Ch. 713; Glasier *v.* Rolls (1889), 42 Ch. D. 436; Knox *v.* Hayman (1892), 67 L. T. 137; Greenwood *v.* Leather Shod Wheel Co., [1900] 1 Ch. 421; Cackett *v.* Keswick, [1902] 2 Ch. 456; Macleay *v.* Tait, [1906] A. C. 24; Shepheard *v.* Bray, [1906] 2 Ch. 235. *As to* (4) **Reld.** Edgington *v.* Fitzmaurice (1885), 29 Ch. D. 459; Derry *v.* Peek (1889), 14 App. Cas. 337. *As to* (5) **Consd.** Arnison *v.* Smith (1889), 41 Ch. D. 348; Derry *v.* Peek (1889), 14 App. Cas. 337. *As to* (6) **Consd.** Arnison *v.* Smith (1889), 41 Ch. D. 348. **Reld.** Cackett *v.* Keswick, [1902] 2 Ch. 456; Nash *v.* Calthorpe, [1905] 2 Ch. 237. *As to* (7) **Consd.** Hughes *v.* Twisden (1886), 55 L. J. Ch. 481; Arnison *v.* Smith (1889), 41 Ch. D. 348; Andrews *v.* Mockford (No. 1) (1896), 73 L. T. 726. **Reld.** Nash *v.* Calthorpe, [1905] 2 Ch. 237. *As to* (8) **Apprvd.** Derry *v.* Peek (1889), 14 App. Cas. 337. *Generally*, **Reld.** Smith *v.* Reed (1886), 2 T. L. R. 442; Angus *v.* Clifford, [1891] 2 Ch. 449; *Re* Metropolitan Coal Consumers' Assocn., Karberg's Case (1892), 66 L. T. 700; Broome *v.* Speak, [1903] 1 Ch. 586; Pearson *v.* Dublin Corpn., [1907] A. C. 351; Tackey *v.* McBain, [1912] A. C. 186.

107. —— —— ——.]—LOW *v.* BOUVERIE, No. 254, *post*.

108. —— —— ——.]—Where an ambiguous expression was used it must be shown that it was used with a fraudulent intent (BOWEN, L.J.).—WATTS *v.* ATKINSON (1892), 8 T. L. R. 235, C. A.

Statement in prospectus.]—*See* COMPANIES, Vol. IX., pp. 114, 118, 119, 123, 126, 128, Nos. 545, 546, 584, 588, 631, 652, 669, 670.

C. Representations Compounded of More than One Statement.

Whole representation must be looked at—Sale by auction.]—*See* AUCTION & AUCTIONEERS, Vol. III., p. 18, Nos. 134, 135.

—— **Company prospectus.**]—*See* COMPANIES, Vol. IX., p. 112, No. 531.

—— **Life insurance circular.**]—*See* INSURANCE, Vol. XXIX., p. 371, No. 2977.

SUB-SECT. 3.—DATE AT WHICH FALSITY MATERIAL.

109. Time when representation acted on—Continuing representation.]—(1) When a party has practised a deception with a view to a particular end, which has been attained by it, he cannot be allowed to deny its materiality.

(2) Representations inducing a person to enter into a particular contract, though not made at the moment the contract is actually entered into, constitute, if fraudulently made, *dolus dans locum contractui*.

It is a continuing representation. The representation does not end for ever when the representation is once made (LORD CRANWORTH).

(3) Can it be permitted to a party who has practised a deception, with a view to a particular end, which has been attained by it, to speculate

Sect. 1.—*Falsity: Sub-sect.* 3. *Sect.* 2: *Sub-sects.* 1 & 2, *A.* (*a*).]

on what might have been the result if there had been a full communication of the truth? (LORD CHELMSFORD, C.).—SMITH *v.* KAY (1859), 7 H. L. Cas. 750; 30 L. J. Ch. 45; 11 E. R. 299, H. L.; *affg.* S. C. *sub nom.* KAY *v.* SMITH (1856), 21 Beav. 522.

Annotations:—*As to* (3) **Apld.** Gordon *v.* Street, [1899] 2 Q. B. 641. *Generally*, **Mentd.** Aylesford *v.* Morris (1873), 8 Ch. App. 484; King *v.* Anderson (1874), 23 W. R. 196.

—— —— **Error in bank pass book.**]—*See* BANKERS, Vol. III., pp. 243–247.

—— —— **Statement in prospectus.**]—*See* COMPANIES, Vol. IX., p. 114, Nos. 547, 548.

—— **False representation corrected—Sale by auction.**]—*See, generally*, AUCTION & AUCTIONEERS, Vol. III., pp. 17, 18, Nos. 124–128.

—— **True representation becoming false—Sale by auction.**]—*See* AUCTION & AUCTIONEERS, Vol. III., p. 16, No. 120.

—— —— **Statement in prospectus.**]—*See* COMPANIES, Vol. IX., pp. 139–141, 271–273, Nos. 772–784, 1670–1679.

—— —— **Effect of subsequent non-belief.**]—*See* Part IV., Sect. 1, sub-sect. 4, *post.*

SECT. 2.—OMISSION, SILENCE OR INACTION.

SUB-SECT. 1.—GENERAL RULE.

See ESTOPPEL, Vol. XXI., pp. 328 *et seq.*

110. Mere silence no misrepresentation.]—If a person, who is asked by a tradesman respecting the circumstances & credit of another, tells him that he has been paid a debt due to himself from such person, & that he was ready to give him credit for anything he wanted; that representation would not be sufficient to support an action for a deceitful misrepresentation of such person's circumstances, whereby the tradesman was induced to give him credit although such person had been before that time discharged under an insolvent Act, & that deft. knew it but did not mention it. Such a colloquium will not support an innuendo that deft. meant thereby that such person was in good circumstances & fit to be trusted generally with goods on credit.—GAINSFORD *v.* BLACHFORD (1819), 7 Price, 544; 146 E. R. 1056.

111. ——.]—TURNER *v.* HARVEY, No. 101, *ante.*

112. ——.]—WALTERS *v.* MORGAN, No. 137, *post.*

113. ——.]—In an action by a governess for breach of an agreement in writing, in which she was described as K., spinster, & by which deft. undertook that she should be employed for a term of three years, it was pleaded that pltf. intending to induce deft. to enter into the contract, concealed from him a fact material to her qualifications as such governess, & material to be known by deft. in engaging her as such governess, namely, that she had previously been married, & that the marriage had been dissolved by decree of the Divorce Ct.:—*Held*: the plea was bad, as there was no allegation of fraud, & the mere non-disclosure of a material fact was, except in the case of policies of insurance, no answer to an action upon a contract.—FLETCHER *v.* KRELL (1873), 42 L. J. Q. B. 55; 28 L. T. 105; 37 J. P. 198.

Annotation:—**Reid.** Pearce *v.* Foster (1885), 2 T. L. R. 76.

114. ——.]—(1) Supposing you state a thing partially, you may make as false a statement as much as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you may make a false statement (JAMES, L.J.).

(2) In an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false or with a reckless disregard as to whether it is or is not true (COTTON, L.J.).

(3) An action of deceit is a common law action & must be decided on the same principles whether it be brought in the Ch. Div. or any of the common law Divs., there being, in my opinion, no such thing as an equitable action for deceit (COTTON, L.J.).—ARKWRIGHT *v.* NEWBOLD (1881), 17 Ch. D. 301, 313; 50 L. J. Ch. 372; 44 L. T. 393; 29 W. R. 455, C. A.

Annotations:—*As to* (1) **Reid.** Roots *v.* Snelling (1883), 48 L. T. 216. *As to* (2) **Consd.** Mathias *v.* Yetts (1882), 46 L. T. 497. **Apld.** Nash *v.* Wooderson (1884), 52 L. T. 49. **Apprvd.** Derry *v.* Peek (1889), 14 App. Cas. 337. **Reid.** Joliffe *v.* Baker (1883), 11 Q. B. D. 255. *As to* (3) **Consd.** Mathias *v.* Yetts (1882), 46 L. T. 497. **Apld.** Nash *v.* Wooderson (1884), 52 L. T. 49. **Folld.** Smith *v.* Chadwick (1884), 9 App. Cas. 187. **Apprvd.** Derry *v.* Peek (1889), 14 App. Cas. 337. *Generally*, **Reid.** Boswell *v.* Coaks (1883), 23 Ch. D. 302; *Re* Scottish Petroleum Co., Wallace's Case (1883), 49 L. T. 348; Capel *v.* Sim's Ships Compositions Co. (1888), 57 L. J. Ch. 713. **Mentd.** Lydney & Wigpool Iron Ore Co. *v.* Bird (1885), 31 Ch. D. 328.

115. ——.]—Inasmuch as a purchaser is, generally speaking, under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate with them. This, however, he may be held to do, if he makes some other communication which, without the addition of those facts would be necessarily or naturally & probably misleading.

If it is a just conclusion that he did this intentionally & with a view to mislead in any material point, that is found. . . . A man is presumed to intend the necessary or natural consequences of his own words & acts & the *evidentia rei* would therefore be sufficient without other proof of intention.

If the vendor was not, in fact, misled, the contract could not be set aside; because a *dolus* which neither induced nor materially affected the contract is not enough (LORD SELBORNE, C.).—COAKS *v.* BOSWELL (1886), 11 App. Cas. 232; 55 L. J. Ch. 761; 55 L. T. 32, H. L.; *revsg.* S. C. *sub nom.* BOSWELL *v.* COAKS (1884), 27 Ch. D. 424, C. A.; *subsequent proceedings, sub nom.* BOSWELL *v.* COAKS (No. 2) (1894), 86 L. T. 365, n., H. L.

Annotations:—**Reid.** Davis *v.* Ohrly (1898), 14 T. L. R. 260. **Mentd.** *Re* Boswell, Merritt *v.* Boswell, [1906] 2 Ch. 359.

116. ——.]—HOWARD *v.* ESCOMBE (1887), 3 T. L. R. 316.

117. ——.]—CHARSLEY *v.* COAKS (1888), 4 T. L. R. 528.

118. ——.]—A statement may have been made to somebody who remained silent; but as far as I know silence has never yet been held to amount to misrepresentation (JOYCE, J.).—SEDDON *v.* NORTH EASTERN SALT CO., LTD., [1905] 1 Ch. 326; 91 L. T. 793; 53 W. R. 232; 49 Sol. Jo. 119.

Annotations:—**Reid.** Hindle *v.* Brown (1907), 98 L. T. 44; Angel *v.* Jay, [1911] 1 K. B. 666; Armstrong *v.* Jackson, [1917] 2 K. B. 822; Compagnie Chemin de Fer Paris-Orleans *v.* Leeston Shipping Co. (1919), 36 T. L. R. 68; First National Reinsurance *v.* Greenfield, [1921] 2 K. B. 260.

110 l. *Mere silence no misrepresentation.*]—THOMPSON *v.* LAMBERT (1868), 17 W. R. 111.—IR.

119. —— Though moral duty to disclose.]—(1) I am not aware of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally but not legally bound to disclose (LORD CHELMSFORD).

(2) In a civil proceeding of this kind all that your lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? If there was, however innocent the motive may have been, your lordships will be obliged to arrive at the consequences which properly would result from what was done (LORD CAIRNS).

(3) There can be no doubt that equity exercises a concurrent jurisdiction in cases of this description & the same principles applicable to them must prevail both at law & in equity (LORD CHELMSFORD).—PEEK *v.* GURNEY (1873), L. R. 6 H. L. 377; 43 L. J. Ch. 19; 22 W. R. 29, H. L.; *affg.* (1871), L. R. 13 Eq. 79.

Annotations:—As to (1) **Consd.** Edgington *v.* Fitzmaurice (1885), 29 Ch. D. 459. **Reid.** Arkwright *v.* Newbold (1881), 17 Ch. D. 301; Smith *v.* Chadwick (1882), 20 Ch. D. 27; Lange *v.* Barton (1891), 7 T. L. R. 451; Cackett *v.* Keswick, [1902] 2 Ch. 456. *As to* (2) **Consd.** Eaglesfield *v.* Londonderry (1876), 4 Ch. D. 693; Derry *v.* Peek (1889), 14 App. Cas. 337. **Reid.** Tackey *v.* McBain, [1912] A. C. 186. *As to* (3) **Reid.** Newbigging *v.* Adam (1886), 34 Ch. D. 582; Nocton *v.* Ashburton, [1914] A. C. 932; Geipel *v.* Peach, [1917] 2 Ch. 108. *Generally,* **Reid.** Phosphate Sewage Co. *v.* Hartmont (1876), 34 L. T. 154; Schroeder *v.* Mendl (1877), 37 L. T. 452; Cargill *v.* Bower (1878), 10 Ch. D. 502; Davies *v.* London & Provincial Marine Insce. (1878), 38 L. T. 478; Weir *v.* Bell (1878), 3 Ex. D. 238; Glasier *v.* Rolls (1889), 42 Ch. D. 436; Salaman *v.* Warner (1891), 65 L. T. 132; Aaron's Reefs *v.* Twiss, [1896] A. C. 273; Andrews *v.* Mockford, [1896] 1 Q. B. 372. **Mentd.** Pender *v.* Fox (1872), 20 W. R. 966; Twycross *v.* Grant (1878), 4 C. P. D. 40; R. *v.* Most (1881), 50 L. J. M. C. 113; Phillips *v.* Homfray (1883), 24 Ch. D. 439; Young *v.* Wallingford (1883), 52 L. J. Ch. 590; *Re* Southport & West Lancashire Banking Co., Fisher & Sherrington's Case (1885), 53 L. T. 832; Hatchard *v.* Mège (1887), 18 Q. B. D. 771; Cavalier *v.* Pope, [1905] 2 K. B. 757; Chapman *v.* Great Central Freehold Mines (1905), 22 T. L. R. 90; Quirk *v.* Thomas, [1915] 1 K. B. 798.

120. —— ——.]—MARNHAM *v.* WEAVER, No. 90, *ante.*

121. —— Where no duty to disclose.]—Mere silence as regards a material fact, which the one party is not bound to disclose to the other, is not a ground for rescission, or a defence to specific performance.—TURNER *v.* GREEN, [1895] 2 Ch. 205; 64 L. J. Ch. 539; 72 L. T. 703; 43 W. R. 537; 39 Sol. Jo. 484; 13 R. 551.

*Annotation:—***Apld.** Carlish *v.* Salt, [1906] 1 Ch. 335.

122. —— ——.]—Mere non-disclosure on the part of the vendor, apart from circumstances imposing a duty upon him to disclose or inform the other party, does not entitle the purchaser to avoid his contract (JOYCE, J.).—CARLISH *v.* SALT, as reported in, [1906] 1 Ch. 335; 75 L. J. Ch. 175; 94 L. T. 58.

*Annotations:—***Reid.** Shepherd *v.* Croft, [1911] 1 Ch. 521; Tingley *v.* Müller, [1917] 2 Ch. 144; Beyfus *v.* Lodge, [1925] Ch. 350.

-.]—*See, also,* SALE OF GOODS; SALE OF LAND.

.]—*See, also,* COMPANIES, Vol. IX., p. 109, No. 492.

SUB-SECT. 2.—EXCEPTIONS TO GENERAL RULE.

A. Concealment.

(a) In General.

See ESTOPPEL, Vol. XXI., pp. 346, 347, Nos. 1320–1324.

123. Whether amounting to misrepresentation.]—In treaties for an agreement, a wilful & industrious concealment of a material fact, by one of the parties, in order to keep the other in ignorance, & to profit by that ignorance, is a gross fraud, & will in equity set aside the contract.—MEADE *v.* WEBB (1744), 1 Bro. Parl. Cas. 308; 1 E. R. 586, H. L.

124. ——.]—There is fraud apparent on the face of the transaction. . . . All the circumstances & urgency of the case should have been disclosed to the boatman at the time & he should have been asked whether he chose to undertake the risk (LORD KENYON, C.J.).—EDWARDS *v.* SHERRATT (1801), 1 East, 604; 102 E. R. 233.

125. ——.]—In an action on the case for giving a false character to a tradesman, whereby he was induced to trust an insolvent person:—*Held:* (1) fraud was necessary to support the action.

(2) Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man professing to answer a question select those facts only which are likely to give a credit to the person to whom he speaks, & keeps back the rest, he is a more artful knave than he who tells a direct falsehood (CHAMBRE, J.).—TAPP *v.* LEE (1803), 3 Bos. & P. 367; 127 E. R. 200.

Annotations:—As to (1) **Reid.** Foster *v.* Charles (1830), 7 Bing. 105. *As to* (2) **Consd.** Foster *v.* Charles (1830), 6 Bing. 396. *Generally,* **Reid.** Ames *v.* Millward (1818), 2 Moore, C. P. 713.

126. ——.]—*Semble:* where a fact is in the knowledge of the party who is the proposer of a compact, & is a fact which, if known to the other, would be unfavourable to him who proposes, the suppression of the fact will be, in point of law, a fraud; although the other party made no inquiry on the subject.—BRUCE *v.* RULER (1828), 2 Man. & Ry. K. B. 3; 6 L. J. O. S. K. B. 228.

*Annotation:—***Consd.** Gray *v.* Owen, [1910] 1 K. B. 622.

127. ——.]—A., on Tuesday, Nov. 17, asked B. to give him change for a cheque for £10 10*s.* drawn by C. on W. & co., bankers. B. did so, & kept the cheque till the following Saturday, when he paid it to his bankers. On Monday, Nov. 23, W. & co. stopped payment, & the cheque was not paid by them. On the evening of that day B. told A. that the cheque had been returned, not telling A. that W. & co. had stopped payment, a fact which A. did not know. A. gave B. £5, & an I.O.U. for £5 10*s.*, & took back the cheque. It was proved that C. had funds in the hands of W. & co.:—*Held:* the suppression of the fact by B. that W. & co. had stopped payment, & the statement by him that the cheque had been returned, amounted to such a fraud upon A. as would entitle him to recover back the £5, in an action for money had & received; &, to entitle him to do so, it was not necessary that he should have given or tendered back the check to B.—BILLING *v.* RIES (1841), Car. & M. 26, N. P.

128. ——.]—(1) A fraudulent suppression or concealment may be, & sometimes is, equivalent *civiliter* to a false assertion fraudulently made in express terms (KNIGHT BRUCE, V.-C.).

(2) The burthen of proof lies upon the party who affirms, not upon the party who denies, but the rule is not unqualified, nor is it without exception. Neither criminality nor fraud is to be presumed (KNIGHT BRUCE, V.-C.).—STIKEMAN *v.* DAWSON (1847), 1 De G. & Sm. 90; 4 Ry. & Can. Cas. 585; 16 L. J. Ch. 205; 8 L. T. O. S. 551; 11 Jur. 214; 63 E. R. 984.

Annotations:—As to (1) **Reid.** Stocks *v.* Wilson, [1913] 2 K. B. 235; Leslie *v.* Sheill, [1914] 3 K. B. 607. *Generally,* **Reid.** Wright *v.* Leonard (1861), 11 C. B. N. S. 258; Miller *v.* Blankley (1878), 38 L. T. 527.

129. ——.]—Misrepresentations may be either by a suppression of the truth or an assertion of

Sect. 2.—Omission, silence or inaction: Sub-sect. 2, A. (a)

what is false; but to be the ground for avoiding the contract, the representation must be one "*dans locum contractui*," or such, that it is reasonable to infer, that in its absence the party deceived would not have entered into the contract.—PULSFORD *v.* RICHARDS (1853), 17 Beav. 87; 22 L. J. Ch. 559; 22 L. T. O. S. 51; 17 Jur. 865; 1 W. R. 295; 51 E. R. 965.

Annotations:—**Apld.** Jennings *v.* Broughton (1853), 17 Beav. 234. **Reld.** Bushby *v.* Ellis (1853), 17 Beav. 279; Clelland *v.* Leech (1856), 27 L. T. O. S. 59; Gordon *v.* Street, [1899] 2 Q. B. 641.

130. ——.]—(1) Where a person has been, by the fraudulent misrepresentations of directors, or by their fraudulent concealment of facts, drawn into a contract to purchase shares in a co., the directors cannot enforce the contract against him, but he may rescind it. But he must do so within a reasonable time.

It is said that everything which is stated in the prospectus is literally true & so it is, but the objection to it is not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told, the character of falsehood (LORD CHELMSFORD, C.).

(2) A contract induced by fraud is not void, but voidable.—OAKES *v.* TURQUAND & HARDING, PEEK *v.* TURQUAND & HARDING, *Re* OVEREND, GURNEY & Co. (1867), L. R. 2 H. L. 325; 36 L. J. Ch. 949; 16 L. T. 808; 15 W. R. 1201, H. L.; *affg.* S. C. *sub nom. Re* OVEREND, GURNEY & Co., *Ex p.* OAKES & PEEK, L. R. 3 Eq. 576.

Annotations:—*As to* (1) **Consd.** Overend, Gurney *v.* Gurney (1869), 4 Ch. App. 701. **Apld.** *Re* General Provincial Life Assce., *Ex p.* Daintree (1870), 18 W. R. 396. **Consd.** Waterhouse *v.* Jamieson (1870), L. R. 2 Sc. & Div. 29; Peek *v.* Gurney (1871), L. R. 13 Eq. 79. **Reld.** Henderson *v.* Lacon (1867), L. R. 5 Eq. 249; Kent *v.* Freehold Land & Brickmaking Co. (1868), 3 Ch. App. 493; Ogilvie *v.* Currie (1868), 37 L. J. Ch. 541; *Re* Aberaman Ironworks, Peek's Case (1869), 4 Ch. App. 532; *Re* Estates Investment Co., Pawle's Case (1869), 4 Ch. App. 497; *Re* London & County General Agency Assocn., Hare's Case (1869), 4 Ch. App. 508; McEuen *v.* West London Wharves & Warehouses Co. (1871), 6 Ch. App. 655; Stone *v.* City & County Bank, Collins *v.* City & County Bank (1877), 3 C. P. D. 282; Twycross *v.* Grant (1877), 46 L. J. Q. B. 636; Tennent *v.* City of Glasgow Bank (1879), 4 App. Cas. 615; *Re* Hull & County Bank, Burgess's Case (1880), 15 Ch. D. 507; *Re* London & Leeds Bank, *Ex p.* Carling, Carling *v.* London & Leeds Bank (1887), 56 L. J. Ch. 321; *Re* British Burmah Land Co. (1888), 4 T. L. R. 631; Cocksedge *v.* Metropolitan Coal Consumers Assocn. (1891), 64 L. T. 826; Boaler *v.* Brodhurst (1892), 8 T. L. R. 398; Abram S.S. Co. *v.* Westville Shipping Co., [1923] A. C. 773. *As to* (2) **Apld.** Reese River Silver Mining Co. *v.* Smith (1869), L. R. 4 H. L. 64. **Distd.** *Re* Warren's Blacking Co., Pentelow's Case (1869), 4 Ch. App. 178. **Reld.** *Re* Oriental Commercial Bank, Alabaster's Case (1868), L. R. 7 Eq. 273; *Re* London & Mediterranean Bank, Wright's Case (1871), 7 Ch. App. 55; *Re* Laxon (No. 2), [1892] 3 Ch. 555. *Generally*, **Mentd.** *Re* Cleveland Iron Co., *Ex p.* Stevenson (1867), 16 W. R. 95; *Re* Overend, Gurney, *Ex p.* Musgrave (1867), 37 L. J. Ch. 161; *Re* Universal Banking Corpn., Gunn's Case (1867), 3 Ch. App. 40; Downes *v.* Ship (1868), L. R. 3 H. L. 343; *Re* Overend, Gurney, Barrow's Case (1868), 3 Ch. App. 784; *Re* London & Northern Insce. Corpn., Stace & Worth's Case (1869), 4 Ch. App. 682; *Re* Imperial Land Co. of Marseilles, *Ex p.* Jeaffreson (1870), L. R. 11 Eq. 109; *Re* Contract Corpn., Hudson's Case (1871), L. R. 12 Eq. 1; *Re* Empire Assce. Corpn., Challis's Case, Somerville's Case (1871), 6 Ch. App. 266; *Re* Hercules Insce., Pugh & Sharman's Case (1872), L. R. 13 Eq. 566; *Re* Paraguassu Steam Tramroad Co., Black's Case (1872), 8 Ch. App. 254; *Re* Blakely Ordnance Co., Brett's Case, *Re* Oriental Commercial Bank, Morris' Case (1873), 8 Ch. App. 800; *Re* Welsh Flannel & Tweed Co. (1875), L. R. 20 Eq. 360; *Re* Nassau Phosphate Co. (1876), 2 Ch. D. 610; Cree *v.* Somervail (1879), 4 App. Cas. 648; *Re* Scottish Petroleum Co., Maclagan's Case (1882), 51 L. J. Ch. 841; *Re* Scottish Petroleum Co. (1883), 23 Ch. D. 413; *Re* Ystalyfera Co. (1886), 2 T. L. R. 900; *Re* London Colluloid Co., Bayley & Hanbury's Cases (1888), 36 W. R. 673; *Re* Lennox Publishing Co., *Ex p.* Storey (1890), 62 L. T. 791; *Re* National Debenture & Assets Corpn., [1891] 2 Ch. 505; Westmoreland Green & Blue Slate Co. *v.* Feilden (1891), 7 T. L. R. 585; East Broken Hill Consols *v.* Mallaby-Deeley (1895), 11 T. L. R. 465; *Re* Hemp, Yarn & Cordage Co., Hindley's Case, [1896] 2 Ch. 121; *Re* Kent Coalfields Syndicate, [1898] 1 Q. B. 754; Ladies' Dress Assocn. *v.* Pulbrook (1899), 68 L. J. Q. B. 871; *Re* Trench & Tubeless Tyre Co., Bethell *v.* Trench & Tubeless Tyre Co. (1899), 69 L. J. Ch. 97; *Re* Yolland, Husson & Birkett, Leicester *v.* Yolland, Husson & Birkett (1907), 77 L. J. Ch. 43; Moosa Goolam Ariff *v.* Ebrahim Goolam Ariff (1912), 28 T. L. R. 505; First National Reinsurance *v.* Greenfield, [1921] 2 K. B. 260.

131. ——.] — *Semble:* if a co., knowing that their line is blocked, issued a ticket to a passenger for a through train, he might hold them for misrepresentation.—WOODGATE *v.* GREAT WESTERN RY. Co. (1884), 51 L. T. 826; 49 J. P. 196; 33 W. R. 428; 1 T. L. R. 133, D. C.

Annotations:—**Mentd.** McCartan *v.* N. E. Ry. (1885), 54 L. J. Q. B. 441; Stevens *v.* G. W. Ry. (1885), 49 J. P. 310.

132. ——.] — MARNHAM *v.* WEAVER, No. 90, *ante*.

133. ——.] — Misrepresentation undoubtedly might be made by concealment (ROMER, L.J.).—SEATON *v.* HEATH, SEATON *v.* BURNAND, [1899] 1 Q. B. 782; 68 L. J. Q. B. 631; 80 L. T. 579; 47 W. R. 487; 15 T. L. R. 297; 4 Com. Cas. 193, C. A.; *on appeal, sub nom.* SEATON *v.* BURNAND, BURNAND *v.* SEATON, [1900] A. C. 135, H. L.

Annotations:—**Reld.** London General Omnibus Co. *v.* Holloway, [1912] 2 K. B. 72. **Mentd.** Parr's Bank *v.* Albert Mines Syndicate (1900), 5 Com. Cas. 116; *Re* Denton's Estate, Licenses Insce. Corpn. & Guarantee Fund *v.* Denton, [1904] 2 Ch. 178; Floyd *v.* Gibson (1909), 100 L. T. 761; Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. 452; Banbury *v.* Bank of Montreal, [1918] A. C. 626; Yorke *v.* Yorkshire Insce., [1918] 1 K. B. 662; Wilson *v.* United Counties Bank, [1920] A. C. 102; Yorkshire Insce. *v.* Craine, [1922] 2 A. C. 541.

——.]—*See, also*, CARRIERS, Vol. VIII., p. 45, Nos. 273–278.

134. —— **Question for jury.**] — BOWRING *v.* STEVENS, No. 565, *post*.

135. —— ——.]—In case against husband & wife for falsely representing to pltf., a broker employed by them to distrain upon certain premises in which the wife had an interest, that the latter was entitled to distrain for rent in arrear, whereby pltf., who made the distress, was put to costs in a replevin suit—it appeared that a distress warrant was signed by the wife & handed to pltf. in the presence of the husband; that no representation whatever was made by defts. or either of them, at the time the warrant was so handed over; but that, in fact, the wife had no right to sign a warrant, the legal estate in the premises being in the trustees under her marriage settlement:—*Held:* it was properly left to the jury to say whether there was any false or fraudulent representation in the mere omission to state that the property was in settlement when pltf. was employed to distrain; &, the jury having found there was not, pltf. was not entitled to recover on not guilty, it being essential to the maintenance of the action that the falsehood of the representation should have been known to the party making it.

A statement false in fact, but not false to the knowledge of the party making it, nor made with any intention to deceive, will not support an action, unless from the nature of the dealings between the parties a contract to indemnify can be implied (TINDAL, C.J.).—RAWLINGS *v.* BELL (1845), 1 C. B. 951; 14 L. J. C. P. 265; 5 L. T. O. S. 391; 9 Jur. 973; 135 E. R. 817.

Annotations:—**Reld.** Childers *v.* Wooler (1859), 2 E. & E. 287; Dickson *v.* Reuter's Telegraph Co. (1877), 2 C. P. D. 62.

136. —— **Dependent on circumstances of each case.**]—Whether fraud is made out must depend on the circumstances in each case.—ENGLAND *v.*

DOWNS (1840), 2 Beav. 522; 9 L. J. Ch. 313; 4 Jur. 526; 48 E. R. 1284.

Annotations:—**Mentd.** Doe d. Richards *v.* Lewis, Richards *v.* Lewis (1852), 11 C. B. 1035; Whateley *v.* Spooner (1857), 3 K. & J. 542; *Re* Deprez, Henriques *v.* Deprez, [1917] 1 Ch. 24.

Duty to disclose.]—*See* Sub-sect. 2, A. (*b*), *post.*

Rights of assignee of contract.]—*See* Part VI., Sect. 3, sub-sect. 2, *post.*

(*b*) *Duty to Disclose.*

137. When duty arises—Fiduciary relationship.]—There being no fiduciary relation between vendor & a purchaser, the purchaser is not bound to disclose any fact exclusively within his knowledge which might be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, but a word or gesture intended to induce the vendor to believe in the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a ct. of equity to refuse a decree of specific performance, & so, *a fortiori*, would any contrivance on the part of the purchaser, better informed than the vendor as to value, to hurry the vendor into an agreement without giving him an opportunity of being fully informed on that subject, or taking advice as to the terms of the bargain.

A single word, or, I may add, a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold would be sufficient ground for a ct. of equity to refuse a decree for a specific performance of the agreement (LORD CAMPBELL, C.).—WALTERS *v.* MORGAN (1861), 3 De G. F. & J. 718; 4 L. T. 758; 45 E. R. 1056, L. C.

Annotations:—**Consd.** Turner *v.* Green, [1895] 2 Ch. 205. **Reld.** Seddon *v.* North Eastern Salt Co., [1905] 1 Ch. 326.

138. —— ——.]—TURNER *v.* GREEN, No. 121, *ante.*

-.]—*See* CARRIERS, Vol. VIII., pp. 23, 24, Nos. 126–137.

Remedy for innocent misrepresentation.]—*See* Part VII., Sect. 3, sub-sect. 2, D., *post.*

139. Whether existence of duty essential—To render concealment fraudulent.]—IRVINE (OR DOUGLAS) *v.* KIRKPATRICK, No. 380, *post.*

140. —— ——.]—HORSFALL *v.* THOMAS, No. 182, *post.*

141. Contract dependent on truth & accuracy of representation.]—Suppression of the truth, or misrepresentation of a material fact, will vitiate any contract or gift, the validity of which depends upon the truth & accuracy of the representation on which it is made (STUART, V.-C.).—PRIDEAUX *v.* LONSDALE (1863), 4 Giff. 159; 1 New Rep. 565; 32 L. J. Ch. 317; 8 L. T. 109; 9 Jur. N. S. 488; 11 W. R. 531; 66 E. R. 661; *on appeal*, 1 De G. J. & Sm. 433, L. JJ.

Annotations:—**Mentd.** Everitt *v.* Everitt (1870), L. R. 10 Eq. 405; Phillips *v.* Mullings (1871), 7 Ch. App. 244; Baker *v.* Loader (1872), L. R. 16 Eq. 49; Welman *v.* Welman (1880), 15 Ch. D. 570.

——.]—*See* CARRIERS, Vol. VIII., pp. 23, 24, Nos. 126–137.

142. Compromise.]—A compromise sanctioned by the Ct. of Ch., on behalf of persons under disability, is liable to be set aside on the ground of fraud, or of suppression of material facts, which amounts, in the eye of the ct., to fraud.—BROOKE *v.* MOSTYN (LORD) (1864), 2 De G. J. & Sm. 373; 5 New Rep. 206; 34 L. J. Ch. 65; 11 L. T. 392; 10 Jur. N. S. 1114; 13 W. R. 115; 46 E. R. 419, L. JJ.; *on appeal, sub nom.* MOSTYN *v.* BROOKE (1866), L. R. 4 H. L. 304.

Annotations:—**Expld.** Micholls *v.* Corbett (1865), 3 De G. J. & Sm. 18. **Reld.** Fadelle *v.* Bernard (1871), 19 W. R. 555; Coaks *v.* Boswell (1886), 11 App. Cas. 232. **Mentd.** *Re* Wells, Boyer *v.* Maclean, [1903] 1 Ch. 848.

143. ——.]—It seems to me that the ground on which pltf. was asked to enter into a compromise was that the son was absolutely without means, that the father had the means, but was refusing to assist him. . . . It was brought to the mind of deft.'s solr., that that was the ground upon which pltf.'s solr. would enter into negotiations & probably come to a compromise. He knowing that & knowing the materiality of the fact of the father being dead, intentionally concealed that fact, knowing . . . that if he said that the father was then dead, the other solr. would immediately stop the negotiations. It seems to me that his concealment of that fact under those circumstances amounted virtually to an absolute misrepresentation of fact by which the contract was obtained (BRETT, L.J.).—GILBERT *v.* ENDEAN (1878), 9 Ch. D. 259; 39 L. T. 404; 27 W. R. 252, C. A.

Annotations:—**Reld.** Arkwright *v.* Newbold (1881), 17 Ch. D. 301; Turner *v.* Green (1895), 43 W. R. 537. **Mentd.** *Re* Gaudet S.S. Co. (1879), 12 Ch. D. 882; Charles *v.* Butson (1895), 39 Sol. Jo. 346; Ainsworth *v.* Wilding, [1896] 1 Ch. 673; Stephenson *v.* Garnett, [1898] 1 Q. B. 677; Halford *v.* Hardy (1899), 81 L. T. 721; Carter *v.* Roberts, [1903] 2 Ch. 312; Townend *v.* Townend (1905), 93 L. T. 680; *Re* Launder, Launder *v.* Richards (1908), 98 L. T. 554.

Transaction by agents.]—*See* AGENCY, Vol. I., pp. 478, 479, Nos. 1594–1600.

Company prospectus.]—*See* COMPANIES, Vol. IX., pp. 104–112, Nos. 447–529.

Company promotion.]—*See* COMPANIES, Vol. IX., pp. 45–49, 59, 60, Nos. 67–70, 80–85, 159–163.

Company officers.]—*See* COMPANIES, Vol. IX., p. 467, Nos. 3048, 3049.

Family arrangements.]—*See* FAMILY ARRANGEMENTS, Vol. XXIV., pp. 958, 959, Nos. 116–126.

Contracts of guarantee.]—*See* GUARANTEE, Vol. XXVI., pp. 98, 99, 211–217, Nos. 679, 1665–1716.

Agreements for marriage.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 31, Nos. 69, 70.

Contracts of insurance.]—*See* INSURANCE, Vol. XXIX., pp. 163–174, Nos. 1187–1310.

Fitness of premises for proposed tenancy.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 176, No. 3080.

Mortgages.]—*See* MORTGAGE, Part XIII., Sect. 13, sub-sect. 2, A., *post.*

Contracts for sale of land.]—*See* SALE OF LAND.

Solicitors.]—*See* SOLICITORS.

Trustees.]—*See* TRUSTS & TRUSTEES.

PART III. SECT. 2, SUB-SECT. 2.—A. (b).

m. *When duty arises—Subsequent discovery of falsity.*]—A person who has induced another to enter into contractual relations with him by honestly & *bonâ fide* making a representation, which he afterwards discovers to be false, is, as regards contracts entered into with him subsequently to such discovery, under a duty to disclose the falsity of the representation to the other contracting party.—ROBERTSON & MOFFAT *v.* BELSON, [1905] V. L. R. 555.—**AUS.**

139 i. *Whether existence of duty essential—To render concealment fraudulent.*]—The concealment which a ct. of equity will deem "undue," & for which it will grant relief, is non-disclosure which one party is under some obligation to communicate, & which some other party had a right *de jure* to know.—RIDLEY & SONS TRUSTEES INSOLVENT ESTATE *v.* ALLIANCE BANK (1875), 6 Nfld. L. R. 68.—**NFLD.**

139 ii. —— ——.]—Concealment, to form ground for a charge of fraud, must be of something which the party using it was bound to disclose.—IRVINE *v.* KIRKPATRICK (1850), 7 Bell, Sc. App. 186; 22 Sc. Jur. 634; *revsg.* (1848), 10 Dunl. (Ct. of Sess.) 367.—**SCOT.**

139 iii. —— ——.]—JOY CHANDRA BANERJEE *v.* SREENATH CHATTERJEE (1905), I. L. R. 32 Calc. 357.—**IND.**

Sect. 2.—Omission, silence or inaction: Sub-sect. 2, A. (c). Sect. 3. Part IV. Sect. 1: Sub-sects. 1 & 2, A.]

(c) *Partial Truth Disclosed.*

144. Partial information may amount to misrepresentation.]—Deft. having had a credit lodged with him by a foreign house in favour of T. to a certain amount, upon an express stipulation that T. should previously lodge in his hands goods to treble the amount; & being applied to by pltfs. for information respecting the responsibility of T. answered that he knew nothing of T. himself, but what he had learned from his correspondent; but that he had a credit lodged with him for so much by a respectable house at H., which he held at T.'s disposal, omitting the condition, & upon a view of all the circumstances which had come to his, deft.'s, knowledge, pltfs. might execute T.'s order with safety, an order for the sale & delivery of goods on credit. In an action on the case to recover damages incurred by pltfs. in consequence of having trusted T. on this representation:—*Held:* there was a material suppression of the truth, & evidence sufficient for the jury to find fraud, which is the gist of the action; although deft. had no immediate interest in making the false representation; & though at the time when it was made, he added, that he gave the advice without prejudice to himself.—EYRE *v.* DUNSFORD (1801), 1 East, 318; 102 E. R. 123.

Annotations:—**Refd.** Haycraft *v.* Creasy (1801), 2 East, 92; Ames *v.* Millward (1818), 2 Moore, C. P. 713.

145. ——.]—Imperfect information equivalent to concealment.—WALKER *v.* SYMONDS (1818), 3 Swan. 1; 36 E. R. 751.

Annotations:—**Mentd.** Tarleton *v.* Hornby (1835), 1 Y. & C. Ex. 333; Munch *v.* Cockerell (1836), 8 Sim. 219; Perry *v.* Knott (1841), 4 Beav. 179; Shipton *v.* Rawlins (1845), 4 Hare, 619; *Re* Tratt, *Ex p.* James (1853), 3 De G. M. & G. 493; Burrows *v.* Walls (1855), 5 De G. M. & G. 233; Thompson *v.* Finch (1856), 22 Beav. 316; Lloyd *v.* Attwood, Attwood *v.* Lloyd (1859), 3 De G. & J. 614; Farrant *v.* Blanchford (1863), 1 De G. J. & Sm. 107; *Re* Brogden, Billing *v.* Brogden (1888), 38 Ch. D. 546; Chillingworth *v.* Chambers, [1896] 1 Ch. 685; Fletcher *v.* Collis, [1905] 2 Ch. 24; London General Omnibus Co. *v.* Holloway, [1912] 2 K. B. 72.

146. ——.]—ARKWRIGHT *v.* NEWBOLD, No. 114, *ante.*

147. —— **Suggestio falsi.**]—COAKS *v.* BOSWELL, No. 115, *ante.*

148. —— ——.]—AARON'S REEFS *v.* TWISS, No. 16, *ante.*

SECT. 3.—BURDEN OF PROOF OF MISREPRESENTATION.

149. General rule—On party setting up misrepresentation.]—STIKEMAN *v.* DAWSON, No. 128, *ante.*

150. —— ——.]—CHARSLEY *v.* COAKS (1888), 4 T. L. R. 528.

151. —— ——.]—In a suit by resp., lately an insolvent, to set aside on the ground of misrepresentation or mutual mistake a release by the official assignee of resp.'s equity of redemption of a certain mtge., for accounts against applts., the mtgees., & in effect to have the benefit of a subsequent resale by the releasee's purchaser, it appeared that the official assignee had in the release admitted the truth of the representations made to him, & that resp. had thereafter taken a conveyance from him of all the estate vested in him under the insolvency:—*Held:* the *onus* was upon resp., who was *primâ facie* bound by the admissions under seal of his vendor, to prove the falsehood of the representations, & not upon the applts. to establish their truth.—MELBOURNE BANKING CORPN. *v.* BROUGHAM (1882), 7 App. Cas. 307; 51 L. J. P. C. 65; 46 L. T. 605; 30 W. R. 925, P. C.

Annotation:—**Mentd.** Mainland *v.* Upjohn (1889), 41 Ch. D. 126.

152. Ambiguous statement—On party setting up falsity.]—CAPEL & CO. *v.* SIM'S SHIPS COMPOSITIONS CO., LTD., No. 432, *post.*

Part IV.—Fraudulent and Innocent Misrepresentation.

SECT. 1.—FRAUDULENT MISREPRESENTATION.

SUB-SECT. 1.—IN GENERAL.

153. Whether benefit to representor necessarily involved—Or collusion of representor with person benefited.]—PASLEY *v.* FREEMAN, No. 163, *post.*

154. Whether moral turpitude necessarily involved.]—MOENS *v.* HEYWORTH, No. 96, *ante.*

155. ——.]—In an action for a false representation of soundness of a ship, knowing it to be false, the declaration alleged that it was made with a view to, & that it did, induce pltfs. to lay out moneys on the ship. The pleas were: Not guilty; A traverse of the latter allegation. It appeared on the trial that the expenditure of the money by pltfs. was necessary for a purpose for which they had purchased the ship, & of which defts. were aware; & the judge having left it to the jury, without exception taken on either side, to say whether the representation was false, & false to defts.' knowledge, & whether the expenditure was caused by it, the jury found for pltfs., acquitting defts. of all fraud:—*Held:* the verdict was for pltfs., & that defts. were not entitled to enter it, because the qualification of the jury merely acquitted them of moral, as distinguished from legal, fraud, or of a fraudulent intention to inflict any injury on pltfs.—MILNE *v.* MARWOOD (1855), 15 C. B. 778; 3 C. L. R. 228; 24 L. J. C. P. 36; 139 E. R. 632.

156. ——.]—RAWLINS *v.* WICKHAM, No. 271, *post.*

157. ——.]—The term "fraud" should not be employed to designate conduct which is not accompanied by moral delinquency.—*Re* AGRICULTURAL CATTLE INSURANCE CO., SPACKMAN'S CASE (1864), 11 L. T. 13; 28 J. P. 660; 10 Jur. N. S. 911; 12 W. R. 1133; *revsd.* on other grounds, *sub nom.* SPACKMAN *v.* EVANS (1868), L. R. 3 H. L. 171.

Annotations:—**Refd.** *Re* Agriculturist Cattle Insce., Stanhope's Case (1866), 1 Ch. App. 161; *Re* Agriculturist Cattle Insce., Bush's Case (1870), 6 Ch. App. 246; *Re* Bewley's Estates, Jefferys *v.* Jefferys (1871), 24 L. T. 177. **Mentd.** *Re* Agriculturist Cattle Insce., Belhaven's Case (1865), 3 De G. J. & Sm. 41; *Re* Agriculturist Cattle Insce., Stewart's Exors. Case (1866), 12 Jur. N. S. 611;

Whether moral turpitude necessarily involved.]—A finding of fraud should be reserved for that which is dishonest & morally wrong.—PARESH NATH MALLICK *v.* HARI CHARAN DEY (1911), I. L. R. 38 Calc. 622.—IND

Downes *v.* Ship (1868), L. R. 3 H. L. 343; Evans *v.* Smallcombe's Exors. (1868), 37 L. J. Ch. 793; Houldsworth *v.* Evans (1868), L. R. 3 H. L. 263; *Ex p.* London & Colonial Co., Tooth's Case (1868), 19 L. T. 599; *Re* Agriculturist Cattle Insce., Dixon's Case (1869), 5 Ch. App. 79; *Re* Cobre Copper Mine Co., Kelk's Case, Pahlen's Case (1869), L. R. 9 Eq. 107; *Re* General Provident Assce., Cross's Case (1869), 38 L. J. Ch. 583; *Re* Patent Paper Manufacturing Co., Addison's Case (1870), 5 Ch. App. 294; *Re* Phosphate of Lime Co., Austin's Case (1871), 24 L. T. 932; Phosphate of Lime Co. *v.* Green (1871), L. R. 7 C. P. 43; *Re* Accidental Death Insce., Allin's Case (1873), 43 L. J. Ch. 116; Ashbury Railway Carriage & Iron Co. *v.* Riche (1875), L. R. 7 H. L. 653; *Re* Esparto Trading Co. (1879), 12 Ch. D. 191; *Re* Scottish Petroleum Co., MacLagan's Case (1882), 46 L. T. 880; *Re* London & Staffordshire Fire Insce. (1883), 24 Ch. D. 149; *Re* Argyle Coal & Cannell Co., *Ex p.* Watson (1885), 54 L. T. 233; Ho Tung *v.* Manon Insce. (1901), 71 L. J. P. C. 46; *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139.

158. ——.]—DERRY *v.* PEEK, No. 185, *post.*

159. Whether statutory illegality necessarily involved.]—A general plea of fraud & covin to an action on a contract is not supported by evidence of circumstances calculated to mislead the public at large; but they must be of such a nature as to vary the liability of the contracting party in the particular transaction.

Pltfs. were members of a friendly society, instituted, among other purposes, for that of lending money to its members on interest. Deft. became security for B., who borrowed £20 on his promissory note to the society. It appeared in evidence, that the society, in the place of being formed according to its printed rules consisted of only two members, pltfs.:—*Held:* these facts could not be given in evidence on fraud & covin pleaded; fraud & covin on a plea, does not mean that which shows any statutory illegality; as, for instance, any act done against the game laws; but, it means, some concealment or deceit in a particular thing touching the parties in question. —GREEN *v.* GOSDEN (1841), 3 Man. & G. 446; 4 Scott, N. R. 13; 11 L. J. C. P. 4; 5 Jur. 1010; 133 E. R. 1218.

Annotations:—**Refd.** Cannan *v.* Johnson (1847), 9 L. T. O. S. 82; Wright *v.* Campbell (1861), 2 F. & F. 393.

160. Must touch parties in question.]—GREEN *v.* GOSDEN, No. 159, *ante.*

161. One of several representations fraudulent—Whether sufficient to vitiate contract.]—REYNELL *v.* SPRYE, SPRYE *v.* REYNELL, No. 58, *ante.*

162. Document obtained for one purpose Used for another.]—Where a father obtained an absolute conveyance from a daughter, in order to answer one particular purpose, & afterwards makes use of it for another, this ct. will relieve under the head of fraud.—YOUNG *v.* PEACHY (1742), 2 Atk. 254; 26 E. R. 557, L. C.

Annotation:—**Refd.** Hoghton *v.* Hoghton (1852), 15 Beav. 278.

Fraudulent intent.]—*See* Sub-sect. 7, A., *post.*

Necessity for proof of fraud—Action for damages.] —*See* Part VIII., Sect. 1, sub-sect. 2, A., *post.*

—— **Proceedings for rescission.**]—*See* Part IX., Sect. 1, sub-sect. 2, *post.*

—— **Misrepresentation set up as defence.**]—*See* Part X., *post.*

Non-disclosure amounting to fraud.]—*See* Part III., Sect. 2, sub-sect. 2, A. (*a*), *ante.*

SUB-SECT. 2.—FALSITY OF STATEMENT.

A. Whether Sufficient by Itself.

163. General rule.]—A false affirmation, made by deft. with intent to defraud pltf., whereby pltf. receives damage, is the ground of an action upon the case in the nature of deceit. In such an action, it is not necessary that deft. should be benefited by the deceit, or that he should collude with the person who is.

I agree that an action cannot be supported for telling a bare naked lie. . . . Every deceit comprehends a lie, but a deceit is more than a lie on account of the view with which it is practised, its being coupled with some dealing, & the injury which it is calculated to occasion & does occasion to another person (BULLER, J.).—PASLEY *v.* FREEMAN (1789), 3 Term Rep. 51; 100 E. R. 450.

Annotations:—**Apld.** Eyre *v.* Dunsford (1801), 1 East, 318; Haycraft *v.* Creasy (1801), 2 East, 92. **Consd.** Evans *v.* Bicknell (1801), 6 Ves. 174; *Ex p.* Carr (1814), 3 Ves. & B. 108; Langridge *v.* Levy (1837), 2 M. & W. 519; Taylor *v.* Ashton (1843), 11 M. & W. 401. **Apld.** Robson *v.* Devon (1857), 29 L. T. O. S. 300. **Consd.** Wright *v.* Leonard (1861), 11 C. B. N. S. 258; Ramshire *v.* Bolton (1869), L. R. 8 Eq. 294; Derry *v.* Peek (1889), 14 App. Cas. 337; Banbury *v.* Bank of Montreal, [1918] A. C. 626. **Refd.** Hamar *v.* Alexander (1806), 2 Bos. & P. N. R. 241; Nash *v.* Palmer (1816), 5 M. & S. 374; Ames *v.* Millward (1818), 2 Moore, C. P. 713; Bromage *v.* Prosser (1825), 4 B. & C. 247; Adamson *v.* Jarvis (1827), 5 L. J. O. S. C. P. 68; Foster *v.* Charles (1830), 4 Moo. & P. 741; Lyde *v.* Barnard (1836), 1 M. & W. 101; Shrewsbury *v.* Blount (1841), 2 Scott, N. R. 588; Collins *v.* Evans (1844), 5 Q. B. 805; Wilde *v.* Gibson (1848), 1 H. L. Cas. 605; Money *v.* Jorden (1852), 15 Beav. 372; Bushby *v.* Ellis (1853), 17 Beav. 279; Randell *v.* Trimen (1856), 18 C. B. 786; Tatton *v.* Wade (1856), 4 W. R. 548; Bentley *v.* Mackay (1862), 31 Beav. 143; *Re* Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576; Hyde *v.* Bulmer (1868), 18 L. T. 293; Smith *v.* Chadwick (1884), 9 App. Cas. 187; *Re* London & Leeds Bank, *Ex p.* Carling, Carling *v.* London & Leeds Bank (1887), 56 L. J. Ch. 321; Wilkinson *v.* Downton, [1897] 2 Q. B. 57; Tallerman *v.* Dowsing Radiant Heat Co., [1900] 1 Ch. 1; De Lassalle *v.* Guildford, [1901] 2 K. B. 215; Nash *v.* Calthorpe, [1905] 2 Ch. 237; Heilbut, Symons *v.* Buckleton, [1913] A. C. 30; Nocton *v.* Ashburton, [1914] A. C. 932; Hulton *v.* Hulton, [1917] 1 K. B. 813; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623; Janvier *v.* Sweeney, [1919] 2 K. B. 316. **Mentd.** Burrowes *v.* Lock (1805), 10 Ves. 470; Clifford *v.* Brooke (1806), 13 Ves. 131; Pilmore *v.* Hood (1838), 6 Scott, 827; Pontifex *v.* Bignold (1841), 9 Dowl. 860; Morley *v.* Attenborough (1849), 3 Exch. 500; Shortridge *v.* Bosanquet (1852), 16 Jur. 919; Childers *v.* Wooler (1860), 2 E. & E. 287; Slim *v.* Croucher (1860), 1 De G. F. & J. 518; *Re* Ward (1862), 31 Beav. 1; Eichholz *v.* Bannister (1864), 17 C. B. N. S. 708; Schroeder *v.* Mendl (1877), 37 L. T. 452; *Re* Dangar's Trusts (1889), 58 L. J. Ch. 315; Allen *v.* Flood, [1898] A. C. 1; Cackett *v.* Keswick, [1902] 2 Ch. 456; Cavalier *v.* Pope (1905), 74 L. J. K. B. 857.

164. ——.]—ASHLIN *v.* WHITE, No. 192, *post.*

165. ——.] — The true principle [is]: he who affirms either what he does not know to be true or knows to be false, to another's prejudice & his own gain, is both in morality & law guilty of falsehood, & must answer in damages (BEST, C.J.).—ADAMSON *v.* JARVIS (1827), 4 Bing. 66; 12 Moore, C. P. 241; 5 L. J. O. S. C. P. 68; 130 E. R. 693.

Annotations:—**Refd.** Collins *v.* Evans (1844), 5 Q. B. 820 Ormrod *v.* Huth (1845), 5 L. T. O. S. 268; Elliot *v.* Von Glehn (1849), 13 Q. B. 632; Robson *v.* Devon (1857), 5 W. R. 724; Burrows *v.* Rhodes, [1899] 1 Q. B. 816. **Mentd.** Betts *v.* Gibbins (1834), 2 Ad. & El. 57; Morley *v.* Attenborough (1849), 18 L. J. Ex. 148; Dugdale *v.* Lovering (1875), L. R. 10 C. P. 196; Birmingham & District Land Co. *v.* L. & N. W. Ry. (1886), 56 L. J. Ch. 956; Barker *v.* Furlong, [1891] 2 Ch. 172; Palmer *v.* Wick & Pulteneytown Steam Shipping Co., [1894] A. C.

PART IV. SECT. 1, SUB-SECT. 2.—A.

163 i. *General rule.*]—In order that a representation may be actionable, it must be fraudulently made.—WHITE *v.* SAGE (1892), 19 A. R. 135.—**CAN.**

163 ii. ——.]—WHITE (S. H.) CO. *v.* CANNON (P. E. I.) (1913), 13 E. L. R. 222.—**CAN.**

163 iii. ——.]—Nothing short of crass & wilful misrepresentation intended to fraudulently deprive the deceived party of his property, &, having that effect, must be proved to enable the deceived party to succeed in an action for false representation.—RICHARDSON *v.* HATRICK & MERSON (1908), 28 N. Z. L. R. 170.—**N.Z.**

163 iv. ——.]—MANNERS *v.* WHITEHEAD (1898), 1 F. (Ct. of Sess.) 171; 36 Sc. L. R. 94; 6 S. L. T. 199.—**SCOT.**

n. *Falsity as to part of representation.*]—It is not necessary to establish the falsity of every part of the false representation alleged; it is enough if a substantial part of it is untrue & pltf. was thereby induced to act.—LAMB *v.* JOHNSON (1914), 15 S. R. N. S. W. 65.—**AUS.**

Sect. 1.—*Fraudulent misrepresentation: Sub-sect.* 2, *A. & B.* (*a*).]

318; The Englishman, The Australia, [1895] P. 212; Halbronn *v.* International Horse Agency & Exchange, [1903] 1 K. B. 270; Leslie *v.* Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652; London Assocn. for Protection of Trade *v.* Greenlands, [1916] 2 A. C. 15; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

166. ——.]—In an action on an agreement in which fraud is pleaded, the plea is not supported unless some wilful misrepresentation should have been made.—STEVENS *v.* WEBB (1835), 7 C. & P. 60, N. P.

167. ——.]—(1) To entitle pltf. to recover back deposits paid upon shares in an abortive railway scheme, it is necessary to prove a fraudulent statement to pltf. before payment of the money; that such statement was made by deft. personally, or with his knowledge & authority.

Where the deposit was paid before deft. joined the co.:—*Held:* he was not liable.

(2) Every false statement will not constitute a fraudulent representation. A representation on behalf of the co. that the full amount of the deposits had been paid up, is not necessarily fraudulent, though untrue in fact.—NEWTON *v.* CONYNGHAM (LORD) (1847), 10 L. T. O. S. 211, N. P.

168. ——.]—The case of a simple lie, where the party is under no obligation to tell the truth, gives no cause of action (POLLOCK, C.B.).—COLLINS *v.* CAVE (1859), as reported in 4 H. & N. 225; 32 L. T. O. S. 370; 157 E. R. 824; *on appeal* (1860), 6 H. & N. 131, Ex. Ch.

Annotations:—**Mentd.** Fitzjohn *v.* Mackinder (1861), 7 Jur. N. S. 1283; Spedding *v.* Nevoll (1869), 38 L. J. C. P. 133.

169. ——.]—DICKSON *v.* REUTER'S TELEGRAM CO., No. 473, *post.*

170. ——.]—DERRY *v.* PEEK, No. 185, *post.*

171. Application of rule—Account made out on wrong principle of calculation—Bonâ fide.]—(1) The ct. has no jurisdiction to investigate an ordinary builder's account, against which fraud cannot be established, unless no relief can be obtained at law. The making out of an account on a wrong principle of calculation, if it be done *bonâ fide*, is not fraud, though it may amount to a false representation.

(2) Misrepresentation, merely false, may be pleaded at law to an action on a bill or note given in satisfaction of a stated account.—FLOCKTON *v.* PEAKE (1804), 3 New Rep. 453; 12 W. R. 464; *affd.*, 10 L. T. 173, L. JJ.

Annotation:—*As to* (1) **Reld.** Makepeace *v.* Rogers (1865), 5 New Rep. 399.

172. —— **False statement innocently passed on.**]—(1) Defts., corn merchants in London, received a telegram from their agents at Gibraltar to the effect that a cargo of rye, shipped for defts. at Sulina, had arrived at Gibraltar in good condition. Defts. advertised the cargo for sale, &, on pltfs.' agent negotiating with them for the purchase of it, showed him the telegram. Pltfs. thereupon purchased the cargo, which turned out to be rotten, & was sold by pltfs. at a loss. Defts. did not know whether or not the cargo had been examined by their agents at Gibraltar; but they knew it was not usual to examine cargoes at a British port of call unless an order was sent to the agent there from the owner; & they had sent no such order in this instance:—*Held:* these facts would not ——— a count in a declaration before the Jud. Acts for false representation, & pltfs. were not entitled to any equitable relief, not claimed in the pleadings, as having suffered loss through a false representation innocently made by defts.

(2) Equity cannot give relief for damages arising from deceit unless the same action were good at common law (COTTON, L.J.).—SCHROEDER *v.* MENDL (1877), 37 L. T. 452, C. A.

B. Knowledge of Falsity.

(*a*) *General Rule.*

173. Necessity for knowledge.]—An action of deceit does not lie against a person making an untrue representation to another, on the faith of which the hearer acts, & thereby incurs damage, if the party making such representation did not know it to be untrue.—FREEMAN *v.* BAKER (1833), 5 B. & Ad. 797; 2 Nev. & M. K. B. 446; 3 L. J. K. B. 17; 110 E. R. 985.

Annotations:—**Reld.** Collins *v.* Evans (1844), 5 Q. B. 820. **Mentd.** Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542; Taylor *v.* Bullen (1850), 5 Exch. 779.

174. ——.]—TAYLOR *v.* ASHTON, No. 222, *post.*

175. ——.]—COLLINS *v.* EVANS, No. 211, *post.*

176. ——.]—NEWTON *v.* CONYNGHAM (LORD), No. 167, *ante.*

177. ——.]—Any false statement knowingly made for the purpose of inducing a party to enter into a contract is fraud in law. Fraud in one contracting party does not render the contract void, but only defeasible at the option of the other contracting party.

There was fraud if at the time of the sale a warranty was given . . . which induced the other party to enter into the contract if in the knowledge of the vendor that statement was false; for it was an untruth told to another with a view to induce him to alter his condition & thereby altering it (PARKE, B.).—MURRAY *v.* MANN (1848), 2 Exch. 538; 17 L. J. Ex. 256; 12 Jur. 634; 154 E. R. 605.

Annotations:—**Apld.** Stevens *v.* Legh (1853), 2 C. L. R. 251. **Reld.** Clarke *v.* Dickson (1858), 27 L. J. Q. B. 223. **Mentd.** Brady *v.* Todd (1861), 9 C. B. N. S. 592; Holland *v.* Russell (1861), 30 L. J. Q. B. 308; Udell *v.* Atherton (1861), 7 H. & N. 172.

178. ——.]—A false statement knowingly made, for the purpose of enabling another to enter into a contract is fraud in law.—STEVENS *v.* LEGH (1853), 2 C. L. R. 251; 22 L. T. O. S. 84; 2 W. R. 16.

179. ——.]—In the printed & published time tables of defts., for Mar. 1855, which were kept in circulation throughout the month, a passenger train was advertised to leave defts.' station in London at 5 p.m. & to arrive at Peterborough at about 7.20 p.m. the same evening, & about the same time to proceed on to Hull, arriving at Hull about midnight. The time tables contained a notice to the effect that defts. would not hold themselves responsible for delay or the consequences arising therefrom. Defts.' line of railway extended as far as A. beyond Peterborough, but they had running powers over the L. & Y. Ry. to M. where the N. E. Ry. co.'s line joined; &, under 13 & 14 Vict. c. xxxiii., defts. had for some time been issuing tickets with which passengers were conveyed, as advertised, from Peterborough to Hull. But, on Mar. 1, the N. E. Ry. co. discontinued to run their train, having given previous notice to defts., but not until after their time tables had been printed & published, &, in

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GHOSE *v.* MOHENDRONATH PURKAIT (1889), I. L. R. 17 Calc. 291; L. R. 16 Ind. App. 233.—IND.

p. ——.]—ABAJI *v.* LAXMAN (1906), I. L. R. 30 Bom. 426.—IND.

PART IV. SECT. 1, SUB-SECT. 2.—B. (a).

173 i. *Necessity for knowledge.*]—The mere assertion of that which is not true shall not vitiate dealings. The party to be visited by fraud must have made the false assertion wilfully & knowingly.—PIKE *v.* VICKERS (1839), 2 Dr. & Wal. 252.—IR.

consequence, defts. were no longer able to issue tickets by the train as advertised. Relying on the time tables, pltf. left London on Mar. 25 for Peterborough, on business, intending to go on to Hull, the same evening. He accordingly applied to the clerk at the Peterborough station in proper time for a ticket by the train advertised to leave for Hull about 7.20 p.m., & offered to pay the fare; the clerk, however, refused to grant the ticket, stating as a reason, the N. E. Ry. co. having discontinued running their train as before. Pltf. then took a ticket, & proceeded as far as the M. Junction, where he was obliged to remain that night, &, it was admitted, had, in consequence, sustained a pecuniary loss:—*Held:* (1) the publication of the time tables amounted to a promise by defts. that a train would leave Peterborough for Hull, as advertised, for the conveyance of any person who regularly applied for a ticket & tendered the proper fare, although part of the line of railway belonged to a different co., & defts. therefore were liable to pltf. for a breach of contract; (2) by continuing the publication of the time tables throughout Mar. defts. were also liable for the loss to pltf., caused by a false representation knowingly made.—DENTON *v.* GREAT NORTHERN RY. CO. (1856), 5 E. & B. 860; 25 L. J. Q. B. 129; 26 L. T. O. S. 216; 20 J. P. 483; 2 Jur. N. S. 185; 4 W. R. 240; 119 E. R. 701.

Annotations:—As to (1) **Reld.** Warlow *v.* Harrison (1859), 1 E. & E. 309; Hurst *v.* G. W. Ry. (1865), 19 C. B. N. S. 310; Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256. *Generally,* **Reld.** Lockyer *v.* International Sleeping Car & European Express Trains Co. (1892), 61 L. J. Q. B. 701. **Mentd.** *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 2 Ch. App. 391; Houldsworth *v.* City of Glasgow Bank & Liquidators (1880), 28 W. R. 677.

180. ——.]—No action will lie for a false representation, unless the party making it knows it to be untrue, & makes it with the intention of inducing pltf. to act upon it, & the latter does so act upon it & sustains damage in consequence.—BEHN *v.* KEMBLE (1859), 7 C. B. N. S. 260; 141 E. R. 816.

181. ——.]—FULLAGAR *v.* CLARK, No. 530, *post.*

182. ——.]—The fraud must be committed by the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true & which it was his duty to make known (BRAMWELL, B.).—HORSFALL *v.* THOMAS (1862), 1 H. & C. 90; 2 F. & F. 785; 31 L. J. Ex. 322; 6 L. T. 462; 8 Jur. N. S. 721; 10 W. R. 650; 158 E. R. 813.

*Annotations:—***Consd.** Smith *v.* Hughes (1871), L. R. 6 Q. B. 597. **Reld.** Carlish *v.* Salt, [1906] 1 Ch. 335; Shepherd *v.* Croft, [1911] 1 Ch. 521.

183. ——.]—BEHN *v.* BURNESS, No. 1, *ante.*

184. ——.]—WALKER *v.* MILNER, No. 75, *ante.*

185. ——.]—(1) In an action of deceit pltf. must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

(2) A false statement, made through carelessness & without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.

(3) A special Act incorporating a tramway co. provided that the carriages might be moved by animal power, &, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special Act the co. had the right to use steam power instead of horses. Pltf. took shares on the faith of this statement. The Board of Trade afterwards refused their consent to the use of steam power, & the co. was wound up. Pltf. having brought an action of deceit against the directors founded upon the false statement:—*Held:* defts. were not liable, the statement as to steam power having been made by them in the honest belief that it was true.

(4) To quote the language now some centuries old in dealing with actions of this character, fraud without damage or damage without fraud does not give rise to such actions (LORD HALSBURY, C.).

(5) Where rescission is claimed it is only necessary to prove that there was misrepresentation; then however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand (LORD HERSCHELL).

(6) An action of deceit is a common law action, & must be decided on the same principles, whether it be brought in the Ch. Div. or any of the Common Law Divs., there being in my opinion, no such thing as an equitable action for deceit. This was the language of COTTON, L.J., in *Arkwright* v. *Newbold,* No. 114, *ante.* It was adopted by LORD BLACKBURN in *Smith* v. *Chadwick,* No. 100, *ante,* & is not, I think, open to dispute (LORD HERSCHELL).

(7) To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth (LORD HERSCHELL).

(8) Although means of knowledge are . . . a very different thing from knowledge, if I thought a person making a false statement, had shut his eyes to the facts, or purposely abstained from inquiring into them, it should hold that honest belief was absent, & that he was just as fraudulent as if he had knowingly stated that which was false (LORD HERSCHELL).—DERRY *v.* PEEK (1889), 14 App. Cas. 337; 58 L. J. Ch. 864; 61 L. T. 265; 54 J. P. 148; 38 W. R. 33; 5 T. L. R. 625; 1 Meg. 292, H. L.; *revsg.* S. C. *sub nom.* PEEK *v.* DERRY (1887), 37 Ch. D. 541, C. A.

Annotations:—As to (1) **Folld.** Angus *v.* Clifford, [1891] 2 Ch. 449. **Consd.** Low *v.* Bouverie, [1891] 3 Ch. 82. **Apld.** Thiodon *v.* Tindall & Lloyd's Register of British & Foreign Shipping Committee (1891), 60 L. J. Q. B. 526; Knox *v.* Hayman (1892), 67 L. T. 137. **Consd.** Le Lievre *v.* Gould, [1893] 1 Q. B. 491; Oliver *v.* Bank of England, [1902] 1 Ch. 610. **Apld.** Jones *v.* Hulton, [1909] 2 K. B. 444; Parsons *v.* Barclay & Goddard (1910), 103 L. T. 196. **Folld.** Tackey *v.* McBain, [1912] A. C. 186. **Consd.** Heilbut, Symons *v.* Buckleton, [1913] A. C. 30; Nocton *v.* Ashburton, [1914] A. C. 932; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409. **Reld.** *Re* Postlethwaite, Postlethwaite *v.* Rickman (1888), 59 L. T. 58; *Re* Duce & Duce, *Ex p.* Duce (1889), 6 Morr. 290; Scholes *v.* Brook (1891), 63 L. T. 837; Cackett *v.* Keswick, [1902] 2 Ch. 456; Armstrong *v.* Jackson, [1917] 2 K. B. 822. *As to* (2) **Apld.** Angus *v.* Clifford, [1891] 2 Ch. 449. **Consd.** Knox *v.* Hayman (1892), 67 L. T. 137; Le Lievre *v.* Gould, [1893] 1 Q. B. 491; Nocton *v.* Ashburton, [1914] A. C. 932. **Reld.** Butler *v.* Goundry (1888), 4 T. L. R. 711; Priestley *v.* Stone (1888), 4 T. L. R. 730; Bishop *v.* Balkis Consolidated Co. (1890), 25 Q. B. D. 512; Low *v.* Bouverie, [1891] 3 Ch. 82; Dawson *v.* Bingley U. C., [1911] 2 K. B. 149. *As to* (3) **Consd.** Nocton *v.* Ashburton, [1914] A. C. 932. **Reld.** Scott *v.* Snyder Dynamite Projectile Co. (1892), 67 L. T. 104. *As to* (4) **Consd.** Angus *v.* Clifford, [1891] 2 Ch. 449. *As to* (5) **Reld.** Scott *v.* Snyder Dynamite Projectile Co. (1892), 67 L. T. 104; McKeown *v.* Boudard-Peverll Gear Co. (1896), 65 L. J. Ch. 735; Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853; Armstrong *v.* Jackson, [1917] 2 K. B. 822. *As to* (6) **Reld.** Le Lievre *v.* Gould, [1893] 1 Q. B. 491; Nocton *v.* Ashburton, [1914] A. C. 932. *As to* (7) **Reld.** Angus *v.* Clifford, [1891] 2 Ch. 449; Knox *v.* Hayman (1892), 67 L. T. 137. *As to* (8) **Reld.** Angus *v.* Clifford, [1891] 2 Ch. 449. *Generally,* **Reld.** Cann *v.* Willson (1888), 39 Ch. D. 39; Duncan *v.* Scaife (1888), 4 T. L. R. 716; Arnison *v.* Smith (1889), 41 Ch. D. 348; Glasier *v.* Rolls (1889), 42 Ch. D. 436; L. & N. W. Ry. *v.* Boulton (1890), 63 L. T. 727; Balkis Consolidated Co. *v.* Tomkinson (1893), 42 W. R. 204; *Re* Ottos Kopje Diamond Mines, [1893] 1 Ch. 618; Davis *v.* Ohrly (1898),

Sect. 1.—*Fraudulent misrepresentation: Sub-sect.* 2, *B.* (*a*) & (*b*) *i., ii., iii. & iv.*]

14 T. L. R. 260; Greenwood *v.* Leather Shod Wheel Co. (1899), 80 L. T. 462; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; Greenwood *v.* Leather Shod Wheel Co., [1900] 1 Ch. 421; Whittington *v.* Seale-Hayne (1900), 82 L. T. 49; Pritty *v.* Child (1902), 71 L. J. K. B. 512; Broome *v.* Speak, [1903] 1 Ch. 586; McConnel *v.* Wright, [1903] 1 Ch. 546; Sheffield Corpn. *v.* Barclay, [1903] 1 K. B. 1; Starkey *v.* Bank of England, [1903] A. C. 114; Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234; Nash *v.* Calthorpe, [1905] 2 Ch. 237; First National Reinsurance *v.* Greenfield, [1921] 2 K. B. 260; Edwards *v.* Porter, [1925] A. C. 1. **Mentd.** Williams *v.* Pinckney (1897), 67 L. J. Ch. 34; Bell *v.* Marsh (1903), 72 L. J. Ch. 360; Yonge *v.* Toynbee, [1910] 1 K. B. 215; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; Fry *v.* Smellie, [1912] 3 K. B. 282; Jarvis *v.* Surrey County Council, [1925] 1 K. B. 554.

186. ——.]—I have no doubt that pltf. here was induced by those two statements [in prospectus] & that if, in addition they were false, & false within the knowledge of defts., she has a right of action for damages on the ground that she was deceived (KEKEWICH, J.).—KNOX *v.* HAYMAN (1892), 67 L. T. 137; 8 T. L. R. 654, C. A.

187. ——.]—(1) No action will lie for damages suffered by pltf. in consequence of his reliance on untrue statements made negligently, but not fraudulently, by deft. when there is no contract between them.

(2) If a man tells a wilful falsehood with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked & he must be said to be acting fraudulently. Again a man must also be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, & not caring whether it be true or false. . . . But negligence however great does not of itself constitute fraud (ESHER, M.R.).

Gross negligence might amount to evidence of fraud, if it were so gross as to be incompatible with the idea of honesty but even gross negligence. in the absence of dishonesty did not of itself amount to fraud. . . . There seems to have been some sort of an idea that when a jury was asked . . . whether a man had made the representation not knowing & not caring whether his statement was true or false, the expression "not caring" had something to do with his not taking care. But that expression did not mean not taking care to find out whether the statement was true or false; it meant not caring in the man's own heart & conscience whether it was true or false—& that would be wicked indifference and recklessness (BOWEN, L. J.).—LE LIEVRE *v.* GOULD, [1893] 1 Q. B. 491; 62 L. J. Q. B. 355; 68 L. T. 626; 57 J. P. 484; 41 W. R. 468; 37 Sol. Jo. 267; 4 R. 274; *sub nom.* DENNES *v.* GOULD, 9 T. L. R. 243, C. A.

Annotations:—*As to* (1) **Consd.** Love *v.* Mack (1905), 92 L. T. 345. **Reid.** Pritty *v.* Child (1902), 71 L. J. K. B. 512; Compania Naviera Vasconzada *v.* Churchill & Sim, Same *v.* Burton, [1906] 1 K. B. 237; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; Australian Steam Shipping Co. *v.* Devitt (1917), 33 T. L. R. 178; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409; Everett *v.* Griffiths, [1920] 3 K. B. 163. *Generally*, **Reid.** Empress Assce. Corpn. *v.* Bowring (1905), 11 Com. Cas. 107. **Mentd.** Lane *v.* Cox (1896), 66 L. J. Q. B. 193; Earl *v.* Lubbock (1904), 74 L. J. K. B. 121; Cavalier *v.* Pope, [1905] 2 K. B. 757; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272; Weld-Blundell *v.* Stephens, [1920] A. C. 956; Baker *v.* James, [1921] 2 K. B. 674.

188. Effect of implied contract to indemnify.]—RAWLINGS *v.* BELL, No. 135, *ante*.

——.]—*See, further*, Part. VII., Sect. 3, sub-sect. 2, B., *post*.

Statement in honest belief of truth.]—*See* Sub-sect. 2, C., *post*.

Representation distinguished from warranty.]—*See* Part I., Sect. 9, *ante*; ANIMALS, Vol. II., pp. 260, 261, Nos. 392–401; SALE OF GOODS.

(*b*) *Application of Rule.*

i. *Statement of Intention.*

189. Necessity for knowledge—Actual intention not as stated.]—If a person induces the owner of a horse or a vessel to part with possession, with a view to a particular purpose, for the benefit of the owner, as for a sale, & intending & fraudulently concealing the intention, to use it for another & different purpose, for his own benefit, & inconsistent with the agreement, it is fraud which avoids the agreement.—BENNETT *v.* DOSSETT (1865), 4 F. & F. 600.

190. —— ——.]—I think that S. when he went for the goods must be taken to have made an implied representation that he intended to pay for them, & if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown (MELLISH, L.J.).—*Re* SHACKLETON, *Ex p.* WHITTAKER (1875), 10 Ch. App. 446; 44 L. J. Bcy. 91; 32 L. T. 443; 23 W. R. 555, L. JJ.

Annotations:—**Reid.** Edgington *v.* Fitzmaurice (1885), 29 Ch. D. 459. **Mentd.** *Re* Wilson, *Ex p.* Salaman, [1926] Ch. 21.

191. —— ——.]—*Re* EASTGATE, *Ex p.* WARD, No. 724, *post*.

See, also, Part I., Sect. 2, *ante*.

ii. *Misrepresentation as to Character or Credit.*

192. Necessity for knowledge.]—In an action on the case, for falsely representing the character of another, by reason of which false representation he obtained credit of pltf.; it is necessary to prove against deft. both fraud & falsehood, viz. that the representation which he made was false, & that deft. knew it to be false at the time he made it. Falsehood without fraud is not sufficient.—ASHLIN *v.* WHITE (1816), Holt, N. P. 387, N. P.

Annotation:—**Reid.** Hulton *v.* Hulton, [1917] 1 K. B. 813.

193. ——.]—A party agreed with another as follows: "Provided you use your influence, & secure me the situation of superintendent," etc., "I agree to pay you the amount of my first quarter's salary," etc. To an action on this agreement, deft. pleaded (*inter alia*), that he was induced to make the agreement by fraud & covin on the part of pltf., & also that pltf. did not use his influence & secure him the situation:—*Held*: to maintain the action, the influence used must be such that the situation was, in fact, secured by it; & also, to constitute fraud & covin, the representations made by pltf. must be false to his knowledge at the time he made them; & it is not enough to show that he stated warmly the power he possessed, but the jury must be quite satisfied, before they affix on a party the stigma of fraud, that he stated what was untrue to his knowledge.—NEELEY *v.* LOCK (1838), 8 C. & P. 527, N. P.

194. ——.]—In an action for false & fraudulent representations as to the financial circumstances of a business the purchaser must prove that the vendor had represented what at the time he knew to be false, or that he represented recklessly as facts that which he did not know to be true. If, however, the vendor has represented that certain

192 i. *Necessity for knowledge.*]—IRVING *v.* BURNS, [1915] S. C. 260; [1915] 1 S. L. T. 2.—SCOT.

profits were made, honestly believing the truth & accuracy of his statements, he is entitled to a verdict, even if it is proved that the actual profits after the sale had not come up to his representations.—WESTFIELD *v.* DAVIDSON (1887), 3 T. L. R. 362.

iii. *Misrepresentation as to Company.*

195. Necessity for knowledge.] —(1) It is a fraud to state dishonestly for the purpose of gain that which is false in fact & material, either knowing it to be untrue, or recklessly without knowing or caring whether it is true or false, for the purpose of its being acted upon as true, & of so deceiving the person who seeks to avoid the transaction into which he is thereby misled (WILLES, J.).

(2) A person who is taken in by a fraud may elect to avoid the transaction within a reasonable time after the discovery of the fraud, & before he has taken any benefit under it (WILLES, J.).

(3) A co. is not answerable for the fraud of individual directors, or of directors acting otherwise than on a board, or by the authority of the co. (WILLES, J.).

(4) A co. cannot any more than a private individual, enforce a contract to which a party has been procured by the fraud of its agents (WILLES, J.).

(5) Utter carelessness of truth, when the interests of others are concerned, is evidence of fraud (WILLES, J.).—GLAMORGANSHIRE IRON & COAL CO. *v.* IRVINE (1866), 4 F. & F. 947 ; 15 L. T. 52, N. P.

Annotations :—As to (4) **Apld.** Bwlch-y-Plwm Lead Mining Co. *v.* Baynes (1867), L. R. 2 Exch. 324. **Reid.** First National Reinsurance *v.* Greenfield, [1921] 2 K. B. 260.

196. ——.]—At a general meeting of a co. formed to work a mine the directors, one of whom was deft. B., were authorised to raise money by debentures. The directors accordingly, by the secretary, employed brokers to place the debentures ; & the brokers prepared & issued a prospectus bearing the name of B., amongst others, containing statements as to the co. which were false to the knowledge of the brokers, & which induced pltf. to subscribe & pay for debentures. None of the statements were made by B. personally or by his personal authority, but they were within the authority of the brokers as agents to make. B. derived no benefit from the fraud :—*Held :* deft., B. was not liable for the fraud of the brokers, & was therefore entitled to judgment on the ground of his ignorance of the statements complained of being untrue, & of his personally deriving no pecuniary benefit therefrom, notwithstanding his being a party as director to the receipt of the money & on the ground that he was innocent of any moral fraud.—WEIR *v.* BELL (1878), 3 Ex. D. 238 ; 47 L. J. Q. B. 704 ; *sub nom.* WEIR *v.* BARNETT, BELL, ETC., 38 L. T. 929 ; 26 W. R. 746, C. A.

Annotations :—**Folld.** Cargill *v.* Bower (1878), 10 Ch. D. 502. **Consd.** Derry *v.* Peek (1889), 14 App. Cas. 337. **Apld.** Glasier *v.* Rolls (1889), 42 Ch. D. 436. **Reid.** Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317 ; Joliffe *v.* Baker (1883), 11 Q. B. D. 255 ; Baldry *v.* Bates (1885), 1 T. L. R. 311 ; Lloyd *v.* Grace, Smith, [1912] A. C. 716 ; Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853. **Mentd.** Mirehouse *v.* Barnett (1878), 47 L. J. Ch. 689 ; Watt *v.* Barnett (1878), 3 Q. B. D. 363.

197. ——.]—ARKWRIGHT *v.* NEWBOLD, No. 114, *ante*.

198. ——.]—(1) In an action of deceit against deft. for misrepresentations made in a prospectus, or otherwise, upon which pltf. acts, pltf. must prove that the statements were false, & that deft. made those statements knowing them to be false.

(2) A statement untrue in fact, if believed by the party making it to be true, though without any reasonable ground for such belief, is not now, since the decision in *Derry* v. *Peek*, No. 185, *ante*, fraud such as to support an action for deceit.

(3) It lies on pltf. to prove dishonesty, not on deft. to prove honesty.—GLASIER *v.* ROLLS (1889), 42 Ch. D. 436 ; 58 L. J. Ch. 820 ; 62 L. T. 133 ; 38 W. R. 113 ; 5 T. L. R. 691 ; 1 Meg. 418, C. A.

Annotation :—As to (1) **Reid.** Angus *v.* Clifford (1891), 60 L. J. Ch. 443.

—— **Issue of prospectus.**]—*See* COMPANIES, Vol. IX., pp. 109, 110, Nos. 497–502.

——.]—*See, also,* COMPANIES, Vol. IX., p. 122, Nos. 626–628.

iv. *Misrepresentation as to Contract of Sale.*

199. Necessity for knowledge.]—In deceit for selling goods as his own, it must be averred that deft. knew the fact to be false.—DALE'S CASE (1585), Cro. Eliz. 44 ; 78 E. R. 308.

200. ——.]—Trespass on the case for selling a jewel, affirming it to be a bezar stone, *ubi revera* it was not a bezar stone, will not lie unless it be alleged that deft. knew it was not a bezar, or that he warranted it was a bezar.—CHANDELOR *v.* LOPUS (1603), Cro. Jac. 4 ; 79 E. R. 3 ; *sub nom.* LOPUS *v.* CHANDLER, 1 Dyer, 75, n., Ex. Ch.

Annotations :—**Dbtd.** Gray *v.* Cox (1824), 1 C. & P. 49. **Consd.** Derry *v.* Peek (1889), 14 App. Cas. 337. Heilbut, Symons *v.* Buckleton, [1913] A. C. 30. Jones *v.* Bright (1829), 5 Bing. 533 ; Ormrod *v.* Huth (1845), 14 L. J. Ex. 366 ; Atkinson *v.* Pocock (1848), 12 Jur. 60 ; Hall *v.* Conder (1857), 2 C. B. N. S. 22 ; Smith *v.* Chadwick (1884), 9 App. Cas. 185.

201. ——.]—If a vendor falsely affirm the goods to be his, knowing them to be a stranger's, an action lies for the deceit, though the goods are not reclaimed.—FURNIS *v.* LEICESTER (1618), Cro. Jac. 474 ; 79 E. R. 404.

Annotations :—**Reid.** Cross *v.* Gardner (1688), 1 Show. 68 ; Pasley *v.* Freeman (1789), 3 Term Rep. 51 ; Morley *v.* Attenborough (1849), 12 L. T. O. S. 532.

202. ——.]—SPRIGWELL *v.* ALLEN (1648), Aleyn, 91 ; 2 East, 448, n. ; 82 E. R. 931.

Annotations :—**Apld.** Early *v.* Garrett (1829), 4 Man. & Ry. K. B. 687 ; Morley *v.* Attenborough (1849), 3 Exch. 500.

203. ——.]—An action will lie against one that has possession of goods, & sells them as his own & they are not.—CROSS *v.* GARDNER (1689), 1 Show. 68 ; Carth. 90 ; Comb. 142 ; Holt, K. B. 5 ; 3 Mod. Rep. 261 ; 89 E. R. 453.

Annotations :—**Consd.** Pasley *v.* Freeman (1789), 3 Term Rep. 51. **Apld.** Adamson *v.* Jarvis (1827), 4 Bing. 66. **Reid.** Medina *v.* Stoughton (1700), 1 Ld. Raym. 593 ; Collins *v.* Evans (1844), 5 Q. B. 820 ; Derry *v.* Peek (1889), 14 App. Cas. 337 ; De Lassalle *v.* Guildford, [1901] 2 K. B. 215 ; Heilbut, Symons *v.* Buckleton, [1913] A. C. 30 ; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623.

204. ——.]—An action lies against the seller of goods for affirming them at the time of the sale to be his own, when they were not, if he was in possession of them at the time of the sale.—MEDINA *v.* STOUGHTON (1700), 1 Ld. Raym. 593 ; Holt, K. B. 208 ; 1 Salk. 210 ; 91 E. R. 1297.

Annotations :—**Consd.** Pasley *v.* Freeman (1789), 3 Term Rep. 51. **Apld.** Dobell *v.* Stevens (1825), 3 L. J. O. S. K. B. 89 ; Adamson *v.* Jarvis (1827), 4 Bing. 66. **Reid.** Collins *v.* Evans (1844), 5 Q. B. 820 ; Morley *v.* Attenborough (1849), 3 Exch. 500 ; Sims *v.* Marryat (1851), 17 Q. B. 281 ; Eichholz *v.* Bannister (1864), 17 C. B. N. S. 708 ; De Lassalle *v.* Guildford, [1901] 2 K. B. 215 ; Heilbut, Symons *v.* Buckleton, [1913] A. C. 30 ; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623. **Mentd.** Godson *v.* Good (1816), 2 Marsh. 299.

205. ——.]—DOWDING *v.* MORTIMER (1798), 2 East, 450, n. ; 102 E. R. 440.

Annotation :—**Reid.** Williamson *v.* Allison (1802), 2 East, 446.

Sect. 1.—*Fraudulent misrepresentation: Sub-sect.* 2, *B.* (*b*) *iv., & C.: sub-sects.* 3 *& 4.*]

206. ——.]—Declaration in tort, stating that deft., on the sale of "Teneriffe Barilla," asserted that 7¼ cwt. would produce a ton of soap, well knowing it would not do so, is not supported by evidence that he said he had made 7 tons of soap out of 51 cwt. & no proof of the *scienter*.—HORNCASTLE *v.* MOAT (1824), 1 C. & P. 166, N. P.

207. ——.]—Upon a sale of goods, where no warranty is taken by the purchaser, he cannot recover in an action upon a representation made by the vendor as to the quality of the goods, which turns out to be false in fact, unless it be shown that such representation was false to the knowledge of the seller of the goods, or that he acted fraudulently in making the representation.—ORMROD *v.* HUTH (1845), 14 M. & W. 651; 14 L. J. Ex. 366; 5 L. T. O. S. 268; 153 E. R. 636, Ex. Ch.

Annotations:—**Apld.** Thom *v.* Bigland (1853), 8 Exch. 725; Udell *v.* Atherton (1861), 7 H. & N. 172; Dickson *v.* Reuter's Telegraph Co. (1877), 2 C. P. D. 62; Joliffe *v.* Baker (1883), 11 Q. B. D. 255. **Reld.** Morley *v.* Attenborough (1849), 3 Exch. 500; Collen *v.* Wright (1857), 4 Jur. N. S. 357; Hall *v.* Conder (1857), 2 C. B. N. S. 22; Collins *v.* Cave (1859), 4 H. & N. 225; Rogers *v.* Hadley (1861), 7 Jur. N. S. 733; Osborn *v.* Hart (1871), 23 L. T. 851.

208. ——.]—Pltf. made a purchase under the influence of the misrepresentations of deft., although a considerable time had elapsed, between the misrepresentations & the sale:—*Held:* pltf. was entitled to recover from deft.

The jury must be satisfied that deft. knew the falseness of the representations (WILDE, C.J.).—BARDELL *v.* SPINKS (1846), 2 Car. & Kir. 646, N. P.; *subsequent proceedings, sub nom.* SPINKS *v.* BARDELL (1847), 8 L. T. O. S. 338.

See, also, SALE OF GOODS; SALE OF LAND.

C. Effect of Honest Belief in Truth.

209. Whether representation fraudulent.]—HAYCRAFT *v.* CREASY, No. 26, *ante*.

210. ——.]—(1) In an action by A. against B., C. & D. for false representations alleged to have been made by them, acting as directors of a joint stock co., conversations between B. & C., & conversations between C. & E. a former agent of the co., are admissible in evidence to show the *bona fides* of defts. in making such representations.

(2) An action does not lie for a false representation whereby pltf., being induced to purchase the subject matter of the representation from a third party, has sustained damage, the representations appearing to have been made *bonâ fide* under a reasonable & well grounded belief that the same were true.

It appeared to me that defts., at the time they made the representations, really believed in their truth. Perhaps it would have been as well if I had put it more distinctly to the jury to consider whether defts. honestly believed the representations to be true; but that was in substance left to them (ERSKINE, J.).—SHREWSBURY *v.* BLOUNT (1841), 2 Man. & G. 475; Drinkwater, 70; 2 Scott, N. R. 588; 133 E. R. 836.

211. ——.]—Representation false in fact, but not known to be so by the person who makes it without fraud is not actionable. A sheriff declared in case, for that, defts. being attorneys of P. who had sued out a *ca. sa.* against J. W., & the sheriff having in custody, under another *ca. sa.*, another J. W. who was entitled to his discharge, defts., well knowing the premises, falsely represented to the sheriff that the last mentioned J. W. was the J. W. against whom P.'s writ had issued; by means whereof defts. caused the sheriff to detain the J. W. who was in his custody; for which the last mentioned J. W. sued the sheriff, & he paid money by way of compromise. The attorneys pleading not guilty, evidence was given, for the sheriff, that his officer delivered a note to defts.' managing clerk in P.'s action, describing the J. W. who was in custody, & inquired if that was the J. W. whom they had sued on behalf of P.; & that the clerk took the letter into the office where defts. were, & afterwards returned & told the officer that that was the J. W.; neither defts. nor the clerk at that time knowing the contrary:—*Held:* a plea alleging that defts. had good & probable reason to believe, & did with good faith believe, the representation to be true, was an answer to the action.—COLLINS *v.* EVANS (1844), 5 Q. B. 820; 1 Dav. & Mer. 669; 13 L. J. Q. B. 180; 2 L. T. O. S. 425; 8 Jur. 345; 114 E. R. 1459, Ex. Ch.; *revsg.* S. C. *sub nom.* EVANS *v.* COLLINS (1843), 5 Q. B. 804.

Annotations:—**Consd.** Barley *v.* Walford (1846), 9 Q. B. 197; Thom *v.* Bigland (1853), 8 Exch. 725. **Distd.** Childers *v.* Wooler (1859), 2 E. & E. 287; Richardson *v.* Silvester (1873), L. R. 9 Q. B. 34. **Consd.** Derry *v.* Peek (1889), 14 App. Cas. 337. **Reld.** Freeman *v.* Cooke (1848), 18 L. J. Ex. 114; Evans *v.* Edmonds (1853), 1 C. L. R. 653; Collen *v.* Wright (1858), 4 Jur. N. S. 357; Leather *v.* Simpson (1871), 40 L. J. Ch. 177. **Mentd.** Sheffield Corpn. *v.* Barclay, [1905] A. C. 392; Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94.

212. ——.]—RAWLINGS *v.* BELL, No. 135, *ante*.

213. ——.]—SWIFT *v.* SPOOLEY (1854), 23 L. T. O. S. 300.

214. ——.]—(1) His Lordship told the jury, that if the directors put forth in their report important statements which they had no reasonable ground to believe to be true, that would be misrepresentation & deceit, & in the estimation of the law would amount to fraud. I confess that my opinion was that in what his Lordship thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care & caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, & so that they were guilty of fraud (LORD CRANWORTH).

(2) *Restitutio in integrum* can be had only where the party seeking it is able to put those against whom it is asked in the same situation as that in which they stood when the contract was entered into (LORD CRANWORTH).—WESTERN BANK OF SCOTLAND *v.* ADDIE, ADDIE *v.* WESTERN BANK OF SCOTLAND (1867), L. R. 1 Sc. & Div. 145, H. L.

Annotations:—*As to* (1) **Apld.** Derry *v.* Peek (1889), 14 App. Cas. 337. *As to* (2) **Reld.** Erlanger *v.* New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317; Armstrong *v.* Jackson, [1917] 2 K. B. 822. *Generally,* **Reld.** *Re* Overend, Gurney, Oakes *v.* Turquand & Harding, Peek *v.* Same (1867), L. R. 2 H. L. 325; Swift *v.* Winterbotham

PART IV. SECT. 1, SUB-SECT. 2.—C.

q. General rule.]—CARROLL *v.* BELL B. C.) (1910), 15 W. W. R. 327.—**CAN.**

r. ——.]—DEVALL *v.* GORMAN, CLANCEY & GRINDLEY, LTD., [1918] 3 W. W. R. 221; 13 Alta. L. R. 557; 42 D. L. R. 573.—**CAN.**

t. ——.]—An action for deceit will not lie where an untrue statement is made if the person making it honestly believes it to be true.—FOLEY'S CREEK EXTENDED CO. *v.* CUTTEN & FAITHFUL (1903), 22 N. Z. L. R. 759.—**N.Z.**

a. ——.]—Honest belief in the truth of a statement is sufficient to negative fraud.—DICKSON & CO. *v.* LEVY (1894), 11 S. C. 33.—**S. AF.**

& Goddard (1873), 42 L. J. Q. B. 111; Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; Weir *v.* Bennett (1877), 3 Ex. D. 32; Blake *v.* Albion Life Assce. Soc. (1878), 4 C. P. D. 94; Newlands *v.* National Employers' Accident Assocn. (1885), 54 L. J.

Co., [1896] 1 Ch. 178; Lloyd *v.* Grace, Smith, [1912] A. C. 716. **Mentd.** Chapleo *v.* Brunswick Benefit Bldg. Soc. (1880), 5 C. P. D. 331; Salomon *v.* Salomon, Salomon *v.* Salomon, [1897] A. C. 22; Hambro *v.* Burnand, [1903] 2 K. B. 399; Citizens' Life Assce. *v.* Brown, [1904] A. C. 423.

215. ——.]—WESTFIELD *v.* DAVIDSON, No. 194, *ante*.

216. ——.]—DERRY *v.* PEEK, No. 185, *ante*.

217. ——.]—GLASIER *v.* ROLLS, No. 198, *ante*.

218. ——.]—ANGUS *v.* CLIFFORD, No. 488, *post*.

219. ——.]—S. & R., trustees of a will, sold & conveyed a piece of land to T., who mortgaged it to B. Some time afterwards T. induced them to execute to him a second conveyance of part of the same land, he representing to them that it was a conveyance of a piece of land not previously purchased by him. By this deed, which recited that testator was seised in fee at his death, & recited his will, by which he devised his real estate to the vendors giving them a power of sale, recited his death, & that the vendors in exercise of the power had contracted for the sale to T. of this piece of land in fee simple free from incumbrances, & that S. as beneficial owner had agreed to concur, S. & R. granted, & S. confirmed, the land to T. in fee & S. & R. entered into the usual trustee covenant that they had done no act to incumber, & S. also covenanted for title. T. then mortgaged this land to pltfs. Some years afterwards B. took possession, & pltfs.' security proved worthless. Pltfs. sued S. & R. for indemnity on the ground that S. & R. had by the second conveyance to T. misrepresented their title, & in the alternative for damages on the covenants:—*Held:* pltfs. could not have any remedy on the ground of misrepresentation by defts., as the representation was made honestly.—ONWARD BUILDING SOCIETY *v.* SMITHSON, [1893] 1 Ch. 1; 62 L. J. Ch. 138; 68 L. T. 125; 41 W. R. 53; 37 Sol. Jo. 9; 2 R. 106, C. A.

Annotations:—**Mentd.** Williams *v.* Pinckney (1897), 66 L. J. Ch. 551; Poulton *v.* Moore, [1915] 1 K. B. 400.

220. ——.]—MOORE *v.* BURKE, No. 403, *post*.

221. —— **Duty of defendant to give correct information.**]—LOW *v.* BOUVERIE, No. 254, *post*.

—— **Statement in company prospectus.**]—*See* COMPANIES, Vol. IX., pp. 110, 124–126, 128, 129, Nos. 502, 638–646, 673–676.

Representation on letting of premises.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 176, 177, Nos. 3082–3088.

—— —— **Agent innocently acting under forged power.**]—*See* AGENCY, Vol. I., pp. 662, 663, Nos. 2777, 2778.

Innocent misrepresentation not amounting to warranty.]—*See* No. 213, *ante*, Nos. 486, 487, *post*.

Negligent belief.]—*See* Sub-sect. 5, *post*.

No reasonable grounds for belief.]—*See* Nos. 263–265, *post*.

SUB-SECT. 3.—NON-BELIEF WHEN REPRESENTATION MADE.

222. Equivalent to fraud.]—(1) If a party makes an untrue representation to another for a fraudulent purpose, with the intent to induce the latter to do an act which he afterwards does to his prejudice, an action on the case for deceit lies, & it is not necessary to show also that deft. knew the representation to be untrue.

(2) If they stated a fact which was true for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal & moral fraud (PARKE, B.).—TAYLOR *v.* ASHTON (1843), 11 M. & W. 401; 12 L. J. Ex. 363; 7 Jur. 978; 152 E. R. 860.

Annotations:—*As to* (1) **Consd.** Higgins *v.* Samels (1862), 2 John. & H. 460; Derry *v.* Peek (1889), 14 App. Cas. 337. **Refd.** Denton *v.* G. N. Ry. (1856), 5 E. & B. 860; Joliffe *v.* Baker (1883), 11 Q. B. D. 255. *As to* (2) **Consd.** Higgins *v.* Samels (1862), 2 John. & H. 460; Derry *v.* Peek (1889), 14 App. Cas. 337. *Generally*, **Refd.** Gerhard *v.* Bates (1853), 2 E. & B. 476; Eastwood *v.* Bain (1858), 28 L. J. Ex. 74; *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 16 L. T. 162. **Mentd.** Ryan *v.* Oceanic Steam Navigation Co., O'Connell *v.* Same, Scanlon *v.* Same, O'Brien *v.* Same, [1914] 3 K. B. 731.

223. ——.]—MOORE *v.* BURKE, No. 403, *post*.

224. ——.]—DERRY *v.* PEEK, No. 185, *ante*.

225. ——.]—LOW *v.* BOUVERIE, No. 254, *post*.

Statements in disregard of truth.]—*See* Sub-sect. 5, A., *post*.

Statement founded on negligent or unreasonable belief.]—*See* Sub-sect. 5, B., *post*.

Statement without knowledge.]—*See* Sub-sect. 5, C., *post*.

SUB-SECT. 4.—NON-BELIEF ARISING AFTER REPRESENTATION MADE.

226. Error ascertained after representation—Duty to correct.]—On Nov. 4, shares in a projected railway co. were allotted to pltf.; on Nov. 14, he paid the deposit thereon; on Dec. 6, a report was made by deft., who had inspected the proposed line, to the committee of management, of which he was a member, showing, that all the essential statements in the prospectus which the committee had issued were false, & that the undertaking could not be prosecuted; on Dec. 13, pltf., in ignorance of that report having been made, signed the parliamentary contract & subscribers' agreement. In *assumpsit* for money had & received brought to recover back the deposit so paid, two questions were left to the jury, (*a*) whether the undertaking to which pltf. had subscribed, had been abandoned, (*b*) whether pltf.'s signature to the subscribers' agreement had been obtained by fraud. The jury having returned a verdict for pltf. the ct. refused to disturb it.

The question here is whether it was properly left to the jury to say whether or not there was fraud in getting parties to sign the agreement, suppressing facts that ought to have been disclosed. The evidence of fraud was the concealment of the report of Dec. 6, which contained information that was important to pltf., but the communication of which was studiously confined to the committee (WILDE, C.J.).—JARRETT *v.* KENNEDY (1848), 6 C. B. 319; 136 E. R. 1274.

227. —— ——.]—REYNELL *v.* SPRYE, SPRYE *v.* REYNELL, No. 58, *ante*.

228. —— ——.]—Where parties are contracting, either of them, unless he is under a duty to the other, may keep silence even as to facts which he believes would be operative on the mind of the other; if, however, one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement.—DAVIES *v.* LONDON & PROVINCIAL MARINE INSURANCE CO. (1878), 8 Ch. D. 469; 38 L. T. 478; 26 W. R. 794; *sub nom.* LONDON & PROVINCIAL MARINE INSURANCE CO. *v.* DAVIES, DAVIES *v.*

Sect. 1.—Fraudulent misrepresentation: Sub-sects. 4 & 5, A. & B. (a).]

LONDON & PROVINCIAL MARINE INSURANCE CO., 47 L. J. Ch. 511.

Annotations:—**Reld.** National Provincial Bank of England *v.* Glanusk, [1913] 3 K. B. 335; Moody *v.* Cox & Hatt, [1917] 2 Ch. 71. **Mentd.** Whitmore *v.* Farley (1880), 43 L. T. 192; London General Omnibus Co. *v.* Holloway, [1912] 2 K. B. 72.

229. —— ——.]—BROWNLIE *v.* CAMPBELL, No. 24, *ante*.

230. —— —— **Statement by third party—Report of expert.**]—The directors of a co. issued a prospectus containing certain grave misstatements as to fact. At the time of issue the directors themselves honestly believed in these misstatements, although they knew that they were based upon the report of an intermediate vendor to the co., & although they did not at the time take pains to investigate their truth. Subsequently the directors discovered that these statements were in fact false; but they did not take any form of action in respect of their discovery. The directors were also, at the time of the issue of the prospectus, aware that the property that the co. was being formed to purchase had been sold not very long previously for a much smaller sum; but they did not take any steps to satisfy themselves as to the reason for the very great rise in price. One of the arts. of assocn. of the co. provided that "no director shall be liable . . . for any loss, damage, or misfortune whatever which shall happen in the execution of the duties of his office or in relation thereto unless the same happen through his own dishonesty." The co., having been ordered to be wound up by the ct., the liquidator asked that the directors might be compelled to indemnify the co. for the loss suffered by the co. by reason of their alleged misfeasance as disclosed in the facts mentioned above:—*Held:* (1) the directors had honestly believed that the contract was a beneficial one for the co.; &, notwithstanding the discrepancy in price & the absence of an independent report, this conclusion had not been arrived at by negligence on their part as directors; (2) their conduct subsequent to the discovery of the misstatements was a matter of lack of sound judgment rather than of negligence.—*Re* BRAZILIAN RUBBER PLANTATIONS & ESTATES, LTD., [1911] 1 Ch. 425; 80 L. J. Ch. 221; 103 L. T. 697; 27 T. L. R. 109; 18 Mans. 177; *subsequent proceedings*, 103 L. T. 882, C. A.

Annotation:—*Generally*, **Mentd.** *Re* City Equitable Fire Insce., [1925] Ch. 407.

231. —— **Effect of subsequent statement of truth—Not admitting original error.**]—ARNISON *v.* SMITH, No. 374, *post*.

232. Statement falsified by subsequent events—Timetable issued after train withdrawn.]—DENTON *v.* GREAT NORTHERN RY. CO., No. 179, *ante*.

233. —— **Duty to disclose.**]—What is the duty of a person who knows that another is contracting with him upon the faith of a statement made by him which at the time it was made was true, but which has become untrue before the proposal has been accepted? It does not want authority to show that the duty of such a person is to disclose to him with whom he is contracting the subsequent untruthfulness of the statement which at the time it was made was true (FRY, J.).—ARKWRIGHT *v.* NEWBOLD (1880), 17 Ch. D. 301; 49 L. J. Ch. 684; 42 L. T. 759; 28 W. R. 828; *on appeal* (1881), 17 Ch. D. p. 313.

Annotations:—**Reld.** Mathias *v.* Yetts (1882), 46 L. T. 497; Joliffe *v.* Baker (1883), 11 Q. B. D. 255; Roots *v.* Snelling (1883), 48 L. T. 216; Nash *v.* Wooderson (1884), 52 L. T. 49; Smith *v.* Chadwick (1884), 9 App. Cas. 187; Capel *v.* Sim's Ships Compositions Co. (1888), 57 L. J. Ch. 713; Derry *v.* Peek (1889), 14 App. Cas. 337; McConnel *v.* Wright (1903), 51 W. R. 661. **Mentd.** Boswell *v.* Coaks (1883), 23 Ch. D. 302; *Re* Scottish Petroleum Co., Wallace's Case (1883), 49 L. T. 348; Lydney & Wigpool Iron Ore Co. *v.* Bird (1885), 31 Ch. D. 328.

234. —— —— **Circumstance calculated to affect conduct of representee.**]—When, in a negotiation between A. & B., A. induces B. by a particular representation of the circumstances, to consent to a particular course, & A. afterwards, & before B. has acted, becomes aware of such a change of the circumstances as might materially affect B.'s conduct, of which change B. is not aware, & omits to inform B., thereof, but leaves him to act under his former impression, this ct. will not hold B. bound by his acts whilst under that former impression.—TRAILL *v.* BARING (1864), 4 De G. J. & Sm. 318; 3 New Rep. 681; 33 L. J. Ch. 521; 10 L. T. 215; 10 Jur. N. S. 377; 12 W. R. 678; 46 E. R. 941, L. JJ.

Annotations:—**Folld.** British Equitable Insce. *v.* G. W. Ry. (1868), 38 L. J. Ch. 132. **Reld.** Hoare *v.* Bremridge (1872), 27 L. T. 368; Canning *v.* Hoare (1885), 1 T. L. R. 526; *Re* Metropolitan Coal Consumers' Assocn., Karberg's Case (1892), 66 L. T. 700. **Mentd.** *Re* Scottish Petroleum Co., Wallace's Case (1883), 23 Ch. D. 413.

Falsity of representation at time when acted on.]—*See* No. 109, *ante*.

SUB-SECT. 5.—STATEMENT MADE RECKLESSLY OR NEGLIGENTLY.

A. Reckless Disregard of Truth.

235. Equivalent to fraud.]—(1) If there had been criminal intercourse between pltf. & deft.'s wife before the separation, & pltf. at the time of such intercourse knew that she was deft.'s wife, & concealed her criminality from deft., with a view to induce him to execute the deed, all which the jury must be assumed to have found, that was such a suppression of a material fact as will support a general plea of fraud (JERVIS, C.J.).

(2) If a man having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; &, if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for, he takes upon himself to warrant his own belief of the truth of that which he so asserts (MAULE, J.).—EVANS *v.* EDMONDS (1853), 13 C. B. 777; 1 C. L. R. 653; 22 L. J. C. P. 211; 21 L. T. O. S. 155; 17 Jur. 883; 1 W. R. 412; 138 E. R. 1407.

Annotations:—*As to* (1) **Reld.** Hulton *v.* Hulton, [1916] 2 K. B. 642. *As to* (2) **Apld.** Higgins *v.* Samels (1862), 2 John. & H. 460; Hart *v.* Swaine (1877), 7 Ch. D. 42. **Consd.** Mathias *v.* Yetts (1882), 46 L. T. 497; Joliffe *v.* Baker (1883), 11 Q. B. D. 255; Derry *v.* Peek (1889), 14 App. Cas. 337. **Reld.** Evans *v.* Carrington (1860), 2 De G. F. & J. 481; Dempster *v.* Dempster (1887), 3 T. L. R. 299. *Generally*, **Reld.** Feret *v.* Hill (1854), 15 C. B. 207; Canham *v.* Barry (1855), 15 C. B. 597.

236. ——.]—BEHN *v.* BURNESS, No. 1, *ante*.

237. ——.]—GLAMORGANSHIRE IRON & COAL CO. *v.* IRVINE, No. 195, *ante*.

238. ——.]—DICKSON *v.* REUTER'S TELEGRAM CO., No. 473, *post*.

239. ——.]—ARKWRIGHT *v.* NEWBOLD, No. 114, *ante*.

240. ——.]—If persons who have full means of acquiring knowledge about a particular thing, yet with the intention of inducing other people to spend their money upon that thing, . . . recklessly, &, so to speak, in a gambling spirit, without properly inquiring into the truth or falsehood of the thing, without caring sufficiently whether it is true or false, & will or will not mislead people; if such persons wilfully abstain from making inquiries, & make use of incorrect statements about

the thing, without which the money would not have been advanced, then that is in the eye of the law a fraudulent statement, as much as if the persons making it had known it to be false (DENMAN, J.).—EDGINGTON *v.* FITZMAURICE (1884), 29 Ch. D. 459 ; 53 L. T. 369 ; 32 W. R. 848 ; *affd.*, 29 Ch. D., p. 476, C. A.

Annotations :—**Consd.** *Re* London & Leeds Bank, *Ex p.* Carling, Carling *v.* London & Leeds Bank (1887), 56 L. J. Ch. 321. **Reid.** Derry *v.* Peek (1889), 14 App. Cas. 337 ; Oliver *v.* Bank of England, [1902] 1 Ch. 610. **Mentd.** Yorkshire Insce. *v.* Craine, [1922] 2 A. C. 541 ; Short *v.* Poole Corpn., [1926] Ch. 66.

241. ——.]—WESTFIELD *v.* DAVIDSON, No. 194, *ante*.

242. ——.]—CANN *v.* WILLSON (1888), 39 Ch. D. 39 ; 57 L. J. Ch. 1034 ; 59 L. T. 723 ; 37 W. R. 23 ; 4 T. L. R. 588 ; 32 Sol. Jo. 542.

Annotations :—**Dbtd.** Le Lievre *v.* Gould, [1893] 1 Q. B. 491. **Reid.** Scholes *v.* Brook (1891), 63 L. T. 837. **Mentd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533.

243. ——.]—DERRY *v.* PEEK, No. 185, *ante*.

244. ——.]—LE LIEVRE *v.* GOULD, No. 187, *ante*.

245. —— **Special contractual relationship—Breach of duty.**]—PRITTY *v.* CHILD, No. 25, *ante*.

246. No real belief in truth of statement.]—COATS, LTD. *v.* CROSSLAND (1904), 20 T. L. R. 800.

—— **Statement in company prospectus.**]—*See* COMPANIES, Vol. IX., p. 126, Nos. 645, 646.

247. Meaning of "not caring"—Indifference to truth.]—ANGUS *v.* CLIFFORD, No. 488, *post*.

248. —— ——.]—LE LIEVRE *v.* GOULD, No. 187, *ante*.

Exaggeration or puffing.]—*See* Part I., Sect. 8, *ante*.

Statement as fact in ignorance of truth.]—*See* Sub-sect. 5, C., *post*.

Negligent statement.]—*See* Sub-sect. 5, B., *post*.

B. Statements founded on Negligent or Unreasonable Belief.

(a) In General.

See, generally, NEGLIGENCE.

For particular instances.]—*See* Titles *passim*.

249. Effect of mere negligence.]—(1) Bill to charge a trustee, as having by delivering the title deeds to the tenant for life enabled him to make a mtge. of a settled estate as tenant in fee, dismissed ; the fraudulent purpose of enabling him to mtge. resting upon the evidence of a single witness, & being positively denied by the answer.

The purpose held out disclosed nothing of fraud. If negligence alone were sufficient, it ought to have had the effect in that case (LORD ELDON, C.).

(2) Is there negligence so gross as to amount to constructive fraud ; . . . such evidence of fraud that he shall not be heard in a ct. of justice to say, there was not fraud (LORD ELDON, C.).

(3) If the intention is fraudulent in any respect, though not pointing exactly to the object accomplished, yet he will be bound (LORD ELDON, C.).

(4) An old head of equity that if a representation is made to a man, going to deal on the faith of it in a matter of interest, the person making the representation, knowing it false, shall make it good ; & the jurisdiction assumed by cts. of law in such cases will not prevent relief in equity.—EVANS *v.* BICKNELL (1801), 6 Ves. 174 ; 31 E. R. 998, L. C.

Annotations :—*As to* (1) **Consd.** Clifford *v.* Brooke (1806), 13 Ves. 131. **Apld.** Hunt *v.* Elmes (No. 2) (1860), 28 Beav. 631. **Reid.** Hall *v.* Maltby (1819), 6 Price, 240 ; Loveridge *v.* Cooper (1823), 2 L. J. O. S. Ch. 75 ; Martinez *v.* Cooper (1826), 2 Russ. 198 ; Dryden *v.* Frost (1837), 1 Jur. 330 ; Farrow *v.* Rees (1840), 4 Beav. 18 ; Jones *v.* Smith (1841), 1 Hare, 43 ; West *v.* Reid (1843), 2 Hare, 249 ; Stevens *v.* Stevens (1845), 2 Coll. 20 ; Allen *v.* Knight (1846), 5 Hare, 272 ; Jorden *v.* Money (1854), 5 H. L. Cas. 185 ; Stackhouse *v.* Jersey (1861), 1 John. & H. 721 ; Clark *v.* Hoskins (1868), 37 L. J. Ch. 561 ; Newton *v.* Newton (1868), L. R. 6 Eq. 135 ; Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1871), 20 W. R. 218 ; Keith *v.* Burrows (1876), 1 C. P. D. 722 ; *Re* Ingham, Jones *v.* Ingham, [1893] 1 Ch. 352. *As to* (2) **Consd.** Hewitt *v.* Loosemore (1851), 9 Hare, 449 ; Colyer *v.* Finch (1856), 5 H. L. Cas. 905. **Apld.** Dowle *v.* Saunders (1864), 2 Hem. & M. 242. **Consd.** Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482. **Reid.** Dearle *v.* Hall (1828), 3 Russ. 1 ; Manners *v.* Mew (1885), 29 Ch. D. 725 ; Taylor *v.* Russell, [1891] 1 Ch. 8 ; Walker *v.* Linom, [1907] 2 Ch. 104. *As to* (4) **Consd.** Burrowes *v.* Lock (1805), 10 Ves. 470 ; Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542. **Apld.** Hutton *v.* Rossiter (1855), 7 De G. M. & G. 9. **Consd.** Slim *v.* Croucher (1860), 1 De G. F. & J. 518 ; *Re* Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576 ; Low *v.* Bouverie, [1891] 3 Ch. 82. **Reid.** Adamson *v.* Evitt (1830), 2 Russ. & M. 66 ; Attwood *v.* Small (1838), 6 Cl. & Fin. 232 ; Blair *v.* Bromley (1847), 2 Ph. 354 ; Ingram *v.* Thorp (1848), 7 Hare, 67 ; Phillipson *v.* Gatty, Gatty *v.* Phillipson (1848), 7 Hare, 516 ; Wilson *v.* Short (1848), 6 Hare, 366 ; Ramshire *v.* Bolton (1869), L. R. 8 Eq. 294 ; Hill *v.* Lane (1870), L. R. 11 Eq. 215 ; Schroeder *v.* Mendl (1877), 37 L. T. 452 ; Moore *v.* Knight (1890), 63 L. T. 831 ; Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234. *Generally*, **Reid.** Nocton *v.* Ashburton, [1914] A. C. 932. **Mentd.** Harrison *v.* Gardner (1817), 2 Madd. 198 ; Wiseman *v.* Westland (1826), 1 Y. & J. 117 ; Horlock *v.* Priestley (1827), 2 Sim. 75 ; Jones *v.* Jones (1838), 8 Sim. 633 ; Meux *v.* Bell (1841), 1 Hare, 73 ; Sharples *v.* Adams (1863), 32 Beav. 213 ; *Re* Tichener (1865), 35 Beav. 317 ; Lloyd *v.* Banks (1867), 15 W. R. 1006 ; Brocklesby *v.* Temperance Bldg. Soc., [1895] A. C. 173.

250. ——.]—DICKSON *v.* REUTER'S TELEGRAM CO., No. 473, *post*.

251. ——.]—DERRY *v.* PEEK, No. 185, *ante*.

252. ——.]—GLASIER *v.* ROLLS, No. 198, *ante*.

253. ——.]—ANGUS *v.* CLIFFORD, No. 488, *post*.

254. ——.]—(1) An action for deceit or fraud, properly so called, would only lie at law for a fraudulent misrepresentation, a fraudulent allegation that a fact existed which did not exist, in the truth of which representation the person making it had no genuine or honest belief. . . . Negligent misrepresentation does not certainly amount to deceit, & negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful, not to give information except after careful inquiry (BOWEN, L.J.).

(2) If there was fraud & the statement was intended to mislead, its ambiguity would not be a defence (KAY, L.J.).—LOW *v.* BOUVERIE, [1891] 3 Ch. 82 ; 60 L. J. Ch. 594 ; 65 L. T. 533 ; 40 W. R. 50 ; 7 T. L. R. 582, C. A.

Annotations :—*As to* (1) **Consd.** Nocton *v.* Ashburton, [1914] A. C. 932. **Reid.** Balkis Consolidated Co. *v.* Tomkinson (1893), 42 W. R. 204 ; Le Lievre *v.* Gould, [1893] 1 Q. B. 491. *As to* (2) **Consd.** Porter *v.* Moore, [1904] 2 Ch. 367. *Generally*, **Reid.** Elkington *v.* Hürter, [1892] 2 Ch. 452 ; Ward *v.* Duncombe (1893), 69 L. T. 121 ; Whittington *v.* Seale-Hayne (1900), 82 L. T. 49 ; Oliver *v.* Bank of England, [1902] 1 Ch. 610 ; Whitechurch *v.* Cavanagh, [1902] A. C. 117 ; Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234 ; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409 ; Pierson *v.* Altrincham U. C. (1917), 86 L. J. K. B. 969. **Mentd.** *Re* Tillott, Lee *v.* Wilson, [1892] 1 Ch. 86 ; *Re* Wyatt, White *v.* Ellis, [1892] 1 Ch. 188 ; Williams *v.* Pinckney (1897), 67 L. J. Ch. 34 ; Fry *v.* Smollie, [1912] 3 K. B. 282 ; Everett *v.* Griffiths, [1920] 3 K. B. 163.

255. ——.]—LE LIEVRE *v.* GOULD, No. 187, *ante*.

256. Gross negligence—Amounting to constructive fraud.]—EVANS *v.* BICKNELL, No. 249, *ante*.

257. —— **Incompatible with honesty—Evidence of fraud.**]—LE LIEVRE *v.* GOULD, No. 187, *ante*.

258. Representor under duty to use care—Contractual relations.]—LE LIEVRE *v.* GOULD, No. 187, *ante*.

259. ——.]—LOW *v.* BOUVERIE, No. 254, *ante*.

Representor with opportunity of knowing facts.]—*See* Sub-sect. 5, B. (*b*), *post*.

Sect. 1.—Fraudulent misrepresentation: Sub-sect. 5, B. (a) & (b), & C.; sub-sects. 6 & 7, A.]

Liability of director of company—Standard of diligence.]—*See* COMPANIES, Vol. IX., pp. 468, 469, Nos. 3056–3068.

See, also, Part VII., Sect. 3, sub-sect. 2, D., *post*.

(b) Representor with Opportunity of Knowing Facts.

See, generally, NEGLIGENCE.

260. Neglect to use means of knowledge.]—A person making a false representation through mistake, but where he might have had notice of the truth, it shall bind him.—PEARSON *v.* MORGAN (1788), 2 Bro. C. C. 388; 29 E. R. 214.

Annotation:—**Apld.** Merewether *v.* Shaw (1789), 2 Cox, Eq. Cas. 124.

261. Representor failing to recollect true facts.]—Trustee charged in respect of a misrepresentation to a purchaser, having notice, & alleging only, that he did not recollect the fact.

The excuse alleged by the trustee is that though he had received information of the fact, he did not at the time recollect it . . . it is no excuse to say he did not recollect it (GRANT, M.R.).—BURROWES *v.* LOCK (1805), 10 Ves. 470; 32 E. R. 927.

Annotations:—**Consd.** Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542; Price *v.* Macaulay (1852), 2 De G. M. & G. 339. **Apld.** Slim *v.* Croucher (1860), 1 De G. F. & J. 518; *Re* Ward, Simmons *v.* Rose, Weeks *v.* Ward (1862), 31 Beav. 1. **Distd.** Stephens *v.* Venables (No. 2) (1862), 31 Beav. 124. **Consd.** *Re* Overend, Gurney, *Ex p.* Oakes & Peck (1867), L. R. 3 Eq. 676. **Distd.** Peek *v.* Gurney (1873), L. R. 6 H. L. 377; Brownlie *v.* Campbell (1880), 5 App Cas. 925. **Apld.** Mathias *v.* Yetts (1882), 46 L. T. 497. **Consd.** Derry *v.* Peek (1889), 14 App. Cas. 337; Low *v.* Bouverie, [1891] 3 Ch. 82. *Burrowes* v. *Lock* can be supported & taken as a guide on the ground of estoppel or possibly fraud (LINDLEY, L.J.). **Refd.** Ingram *v.* Thorp (1848), 7 Hare, 67; Pulsford *v.* Richards (1853), 17 Beav. 87; Lake *v.* Brutton (1856), 8 De G. M. & G. 440; Robson *v.* Devon (1857), 5 W. R. 724; Lloyd *v.* Banks (1867), L. R. 4 Eq. 222; Ramshire *v.* Bolton (1869), L. R. 8 Eq. 294; Hill *v.* Lane (1870), L. R. 11 Eq. 215; Eaglesfield *v.* Londonderry (1876), 4 Ch. D. 693; Balkis Consolidated Co. *v.* Tomkinson (1893), 42 W. R. 204; Whittington *v.* Seale-Hayne (1900), 82 L. T. 49; Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234; Nocton *v.* Ashburton, [1914] A. C. 932. **Mentd.** *Re* Tichener (1865), 35 Beav. 317; *Re* Dangar's Trusts (1889), 58 L. J. Ch. 315; L. & N. W. Ry. *v.* Boulton (1890), 63 L. T. 727; Thisdon *v.* Tindall (1891), 40 W. R. 141; Williams *v.* Pinckney (1897), 67 L. J. Ch. 34.

262. ——.]—A., desiring to borrow money, represented to B.'s solr. that he was entitled under an agreement to a lease of certain property in Middlesex, & the lessor, on A.'s application, wrote a letter, in Dec. 1856, to B.'s solr., stating that he would grant such lease to A. The lessor accordingly, in Jan. 1857, granted a lease of such property to A. at a peppercorn rent, & A. mortgaged the same to B. by way of underlease. B. afterwards found that the lessor had, on Aug. 6, 1856, granted a lease of the same property to A., & that A. had, before his mtge. to B., mortgaged the same property to D. The lease granted on Aug. 6, 1856, was registered on Aug. 23 of that month:—*Held:* B. was entitled to a decree for repayment by the lessor of the sum advanced by B. to A., the lessor alleging only that he had forgotten the grant of the prior lease to A. when he executed the lease of Jan. 1857.—SLIM *v.* CROUCHER (1860), 1 De G. F. & J. 518; 29 L. J. Ch. 273; 2 L. T. 103; 6 Jur. N. S. 437; 8 W. R. 347; 45 E. R. 462, L. C. & L. JJ.

Annotations:—**Distd.** Stephens *v.* Venables (No. 2) (1862), 31 Beav. 124. **Consd.** Ramshire *v.* Bolton (1869), L. R. 8 Eq. 294. **Distd.** Peek *v.* Gurney (1873), L. R. 6 H. L. 377; Brownlie *v.* Campbell (1880), 5 App. Cas. 925. **Apld.** Mathias *v.* Yetts (1882), 46 L. T. 497. **Overd.** Low *v.* Bouverie, [1891] 3 Ch. 82. *Slim* v. *Croucher* cannot any longer be regarded as having been rightly decided, fraud having been negatived (LINDLEY, L.J.). **Consd.** Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234; Nocton *v.* Ashburton, [1914] A. C. 932. It may be that the decision can be supported on the ground that deft. warranted by implication that he had power to grant a valid lease (LORD HALDANE, C.). **Refd.** Hill *v.* Lane (1870), L. R. 11 Eq. 215; Eaglesfield *v.* Londonderry (1876), 4 Ch. D. 693; Schroeder *v.* Mendl (1877), 37 L. T. 452; Elkington *v.* Hürter, [1892] 2 Ch. 452; Balkis Consolidated Co. *v.* Tomkinson (1893), 42 W. R. 204; Whittington *v.* Seale-Hayne (1900), 82 L. T. 49. **Mentd.** Thisdon *v.* Tindall (1891), 40 W. R. 141.

263. Unreasonable belief.] — WESTERN BANK OF SCOTLAND *v.* ADDIE, ADDIE *v.* WESTERN BANK OF SCOTLAND, No. 214, *ante*.

264. ——.]—DERRY *v.* PEEK, No. 185, *ante*.

265. ——.]—GLASIER *v.* ROLLS, No. 198, *ante*.

266. Representor avoiding knowledge.]—DERRY *v.* PEEK, No. 185, *ante*.

C. Statements without Knowledge.

267. Statement as fact.]—It is equally false to undertake to say that which he knows nothing at all of, as to say that is true which he knows is not true (LORD MANSFIELD, C.J.).—PAWSON *v.* WATSON (1778), 2 Cowp. 785; 98 E. R. 1361; *sub nom.* PAWSON *v.* EWER, PAWSON *v.* SNELL, PAWSON *v.* WATSON, PAWSON *v.* BARNEVELT, 1 Doug. K. B. 12, n.

Annotations:—**Refd.** Bean *v.* Stupart (1778), 1 Doug. K. B. 11; Cornfoot *v.* Fowke (1840), 6 M. & W. 358; Smith *v.* Chadwick (1882), 20 Ch. D. 27.

268. ——.]—HAYCRAFT *v.* CREASY, No. 26, *ante*.

269. ——.]—It signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false (LORD MANSFIELD, C.J.).—SCHNEIDER *v.* HEATH (1813), 3 Camp. 506.

Annotations:—**Consd.** Ward *v.* Hobbs (1877), 3 Q. B. D. 150. **Refd.** Cornfoot *v.* Fowke (1840), 6 M. & W. 358.

270. ——.]—EVANS *v.* EDMONDS, No. 235, *ante*.

271. ——.]—(1) Where a person has been induced to enter into a contract by a material misrepresentation of the other party, he is entitled to have the contract set aside, & not merely to have the representation made good.

B. & W., who were partners in a bank, agreed to take R. into partnership with them. W., who took no actual part in the business, & was known to R. not to do so, joined with B. in producing to R. during the negotiation, as a true account of the affairs of the bank, a paper stating the amount in which it was indebted to customers to be £11,000, the amount being in fact £26,000. R. entered into the partnership without examining the books, & continued in it for four years, taking no part in the business & never examining the books. At the end of that time the bank turned out to be insolvent. R. then filed a bill against B. & the exors. of W., asking to have the agreement for partnership rescinded, & to have an indemnity against the debts of the concern:—*Held:* (1) the delivery of the paper to R. as a true account of the state of the bank was such a misrepresentation as entitled R. to have the contract rescinded; (2) the case as regarded W. was not varied by the facts that W. took no part in the affairs of the bank, & was known by R. not to do so, & did not know the representation to be untrue; (3) R.'s having

260 l. *Neglect to use means of knowledge.*]—A representation false in fact may be fraudulent so as to sustain an action, if made by one having the means of knowledge of its falsehood, & who ought to have known by the use of these means the fact of its falsehood.—DOYLE *v.* HORT (1879), 4 L. R. Ir. 661.—IR.

brought an action against B. & W. for the misrepresentation, & recovered damages against B., did not take away his right against W.'s estate.

(4) This was a representation by him of a fact of the truth or falsehood of which he knew nothing. . . . It turned out that this representation was contrary to the fact. There was not as I think any moral fraud, but there was legal fraud (TURNER, L.J.).—RAWLINS *v.* WICKHAM (1858), 3 De G. & J. 304; 28 L. J. Ch. 188; 5 Jur. N. S. 278; 44 E. R. 1285; *sub nom.* RAWLINS *v.* WICKHAM, WICKHAM *v.* RAWLINS, 1 Giff. 355; *sub nom.* RAWLINS *v.* WICKHAM, WICKHAM *v.* BAILEY, 32 L. T. O. S. 231; 7 W. R. 145, L. JJ.

Annotations:—As to (1) **Consd.** Betjemann *v.* Betjemann, [1895] 2 Ch. 474. **Distd.** Hindle *v.* Brown (1907), 98 L. T. 44. **Refd.** Gorsuch *v.* Cree (1860), 8 C. B. N. S. 574; Davies *v.* Marshall (1861), 10 C. B. N. S. 697; Hallows *v.* Fernie (1867), L. R. 3 Eq. 520; A.-G. *v.* Ray (1874), 9 Ch. App. 402, n.; *Re* Royal Victoria Palace Theatre Syndicate, Moore & De La Torre's Case (1874), L. R. 18 Eq. 661; Edwick *v.* Hawkes (1881), 18 Ch. D. 199; Redgrave *v.* Hurd (1881), 20 Ch. D. 1; Mathias *v.* Yetts (1882), 46 L. T. 497; *Re* Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 56 L. T. 622; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; *As to* (2) **Refd.** Conybeare *v.* New Brunswick & Canada Ry. (1860), 1 Giff. 339; Gorsuch *v.* Cree (1860), 8 C. B. N. S. 574; Evans *v.* Robins (1863), 11 L. T. 211; *Re* Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576; Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n. *As to* (3) **Refd.** Peek *v.* Gurney (1873), L. R. 6 H. L. 377. *As to* (4) **Apld.** *Re* Reese River Silver Mining Co., Smith's Case (1867), 2 Ch. App. 604; Hart *v.* Swaine (1877), 7 Ch. D. 42. **Expld.** Jolliffe *v.* Baker (1883), 11 Q. B. D. 255. *Generally,* **Consd.** Newbigging *v.* Adam (1886), 2 T. L. R. 609. **Mentd.** Scholefield *v.* Templer (1859), John. 155; Graham *v.* Wickham (1865), 2 De G. J. & Sm. 497; Overend, Gurney *v.* Gurney (1869), 17 W. R. 719; Lacey *v.* Hill, Leney *v.* Hill (1876), 4 Ch. D. 537.

272. ——.]—If pltf. asserted, as of his own knowledge, any matter of fact which turned out to be false, & by means of such assertion obtained the contract, then that would be a fraud on his part, which would vitiate the contract. For if a man for his own object & his own benefit asserts a fact as known to himself to exist, which does not exist, he is guilty of fraud, whether or not he knows it does not exist, because he asserts it as of his own knowledge when he does not know whether it exists or not. This principle does not, it is obvious, apply to matters of mere opinion, but only to assertions of matters of fact, on which it may be supposed that the other party has relied (ERLE, C.J.).—SMITH *v.* PRICE (1862), 2 F. & F. 748.

273. ——.]—MOORE *v.* BURKE, No. 403, *post.*

274. ——.]—(1) A contract voidable but not void, is valid until rescinded.

(2) Recission by a ct. of competent authority dates from the moment when proceedings were taken invoking the aid of that competent authority.

(3) If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue (LORD CAIRNS).—REESE RIVER SILVER MINING CO., LTD. *v.* SMITH (1869), L. R. 4 H. L. 64; 39 L. J. Ch. 849; 17 W. R. 1042, H. L.; *affg.* S. C. *sub nom. Re* REESE RIVER SILVER MINING CO., SMITH'S CASE (1867), 2 Ch. App. 604, L. JJ.

Annotations:—As to (1) **Consd.** *Re* General Railway Syndicate, Whiteley's Case, [1899] 1 Ch. 770. **Expld.** Abram S.S. Co. *v.* Westville Shipping Co., [1923] A. C. 773. *As to* (2) **Distd.** Kent *v.* Freehold Land & Brick-making Co. (1868), 3 Ch. App. 493. **Apld.** *Re* British Burmah Lead Co. (1888), 4 T. L. R. 631. **Consd.** *Re* General Railway Syndicate, [1899] 1 Ch. 770. **Refd.** *Re* Estates Investment Co., Pawle's Case (1869), 4 Ch. App. 497; *Re* Scottish Petroleum Co. (1883), 23 Ch. D. 413; Cocksedge *v.* Metropolitan Coal Consumers Assocn. (1891), 64 L. T. 826. *As to* (3) **Apld.** Henderson *v.* Lacon (1867), L. R. 5 Eq. 249; A.-G. *v.* Ray (1874), 9 Ch. App. 402, n.; Eaglesfield *v.* Londonderry (1876), 4 Ch. D. 693; Nash *v.* Wooderson (1884), 52 L. T. 49. **Expld.** Derry *v.* Peek (1889), 14 App. Cas. 337. **Consd.** *Re* Pacaya Rubber & Produce Co., Burns Appln., [1914] 1 Ch. 542. **Refd.** *Re* Ruby Consolidated Mining Co., Askew's Case (1874), 31 L. T. 55; Redgrave *v.* Hurd (1881), 20 Ch. D. 1; Mathias *v.* Yetts (1882), 46 L. T. 497; Lodwick *v.* Perth (1884), 1 T. L. R. 76; *Re* British Burmah Lead Co., *Ex p.* Vickers (1887), 56 L. T. 815; Peek *v.* Derry (1887), 37 Ch. D. 541; Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853. *Generally,* **Mentd.** *Re* Cleveland Iron Co., *Ex p.* Stevenson (1867), 16 W. R. 95; *Re* Overend, Gurney, Oakes *v.* Turquand & Harding, Peek *v.* Same (1867), L. R. 2 H. L. 325; *Re* Canadian Native Oil Co., Fox's Case (1868), L. R. 5 Eq. 118; Peek *v.* Gurney (1871), L. R. 13 Eq. 79; Schroeder *v.* Mendl (1874), 37 L. T. 452; *Re* Coal Economising Gas Co., Govors Case (1875), L. R. 20 Eq. 114; Smith *v.* Reed (1886), 2 T. L. R. 442; *Re* Sussex Brick Co., [1904] 1 Ch. 598; First National Reinsurance *v.* Greenfield, [1921] 2 K. B. 260.

275. ——.]—DERRY *v.* PEEK, No. 185, *ante.*

276. ——.]—PRITTY *v.* CHILD, No. 25, *ante.*

Negligent statement.]—*See* Sub-sect. 5, B., *ante.*

Reckless disregard of truth.]—*See* Sub-sect. 5, A., *ante.*

SUB-SECT. 6.—INDUCEMENT, MATERIALITY, AND ALTERATION OF POSITION.

See Part V., *post.*

SUB-SECT. 7.—REPRESENTOR'S MOTIVE OR INTENTION.

A. Fraudulent Intention.

277. Intention to mislead—Without knowledge of falsity.]—TAYLOR *v.* ASHTON, No. 222, *ante.*

278. ——.]—RAWLINGS *v.* BELL, No. 135, *ante.*

279. ——.]—No man ought to be found guilty of fraud unless you can say he had a fraudulent mind & an intention to deceive (BRETT, L.J.).—WILSON *v.* CHURCH (1879), 13 Ch. D. 1; 41 L. T. 50, C. A.; *on appeal, sub nom.* NATIONAL BOLIVIAN NAVIGATION CO. *v.* WILSON (1880), 5 App. Cas. 176, H. L.

*Annotations:—***Mentd.** Smith *v.* Anderson (1880), 15 Ch. D. 247; Collingham *v.* Sloper, Foreign American & General Investments Trust Co. *v.* Sloper, Foreign American & General Investments Trust Co. *v.* Sloper, [1893] 2 Ch. 96; Wilson *v.* Church (1911), 106 L. T. 31; Royal Bank of Canada *v.* R., [1913] A. C. 283; Sinclair *v.* Brougham, [1914] A. C. 398.

280. ——.]—Where a person's acts or declarations induce another to act in a particular way, he will be bound by the consequences if injurious to that other, though he may himself have been under a mistake, & may have had no intention to mislead or deceive.—SARAT CHUNDER DEY *v.* GOPAL CHUNDER LALA (1892), 56 J. P. 741; 8 T. L. R. 732, P. C.

281. Intention to defraud.]—The main question in this case is . . . whether the promissory note was obtained from deft. under circumstances which are deemed in law to amount to covin (for there is no suggestion whatever of any intentional fraud or misrepresentation on the part of pltfs. personally) so as thereby to avoid the validity of the security in the hands of pltfs. (TINDAL, C.J.).—STONE *v.* COMPTON (1838), 5 Bing. N. C. 142; 1 Arn. 436; 6 Scott, 846; 2 Jur. 1042; 132 E. R. 1059; *subsequent proceedings* (1839), 3 Jur. 266.

*Annotations:—***Refd.** Green *v.* Gosden (1841), 3 Man. & G. 446; Mann *v.* Beeny & Humphrey (1843), 1 L. T. O. S. 56; *Re* Mason, *Ex p.* Sharp (1844), 3 Mont. D. & De G. 490; Mallalieu *v.* Hodgson (1851), 16 Q. B. 689; Owen *v.* Homan (1851), 3 Mac. & G. 378; Mackreth *v.* Walmesley (1884), 51 L. T. 19. **Mentd.** Evans *v.* Bremridge (1855), 4 W. R. 161.

282. —— **Intention presumed.**] — (1) The question is whether from the statement's being

Sect. 1.—*Fraudulent misrepresentation: Sub-sect.* 7, *A. & B.; sub-sect.* 8, *A.*]

false within deft.'s knowledge, the ct. must not infer fraud (ALDERSON, J.).

(2) It was properly left to the jury to consider whether the representation made by deft. was false within his own knowledge (ALDERSON, J.).—CORBETT *v.* BROWN (1831), 8 Bing. 33; 1 Moo. & S. 85; 1 L. J. C. P. 13; 131 E. R. 312; *subsequent proceedings* (1832), 5 C. & P. 363, N. P.

Annotations:—*As to* (1) **Apld.** Polhill *v.* Walter (1832), 3 B. & Ad. 114. **Consd.** Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542. **Apld.** Derry *v.* Peek (1889), 14 App. Cas. 337. **Reld.** Evans *v.* Collins (1844), 5 Q. B. 804; Wilde *v.* Gibson (1848), 1 H. L. Cas. 605; Thom *v.* Bigland (1853), 8 Exch. 725. *Generally*, **Reld.** Crawshay *v.* Thompson (1842), 5 Scott, N. R. 562.

283. ——— ———.]—If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure (MAULE, J.).—CRAWSHAY *v.* THOMPSON (1842), 4 Man. & G. 357; 5 Scott, N.R. 562; 11 L. J. C. P. 301; 134 E. R. 146.

Annotations:—**Consd.** Singer Manufacturing Co. *v.* Loog (1882), 8 App. Cas. 15; Derry *v.* Peek (1889), 14 App. Cas. 337. **Reld.** Rodgers *v.* Nowill (1847), 5 C. B. 109; Edelsten *v.* Vick (1853), 11 Hare, 78. **Mentd.** Rodgers *v.* Nowill (1847), 6 Hare, 325; Cartier *v.* Carlile (1862), 31 Beav. 292; Mansell *v.* Valley Printing Co., [1908] 2 Ch. 441.

284. ——— ———.]—(1) Pltf.'s particulars in a county ct. action alleged that deft. caused to be inserted in a newspaper an advertisement for the letting by tender, with immediate possession, of a farm and sheepwalk; & pltf. believing in the *bona fides* of such advertisement, was induced to inspect the said farm, & employ persons to value it with a view to his becoming tenant thereof, whereas deft. knew at the time he caused such advertisement to be published that he had not power to let the said farm, & that the said farm was not to be let:—*Held:* these particulars disclosed a *primâ facie* cause of action.

(2) There can be no damages unless pltf. can prove that he was induced to incur the alleged expenses in consequence of the advertisement (BLACKBURN, J.).—RICHARDSON *v.* SILVESTER (1873), L. R. 9 Q. B. 34; 43 L. J. Q. B. 1; 29 L. T. 395; 38 J. P. 628; 22 W. R. 74.

Annotation:—*As to* (1) **Consd.** Ajello *v.* Worsley, [1898] 1 Ch. 274.

285. ——— ———.]—A., who was about to grant a lease to B., wrote to C., who was named by B. as a referee:—"B. is desirous of leasing premises from us of about the annual value of £400 . . . & we will be glad if you will say if you know him to be in a good & responsible position to meet the responsibility of such an undertaking, & if you can recommend him as a safe & advisable tenant." C. answered:—"I have much pleasure in replying affirmatively." On this B. was accepted as tenant, but afterwards deserted the premises without paying any rent. C., when he answered the reference, was well acquainted with the antecedents of B., & knew him to be a person of no substantial means, who had twice previously failed in businesses similar to that which he intended to carry on on the premises in question. C., however, had no positive intention to deceive:—*Held:* C. was answerable to A. in damages for misrepresentation.—LEDDELL *v.* MCDOUGAL (1881), 29 W. R. 403, C. A.

286. ——— ———.]—COAKS *v.* BOSWELL, No. 115, *ante*.

287. ——— **Not exactly pointing to object accomplished.**]—EVANS *v.* BICKNELL, No. 249, *ante*.

288. ———.]—Where testator had executed a deed of gift to his sons of certain lands & had not disclosed such deed, & had continued in possession of the properties, & sold parts thereof, & had subsequently made a will disposing of these lands:—*Held:* this was not a designed fraud within *Re McCallum, McCallum* v. *McCallum*, No. 296, *post*.—*Re* LEVESLEY, GOODWIN *v.* LEVESLEY (1915), 32 T. L. R. 145; 60 Sol. Jo. 142.

Motive of deception.]—*See* Sub-sect. 7, B., *post*.

B. Motive of Deception.

289. No intention to benefit representor.]—PASLEY *v.* FREEMAN, No. 163, *ante*.

290. ———.]—Their attention had been drawn by me to two classes of motives possible on the part of deft.: first a desire to benefit himself by making a statement which he knew to be false; secondly a desire to benefit some third person; & I stated that although there might be no intention on his part to obtain an advantage for himself, it would still be a fraud for which he was responsible in law, if he made representations productive of loss to another, knowing such representation to be false (TINDAL, C.J.).—FOSTER *v.* CHARLES (1830), 7 Bing. 105; 4 Moo. & P. 741; 9 L. J. O. S. C. P. 32; 131 E. R. 40.

Annotations:—**Apld.** Polhill *v.* Walter (1832), 3 B. & Ad. 114. **Consd.** Derry *v.* Peek (1889), 14 App. Cas. 337; Edwards *v.* Porter, McNeall *v.* Hawes (1923), 129 L. T. 170. **Reld.** Freeman *v.* Baker (1833), 5 B. & Ad. 797; Crawshay *v.* Thompson (1842), 4 Man. & G. 357; Fuller *v.* Wilson (1842), 3 Q. B. 58; Moens *v.* Heyworth (1842), 10 M. & W. 147; Wilde *v.* Gibson (1848), 1 H. L. Cas. 605; Armstrong *v.* Jackson, [1917] 2 K. B. 822.

291. ———.]—POLHILL *v.* WALTER, No. 338, *post*.

292. No intention to injure.]—MILNE *v.* MARWOOD, No. 155, *ante*.

293. ———.]—DERRY *v.* PEEK, No. 185, *ante*.

294. ——— **Practical joke.**]—Deft., by way of a practical joke, falsely represented to pltf., a married woman, that her husband had met with a serious accident whereby both his legs were broken. Deft. made the statement with intent that it should be believed to be true. Pltf. believed it to be true, & in consequence suffered a violent nervous shock which rendered her ill:—*Held:* these facts constituted a good cause of action.—WILKINSON *v.* DOWNTON, [1897] 2 Q. B. 57; 66 L. J. Q. B. 493; 76 L. T. 493; 45 W. R. 525; 13 T. L. R. 388; 41 Sol. Jo. 493.

Annotations:—**Folld.** Janvier *v.* Sweeney, [1919] 2 K. B. 316. **Reld.** Shapiro *v.* La Morta (1923), 130 L. T. 622. **Mentd.** Dulieu *v.* White, [1901] 2 K. B. 669; Hambrook *v.* Stokes, [1925] 1 K. B. 141.

295. ——— **Desire to benefit representee.**]—SMITH *v.* CHADWICK, No. 106, *ante*.

296. ——— ———.]—The intentional concealment by a mother of a conveyance of property by her to her daughter is a "concealed fraud" against the daughter, whatever the mother's motive for concealment may have been.—*Re* MCCALLUM, MCCALLUM *v.* MCCALLUM, [1901] 1 Ch. 143; 70 L. J. Ch. 206; 83 L. T. 717; 49 W. R. 129; 17 T. L. R. 112; 45 Sol. Jo 98, C. A.

Annotations:—**Distd.** *Re* Levesley, Goodwin *v.* Levesley (1915), 60 Sol. Jo. 142. **Reld.** *Re* Coole, Coole *v.* Flight, [1920] 2 Ch. 536.

297. ——— **False statements & threats.**]—False words & threats calculated to cause, uttered with the knowledge that they are likely to cause, & actually causing physical injury to the person to whom they are uttered are actionable.

Defts. were two private detectives. One of them was designing to inspect certain letters, to which he believed pltf., a maid servant, had means of access. He instructed the other deft., who was his assistant, to induce pltf. to show him the letters, telling him that pltf. would be remunerated for this service. The assistant endeavoured to

persuade pltf. by false statements & threats, as the results of which pltf. fell ill from a nervous shock. In an action by pltf. against defts. for damages :—*Held :* the assistant was acting within the scope of his employment & both defts. were liable.

In the present case there was an intention to terrify pltf. for the purpose of attaining an unlawful object (DUKE, L.J.).—JANVIER *v.* SWEENEY, [1919] 2 K. B. 316 ; 88 L. J. K. B. 1231 ; 121 L. T. 179 ; 35 T. L. R. 360 ; 63 Sol. Jo. 430, C. A.

Annotation :—**Mentd.** Hambrook *v.* Stokes, [1925] 1 K. B. 141.

298. Motive innocent.]—PEEK *v.* GURNEY, No. 119, *ante*.

299. Purpose not apparent in representation.]—RICHARDSON *v.* SILVESTER, No. 284, *ante*.

Fraudulent intent imputed from wilful falsehood.]—*See* Nos. 280-283, 285, 286, *ante*, No. 374, *post*.

SUB-SECT. 8.—PROOF OF FRAUD.

A. Question of Law or Fact.

300. Existence of fraud—Question of fact.]—Although on a special verdict the jury find such facts as would well have warranted them to have inferred fraud. yet if they do not expressly find the fraud, the ct. cannot presume it. Fraud is a fact, & must be found by the jury.—CRISP *v.* PRATT (1639), Cro. Car. 549 ; 79 E. R. 1072.

Annotations :—**Mentd.** Tucker *v.* Cosh (1651), Sty. 288 ; Scroope *v.* Scroope (1663), 1 Cas. in Ch. 27 ; Newton *v.* Trigg (1689), 3 Mod. Rep. 327 ; Lilly *v.* Osborn (1734), 3 P. Wms. 298 ; Banks *v.* Farquharson (1752), 2 Hov. Supp. 178 ; Glaister *v.* Hewer (1802), 8 Ves. 195 ; Doe d. Spencer *v.* Clark (1822), 5 B. & Ald. 458.

301. ——— ———.]—By a contract of sale, the property sold was to be paid for by ready money. The vendee induced the servant of the vendor to deliver it for a check upon a banker, by representing it to be as good as money ; in fact he had overdrawn his account for many months, & when the check was presented, payment was refused. On the same day that the goods were purchased, the vendee gave a warrant of attorney to a creditor, under which judgment was immediately entered up, & execution issued, & the property in question seized by the bailiff of a liberty. While it was in his custody, the original owner rescued it. In an action brought against the latter by the bailiff of the liberty for the rescue :—*Held :* the question whether the contract of sale was so vitiated by fraud as to prevent the property in the goods passing to the vendee, depended upon a question of fact, which ought to have been submitted to the jury, viz., whether the vendee had obtained possession of the goods with a preconceived design not to pay for them.—BRISTOL (EARL) *v.* WILSMORE (1823), 1 B. & C. 514 ; 2 Dow. & Ry. K. B. 755 ; 1 Dow. & Ry. M. C. 407 ; 1 L. J. O. S. K. B. 178 ; 107 E. R. 190.

Annotations :—**Refd.** Stephenson *v.* Hart (1828), 1 Moo. & P. 357 ; Peer *v.* Humphrey (1835), 2 Ad. & El. 495 ; Dixon *v.* Hewetson (1863), 16 L. T. 295.

302. ——— ———.]—BOWRING *v.* STEVENS, No. 565, *post*.

303. ——— ———.]—EARLY *v.* GARRET, No. 531, *post*.

304. ——— ———.]—CORBETT *v.* BROWN, No. 282, *ante*.

305. ——— ———.]—The question of fraud was properly left to the jury.—IRVING *v.* MOTLEY (1831), 7 Bing. 543 ; 5 Moo. & P. 380 ; 9 L. J. O. S. C. P. 161 ; 131 E. R. 210.

Annotation :—**Refd.** Dantec *v.* Ashworth (1866), 14 L. T. 488.

306. ——— ———.]—MOENS *v.* HEYWORTH, No. 96, *ante*.

307. ——— ———.]—The judge told the jury, that it was not sufficient to show that C. had committed a fraud on H., but that they must be satisfied that pltf. or his agent was a party to it :—*Held :* a correct direction. The verdict having been returned for pltf., the ct. refused to disturb it, the existence of fraud being a question for the jury.—SPENCER *v.* HANDLEY (1842), 4 Man. & G. 414 ; 5 Scott, N. R. 546 ; 11 L. J. C. P. 250 ; 134 E. R. 169.

308. ——— ———.]—Upon a question whethe it had been fraudulently agreed between pltf. & deft. that pltf. was to conceal a certain matter from a third person, the jury found a verdict for pltf., & one of them at the time said that it was a thing that was done every day. There was no evidence of such an agreement having been expressly come to, & it was contended that it was tacitly understood :—*Held :* it was a question for the jury, & as they had determined it, the verdict ought not to be set aside because an expression had been made use of which was not satisfactory.—RANKIN *v.* PAYNE (1857), 29 L. T. O. S. 182.

309. ——— ———.]—GOODMAN *v.* CORBETT (1858), 1 F. & F. 281.

310. ——— ———.]—S. agreed to purchase of F. the goodwill of a public house, upon condition that the landlord would accept him as tenant at £200 *per annum*. S. becoming very ill, this agreement was cancelled. T. acted as the broker of all parties. R., a client of T.'s, then offered to purchase, but the landlord refused to take less than £300 *per annum*. This R. agreed to give, but T. told him that he must give £100 in addition to the purchase-money, without, according to deft., stating what it was for. R. gave T. a cheque for that amount, which, upon S.'s death, came into the hands of his widow, pltf. Deft. pleaded that the cheque had been obtained by the fraud of T., & that there was no consideration for it :—*Held :* it was for the jury to say whether there had been fraud, misrepresentation, concealment, or misconduct, on the part of T.—SMITH *v.* ROBERTSON (1868), 18 L. T. 413, N. P.

311. ——— ———.]—In an action against directors of a co. for false & fraudulent representations contained in a prospectus issued with their knowledge, & the material statements in which were untrue in fact, but were made, as the prospectus stated, on the authority of vouchers which were mentioned & declared as "believed to be true" but which turned out to be false & fraudulent :—*Held :* it was for the jury whether the representation of the directors was that they believed the statements of the facts to be true, or that they believed the vouchers to be genuine ; in either view the question would be whether they honestly believed in the truth of the representation they made ; & if they had such honest belief they were not liable ; but if they had no such honest belief, & pltf. took his shares & paid his money on the faith of the prospectus, & not on his own judgment on the voucher set forth, then defts. were liable.—CHARLTON *v.* HAY (1875), 32 L. T. 96, N. P.

PART IV. SECT. 1, SUB-SECT. 8.—A.

300 i. *Existence of fraud—Question of fact.*]—Where a question of fraud arises, it is exclusively for the consideration of the jury.—TARRATT *v.* SAWYER (1835), 1 Thom. 1st ed. 20 ; 2nd ed. 46.—**CAN.**

300 ii. ——— ———.]—RICE *v.* PROVINCIAL INSURANCE CO. (1858), 7 C. P. 548.—**CAN.**

Sect. 1.—*Fraudulent misrepresentation: Sub-sect.* 8, *A., B. & C.; sub-sect.* 9. *Sect.* 2.]

312. ——— ———.]—PEARSON (S.) & SON, LTD. *v.* DUBLIN CORPN., No. 83, *ante.*

B. Onus of Proof.

313. On party seeking to establish.]—EVANS *v.* BICKNELL, No. 249, *ante.*

314. ———.]—STIKEMAN *v.* DAWSON, No. 128, *ante.*

315. ———.]—GLADSTONE *v.* SEYLOR, No. 334, *post.*

316. ———.]—GLASIER *v.* ROLLS, No. 198, *ante.*

C. Evidence.

317. Admissibility — Evidence of other like transactions.]—(1) In an action for false representation, other false statements than those laid may be proved & considered by the jury, with reference to the question whether those laid were made fraudulently. But the declaration will not be amended by introducing them as distinct causes of action, at all events without allowing, if necessary, time for their consideration by deft.

(2) This action is founded entirely on fraud, that is, a wilful falsehood; negligent or careless exaggeration will not suffice to sustain it, there must be fraud; & fraud must be satisfactorily shown, & is not to be lightly presumed. Apart from fraud, it is to be assumed that the seller will somewhat over-estimate the value of what he sells, & the buyer will make an allowance for such exaggeration (CROMPTON, J.).—HUNTINGFORD *v.* MASSEY (1859), 1 F. & F. 690.

318. ——— ———.]—In an action against a co. to recover a sum of money obtained by them from pltf., through a fraud of defts.' agent committed with their knowledge & for their benefit, evidence of similar frauds committed on persons other than pltf., by the same agent, in the same manner, with the knowledge, & for the benefit, of defts. is admissible on behalf of pltf.—BLAKE *v.* ALBION LIFE ASSURANCE SOCIETY (1878), 4 C. P. D. 94; 48 L. J. Q. B. 169; 40 L. T. 211; 27 W. R. 321; 14 Cox, C. C. 246.

Annotations:—**Refd.** R. *v.* Ollis, [1900] 2 Q. B. 758. **Mentd.** R. *v.* Bond, [1906] 2 K. B. 389.

.]—*See, further,* EVIDENCE, Vol. XXII., pp. 71 *et seq.*, Nos. 421 *et seq.*

319. ——— **Unstamped instrument—Cheque.**]—The goods of pltf. were fraudulently obtained from him by a third party, by means of a cheque. Deft. purchased the goods from the third party, *bonâ fide*, & after notice by pltf., sold them, & received the money. In an action by pltf. for money had & received by deft.:—*Held:* the cheque, though otherwise inadmissible for want of a stamp, was receivable in evidence against deft., in proof of the fraud.—KEABLE *v.* PAYNE (1838), 8 Ad. & El. 555; 3 Nev. & P. K. B. 531; 1 Will. Woll. & H. 383; 7 L. J. Q. B. 218; 3 Jur. 40; 112 E. R. 948.

Annotation:—**Mentd.** Arbouin *v.* Anderson (1841), 1 Q. B. 498.

320. ——— **Conversations between representors & agents.**]—SHREWSBURY *v.* BLOUNT, No. 210, *ante.*

321. ——— **Belief of others — Representation as to credit.**]—In an action for fraudulently misrepresenting to pltf. that a certain tradesman, who soon after became bkpt., was trustworthy, *primâ facie* evidence was given that deft., at the very time of making the representation, had bought goods below their value from the tradesman in question, the inference being, that deft. was fully acquainted with the tradesman's insolvent circumstances:—*Held:* deft., in answer to such evidence, might call a witness who had been privy to all the said transactions between deft. & the tradesman, to say that, in his belief, the tradesman was trustworthy when the representation to pltf. was made; deft. might go on to call fellow townsmen of the tradesman, as witnesses, to say that the tradesman's reputation for trustworthiness at the time in question was good.—SHEEN *v.* BUMPSTEAD (1863), 2 H. & C. 193; 2 New Rep. 370; 32 L. J. Ex. 271; 8 L. T. 832; 10 Jur. N. S. 242; 11 W. R. 734, Ex. Ch.

322. ——— **To prove bona fides—Conversations between representors.**]—SHREWSBURY *v.* BLOUNT, No. 210, *ante.*

323. Sufficiency.]—GREEN *v.* GOSDEN, No. 159, *ante.*

324. ——— **As to fraudulent intention.**]—FAIRHEAD *v.* KEYMER (1858), 1 F. & F. 282, n.

325. ——— ——— **Excessive valuation.**]—Excessive valuation is almost conclusive evidence of a fraudulent intent.—IONIDES *v.* PENDER (1872), 27 L. T. 244; 1 Asp. M. L. C. 432, N. P.; *on appeal* (1874), L. R. 9 Q. B. 531.

Annotations:—**Mentd.** Rivaz *v.* Gerussi (1880), 6 Q. B. D. 222; Tate *v.* Hyslop (1885), 15 Q. B. D. 368; Thames & Mersey Marine Insce. *v.* Gunford Ship Co., Southern Marine Mutual Insce. Assocn. *v.* Gunford Ship Co., [1911] A. C. 529.

326. ——— **As to honesty of belief—Representor's statement.**]—DERRY *v.* PEEK, No. 185, *ante.*

SUB-SECT. 9.—PRESUMPTION OF FRAUD.

327. Whether fraud can be presumed.]—CRISP *v.* PRATT, No. 300, *ante.*

PART IV. SECT. 1, SUB-SECT. 8.—B.

313 i. *On party seeking to establish.*]—The onus of proving allegations of fraud rests very strongly upon the party complaining.—NORTHWEST TRADING CO., LTD. *v.* NORTHWEST TRADING CO., LTD., [1920] 1 W. W. R. 353.—**CAN.**

313 ii. ———.]—RAJUNDUR NARAIN RAE *v.* BIJAI GOVIND SING (1839), 2 Moo. Ind. App. 181.—**IND.**

313 iii. ———.]—It lies on him who alleges fraud to prove it.—BOO JINATBOO *v.* SHA NAGAR VALAB KANGI (1886), I. L. R. 11 Bom. 78.—**IND.**

b. When burden of proof shifts.]—Where a transaction is impeached on the ground of fraud, & the knowledge of the circumstances surrounding it is chiefly confined to the parties to it, it is sufficient for the parties attacking it to prove facts from which a jury might infer the want of *bona fides* to throw the onus of proof of *bona fides* on the persons supporting the transaction.—*Re* HODD, *Ex p.* OFFICIAL ASSIGNEE (1889), 7 N. Z. L. R. 337.—**N.Z.**

PART IV. SECT. 1, SUB-SECT. 8.—C.

317 i. *Admissibility — Evidence of other like transactions.*]—An action was brought for certain false & fraudulent representations by which pltfs. were induced to enter into a contract. Evidence that deft. had made other false statements with reference to the subject matter of the contract was tendered to show that the misrepresentations for which the action was brought were made with a fradulent intent. The evidence was rejected:—*Held:* the evidence ought to have been received.—LEE *v.* CASTNER (1882), 3 N. S. W. L. R. 460.—**AUS.**

c. ——— *Evidence of acts not pleaded.*]—Where a party filed a bill to set aside a deed on the ground of fraud:—*Held:* evidence of particular acts of fraud, although not charged in the bill, was admissible.—WRIGHT *v.* HENDERSON (1845), 1 O. S. 304.—**CAN.**

d. ——— ———.]—When fraud is charged, the evidence must be confined to the allegations.—KRISHNAJI *v.* WAMNAJI (1893), I. L. R. 18 Bom. 144.—**IND.**

324 i. *Sufficiency—As to fraudulent intention.*]—Fraud is generally shown by such circumstantial evidence as overcomes the natural presumption of honesty & fair dealing, & satisfies a reasonable mind that such presumption has been displaced.—MATHURA PANDAY *v.* RAM RUCHA TEWARI (1869), 3 B. L. R. A. C. 108; 11 W. R. 482.—**IND.**

PART IV. SECT. 1, SUB-SECT. 9.

327 i. *Whether fraud can be presumed.*]—Fraud & dishonesty are not to be presumed on conjecture, however probable.—SHEIKH IMDAD ALI *v.* MUSSUMAT KOOTHY BEGUM (1842), 3 Moo. Ind. App. 1; 6 W. R. 24.—**IND.**

328. ——.]—Fraud must be proved at law, but equity relieves against presumptive fraud.—CHESTERFIELD (EARL) *v.* JANSSEN (1751), 1 Atk. 301; 2 Ves. Sen. 125; 26 E. R. 191, L. C.

Annotations:—**Reld.** Fullagar *v.* Clark (1812), 18 Ves. 481; Aylesford *v.* Morris (1873), 8 Ch. App. 484. **Mentd.** Taylour *v.* Rochfort (1751), 2 Ves. Sen. 281; Baugh *v.* Price (1752), 1 Wils. 320; Carpenter *v.* Heriot (1759), 1 Eden, 338; Murray *v.* Harding (1773), 2 Wm. Bl. 859; Gwynne *v.* Heaton (1778), 1 Bro. C. C. 1; Cockshott *v.* Bennett (1788), 2 Term Rep. 763; Fox *v.* Mackreth (1791), 2 Cox, Eq. Cas. 320; Fawcett *v.* Gee (1797), 3 Anst. 910; Whittingham *v.* Burgoyne (1797), 3 Anst. 900; Bowes *v.* Heaps (1814), 3 Ves. & B. 117; The Cognac (1832), 2 Hag. Adm. 377; King *v.* Hamlet (1834), 2 My. & K. 456; Sloman *v.* Kelly (1840), 4 Y. & C. Ex. 169; Doe d. Haughton *v.* King (1843), 7 Jur. 517; Downes *v.* Green (1844), 12 M. & W. 481; O'Brien *v.* Kenyon (1851), 6 Exch. 382; Cockell *v.* Taylor, Preston *v.* Collett, Collett *v.* Preston (1852), 21 L. J. Ch. 545; Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; Archer *v.* James (1862), 2 B. & S. 67; Kempson *v.* Ashbee (1874), 39 J. P. 164; Beynon *v.* Cook (1875), 10 Ch. App. 391, n.; Heap *v.* Marris (1877), 46 L. J. Q. B. 761; Nevill *v.* Snelling (1880), 15 Ch. D. 679; Bulli Coal Mining Co. *v.* Osborne, [1899] A. C. 351; Nocton *v.* Ashburton, [1914] A. C. 932.

329. ——.]—Where there is no positive proof of fraud, circumstances of suspicion are not sufficient for the ct. to ground a decree upon; all they can do in a matter of account is to give pltf. leave to surcharge & falsify.—TOWNSEND *v.* LOWFIELD (1747), 3 Atk. 536; 1 Ves. Sen. 35; 26 E. R. 1109, L. C.

330. ——.]—Exors. brought an action of trover to recover possession of a promissory note, which it was said had been given by the deceased to a confidential female servant, who claimed it as *donatio causa mortis*. The jury found a verdict for pltfs. The ct. would not grant a new trial, observing, that it required a strong case to rebut a suspicion of fraud when the party had access to keys & drawers.—SIMMS *v.* COX (1824), 3 L. J. O. S. K. B. 44.

331. ——.]—On a bill filed to set aside the sale of an estate, on the ground of fraud practised by deft. on pltf.; pltf. is not at liberty to give evidence of deft.'s having stood in the relation of his attorney at the time of the sale, with a view of raising an inference that he had acted fraudulently by taking advantage of that character; the fact of his having been such an attorney, not being stated or put in issue by the bill.—WILLIAMS *v.* LLEWELLYN (1827), 2 Y. & J. 68.

332. ——.]—STIKEMAN *v.* DAWSON, No. 128, *ante*.

333. ——.]—On the morning of the day of trial of an action, the clerk to defts.' attorney went to one of pltfs., who was a marksman, & attested his execution of a release of the action. The clerk stated that he explained to him the purport of the deed:—*Held:* the judge of the county ct. was at liberty to infer fraud from the circumstances of the case, although there was no direct evidence of it.—SARGENT *v.* WEDLAKE (1851), 11 C. B. 732; 16 J. P. 185; 138 E. R. 662; *sub nom.* WEDLAKE *v.* SARGENT, Cox, M. & H. 553; 18 L. T. O. S. 122; 15 Jur. 1134.

334. ——.]—With respect to the plea of fraud, though it is true that the fraud must be proved by the person relying on it, that does not mean that he must give such evidence as will exclude all possibility of the non-existence of fraud. There are certain presumptions in the case of certain persons, as in the case of this agent, against fraud; & indeed the presumption of fraud is of different degrees as respects different cases & different persons. There are some kinds of fraud of which the presumption is, that they are almost impossible, because they are so extremely improbable; & there are other kinds where the presumption against them is not so great, such as in horse dealing, as to which a person cannot know much of the world without knowing that the presumption is the other way (MAULE, J.).—GLADSTONE *v.* SEYLOR (1851), 16 L. T. O. S. 389.

335. ——.]—A ct. of justice should not impute fraud, & should be careful to see that no inference be raised against the title of a deceased proprietor, which he asserted & proved, & under which he obtained & retained possession during his life unopposed, unless it be such as the evidence in the cause clearly warrants.—SOORENDRONATH ROY *v.* MUSSAMUT HEERAMONEE BURMONEAH (1868), 12 Moo. Ind. App. 81; 16 W. R. 1140, P. C.

Annotation:—**Mentd.** Mir Abdul Hussein Khan *v.* Mussammat Bibi Sona Dero (1917), 34 T. L. R. 45.

336. Inadequacy of consideration—Gross inadequacy.]—Inadequacy of consideration, though not of itself a sufficient ground for setting aside a contract, is, when gross, strong evidence of fraud.—LOWTHER *v.* LOWTHER (1806), 13 Ves. 95; 33 E. R. 230, L. C.

Annotations:—**Reld.** Bower *v.* Cooper (1843), 2 Hare, 408. **Mentd.** Dunne *v.* English (1874), L. R. 18 Eq. 524.

——.]—*See* FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XXV., pp. 180–182, Nos. 224–244.

Presumption as to intention.]—*See* Nos. 282–286, *ante*.

Presumption as to inducement.]—*See* Part V., Sect. 1, sub-sect. 6, C., *post*.

SECT. 2.—**INNOCENT MISREPRESENTATION.**

Honest belief in truth.]—*See* Sect. 1, sub-sect. 2, C., *ante*.

Negligent or unreasonable belief.]—*See* Sect. 1, sub-sect. 5, B., *ante*.

Statement without knowledge.]—*See* Sect. 1, sub-sect. 5, C., *ante*.

Part V.—Inducement, Materiality, and Alteration of Position.

SECT. 1.—INDUCEMENT.

SUB-SECT. 1.—NECESSITY FOR.

337. Actual inducement must be shown.]—To support an action for a false assertion as to the circumstances of a third person, it must appear that deft. intended to impose on pltf., & that pltf. relied on his information.—SCOTT *v.* LARA (1794), Peake, 296, N. P.

338. ——.]—The making of a representation which a party knows to be untrue, & which is intended to, or is calculated from the mode in which it is made, to induce another to act on the faith of it, so that he may incur damage, is a fraud in law.

It was contended . . . that . . . it is not necessary to prove that the false representation was made from a corrupt motive of gain, to deft., or a wicked motive of injury to pltf.; it was said to be enough if the representation is made which the party making it knows to be untrue, & which is intended by him, or which, from the mode in which it is made, is calculated to induce another to act on the faith of it, in such a way as that he may incur damage, & that damage is actually incurred. . . . The principle of these cases [*Foster* v. *Charles*, No. 290, *ante*, *Corbett* v. *Brown*, No. 282, *ante*] appears to us to be well-founded & to apply to the present (TENTERDEN, C.J.).—POLHILL *v.* WALTER (1832), 3 B. & Ad. 114; 1 L. J. K. B. 92; 110 E. R. 43.

Annotations:—**Apld.** Crawshay *v.* Thompson (1842), 4 Man. & G. 357; Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542. **Consd.** Derry *v.* Peek (1889), 14 App. Cas. 337; Edwards *v.* Porter, [1925] A. C. 1. **Refd.** Freeman *v.* Baker (1833), 5 B. & Ad. 797; Moens *v.* Heyworth (1842), 10 M. & W. 147; Smout *v.* Ilbery (1842), 10 M. & W. 1; Wilson *v.* Fuller (1843), 3 Q. B. 68; Collins *v.* Evans (1844), 5 Q. B. 820; Rawlings *v.* Bell (1845), 1 C. B. 951; Freeman *v.* Cooke (1848), 18 L. J. Ex. 114; Murray *v.* Mann (1848), 17 L. J. Ex. 256; Wilde *v.* Gibson (1848), 1 H. L. Cas. 605; Watson *v.* Poulsom (1851), 18 L. T. O. S. 126; Milne *v.* Marwood (1853), 3 C. L. R. 228; Thom *v.* Bigland (1853), 8 Exch. 725; Collen *v.* Wright (1857), 8 E. & B. 647; Eastwood *v.* Bain (1858), 28 L. J. Ex. 74; Collins *v.* Cave (1859), 4 H. & N. 225; Udell *v.* Atherton (1861), 7 H. & N. 172; Sheen *v.* Bumpstead (1862), 1 H. & C. 358; London & Southern Counties Investment Advance & Discount Co. *v.* Clamp (1890), 7 T. L. R. 131; Oliver *v.* Bank of England, [1901] 1 Ch. 652; Yonge *v.* Toynbee, [1910] 1 K. B. 215; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Mentd.** Tyrrell *v.* Woolley (1840), 1 Man. & G. 809; Davis *v.* Clarke (1844), 6 Q. B. 16; R. *v.* White (1847), 9 L. T. O. S. 475; Jenkins *v.* Hutchinson (1849), 13 Q. B. 744; Dublin, Wicklow & Wexford Ry. *v.* Slattery (1878), 3 App. Cas. 1155; Hollman *v.* Pullen (1884), Cab. & El. 254.

339. ——.]—ATTWOOD *v.* SMALL, No. 303, *post*.

340. ——.]—MOENS *v.* HEYWORTH, No. 96, *ante*.

341. ——.]—TAYLOR *v.* ASHTON, No. 222, *ante*.

342. ——.]—HAMMERSLEY *v.* DE BIEL (BARON), No. 496, *post*.

343. ——.]—A bill was filed by two shareholders in a railway co., on behalf of themselves & all the other shareholders, except defts., against the committee of management & provisional committee, praying an account of the assets received by them, & that defts. might be decreed to pay up the deposits on the shares allotted to them. Pltfs. alleged that they were induced to take shares upon the faith of defts. having joined the undertaking, & upon the prospectuses issued by them. Two of defts. demurred on the ground that they had taken no share in the management of the affairs of the co., but had only lent their names as provisional committee men, & that they had not signed the parliamentary contract, & had never taken up their shares:—*Held:* the bill did not sufficiently allege that the two demurring defts. had agreed to take shares; or that pltfs. had been induced to take their shares upon the faith of those defts. having joined the undertaking.—BELL *v.* MEXBOROUGH (LORD) (1848), 5 Ry. & Can. Cas. 149; 10 L. T. O. S. 457; 12 Jur. 65, L. C

344. ——.]—BARLEY *v.* WALFORD, No. 18, *ante*.

345. ——.]—JOYNSON *v.* OLDFIELD (1847), 9 L. T. O. S. 222.

346. ——.]—MURRAY *v.* MANN, No. 177, *ante*.

347. ——.]—To an action on a guarantee, deft. pleaded a release by deed of the principal debtor, without deft.'s consent. Replication, that pltf. was induced to execute the deed by the fraud, covin, & misrepresentation of the principal debtor. The judge told the jury, that if any misrepresentation by the principal debtor had operated on pltf.'s mind, so as to make him desire the execution of the deed, &, consequently, persuade the principal debtor to execute it, that would be a sufficient inducement to support the replication:—*Held:* no misdirection; & also on motion in arrest of judgment, the replication was good.—FUSSELL *v.* LEWIS (1849), 13 L. T. O. S. 158.

348. ——.]—PULSFORD *v.* RICHARDS, No. 129, *ante*.

349. ——.]—BEHN *v.* KEMBLE, No. 180, *ante*.

350. ——.]—A plea of fraud to a bond or deed means fraud by which deft. was misled & deceived in the actual execution of the instrument, not in any transaction which led to it.

The plea of fraud, in an action on a specialty, is a kind of special plea of *non est factum*, & lets in evidence of fraud in regard to the actual execution of the deed, its contents being misread or misrepresented; but no other defence, founded on the nature of the transaction out of which it arose, is admissible or available (BYLES, J.).—WRIGHT *v.* CAMPBELL (1861), 2 F. & F. 393.

351. ——.]—When, as here, there is a duty to tell the truth, & no duty or obligation the other way, which, it might be said, would be when one sought to buy poison to murder another, & an untruth is told to the knowledge of the teller, for his own purposes, & the statement is accepted as true, a fraud is committed (BRAMWELL, B.).—CAVE *v.* MILLS (1862), 7 H. & N. 913; 31 L. J. Ex. 265; 6 L. T. 650; 8 Jur. N. S. 363; 10 W. R. 471; 158 E. R. 740.

Annotation:—**Mentd.** Anderson *v.* Equitable Assce. Soc. of United States (1926), 134 L. T. 557.

352. ——.]—To make out a defence on the grounds of fraud, the deft. must show that pltf.

PART V. SECT. 1, SUB-SECT. 1.

337 i. *Actual inducement must be shown.*]—False & fraudulent representations made by a party to a contract after it has been entered into, which had no influence in inducing it, cannot be deemed sufficient grounds for setting aside the contract.—MCNAUGHTON *v.* HUDSON (1903), 37 N. S. R. 191.—**CAN.**

337 ii. ——.]—ALEXANDER *v.* ENDERTON (1914), 26 W. L. R. 535; 5 W. W. R. 1022; 15 D. L. R. 588; 25 Man. L. R. 82.—**CAN.**

337 iii. ——.]—GAMAGE, LTD. *v.* CHARLESWORTH'S TRUSTEE, [1910] S. C. 257.—**SCOT.**

337 iv. ——.]—ST. MARC *v.* HARVEY (1893), 10 S. C. 267.—**S. AF.**

was guilty of a fraud, by means of which he was induced to enter into the contract. . . . Assuming the deceitful balance sheet to constitute a fraud it was not a fraud committed with a view to this transaction (WILLIAMS, J.).—WAY *v.* HEARN (1862), 13 C. B. N. S. 292; 32 L. J. C. P. 34; 6 L. T. 751; 143 E. R. 117.

353. ——.]—In an action for false representation as to the value of a business, the question will be, not merely whether it was ever made, but whether deft. kept it up, & whether, even if he did, pltf. was thereby induced to complete the purchase.—INCLEDON *v.* WATSON (1862), 2 F. & F. 841.

354. ——.]—CAVALEIRO *v.* PUGET, No. 2, *ante*.

355. ——.]—CLEVELAND IRON CO. *v.* STEPHENSON, No. 399, *post*.

356. ——.]—In an action for fraudulent misrepresentation in the prospectus of a joint stock co., the false statements alleged in the declaration were that half the first issue of shares had been subscribed for, & that certain persons were directors of the co. It was stated that defts., who were directors, thereby induced pltf. to apply for, & become the holder of shares. At the trial it was proved, that both when the application by, & the allotment to pltf., took place, although half the first issue of shares had been applied for, the deposit had not been paid upon that number. It was also proved that at the time of pltf.'s application, the persons mentioned in the declaration were directors of the co., but that before the allotment of the shares to pltf., these persons had, without his knowledge retired:—*Held:* the judge misdirected the jury in saying that it was not material whether the deposit was paid, on the whole of the shares applied for; also, the judge was right in refusing to amend the declaration, by adding a count for fraudulent concealment; it would have been sufficient to establish the declaration, if the alleged second misrepresentation had induced pltf. to become the holder of shares, & it was not necessary to prove that it had induced him to apply for them, but that the evidence failed to show any misrepresentation at all.—BEVAN *v.* ADAMS (1870), 22 L. T. 795; 19 W. R. 76.

357. ——.]—To make a co. or its directors or secretary liable for misrepresentation made in the certificates or transfer of shares purchased from a shareholder, the purchaser must show that he was in fact deceived, & that the misrepresentations were wilful & fraudulent.—EAGLESFIELD *v.* LONDONDERRY (MARQUIS) (1876), 4 Ch. D. 693; 35 L. T. 822; 25 W. R. 190, C. A.; *affd.* (1878), 38 L. T. 303, H. L.

Annotations:—**Refd.** Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394; Cargill *v.* Bower (1878), 10 Ch. D. 502; Yorkshire Railway Waggon Co. *v.* Maclure & Cornwall Minerals Railway (1881), 45 L. T. 747; Deeley *v.* Lloyds Bank, [1912] A. C. 756.

358. ——.]—(1) It must be no doubt a material misstatement, & the other party must have been induced to act upon it. As it was sometimes said, it must be material to the inducing of the contract, but it need not be the only inducement. If it is a part of the inducement, it will do. We had to consider the matter in the Appeal Ct. only recently in *Redgrave* v. *Hurd*, No. 417, *post*. There we said, if a man has a material misstatement made to him which may from its nature induce him to enter into the contract, it is an inference that he is induced to enter into the contract by it. You need not prove it affirmatively (JESSEL, M.R.).

(2) It was argued ingeniously before us that that was not a representation of a fact, but merely a representation of an opinion as to a future event; but I think that is not the true construction of the particulars. "It will be paid thereout" means "payable thereout" (JESSEL, M.R.).—MATHIAS *v.* YETTS (1882), 46 L. T. 497, C. A.

Annotation:—*Generally*, **Mentd.** A.-G. *v.* Bermondsey Vestry (1883), 23 Ch. D. 60.

359. ——.]—SMITH *v.* CHADWICK, No. 100, *ante*.

360. ——.]—BELLAIRS *v.* TUCKER, No. 431, *post*.

361. ——.]—SALAMAN *v.* WARNER, No. 375, *post*.

362. ——.]—If, in negotiations for a contract, an agent make a false representation as to the name of his principal, knowing that, if he disclosed the true name the other party would not enter into the contract, the ct. will not order specific performance of the contract. A. signed a contract for the sale of a house to B. Before signing, he asked, "Are you buying for C. or his nominees?" B. answered, "No." He was, in fact, buying for nominees of C., to whom he afterwards assigned his contract. He & they brought an action for specific performance:—*Held:* the contract could not be specifically performed.

It is true that a man may with impunity tell a lie in gross in the course of negotiations for a contract. But he cannot, in my opinion, tell a lie appurtenant. That is to say, if he tells a lie relating to any part of the contract or its subject-matter, which induces another person to contract to deal with his property in a way which he would not do if he knew the truth, the man who tells the lie cannot enforce his contract (NORTH, J.).—ARCHER *v.* STONE (1898), 78 L. T. 34.

Annotations:—**Distd.** Nash *v.* Dix (1898), 78 L. T. 445. **Refd.** Said *v.* Butt, [1920] 3 K. B. 497; Dyster *v.* Randall, [1926] Ch. 932.

363. —— **Except in case of warranty.**]—(1) Whatever was known to the parties must have been known to the purchasers early after their possession, & it is quite impossible, with the knowledge of that defect, the purchasers going on dealing with the property, not as an ordinary estate, which may be restored at the end of six months in the same state in which it was, but a property of this description, varying every day, that they can set up such an objection at the end of six months, when they must have known the fact from the commencement (LORD CHELMSFORD, C.).

(2) If two parties enter into a contract, & if one of them, for the purpose of inducing the other to contract with him, shall state that which is not true in point of fact, which he knew at the time that he stated it not to be true, & if upon that statement of what is not true, & what is known by the party making it to be false, the contract is entered into by the other party, then generally speaking, & unless there is more than that in the case, there will be at law an action open to the party entering into such contracts, an action of damages, grounded upon the deceit, & there will be a relief in equity to the same party to escape from the contract which he has so been inveigled into making by the false representation of the other contracting party. In one case it is not necessary that all those three circumstances should concur in order to ground an action for damages at law, or a claim for relief in a ct. of equity; I mean in the case of warranty given, in which the party undertakes that it shall in point of fact be so, & in which case, therefore, no question can be raised upon the *scienter*, upon the fraud or wilful misrepresentation (LORD BROUGHAM).

(3) If a mere general intention to overreach

Sect. 1.—*Inducement: Sub-sects.* 1 & 2, *A. & B.; sub-sect.* 3.]

were enough, I hardly know a contract, even between persons of very strict morality, that could stand; we generally find the case to be that there has been an attempt of the one party to overreach the other, & of the other to overreach the first; but that does not make void the contract. It must be shown that the attempt was made, & made with success, *cum fructu*. The party must not only have been minded to overreach, but he must actually have overreached. He must not only have given instructions to the agent to deceive, but the agent must, in fulfilment of his directions, have made a representation, & moreover, the representation so made must have had the effect of deceiving the purchaser; & moreover, the purchaser must have trusted to that representation, & not to his own acumen, not to his own perspicacity, not to inquiries of his own. I will not say that the two might not be mixed up together, the false representation of the seller & the inquiries of the buyer, in such a way as even then to give a right to relief (LORD BROUGHAM).—ATTWOOD *v.* SMALL (1838), 6 Cl. & Fin. 232; 7 E. R. 684; *sub nom.* SMALL *v.* ATTWOOD, 2 Jur. 226, 246, H. L.; *varying* (1832), You. 407; *subsequent proceedings* (1838), 3 Y. & C. Ex. 501; (1840), 6 Cl. & Fin. 523, L. C.

Annotations:—*As to* (1) **Apld.** Lovell *v.* Hicks (1836), 2 Y. & C. Ex. 46. **Consd.** Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485. *As to* (2) **Apprvd.** Central Ry. of Venezuela *v.* Kisch (1867), L. R. 2 H. L. 99. **Reld.** Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542; Smith *v.* Kay (1859), 7 H. L. Cas. 750; Higgins *v.* Samels (1862), 2 John. & H. 460; Panama & South Pacific Telegraph Co. *v.* Indiarubber, Gutta Percha & Telegraph Works Co. (1875), 32 L. T. 238; Arkwright *v.* Newbold (1880), 28 W. R. 828; Roots *v.* Snelling (1883), 48 L. T. 216. *As to* (3) **Expld.** Redgrave *v.* Hurd (1881), 20 Ch. D. 1. *Generally*, **Reld.** Jorden *v.* Money (1854), 5 H. L. Cas. 185; Venezuela Central Ry. *v.* Kisch (1867), 15 W. R. 821; Torrance *v.* Bolton (1872), 41 L. J. Ch. 643. **Mentd.** Walburn *v.* Ingilby (1833), 1 My. & K. 61; Brown *v.* Sawer (1841), 3 Beav. 598; Benson *v.* Heathorn (1842), 1 Y. & C. Ch. Cas. 326; Kirkman *v.* Andrews (1842), 4 Beav. 554; Nelthorpe *v.* Holgate (1844), 8 Jur. 551; Archbold *v.* Charitable Bequests for Ireland Comrs. (1849), 2 H. L. Cas. 440; Marshall *v.* Sladden (1849), 7 Hare, 428; Reynell *v.* Sprye, Sprye *v.* Reynell (1849), 8 Hare, 222; Bodenham *v.* Hoskyns (1852), 2 De G. M. & G. 903; Cockell *v.* Taylor (1852), 15 Beav. 103; Morrell *v.* Wootten (1852), 16 Beav. 197; A.-G. *v.* Chesterfield (1854), 18 Beav. 596; Beavan *v.* Mornington (1860), 8 H. L. Cas. 525; Ernest *v.* Croysdill (1860), 2 De G. F. & J. 175; Other *v.* Smurthwaite (1868), L. R. 5 Eq. 437; Shedden & Shedden *v.* A.-G. & Patrick (1869), 22 L. T. 631; Weise *v.* Wardle (1874), L. R. 19 Eq. 171; *Re* Hooper, Banco de Portugal *v.* Waddell (1880), 5 App. Cas. 161; Burstall *v.* Beyfus (1884), 26 Ch. D. 35.

In prospectus of company.]—*See* COMPANIES, Vol. IX., pp. 111, 119, 120, 122, 126, 354, Nos. 525, 589–601, 626, 627, 647, 648, 2242.

Representation giving rise to estoppel.]—*See* ESTOPPEL, Vol. XXI., pp. 292–305, 400–402, Nos. 1041–1112, 1605–1618.

SUB-SECT. 2.—INTENTION TO INDUCE.

A. Necessity for.

364. General rule.]—SCOTT *v.* LARA, No. 337, *ante*.

365. ——.]—In an action against a vendor for a deceitful representation, pltf. must prove that deceit was used by deft. for the purpose of throwing pltf. off his guard, & preventing him from being watchful.—DAWES *v.* KING (1815), 1 Stark. 75, N. P.

366. ——.]—POLHILL *v.* WALTER, No. 338, *ante*.

367. ——.]—BARLEY *v.* WALFORD, No. 18, *ante*.

368. ——.]—MURRAY *v.* MANN, No. 177, *ante*.

369. ——.]—BEHN *v.* KEMBLE, No. 180, *ante*.

370. ——.]—Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, &, so acting, is injured or damnified; provided it appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner that occasions the injury or loss. The injury, I apprehend, must be the immediate, & not the remote consequence of the representations thus made (PAGE WOOD, V.-C.).—BARRY *v.* CROSKEY (1861), 2 John. & H. 1; 70 E. R. 945.

Annotations:—**Apld.** Peek *v.* Gurney (1873), L. R. 6 H. L. 377; Andrews *v.* Mockford, [1896] 1 Q. B. 372. **Reld.** Salaman *v.* Warner (1891), 64 L. T. 598. **Mentd.** Thacker *v.* Hardy (1878), 4 Q. B. D. 685; Cavalier *v.* Pope, [1905] 2 K. B. 757.

371. ——.]—WAY *v.* HEARN, No. 352, *ante*.

372. ——.]—CLEVELAND IRON CO. *v.* STEPHENSON, No. 399, *post*.

373. ——.]—GLAMORGANSHIRE IRON & COAL CO. *v.* IRVINE, No. 195, *ante*.

374. ——.]—Persons took debenture stock in a co. in reliance on a statement in a prospectus issued by the directors that £200,000 of share capital had been subscribed, when it had in fact only been allotted in fully-paid shares to the contractor. 20 per cent. of the amount subscribed for was to be paid on allotment, & the rest by instalments, with an option to pay up in full on allotment & receive a discount. After allotment the directors sent to the allottees along with their stock certificates a circular which, amid statements about other matters, stated the truth as to the matter misrepresented, but did not admit the misrepresentation, nor inform the allottees that they could retire & get back their money. After this the allottees who had paid up in full received their discount, & those who had not went on paying up the remaining 80 per cent. by instalments. The concern having proved a failure, some of the debenture stock holders sued the directors to recover damages for misrepresentation: —*Held:* (1) the untrue statement in the prospectus was to be taken as inducing the allottees to enter into the contract, & entitled the allottees to damages, & its effect was not done away with by the circular, & the allottees who went on to pay in full after receiving the circular could recover damages for the loss of the money paid by them after receiving it, as well as in respect of what they had paid at first. *Qu.:* how the case would have stood if the circular had admitted the misrepresentation & informed the allottees that they could have their money back. (2) Some of pltfs. were absent from illness at the trial & no evidence was given to prove their individual cases. The judge gave judgment in favour of those pltfs. who proved their cases, but ordered those who did not appear to pay to defts. the costs occasioned by their being joined as pltfs.:—*Held:* this judgment ought to be varied as regards these latter pltfs. by making it without prejudice to their bringing a fresh action.

(3) It was said, & I think justly, by JESSEL,

364 i. *General rule.*]—SALTON & Co. *v.* CLYDESDALE BANK (1898), 1 F. (Ct. of Sess.) 110; 36 Sc. L. R. 119; 6 S. L. T. 212.—SCOT.

364 ii. ——.]—*Semble:* a false representation not intended to be acted upon, & which it was not reasonable to suppose would be acted upon, but in fact was acted upon, is not actionable.—FORBES *v.* BEHR & Co. (1896), 13 S. C. 304; 6 C. T. R. 341.—S. AF.

364 iii. ——.]—JOSEPHI *v.* PARKES, [1906] E. D. C. 213.—S. AF.

M.R., in *Smith* v. *Chadwick*, No. 106, *ante*, that if the ct. sees on the face of the statement that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, unless it is shown that he knew the facts, or that he avowedly did not rely on the statement whether he knew the facts or not (LORD HALSBURY, C.).

(4) If men tell for business purposes what in plain English is called a lie, they are guilty of fraud, & to talk about their having had no intention to deceive is no more a defence than it would be a defence to a prosecution for forging a bill of exchange to say that the forger meant to pay it when it became due (LORD HALSBURY, C.).

(5) It is an old expedient, & seldom successful, to cross-examine a person who has read a prospectus, & ask him as to each particular statement what influence it had on his mind, & how far it determined him to enter into the contract. This is quite fallacious, it assumes that a person who reads a prospectus & determines to take shares on the faith of it can appropriate among the different parts of it the effect produced by the whole. This can rarely be done even at the time, & for a shareholder thus to analyse his mental impressions after an interval of several years, so as to say which representation in particular induced him to take shares, is a thing all but impossible. A person reading a prospectus looks at it as a whole, he thinks the undertaking is a fine commercial speculation, he sees good names attached to it, he observes other points which he thinks favourable, & on the whole he forms his conclusion. You cannot weigh the elements by ounces (LORD HALSBURY, C.).

(6) It is certainly in the highest degree improbable that these pltfs. did not see the prospectus, or that they were not influenced by the representations contained in it, but we are all of opinion that there is no evidence of these facts upon which a ct. of justice can act (LORD HALSBURY, C.).—ARNISON *v.* SMITH (1889), 41 Ch. D. 348; 61 L. T. 63; 37 W. R. 739; 5 T. L. R. 413; 1 Meg. 388, C. A.

Annotations:—As to (1) **Refd.** *Re* London & Colonial Finance Corpn. (1897), 77 L. T. 146. *As to* (2) **Refd.** Glasier *v.* Rolls (1889), 42 Ch. D. 436. *As to* (5) **Apld.** Scott *v.* Snyder Dynamite Projectile Co. (1892), 66 L. T. 278. **Consd.** Knox *v.* Hayman (1892), 67 L. T. 137; Andrews *v.* Mockford, [1896] 1 Q. B. 372; Drincqbier *v.* Wood, [1899] 1 Ch. 393. **Refd.** Greenwood *v.* Leather Shod Wheel Co., [1900] 1 Ch. 421. *Generally*, **Refd.** Derry *v.* Peek (1889), 14 App. Cas. 337; Angus *v.* Clifford, [1891] 2 Ch. 449; Cackett *v.* Keswick (1901), 85 L. T. 14; Broome *v.* Speak (1903), 72 L. J. Ch. 251; *Re* Wimbledon Olympia, [1910] 1 Ch. 630.

375. ——.]—Now, we know one right that a man has as against a stranger, which is this: that a stranger should not make a false statement to him with the intent that he should act upon it; & if he does act upon it & suffers damage, then the one having done that which the other had a right to insist that he should not do, he could maintain an action. Now, what other right is it alleged that pltf. had as against defts.? The first seems to be that he had a right, not that defts. should tell him the truth or should not tell him what was false, but that he had a right that deft. should not tell someone else an untruth I protest that there is no such right that I know of known to the law of England. I have tried to put my views of the matter in broad language, & I say there is no such right that I know of in the law of England. Then pltf. says: "I have this further right, that the people who have nothing to do with me may not agree together to do something, & do that which results in an injury to me." I do not know of any such right. If by something which they do, which is no breach of any right which pltf. has, he has suffered damage it cannot be helped. There is no legal remedy for it, & there is no infringement of any legal right (LORD ESHER, M.R.).—SALAMAN *v.* WARNER (1891), 65 L. T. 132; 7 T. L. R. 484, C. A.

Annotation:—**Refd.** Andrews *v.* Mockford, [1896] 1 Q. B. 372.

376. ——.]—(1) The false representation in the newspaper on which pltf. acted & by so doing was damnified was made with the intent that it should be acted on by any person who had already received the prospectus. The jury have found that the natural consequence of the publication in the newspaper was that pltf. should buy shares; &, if so, the injury received by pltf. was the immediate, & not the remote, consequence of the representation thus made. It follows, therefore, that pltf. was entitled to recover (LORD ESHER, M.R.).

(2) It is not taking the correct view of the case to sever it into parts as deft.'s counsel sought to do, & to argue that the prospectus by itself would not support a cause of action, & that the telegram by itself would not do, & since two nothings make nothing, the combination of the two would not support a cause of action. The case must be taken as a whole (A. L. SMITH, L.J.).—ANDREWS *v.* MOCKFORD, [1896] 1 Q. B. 372; 65 L. J. Q. B. 302; 73 L. T. 726; 12 T. L. R. 139, C. A.

377. ——.]—A mere naked falsehood is not enough to give a right of action; but it is so if it be a falsehood told with intention that it should be acted on by the party injured, & that act must produce damage to him (STIRLING, J.).—TALLERMAN *v.* DOWSING RADIANT HEAT CO., [1900] 1 Ch. 1; 68 L. J. Ch. 618; 48 W. R. 146; 15 T. L. R. 515.

Representation giving rise to estoppel.]—*See* ESTOPPEL, Vol. XXI., pp. 298, 299, Nos. 1072–1076.

B. Where No Actual Inducement.

378. Mere intention insufficient.] — PASLEY *v.* FREEMAN, No. 163, *ante*.

379. ——.]—ATTWOOD *v.* SMALL, No. 363, *ante*.

380. ——.] — (1) A conjectural estimate of what may be the value of an estate is not a misrepresentation.

(2) Concealment, to be fraudulent & material, must be a concealment of something that the party concealing was bound to disclose.

(3) It is of no avail if the party has, in whatever way, become acquainted with the truth at the time, but much more so if he shows that he has become acquainted with it in the very deed which is said to have been obtained from him by the party misrepresenting or concealing. . . . As fraud is never to be presumed against a man, much less is the misrepresentation of his agent to be set down to the debit of his account as fraudulently misrepresenting himself (LORD BROUGHAM).—IRVINE (OR DOUGLAS) *v.* KIRKPATRICK (1850), 17 L. T. O. S. 32, H. L.

381. ——.]—COAKS *v.* BOSWELL, No. 115, *ante*.

382. ——.]—ARCHER *v.* STONE, No. 362, *ante*.

SUB-SECT. 3.—EXTENT OF INDUCEMENT.

383. Misrepresentation need not be sole inducement.]—REYNELL *v.* SPRYE, SPRYE *v.* REYNELL, No. 58, *ante*.

384. ——.]—ATTWOOD *v.* SMALL, No. 363, *ante*.

Sect. 1.—Inducement: Sub-sects. 3, 4, 5 & 6, A.]

385. ——.]—*Re* ROYAL BRITISH BANK, ETC., NICOL'S CASE, No. 407, *post.*

386. ——.]—That he relied solely upon it cannot, I think, be said; but he undoubtedly did rely, to a great extent upon it (PAGE WOOD, V.-C.). —HIGGINS *v.* SAMELS (1862), 2 John. & H. 460; 7 L. T. 240; 70 E. R. 1139.

Annotations:—**Reld.** Colby *v.* Gadsden (1867), 17 L. T. 97. **Mentd.** Mullens *v.* Miller (1882), 31 W. R. 559.

387. ——.]—MATHIAS *v.* YETTS, No. 358, *ante.*

388. ——.]—EDGINGTON *v.* FITZMAURICE, No. 14, *ante.*

389. ——.]—Where a misstatement of fact by deft. materially tended to induce pltf. to do an act by which he had incurred damage, deft. may be made liable in an action of deceit although the misstatement was not the only inducement to the act.—PEEK *v.* DERRY (1887), 37 Ch. D. 541; 57 L. J. Ch. 347; 59 L. T. 78; 36 W. R. 899; 4 T. L. R. 84, C. A.; *revsd.* on other grounds, *sub nom.* DERRY *v.* PEEK (1889), 14 App. Cas. 337, H. L.

Annotations:—**Consd.** Arnison *v.* Smith (1889), 41 Ch. D. 348. **Reld.** Cann *v.* Willson (1888), 39 Ch. D. 39; Le Lievre *v.* Gould, [1893] 1 Q. B. 491; Davis *v.* Ohrly (1898), 14 T. L. R. 260; Nash *v.* Calthorpe, [1905] 2 Ch. 237; Heilbut, Symons *v.* Buckleton, [1913] A. C. 30; Nocton *v.* Ashburton, [1914] A. C. 932. **Mentd.** Butler *v.* Goundry (1888), 4 T. L. R. 711; Duncan *v.* Scalfe (1888), 4 T. L. R. 716; *Re* Postlethwaite, Postlethwaite *v.* Rickman (1888), 59 L. T. 58; Priestley *v.* Stone (1888), 4 T. L. R. 730; *Re* Duce & Duce, *Ex p.* Duce (1889), 6 Morr. 290; Glasier *v.* Rolls (1889), 42 Ch. D. 436; Bishop *v.* Balkis Consolidated Co. (1890), 25 Q. B. D. 512; L. & N. W. Ry. *v.* Boulton (1890), 63 L. T. 727; Angus *v.* Clifford, [1891] 2 Ch. 449; Low *v.* Bouverie, [1891] 3 Ch. 82; Scholes *v.* Brook (1891), 63 L. T. 837; Thiodon *v.* Tindall & Lloyd's Register of British & Foreign Shipping Committee (1891), 60 L. J. Q. B. 526; Knox *v.* Hayman (1892), 67 L. T. 137; Scott *v.* Snyder Dynamite Projectile Co. (1892), 67 L. T. 104; Balkis Consolidated Co. *v.* Tomkinson (1893), 42 W. R. 204; *Re* Ottos Kopje Diamond Mines, [1893] 1 Ch. 618; McKeown *v.* Boudard-Peverll Gear Co. (1896), 65 L. J. Ch. 735; Williams *v.* Pinckney (1897), 67 L. J. Ch. 34; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; Greenwood *v.* Leather Shod Wheel Co., [1900] 1 Ch. 421; Whittington *v.* Seale-Hayne (1900), 82 L. T. 49; Cackett *v.* Keswick, [1902] 2 Ch. 456; Oliver *v.* Bank of England, [1902] 1 Ch. 610; Pritty *v.* Child (1902), 71 L. J. K. B. 512; Bell *v.* Marsh (1903), 72 L. J. Ch. 360; Broome *v.* Speak, [1903] 1 Ch. 586; McConnel *v.* Wright, [1903] 1 Ch. 546; Sheffield Corpn. *v.* Barclay, [1903] 1 K. B. 1; Starkey *v.* Bank of England, [1903] A. C. 114; Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234; Jones *v.* Hulton, [1909] 2 K. B. 444; Parsons *v.* Barclay & Goddard (1910), 103 L. T. 196; Yonge *v.* Toynbee, [1910] 1 K. B. 215; Dawson *v.* Bingley U. C., [1911] 2 K. B. 149; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; Fry *v.* Smellie, [1912] 3 K. B. 282; Tackey *v.* McBain, [1912] A. C. 186; Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853; Armstrong *v.* Jackson, [1917] 2 K. B. 822; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409; First National Reinsurance *v.* Greenfield, [1921] 2 K. B. 260; Edwards *v.* Porter, [1925] A. C. 1; Jarvis *v.* Surrey County Council, [1925] 1 K. B. 554.

—— **Representation in prospectus.**] — *See* COMPANIES, Vol. IX., p. 126, Nos. 649, 650.

—— **Representation as to credit.**] — *See* GUARANTEE, Vol. XXVI., pp. 31–33, Nos. 186–199.

390. Probable action of representee if aware of truth—Not inquired into.]—SMITH *v.* KAY, No. 109, *ante.*

391. —— ——.]—Where a person has been induced to take shares in a co. by misrepresentation contained in the prospectus, the mere circumstance that the co. is insolvent at the time when he takes proceedings to rescind his contract to take shares does not, in the absence of countervailing equities, deprive him of his right to rescind. Where a person seeks to rescind a contract to take shares on the ground of misrepresentation, it is not necessary that he should prove that if the misrepresentation had not been made he would not have taken the shares. It is sufficient if there is evidence to show that he was materially influenced by the misrepresentation. On Sept. 6, C. applied for shares in a co., being induced so to do by misrepresentations in the co.'s prospectus. On Sept. 7, he received notice of allotment. On Sept. 22, he wrote repudiating his contract on the ground of the misrepresentation, & on the same day commenced an action for rescission. On Sept. 24, he moved to have the register of members rectified by removing his name therefrom, & on same day a petition for the winding up of the co. was presented, upon which an order was afterwards made. The co. was insolvent & had been so previously to Sept. 22, but had not stopped payment, & was issuing advertisements for applications for shares. Nearly all the debts of the co. had been contracted before Sept. 6:—*Held:* C. was entitled to have his name removed from the register.—*Re* LONDON & LEEDS BANK, LTD., *Ex p.* CARLING, CARLING *v.* LONDON & LEEDS BANK (1887), 56 L. J. Ch. 321, 56 L. T. 115; 35 W. R. 344; 3 T. L. R. 349.

392. —— ——.]—To my mind, it is very frequently an extremely difficult thing for a man who has taken shares or debentures upon the faith of a prospectus, on being asked, "Would you have taken the shares if something had been left out & something else put in?" to give a satisfactory answer, & probably in many cases his true answer would be, "I can hardly answer that question, as I never saw a prospectus with the statement you mention in it" (BYRNE, J.).—DRINCQBIER *v.* WOOD, [1899] 1 Ch. 393; 68 L. J. Ch. 181; 79 L. T. 548; 47 W. R. 252; 15 T. L. R. 18; 43 Sol. Jo. 29; 6 Mans. 76.

Annotations:—**Reld.** Greenwood *v.* Leather Shod Wheel Co., [1900] 1 Ch. 421. **Mentd.** Market *v.* Knight S.S. Co., Sale & Frazar *v.* Knight S.S. Co. (1910), 103 L. T. 369.

393. —— ——.]—The question in this case is whether a person, whose evil reputation in business is such that no man will deal with him, can, after fraudulently concealing his identity & thus inducing another to enter into a contract which he otherwise would not have done, prevent that other, when sued by the defrauding party upon the contract, from insisting upon the ordinary defence of the defrauded—namely, that he had been induced by the fraud of pltf. to enter into the contract sued on (A. L. SMITH, L.J.).

I am by no means prepared to say that the fraud in this case was not material to the contract itself. But whether it be so or not, I will refer to a passage in the judgment of the LORD CHANCELLOR (LORD CHELMSFORD) in the House of Lords in *Smith* v. *Kay*, No. 109, *ante*, when dealing with the contention of the materiality of a representation, which passage is very much in point. He says: "But can it be permitted to a party who has practised deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth?" I apply this to the present case (A. L. SMITH, L.J.).—GORDON *v.* STREET, [1899] 2 Q. B. 641; 69 L. J. Q. B. 45; 81 L. T. 237; 48 W. R. 158; 15 T. L. R. 445; 43 Sol. Jo. 621, C. A.

Annotations:—**Reld.** Peizer *v.* Lefkowitz (1912), 106 L. T. 776; Said *v.* Butt, [1920] 3 K. B. 497. **Mentd.** Wilton *v.* Osborn, [1901] 2 K. B. 110; Sadler *v.* Whiteman, [1910] 1 K. B. 868.

SUB-SECT. 4.—ENTIRETY OF REPRESENTATION.

394. Representee relying on conjoint effect—Need not point to particular statement—Statements in prospectus.]—He had said in a former part of the examination that he thought there were

inconsistencies in the passages in the prospectus, & he was asked to point them out. He says, "I decline to answer the question, the documents speak for themselves." I think he was justified in that. He is not obliged to enter into any argument, to prove on what particular passages of the prospectus he found the impressions which he states he drew" (KINDERSLEY, V.-C.).—NEW BRUNSWICK & CANADA RAILWAY & LAND CO. *v.* MUGGERIDGE (1860), 1 Drew. & Sm. 363; 30 L. J. Ch. 242; 3 L. T. 651; 7 Jur. N. S. 132; 9 W. R. 193; 62 E. R. 418.

Annotations:—**Refd.** Central Ry. of Venezuela *v.* Kisch (1867), L. R. 2 H. L. 99; Henderson *v.* Lacon (1867), L. R. 5 Eq. 249; Kent *v.* Freehold Land & Brickmaking Co. (1867), L. R. 4 Eq. 588; *Re* Overend, Gurney, *Ex p.* Oakes & Peck (1867), L. R. 3 Eq. 576; Chester *v.* Spargo (1868), 16 W. R. 576; Langham *v.* East Wheal Rose Consolidated Silver Lead Mining Co. (1868), 37 L. J. Ch. 253; Scott *v.* Snyder Dynamite Projectile Co. (1892), 66 L. T. 278; Byrne *v.* Millom & Askam Hæmatite Iron Co. (1901), 46 Sol. Jo. 85.

395. —— —— ——.]—ARNISON *v.* SMITH, No. 374, *ante*.

396. —— —— ——.]—(1) Though pltf. had very great difficulty in fastening upon any particular misrepresentation which he could aver had influenced him in taking shares, still nevertheless it was a question whether he was misled by the prospectus as a whole (COLLINS, M.R.).

(2) The highest limit of his damages is the whole extent of his loss, & that loss is measured by the money which was in his pocket & is now in the pocket of the company, that is the ultimate, final, highest standard of loss. But in so far as he got an equivalent for that money, that loss is diminished; & I think, in assessing the damages, *primâ facie* the assets as represented are taken to be the equivalent & no more for the money which was paid. So far as the assets are an equivalent, he is not damaged; so far as they fall short of being an equivalent, in that proportion he is damaged (COLLINS, M.R.).—MCCONNEL *v.* WRIGHT, [1903] 1 Ch. 546; 72 L. J. Ch. 347; 88 L. T. 431; 51 W. R. 661; 10 Mans. 160, C. A.

Annotation:—*As to* (2) **Refd.** Macleay *v.* Tait, [1906] A. C. 24.

397. —— —— —— **& subsequent telegram.**]—ANDREWS *v.* MOCKFORD, No. 376, *ante*.

398. All circumstances must be considered.]—BLOOMENTHAL *v.* FORD, No. 406, *post*.

399. —— **With reference to particular misstatement.**]—In an action or defence, by a shareholder in a joint stock co., on the ground of fraud, it is for the jury to say upon the whole of the evidence, including the prospectus, & the arts. of assocn., & other documents whether there were material & fraudulent misrepresentations, by which the shareholder was really induced to subscribe. If this partly depends upon the sense & meaning in which any statement in the prospectus might fairly be intended to be, or would naturally be understood, then that is for them to consider on the whole of the prospectus, & the other evidence in the case. If the prospectus is ambiguous, & in one sense is consistent with truth, they are bound to construe it in that sense, unless satisfied that it was meant to mislead. But the question, in such a case, is not whether the statements put forth are strictly, literally, or technically correct, nor even whether they are in any degree really incorrect; but whether they are so far substantially false & wilfully so, as that they must be deemed to have been intended to deceive, & to have, in fact, deceived. Thus the wilful publication of the name of a person of credit as a director, without any reason to believe that he is so, or will be so, with intent to induce others to subscribe on the credit of his name, which intent may be inferred from the very use thus made of the name, assuming it to be wilful, may be deemed fraud; but if there was reason to believe that the person would be a director, though, in fact, he never is so, it is not necessarily fraudulent. So as to a statement that all, or so much of the "capital required" has been subscribed. So of the omission in the prospectus of matters disclosed in the articles. In all such cases, the intent & materiality of the misstatement, as well as the fact of a misstatement, must be considered by the jury with a view to judge whether it was fraudulent. Although on that question they may & ought to look at the whole of the prospectus, it must be with reference to some particular statements in it; & they must be satisfied that on some one or more points it was proved.—CLEVELAND IRON CO. *v.* STEPHENSON (1865), 4 F. & F. 428.

400. —— **Each statement viewed in light of other statements.**]—AARON'S REEFS *v.* TWISS, No. 16, *ante*.

SUB-SECT. 5.—TIME OF INDUCEMENT.

401. Need not be at actual moment contract made.]—SMITH *v.* KAY, No. 109, *ante*.

Time of falsity of representation.]—*See* Part III., Sect. 1, sub-sect. 3, *ante*.

SUB-SECT. 6.—PROOF OF.

A. Question of Law or Fact.

402. Question of fact.]—CLEVELAND IRON CO. *v.* STEPHENSON, No. 399, *ante*.

403. ——.]—(1) B. applied for shares in the C. co. on the faith of a prospectus, which stated (*inter alia*) that a certain portion of the capital had been already subscribed, the greater part of this being the paid-up shares given to the promoters. There were other alleged misrepresentations:—*Held*: the questions for the jury were: whether the statements in the prospectus were false in fact & whether defts. knew them to be false, or issued them in honest belief of their truth & whether pltf. was wholly or in any material degree influenced by those statements.

(2) An ambiguous statement if framed & intended to produce a false impression may be false & fraudulent (COCKBURN, C.J.).

(3) If a man makes a statement as to which he has neither knowledge nor belief & makes it for the purpose of deceit, that is fraudulent (COCKBURN, C.J.).—MOORE *v.* BURKE (1865), 4 F. & F. 258; 15 L. T. 118, N. P.

404. ——.]—SMITH *v.* LAND & HOUSE PROPERTY CORPN., No. 27, *ante*.

405. ——.]—AARON'S REEFS *v.* TWISS, No. 16, *ante*.

406. —— **Unless possibility of inducement excluded—Preposterous statement.**]—The ground upon which that is suggested appears to be partly a question of law & partly a question of fact. As to the question of law I confess for myself I entertain a doubt whether it is ever true in a case where one person has been induced to act by the misrepresentation of another that you can go beyond the fact whether it is so or not. In arriving at a conclusion upon this question of fact all the circumstances must be considered. A statement may be made so preposterous in its nature that nobody could believe that anyone was

Sect. 1.—*Inducement: Sub-sect.* 6, *A., B. & C.* (*a*), (*b*) & (*c*).]

misled (LORD HALSBURY, C.).—BLOOMENTHAL *v.* FORD, [1897] A. C. 156; 66 L. J. Ch. 253; 76 L. T. 205; 45 W. R. 449; 13 T. L. R. 240; 4 Mans. 156, H. L.; *revsg.* S. C. *sub nom. Re* VEUVE MONNIER ET SES FILS, LTD., *Ex p.* BLOOMENTHAL, [1896] 2 Ch. 525, C. A.

Annotations:—**Mentd.** *Re* African Gold Concessions & Development Co., Markham & Darter's Case, [1899] 1 Ch. 414; Dixon *v.* Kennaway, [1900] 1 Ch. 833; Gresham Life Assce. Soc. *v.* Crowther, [1914] 2 Ch. 219.

B. Onus of Proof.

407. On representor.]—The vendor had been induced to take the shares by false & fraudulent representations as to the position of the co. These representations were partly made by one of the directors, & were partly contained in a report which was made by the directors to the co., & approved at an annual meeting, & afterwards embodied in a circular issued by the directors inviting subscriptions for new shares:—*Held:* the co. could not be considered to have authorised such a use of the report, nor to be answerable for the misrepresentations contained in it, & whether they could or not, the vendor having had the means of discovering the fraud, & having taken no step to repudiate the contract before the winding-up of the co., but having received dividends on, & made a transfer of, the shares, was not entitled to be relieved from the contract, but must be held to have been a shareholder down to the time of the transfer.

Semble: if the representations contained in the circular could have been considered those of the co., the circumstance of their having been only some of the representations on which the vendor acted, would not have defeated his right to relief; the burden of proving that one of several misrepresentations which led to a contract was not a material inducement to enter into it being on the party who has made such misrepresentation.

Supposing that the reports & other statements of the directors formed a material part of the inducement to him to take the shares, without which the purchase never would have been made, I cannot think that the effect of them is destroyed, because other influences were at the same time at work, which, either innocently or intentionally, contributed to the success of those false representations (LORD CHELMSFORD, C.).—*Re* ROYAL BRITISH BANK, ETC., NICOL'S CASE (1859), 3 De G. & J. 387; 28 L. J. Ch. 257; 33 L. T. O. S. 14; 5 Jur. N. S. 205; 7 W. R. 217; 44 E. R. 1317.

Annotations:—**Refd.** *Re* Joint Stock Co.'s Winding-up Acts 1848, 1849, *Re* Home Counties & General Life Assce. (1859), 33 L. T. O. S. 196; *Re* London & Eastern Banking Corpn., *Ex p.* Longworth's Exors. (1859), 29 L. J. Ch. 55; *Re* National Patent Steam Fuel Co., *Ex p.* Worth (1859), 28 L. J. Ch. 589; *Re* Royal British Bank, Mixer's Case (1859), 4 De G. & J. 575; Conybeare *v.* New Brunswick, etc. Co. (1860), 1 De G. F. & J. 578; *Re* Royal British Bank, *Ex p.* Frowd (1861), 30 L. J. Ch. 322; *Re* Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576; Western Bank of Scotland *v.* Addie, Addie *v.* Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145. **Mentd.** *Re* Mexican & South American Co., Grisewood & Smith's Case, De Pass' Case (1859), 4 De G. & J. 544; *Re* National Assce. & Investment Assocn. (The Bank of Deposit), *Ex p.* Davies, *Ex p.* Abercorn (1862), 31 L. J. Ch. 828; *Re* Scottish & Universal Finance Bank, Ship's Case (1865), 11 Jur. N. S. 331; *Re* Cachar Co., *Ex p.* Lawrence (1867), 36 L. J. Ch. 490; London & Colonial Co., *Ex p.* Tooth's Case (1868), 19 L. T. 599; Spackman *v.* Evans (1868), L. R. 3 H. L. 171.

408. ——.]—SMITH *v.* KAY, No. 109, *ante*.

409. ——.]—Undoubtedly the statement as to the drains acted as an inducement to deft. to deal with the agent. Pltf. had given a written undertaking that they were in a satisfactory state. On the evidence it is clear that the drains were in a very unsatisfactory state indeed. The assurance of pltf. with respect of their condition, though honestly made, was not true in fact. Unless pltf. can show that deft. did not rely on the statement made, it would be unjust & inequitable to force the house on deft. (ROMER, J.).—TOFIELD *v.* ROBERTS (1894), 10 T. L. R. 437.

410. ——.]—A purchaser agreed to buy an estate, upon a statement in the particulars of sale that it lay upon a valuable vein of coal, which vein afterwards proved to have been mostly worked out. Subsequently the purchaser entered into an agreement with a third party to sell the colliery at a price implying the existence of a considerable quantity of coal, & afterwards discovered the fact of the exhaustion of the coal. Where the particulars of sale are likely to mislead, it is incumbent on a vendor to show that the purchaser has not been misled; & where a misrepresentation has been made by a vendor, the ct. applied the rule of *caveat emptor* with great caution:—*Held:* pltf. having failed to show that his misrepresentation did not influence deft. to enter into the agreement, the rule of *caveat emptor* did not apply, & pltf. must be left to his remedy, if any, at law.—COLBY *v.* GADSEN (1867), 17 L. T. 97; 15 W. R. 1185, L. C.

411. On representee.]—Pltf., who was an underwriter of shares, sought to recover damages for non-disclosure of the same agreement as that in *Cackett* v. *Keswick*, No. 594, *post*, of Mar. 10, 1899, in the prospectus, but the circumstances were different. On Mar. 13, 1899, pltf. met a friend who mentioned the co. to him & showed him a draft prospectus. He was attracted by the name of M. & K. on the front sheet, but in his evidence he stated that he did not remember reading anything about the contracts. He signed an underwriting agreement for 250 shares, & gave a cheque for £62 10*s.*, which was returned to him on Mar. 28, as the directors had decided "not to issue" the prospectus before Easter. Another cheque & a signed application form for those shares were sent before the end of Apr.:—*Held:* pltf. signed his underwriting agreement & application for shares before any prospectus had been issued to the public; the incorporation took place on May 24, and the prospectus was issued on May 27; & Cos. Act, 1867 (c. 38), s. 28, was not intended to apply to copies of a prospectus not authorised for publication shown to friends or speculators by way of anticipation of the public. If such persons were deceived they had certain rights, but could not get the benefit of the statute. Moreover, pltf. had failed to prove that he subscribed on the faith that there was no such contract as that of Mar. 10 in existence; & the fact that his commission was payable in shares was insufficient to regard him as "the careful investor." The contract of underwriting with the promoters was wholly different from that with the co. to take shares, & different considerations applied as to the materiality of facts.—BATY *v.* KESWICK (1901), 85 L. T. 18; 50 W. R. 14; 45 Sol. Jo. 672; *sub nom.* CACKETT *v.* KESWICK, BATY *v.* KESWICK, 17 T. L. R. 664.

412. ——.]—SMITH *v.* CHADWICK, No. 106, *ante*.

PART V. SECT. 1, SUB-SECT. 6.—B.

407 i. *On representor.*]—ALLAN *v.* GOTCH (1883), 9 V. L. R. (L.) 371.—**AUS.**

407 ii. ——.]—Where in an action for rescission of a contract on the ground of false representations the misrepresentations are proved, the *onus* lies on deft. to show clearly that they were not acted on.—MANKOVSKY *v.* JACOB (Man.), [1922] 2 W. W. R. 684; 68 D. L. R. 763.—**CAN.**

413. ——.]—CAPEL & CO. *v.* SIM'S SHIPS COMPOSITIONS CO., LTD., No. 432, *post.*

Misrepresentation in prospectus.]—*See* COMPANIES, Vol. IX., p. 110, Nos. 514–516.

C. Presumption of Inducement.

(a) In General.

414. Failure of representee to give evidence—As to fact of inducement—Effect of.]—SMITH *v.* CHADWICK, No. 106, *ante.*

(b) When it arises.

415. Subject-matter known to representor—Unknown to representee.]—If the party to whom the representations were made, himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation & inquiry, & not upon the representations made to him by the other party; or if the means of investigation & verification be at hand, & the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a ct. of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, & thus the notion of reliance on the representations made to him may be excluded. Again, when the ct. is endeavouring to ascertain what reliance was placed on representations, it must consider them with reference to the subject-matter, & the relative knowledge of the parties. If the subject is capable of being accurately known, & one party is, or is supposed to be, possessed of accurate knowledge, & the other is entirely ignorant, & a contract is entered into, after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed, that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, & if the parties making it, & receiving representations on the subject, have equal knowledge, & means of acquiring knowledge, & equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other. —CLAPHAM *v.* SHILLITO (1844), 7 Beav. 146; 49 E. R. 1019.

Annotation:—**Distd.** Roots *v.* Snelling (1883), 48 L. T. 216.

416. Subject-matter uncertain—Parties having equal knowledge.]—CLAPHAM *v.* SHILLITO, No. 415, *ante.*

417. Material representation calculated to induce—Whether inference one of law or fact.]—(1) It is not now necessary, in order to set aside a contract, to prove that the person who obtained it, by material false representation knew at the time the representation was made that it was false, or even made it recklessly & without care.

(2) If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, & in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation (JESSEL, M.R.).—REDGRAVE *v.* HURD (1881), 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251, C. A.

Annotations:—*As to* (1) **Consd.** Newbigging *v.* Adam (1886), 34 Ch. D. 582; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Reld.** *Re* Metropolitan Coal Consumers' Assocn., Karberg's Case, [1892] 3 Ch. 1; Goldrei, Foucard *v.* Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180. *As to* (2) **Consd.** Mathias *v.* Yetts (1882), 46 L. T. 497. **Dbtd.** Roots *v.* Snelling (1883), 48 L. T. 216. **Expld.** Smith *v.* Chadwick (1884), 9 App. Cas. 187. **Consd.** Smith *v.* Land & House Property Corpn. (1884), 28 Ch. D. 7; Hughes *v.* Twisden (1886), 55 L. J. Ch. 481. **Reld.** *Re* Liberian Government Concessions & Exploration Co. (1892), 9 T. L. R. 136; Aaron's Reefs *v.* Twiss, [1896] A. C. 273; Merino *v.* Mutual Reserve Life Insce. (1904), 21 T. L. R. 167; Nash *v.* Calthorpe, [1905] 2 Ch. 237. *Generally,* **Reld.** Mullens *v.* Miller (1882), 22 Ch. D. 194; Davis *v.* Ohrly (1898), 14 T. L. R. 260; Whittington *v.* Seale-Hayne (1900), 82 L. T. 49; *Re* Law, Law *v.* Law (1904), 74 L. J. Ch. 169; Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853; Wells *v.* Smith, [1914] 3 K. B. 722; Compagnie Chemin de Fer Paris-Orleans *v.* Leeston Shipping Co. (1919), 36 T. L. R. 68; Dawsons *v.* Bonnin, [1922] 2 A. C. 413.

418. —— ——.]—MATHIAS *v.* YETTS, No. 358, *ante.*

419. —— ——.]—SMITH *v.* CHADWICK, No. 106, *ante.*

420. —— ——.]—SMITH *v.* LAND & HOUSE PROPERTY CORPN., No. 27, *ante.*

421. —— ——.]—In 1869 P., a member of a firm of solrs., by his advice induced pltf. to invest moneys upon the security of an equitable mtge. of a lease which he represented as renewable, & which had previously been renewed by custom every fourteen years, but the future renewal whereof was prohibited by statute passed in 1868. In 1875, P. fraudulently, & without the knowledge of his partners, gave a legal mtge. of the lease to a third party without notice of pltf.'s mtge. The security proved insufficient, & P. having absconded, pltf. sought to make P.'s firm liable for the loss sustained by him:—*Held:* (1) since the transaction of 1869 was within the ordinary limits of the partnership business, the firm was liable for negligence in respect thereof, but that the remedy against them was barred by the Stat. Limitations; P.'s fraud of 1875 not being committed in the ordinary course of the business, the firm was not liable in respect thereof. (2) *Semble:* the lease was not improperly described as a "renewable lease"; (3) it is an inference of fact, & not a presumption of law, that if a material representation, calculated to induce a person to enter into a contract, is made to him he was thereby induced to enter into the contract.—HUGHES *v.* TWISDEN (1886), 55 L. J. Ch. 481; 54 L. T. 570; 34 W. R. 498; 2 T. L. R. 432.

422. —— ——.]—ARNISON *v.* SMITH, No. 374, *ante.*

423. —— ——.]—In order that a shareholder may succeed in an action against directors of the co. to recover damages on the ground that he had been induced to subscribe for the shares on the faith of a prospectus which did not, as required by Cos. Act, 1867 (c. 31), s. 38, disclose particulars of a contract entered into by the co., he must prove, not merely that the omitted contract was a material one, but also that he has been damaged by the omission. The mere fact that a material contract has not been disclosed in the prospectus raises no presumption of law that pltf. was induced by the omission to take his shares, or would not have taken them if the contract had been disclosed.—NASH *v.* CALTHORPE, [1905] 2 Ch. 237; 74 L. J. Ch. 493; 93 L. T. 585; 21 T. L. R. 587; 12 Mans. 260, C. A.

Annotations:—**Apprvd.** Calthorpe *v.* Trechmann, Macleay *v.* Tait (1905), 75 L. J. Ch. 90. **Consd.** Marshall *v.* Morrison, [1907] W. N. 29.

(c) How rebutted.

424. Investigation of facts by representee—Presumed reliance on investigation.]—CLAPHAM *v.* SHILLITO, No. 415, *ante.*

Sect. 1.—*Inducement: Sub-sect.* 6, *C.* (*c*), *& D. Sect.* 2: *Sub-sects.* 1, 2, 3 *& 4. Sect.* 3.]

425. Representee's knowledge of facts contrary to representation—Words or conduct showing non-reliance on representation.]—REDGRAVE *v.* HURD, No. 417, *ante.*

426. —— ——.]—SMITH *v.* CHADWICK, No. 448, *post.*

427. —— ——.]—ARNISON *v.* SMITH, No. 374, *ante.*

428. Admission that inducement not relied on.]—SMITH *v.* CHADWICK, No. 448, *post.*

429. ——.]—ARNISON *v.* SMITH, No. 374, *ante.*

D. Evidence.

See, generally, EVIDENCE, Vol. XXII., pp. 19 *et seq.*

430. Admissibility—Declarations of representee—At time of transaction.]—In case for a false representation of the solvency of A., whereby pltfs. trusted him with goods: their declarations, at the time, that they trusted him in consequence of the representation are admissible in evidence for them.—FELLOWES *v.* WILLIAMSON (1829), Mood. & M. 306, N. P.

431. Sufficiency—"Having now seen prospectus"—Letter on application for shares.]—(1) On the whole, I think the evidence is irresistible that pltf.'s contention that he was induced by the prospectus . . . is not a genuine contention; & that the expression in his letter of Feb. 7, "Having now seen the prospectus," falls short of proof that he was induced by the statements in it as to success & realised profits to apply for the shares he took (DENMAN, J.).

(2) I cannot agree with him [LOPES, J.] that the construction of the document was for the jury. I think it was for the judge & not for the jury to say whether, with reference to the surrounding circumstances, the statements in question were expressions of hope or belief only or statements of existing facts (DENMAN, J.).—BELLAIRS *v.* TUCKER (1884), 13 Q. B. D. 562, D. C.

Annotations:—Generally, **Refd.** Edgington *v.* Fitzmaurice (1885), 29 Ch. D. 459; *Re* London & Leeds Bank, *Ex p.* Carling, Carling *v.* London & Leeds Bank (1887), 56 L. J. Ch. 321.

432. —— **Statement on oath of representee—Ambiguous representation.**]—He may succeed by showing that he was misled by statements proved to be inconsistent with the truth couched in language capable of more than one interpretation, but as regards any such statements he is not entitled to say "This must have been the meaning & this is false"; he must prove that he so understood it & relied on it as having that meaning. & his mere oath is not sufficient; it must be a reasonable understanding (KEKEWICH, J.).—CAPEL & CO. *v.* SIM'S SHIPS COMPOSITIONS CO., LTD. (1888), 57 L. J. Ch. 713; 58 L. T. 807; 36 W. R. 689; 4 T. L. R. 458.

Annotation:—**Refd.** Arnison *v.* Smith (1889), 41 Ch. D. 348.

SECT. 2.—MATERIALITY.

SUB-SECT. 1.—IN GENERAL.

433. Definition of materiality—Representation naturally calculated to induce.]—SMITH *v.* CHADWICK, No. 106, *ante.*

In prospectus of company.]—*See* COMPANIES, Vol. IX., pp. 120 *et seq.*

In contracts of insurance.]—*See* INSURANCE, Vol. XXIX., pp. 79, 163–174, 351–358, Nos. 383, 1195–1310, 2842–2900.

SUB-SECT. 2.—NECESSITY FOR.

434. Representation must be on material point.]—GLAMORGANSHIRE IRON & COAL CO. *v.* IRVINE, No. 195, *ante.*

435. ——.]—MATHIAS *v.* YETTS, No. 358, *ante.*

436. ——.]—SMITH *v.* CHADWICK, No. 106, *ante.*

437. —— **General misrepresentations insufficient.**]—Suspension against a charge upon a bond, on the ground of fraud by the charger in obtaining it. The alleged fraud consisted of unfounded representations of circumstances generally, without any direct reference to the bond, which was admitted not to have been elicited by resp. Judgment that the bond was valid, & this decision affirmed upon appeal.—WEBSTER *v.* CHRISTIE (1813), 1 Dow, 247; 3 E. R. 688, H. L.

——.]—*See* INSURANCE, Vol. XXIX., pp. 50–52, 160, 161, 353–355, 358, 359, Nos. 130–151, 1164–1170, 2857–2866, 2902, 2903.

438. Belief of materiality—Not sufficient.]—I do not think the non-disclosure of a fact, which is material in the mind of deft., is enough (CROMPTON, J.).—BEACHEY *v.* BROWN (1860), E. B. & E. 796; 1 L. T. 479; 24 J. P. 518; 6 Jur. N. S. 345; 8 W. R. 292; 120 E. R. 706; *sub nom.* BEECHEY *v.* BROWN, 29 L. J. Q. B. 105.

Annotation:—**Refd.** Baker *v.* Cartwright (1861), 10 C. B. N. S. 124.

Stay of arbitration proceedings on ground of fraud.]—*See* ARBITRATION, Vol. II., p. 369, Nos. 357–359.

Misrepresentation in prospectus.]—*See* COMPANIES, Vol. IX., p. 117, No. 572.

Representation giving rise to estoppel.]—*See, generally,* ESTOPPEL, Vol. XXI., pp. 400–402, Nos. 1605–1618.

SUB-SECT. 3.—PERSONAL CONSIDERATIONS CONSTITUTING MATERIALITY.

439. General rule.]—Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract; not so where the person sought to be bound would have been equally willing to make the same contract with any other person.—SMITH *v.* WHEATCROFT (1878), 9 Ch. D. 223; 47 L. J. Ch. 745; 39 L. T. 103; 27 W. R. 42.

Annotations:—**Consd.** Nash *v.* Dix (1898), 78 L. T. 445 **Distd.** Phillips *v.* Brooks, [1919] 2 K. B. 243. **Consd.** Said *v.* Butt, [1920] 3 K. B. 497. **Refd.** Gordon *v.* Street, [1899] 2 Q. B. 641. **Mentd.** Berners *v.* Fleming, [1925] Ch. 264.

440. Statements as to present or late ownership—Property of deceased gentleman.]—The auction at which the horse was sold purported to be "a sale of goods & effects of a gentleman deceased at his house in the country by order of his exors." Upon this many people would attend on a supposition that the goods were necessary to be sold

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PART V. SECT. 2, SUB-SECT. 1.

433 i. *Definition of materiality—Representation naturally calculated to induce.*]—YOUNG *v.* SMITH (1915), 30 W. L. R. 642; 21 D. L. R. 97; 7 W. W. R. 1355.—**CAN.**

PART V. SECT. 2, SUB-SECT. 2.

434 i. *Representation must be on material point.*]—FLEMING *v.* BONNIE (1909), 10 W. L. R. 50; 2 Sask. L. R. 30.—**CAN.**

434 ii. ——.]—DART *v.* ROGERS (1911), 21 Man. L. R. 721.—**CAN.**

434 iii. ——.]—CANADA FOOD CO., LTD. *v.* STANFORD (1917), 50 N. S. R. 252.—**CAN.**

at all events (LORD MANSFIELD).—BEXWELL *v.* CHRISTIE (1776), 1 Cowp. 395; 98 E. R. 1150.

Annotations:—**Mentd.** Twining *v.* Morrice (1788), 2 Bro. C. C. 326; Howard *v.* Castle (1796), 6 Term Rep. 642; Smith *v.* Clarke (1806), 12 Ves. 477; Crowder *v.* Austin (1826), 11 Moore, C. P. 283; Green *v.* Baverstock (1863), 14 C. B. N. S. 204.

441. —— Property of well-known collector.]—The agent of the vendor of a picture knowing that the purchaser laboured under a delusion, with respect to the picture which materially influenced his judgment, permitted him to make the purchase without removing that delusion:—*Held:* the sale was void.

He saw that deft. had fallen into a delusion in supposing the picture to be Sir Felix Agar's & yet he did not remove it (LORD ELLENBOROUGH).—HILL *v.* GRAY (1816), 1 Stark. 434, N. P.

Annotations:—**Apld.** Pilmore *v.* Hood (1838), 5 Bing. N. C. 97. **Distd.** Keates *v.* Cadogan (1851), 10 C. B. 591. **Consd.** Peek *v.* Gurney (1873), L. R. 6 H. L. 377. **Refd.** Gregg *v.* Wells (1839), 3 Jur. 555; Said *v.* Butt, [1920] 3 K. B. 497. **Mentd.** Smith *v.* Hughes (1871), 40 L. J. Q. B. 221.

—— ——.]—*See* No. 114, *ante*.

442. —— Vendor representing himself as agent for another.]—It is no defence to a bill for specific performance by the vendor, that during the treaty he falsely assumed the character of agent for another, when, in fact, he was dealing on his own behalf, & that he thereby deceived the purchaser as to the party with whom the contract was made, provided the purchaser does not show that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise.—FELLOWES *v.* GWYDYR (LORD) (1829), 1 Russ. & M. 83; 39 E. R. 32, L. C.

Annotation:—**Refd.** Said *v.* Butt, [1920] 3 K. B. 497.

443. —— Misrepresentation on sale of animal.]—JOYNSON *v.* OLDFIELD (1847), 9 L. T. O. S. 222.

—— ——.]—*See* ANIMALS, Vol. II., p. 263, Nos. 415, 416.

444. Statement by person purchasing on behalf of another—Purporting to act on his own behalf.]—ARCHER *v.* STONE, No. 362, *ante*.

445. —— ——.]—In 1895 defts., who were trustees of a Congregational chapel, put up for sale by public auction a building, which had formerly been used as their chapel. The conditions of sale imposed no restrictions on the user of the building. After the sale C. made an offer for the building, but defts. declined to accept it, on the ground that it was made on behalf of a committee of Roman Catholics, who intended to use the building as a Roman Catholic place of worship, & defts. objected to sell for that purpose. The committee then told pltf., who was the manager of a mineral water co., that if he could get the property they would buy it of him at £100 profit. Pltf.'s solrs. wrote to defts.' agent, making an offer for the property "on behalf of our client, the manager of the E. Mineral Water co." After some negotiations, a contract was signed by defts. for sale of the building to pltf. at £1,025 a price less than C.'s offer. No direct statement was made that pltf. was buying for the co., but it was admitted that defts., during the negotiations, believed that he was, & that pltf. knew it. Pltf. signed the contract as principal without protest from defts.' agent. Defts. refused to complete on the ground that pltf. was buying as agent, for the Roman Catholic committee, to whom he knew they would not sell, & had obtained the contract by misrepresentation:—*Held:* pltf. was not buying as agent for the Roman Catholic committee, but for himself with a view to resell to them at a profit; the misrepresentation as to the mineral water co. was immaterial because the vendors did not care whether they sold to the co. or pltf., & as between them no consideration of the person with whom they were contracting entered as an element into the contract.—NASH *v.* DIX (1898), 78 L. T. 445.

Annotation:—**Apld.** Dyster *v.* Randall, [1926] Ch. 932.

446. Negotiation for loan—Lender having bad business reputation—Concealment of identity.]—GORDON *v.* STREET, No. 393, *ante*.

In prospectus of company.]—*See* COMPANIES, Vol. IX., p. 115, Nos. 555–559.

SUB-SECT. 4.—PROOF OF.

See, generally, EVIDENCE, Vol. XXII., pp. 19 *et seq.*

447. Sufficiency — Proof of inducement.]—SMITH *v.* KAY, No. 109, *ante*.

448. —— Triviality of statement.]—(1) If a statement, although untrue to the knowledge of defts. is so trivial that it could not in the opinion of the ct. have influenced the conduct of pltf., it will not support an action for deceit.

(2) Even then you may show that in fact he did not do so [act on inducement] & in one of two ways; either by showing that he knew the truth before he entered into the contract, & therefore could not rely on the misstatements; or else by showing that he avowedly did not rely on them, whether he knew the facts or not (JESSEL, M.R.).—SMITH *v.* CHADWICK (1882), 20 Ch. D. 27; 51 L. J. Ch. 597; 46 L. T. 702; 30 W. R. 661, C. A.; *affd.* (1884), 9 App. Cas. 187, H. L.

Annotations: *As to* (1) **Refd.** McKeown *v.* Boudard-Peveril Gear Co. (1896), 65 L. J. Ch. 735. *As to* (2) **Consd.** Hughes *v.* Twisden (1886), 55 L. J. Ch. 481. **Apld.** Arnison *v.* Smith (1889), 41 Ch. D. 348. **Consd.** Andrews *v.* Mockford (No. 1) (1896), 73 L. T. 726. **Refd.** Edgington *v.* Fitzmaurice (1885), 29 Ch. D. 459; *Re* London & Leeds Bank, *Ex p.* Carling, Carling *v.* London & Leeds Bank (1887), 56 L. J. Ch. 321; Moore *v.* Explosives Co. (1887), 56 L. J. Q. B. 235; Capel *v.* Sam's Ships Compositions Co. (1888), 57 L. J. Ch. 713; Derry *v.* Peek (1889), 14 App. Cas. 337; Glasier *v.* Rolls (1889), 42 Ch. D. 436; Knox *v.* Hayman (1892), 67 L. T. 137; Cackett *v.* Keswick, [1902] 2 Ch. 456; Nash *v.* Calthorpe, [1905] 2 Ch. 237; Macleay *v.* Tait, [1906] A. C. 24. *Generally,* **Refd.** Bellairs *v.* Tucker (1884), 13 Q. B. D. 562; Smith *v.* Reed (1886), 2 T. L. R. 442; Angus *v.* Clifford, [1891] 2 Ch. 449; *Re* Metropolitan Coal Consumers' Assocn., Karberg's Case (1892), 66 L. T. 700; Greenwood *v.* Leather Shod Wheel Co., [1900] 1 Ch. 421; Broome *v.* Speak, [1903] 1 Ch. 586; Shepheard *v.* Bray, [1906] 2 Ch. 235; Pearson *v.* Dublin Corpn., [1907] A. C. 351; Tackey *v.* McBain, [1912] A. C. 186; Bisset *v.* Wilkinson (1926), 42 T. L. R. 727.

Admissibility - Opinion of underwriters.]—*See* INSURANCE, Vol. XXIX., pp. 174, 175, Nos. 1312–1316.

SECT. 3.—ALTERATION OF POSITION.

449. Consequent upon false statement — Made with intention to induce.]—TAYLOR *v.* ASHTON, No. 222, *ante*.

450. —— ——.]—MURRAY *v.* MANN, No. 177, *ante*.

451. —— ——.]—BEHN *v.* KEMBLE, No. 180, *ante*.

452. —— Made with knowledge of untruth.]—DENTON *v.* GREAT NORTHERN RY. CO., No. 179, *ante*.

453. —— Estoppel of representor.]—A lessee granted a mtge. by way of sub-demise for the residue of the term comprised in his lease except the last three days thereof before Conveyancing Act, 1881 (c. 41). He subsequently granted a sub-lease of the mtged. premises to G., without the consent of the mtgee.; & this sub-lease contained

Sect. 3.—*Alteration of position.* *Part VI. Sects.* 1 & 2: *Sub-sects.* 1, 2 & 3. *Sect.* 3: *Sub-sects.*

a provision for re-entry in case the sub-lessee became bkpt. The mtgee. foreclosed, & after the foreclosure received the rent from G. G. granted another underlease with the licence of the mtgee. In the licence it was stated that the reversion expectant on the determination of G.'s term was vested in the mtgee. The mtgee. subsequently assigned his interest to pltf. G. having become bkpt. pltf. claimed a right to determine the sub-lease granted to G.:—*Held:* G. & his underlessee having altered their positions on the faith of representations made by the mtgee., G.'s lease was subsisting, pltf., who stood in the shoes of the mtgee., was estopped from disputing its validity.—KEITH *v.* GANCIA (R.) & CO., LTD., [1904] 1 Ch. 774; 73 L. J. Ch. 411; 90 L. T. 395; 52 W. R. 530; 20 T. L. R. 330; 48 Sol. Jo. 329, C. A.

Annotation:—**Mentd.** Anderson *v.* Equitable Assce. Soc. of United States (1926), 134 L. T. 557.

454. Issue of share certificate—On faith of invalid transfer.]—Where a duly authenticated share certificate is issued by a co. to a transferee, who, on the faith of it, enters, *bonâ fide*, into a contract of sale which he is bound to fulfil, the co. is estopped from denying that the transferee is proprietor of the shares, so that, should the co. refuse to register the purchasers from the transferee, the co. become liable to make good the loss sustained by him in consequence.

Resp. T. had sent in a transfer of certain shares in applt. co. & had received from them a certificate stating he was the proprietor of those shares. This transfer was fraudulently executed by a former proprietor, who had previously transferred them. T. afterwards sold the shares but applt. co. refused to register the purchaser as there had been a prior certified transfer. T. who acted in good faith throughout had consequently to make good the loss at the cost of £717 10*s.*:—*Held:* T. was entitled to recover the sum from the co.—BALKIS CONSOLIDATED CO. *v.* TOMKINSON, [1893] A. C. 396; 63 L. J. Q. B. 134; 69 L. T. 598; 42 W. R. 204; 9 T. L. R. 597; 37 Sol. Jo. 729; 1 R. 178, H. L.; *affg.* S. C. *sub nom.* TOMKINSON *v.* BALKIS CONSOLIDATED CO., [1891] 2 Q. B. 614, C. A.

Annotations:—**Apld.** Dixon *v.* Kennaway, [1900] 1 Ch. 833. **Distd.** Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854. **Reld.** *Re* Concessions Trust, McKay's Case (1896), 65 L. J. Ch. 909; Sheffield Corpn. *v.* Barclay, [1903] 2 K. B. 580; Ruben *v.* Great Fingall Consolidated, [1906] A. C. 439; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489. **Mentd.** Rainford *v.* Keith, James & Blackman Co., [1905] 2 Ch. 147.

455. Commission of criminal offence—Induced by misrepresentation that offence lawful.]—Where a person is induced by the fraudulent misrepresentation of another to do an act which, in consequence of such misrepresentation, he believes to be neither illegal nor immoral, but which is in fact a criminal offence, he has a right of action against the person so inducing him for damages sustained by him in consequence of his having done such act.—BURROWS *v.* RHODES, [1899] 1 Q. B. 816; 68 L. J. Q. B. 545; 80 L. T. 591; 63 J. P. 532; 48 W. R. 13; 15 T. L. R. 286; 43 Sol. Jo. 351.

Annotations:—**Mentd.** Leslie *v.* Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652; Weld-Blundel *v.* Stephens, [1920] A. C. 956.

"Making good" representation.] — *See* Part VII., Sect. 3, *post.*

Necessity for proof of damage—In action for fraud.]—*See* Part VIII., Sect. 1, sub-sect. 2, B., *post.*

Warrant of authority.]—*See* AGENCY, Vol. I., pp. 660–664, Nos. 2765–2790.

Representation implying a request.]—*See* BANKERS, Vol. III., pp. 125, 126, 276, Nos. 24, 25, 862.

Estoppel.]—*See* ESTOPPEL, Vol. XXI., pp. 300–305, Nos. 1082–1112.

Gift induced by innocent misrepresentation.]—*See* GIFTS, Vol. XXV., p. 523, No. 163.

Sale of goods.]—*See* SALE OF GOODS.

Sale of land.]—*See* SALE OF LAND.

Part VI.—Who are deemed Parties to the Representation.

SECT. 1.—IN GENERAL.

Companies.]—*See* COMPANIES, Vol. IX., pp. 624, 625, Nos. 4137–4141.

Corporations.]—*See* CORPORATIONS, Vol. XIII., p. 415, No. 1346.

Infant.]—*See* INFANTS, Vol. XXVIII., pp. 175–178, Nos. 360–380.

Representative of representator.]—*See* EXECUTORS, Vol. XXIV., pp. 649–651, Nos. 6763–6771.

Representative of representee.]—*See* EXECUTORS, Vol. XXIII., p. 296, No. 3621.

Husband—Fraud of wife.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 216, 217, Nos. 1882–1886.

Sheriff.]—*See* EXECUTION, Vol. XXI., p. 547, No. 1227.

Parties to proceedings for rescission.]—*See* Part IX., Sect. 4, *post.*

Agents generally.] — *See* AGENCY, Vol. I., pp. 587–593, Nos. 2245–2273.

When agent's knowledge imputed to principal.]—*See* AGENCY, Vol. I., pp. 610–614, Nos. 2393–2426.

Bankers.]—*See* BANKERS, Vol. III., pp. 161, 163, 212, Nos. 236, 239, 247, 526.

Officers of companies.]—*See* COMPANIES, pp 484–487, 530–532, Nos. 3179–3197, 3501–3513.

Insurance agent.]—*See* INSURANCE, Vol. XXIX., pp. 58–63, Nos. 189–220.

Apprentice.]—*See* MASTER & SERVANT, Vol. XXXIV., p. 521, No. 4398.

Servants.]—*See* MASTER & SERVANT. Vol. XXXIV., pp. 136, 137, Nos. 1056–1062.

Liability of innocent partner for fraud of partner.]—*See* PARTNERSHIP; SOLICITORS.

SECT. 2.—THE REPRESENTOR.

SUB-SECT. 1.—LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT.

See, generally, AGENCY, Vol. I., pp. 267 *et seq.*; SALE OF GOODS; SHIPPING.

SUB-SECT. 2.—LIABILITY OF AGENT.

456. For acts of co-agents.]—To what extent are agents liable for the frauds of their co-agents committed in respect of acts which they know that those co-agents are about to perform? I conceive the general law to be this, that the persons responsible for a fraud, are of two classes.

First, the actual perpetrators of the fraud, the authors of it, the agents who commit it, the parties to it; those who concur in it, who either do something to produce the fraudulent result, or abstain from doing something, which they are under an obligation to the deceived person to do in order to prevent fraud. Secondly, the principal for whom an agent in the performance of his duties as agent commits the fraud is also responsible. But, as a general rule, I think that one agent is not responsible for the acts of another agent, unless he does something by which he makes himself a principal in the fraud (FRY, J.).—CARGILL *v.* BOWER (1878), 10 Ch. D. 502; 47 L. J. Ch. 649; 38 L. T. 779; 26 W. R. 716.

Annotations:—**Mentd.** Symonds *v.* City Bank (1886), 34 W. R. 364; Capel *v.* Sim's Ships Compositions Co. (1888), 57 L. J. Ch. 713; Lewis & Lewis *v.* Durnford, [1907] 24 T. L. R. 64; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762; Falcon *v.* Famous Players Film Co., [1926] 1 K. B. 393.

For own acts.]—*See, generally,* AGENCY, Vol. I., pp. 591, 592, 596, 685, 686, Nos. 2267, 2268, 2288, 2946–2955.

—— **As between principal & agent.**] — *See* AGENCY, Vol. I., pp. 467–470, Nos. 1522–1541.

—— **Breach of warranty of authority.**]—*See* AGENCY, Vol. I., pp. 657–664, Nos. 2748–2790.

—— **Company directors.**]—*See* COMPANIES, Vol. IX., pp. 484–487, Nos. 3179–3197.

——.]—*See, also,* SHIPPING, STOCK EXCHANGE.

Joinder of parties—For discovery.]—*See* DISCOVERY, Vol. XVIII., pp. 44–46, Nos. 24–47.

For costs.]—*See* PRACTICE.

Solicitors as agents.]—*See* SOLICITORS.

SUB-SECT. 3.—LIABILITY OF JOINT REPRESENTORS.

457. All parties to representation jointly liable.] —A., having been bail for D., went accompanied by B. & C. to the lodgings of D., telling her that B. & C. were officers who would take her to gaol if she did not give him security for his debt. B. & C. were not officers, & had no authority to take D. D. gave A. a number of articles, & signed a paper stating that the articles were deposited with A. for security, & that he might sell them if he was not paid in forty-two days:—*Held:* D. might recover the value of the articles in trover; & as B., C. & D. acted in concert, the verdict must pass against all three, although it appeared that C. & D. never had any of the goods.—BLOOMFIELD *v.* BLAKE (1833), 6 C. & P. 75, N. P.

458. —— Principal authorising agent's misrepresentation.]—In an action which was in form for a fraudulent conspiracy between defts. L. & H., by which it was alleged that money had been obtained from pltf., the jury negatived the alleged conspiracy, but found that pltf. had advanced money to L. on the faith of certain misrepresentations, most of which were made by L. as agent for H., & with his authority:—*Held:* pltf. was entitled to recover, notwithstanding the form of the action.—SHICKLE *v.* LAWRENCE (1886), 2 T. L. R. 776, C. A.

—— ——.]—*See, also,* AGENCY, Vol. I., pp. 685, 686, Nos. 2946–2949.

—— **Company directors.**]—*See* COMPANIES, Vol. IX., pp. 122, 123, 485, Nos. 629, 3181.

—— **Partners.**]—*See* PARTNERSHIP.

Liability of joint tortfeasors.]—*See* TORT.

459. Effect of release of one.] — Pltf., having released the principal in a fraud, cannot go on against the other parties, though they would have been secondarily liable.—THOMPSON *v.* HARRISON (1787), 2 Bro. C. C. 164; 1 Cox, Eq. Cas. 344; 29 E. R. 94, L. C.

Annotations:—**Refd.** Tamlyn *v.* Reynolds (1842), 7 Jur. 166. **Mentd.** Rowland *v.* Witherden (1851), 3 Mac. & G. 568.

460. Becoming party subsequently—With notice of representation.]—Where fraudulent representations have been made by the promoters & directors of a proposed co.; one who becomes a director subsequent to such representations with notice thereof, & continues to act, makes himself liable. —BEECHING *v.* LLOYD (1855). 3 Drew. 227; 3 Eq. Rep. 737; 24 L. J. Ch. 679; 25 L. T. O. S. 62; 1 Jur. N. S. 769; 3 W. R. 364; 61 E. R. 890.

Annotations:—**Mentd.** Ellis *v.* Bedford, [1899] 1 Ch. 494; Markt *v.* Knight S.S. Co., Sale & Frazar *v.* Knight S.S. Co., [1910] 2 K. B. 1021.

461. All joint representors need not be made defendants.]—Where a bill is filed for relief in respect of a fraud alleged to have been committed by several persons, it is not necessary that all the persons charged with the fraud should be made defts.—SEDDON *v.* MOULT (1840), 10 Sim. 79; 59 E. R. 542; *sub nom.* SEDDON *v.* CONNELL, SAME *v.* MOULT, SAME *v.* EVANS, 9 L. J. Ch. 341.

SECT. 3.—THE REPRESENTEE.

SUB-SECT. 1.—PERSONS TO WHOM REPRESENTATION MADE.

462. General rule.]—BARRY *v.* CROSKEY, No. 370, *ante.*

SUB-SECT. 2.—PERSON TO WHOM REPRESENTATION INTENDED TO BE PASSED ON.

463. General rule.]—POLHILL *v.* WALTER, No. 338, *ante.*

464. ——.] — A sufficient cause of action against deft. was disclosed, the damage being a consequence of the fraud, whilst the instrument was in the possession of a party to whom deft.'s representation was either directly or indirectly communicated & for whose use he knew the instrument was purchased.—LEVY *v.* LANGRIDGE (1838), 4 M. & W. 337; 150 E. R. 1458; *sub nom.* LEVI *v.* LANGRIDGE, 1 Horn & H. 325; 7 L. J. Ex. 387, Ex. Ch.; *affg.* S. C. *sub nom.* LANGRIDGE *v.* LEVY (1837), 2 M. & W. 519.

Annotations:—**Apld.** Pilmore *v.* Hood (1838), 5 Bing. N. C. 97. **Consd.** Winterbottom *v.* Wright (1842), 10 M. & W. 109; Gerhard *v.* Bates (1853), 2 E. & B. 476; Blakemore *v.* Bristol & Exeter Ry. (1858), 8 E. & B. 1035. **Distd.** Eastwood *v.* Bain (1858), 3 H. & N. 738. **Consd.** Collins *v.* Cave (1859), 4 H. & N. 225. **Apld.** Barry *v.* Croskey (1861), 2 John. & H. 1; George *v.* Skivington (1869), L. R. 5 Exch. 1; Swift *v.* Winterbotham (1873), L. R. 8 Q. B. 244. **Consd.** Peek *v.* Gurney (1873), L. R. 6 H. L. 377; Hosegood *v.* Bull & Kingdom (1876), 36 L. T. 617; Heaven *v.* Pender (1883), 11 Q. B. D. 503; ...cker *v.* Lake & Elliot (1912), 106 L. T. 533. **Refd.** Keates *v.* Cadogan (1851), 10 C. B. 591; Longmeid *v.* Holliday (1851), 6 Exch. 761; Farrant *v.* Barnes (1862), 11 C. B. N. S. 553; The Norway (1864), Brown. & Lush. 226; Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213; Mullett *v.* Mason (1866), Har. & Ruth. 779; Collis *v.* Selden (1868), L. R. 3 C. P. 495; Thompson *v.* Lucas (1868), 17 W. R. 520; Francis *v.* Cockerell (1870), 10 B. & S. 950; Cattle *v.* Stockton Waterworks Co. (1875), L. R. 10 Q. B. 453; Smith *v.* Green (1875), 24 W. R. 142; West London Commercial Bank *v.* Kitson (1884), 50

PART VI. SECT. 2, SUB-SECT. 3.

457 1. ***All parties to representation jointly liable.***] — Where a married woman joined with her husband in making misrepresentations to the exor. of a deceased person in order to obtain possession of a chattel belonging to the testator:—*Held:* she was responsible for such misrepresentation equally with a person *sui juris.*—BLAIN *v.* TERRYBERRY (1865), 11 Gr. 286.—CAN.

Sect. 3.—*The representee: Sub-sects.* 2 *&* 3. *Sect.* 4. *Part VII. Sects.* 1, 2 *&* 3. 3: *Sub-sects.* 1 *&* 2, *A. & B.*]

L. T. 656; Wilkinson *v.* Downton, [1897] 2 Q. B. 57; Tallerman *v.* Dowsing Radiant Heat Co., [1900] 1 Ch. 1; Earl *v.* Lubbock (1904), 74 L. J. K. B. 121; Cavalier *v.* Pope, [1906] A. C. 428; Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94. **Mentd.** Brown *v.* Edgington (1841), 2 Scott, N. R. 496; Howard *v.* Shepherd (1850), 9 C. B. 297; Collett *v.* L. & N. W. Ity. (1851), 16 Q. B. 984; Hadley *v.* Baxendale (1854), 18 Jur. 358; Rogers *v.* Rajendro Dutt (1860), 13 Moo. P. C. C. 209; Dutton *v.* Powles (1861), 7 Jur. N. S. 725; Playford *v.* United Kingdom Electric Telegraph Co. (1867), 17 L. T. 243; Jackson *v.* Watson (1909), 78 L. J. K. B. 587; Janvier *v.* Sweeney, [1919] 2 K. B. 316.

465. ——.]—BARRY *v.* CROSKEY, No. 370, *ante*.

466. Intended for one person—Taking effect on another.] — (1) Relief against fraud, intended against one person, taking effect upon another.

(2) Concurrent jurisdiction in equity; where the law cannot give so speedy & effectual relief.—CLIFFORD *v.* BROOKE (1806), 13 Ves. 131; 33 E. R. 244, L. C.

Annotation:—*As to* (1) **Reld.** Clark *v.* Hoskins (1868), 37 L. J. Ch. 561.

467. Knowledge of representor — That representation passed on.]—Deft. being about to sell a public-house, falsely represented to B., who had agreed to purchase it, that the receipts were £180 a month; B. having, to the knowledge of deft. communicated this representation to pltf., who became the purchaser instead of B.:—*Held:* an action lay against deft. at the suit of pltf.

There arises the question whether a party having entered into a contract the effect of which would be likely to be influenced by such a representation shall be deemed to have committed no fraud if the contract be transferred to a third person. It appears to me that there could not be a much grosser fraud than in this party standing by & allowing a second contract to be entered into under the circumstances stated (VAUGHAN, J.).—PILMORE *v.* HOOD (1838), 5 Bing. N. C. 97; 7 Dowl. 136; 1 Arn. 390; 6 Scott, 827; 8 L. J. C. P. 11; 2 Jur. 991; 132 E. R. 1042.

Annotation:—**Reld.** *Re* Royal British Bank, etc., Nicol's Case (1859), 3 De G. & J. 387.

Representations by banks as to credit.]—*See* BANKERS, Vol. III., pp. 163, 164, Nos. 250–253.

On sale of goods.]—*See* SALE OF GOODS.

Position of innocent parties.]—*See* Part XI., *post*; &, *also*, Part VII., Sect. 3, *post*.

SUB-SECT. 3.—REPRESENTATION MADE TO A CLASS OF PERSONS.

Intending purchasers—Auction announced as without reserve.]—*See* AUCTION & AUCTIONEERS, Vol. III., pp. 12, 13, Nos. 87–90.

Intending passengers — By time table.] — *See* CARRIERS, Vol. VIII., pp. 99, 100, Nos. 665–668.

Shareholders of company.]—*See* COMPANIES, Vol. IX., pp. 123, 124, Nos. 630–635.

Reports of companies.]—*See* COMPANIES, Vol. IX., pp. 486, 487, Nos. 3191–3197.

To underwriters of insurance policy.] — *See* INSURANCE, Vol. XXIX., pp. 162, 163, Nos. 1179–1186.

To public.]—*See* BILLS OF EXCHANGE, Vol. VI., p. 22, No. 118; COMPANIES, Vol. IX., pp. 123, 252–254, Nos. 630, 631, 1570–1576.

See, also, CONTRACT, Vol. XII., pp. 55–58, Nos. 308–324.

SECT. 4.—**MISREPRESENTATION OF AUTHORITY.**

See AGENCY, Vol. I., pp. 653, 654, 657–667, Nos. 2712–2719, 2748–2805.

Part VII.—Remedies for Misrepresentation.

SECT. 1.—**IN GENERAL.**

468. Damages & rescission alternative.]—Deft. contracted to sell an inn to pltf. & in the treaty represented to him that the agreement under which the tenant in possession held it was a void agreement & that he would give pltf. possession at Michaelmas following. He had in fact given the tenant notice to quit at that time; the tenant did not quit. These representations were proved by witnesses:—*Held:* pltf. was entitled to be released from the agreement, or that he might at his election perform it & have compensation.—BESANT *v.* RICHARDS (1830), Taml. 509; 48 E. R. 203.

469. ——.]—CLARKE *v.* DICKSON, No. 742, *post*.

470. ——.] — Pltf. cannot at the same time claim to have the lease declared void & to make deft. liable for use & occupation (JESSEL, M.R.).—LEMPRIERE *v.* LANGE (1879), 12 Ch. D. 675: 41 L. T. 378; 27 W. R. 879.

Annotations:—**Mentd.** *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109; Woolf *v.* Woolf, [1899] 1 Ch. 343; Stocks *v.* Wilson, [1913] 2 K. B. 235; Leslie *v.* Sheill, [1914] 3 K. B. 607.

471. Action on contract induced by fraud — Damages for deceit not recoverable—Unless contract repudiated.]—SELWAY *v.* FOGG, No. 615, *post*.

SECT. 2.—**FRAUD.**

SUB-SECT. 1.—ACTION FOR DAMAGES.

See Part VIII., *post*.

SUB-SECT. 2.—RESCISSION.

See Part IX., Sect. 1, sub-sect. 2, B., C., *post*.

SUB-SECT. 3.—INJUNCTION.

See, generally, INJUNCTION, Vol. XXVIII., pp. 361 *et seq*.

Fraudulent use of name.]—*See* INJUNCTION, Vol. XXVIII., pp. 484–486, Nos. 896–905.

In partnership matters.]—*See* PARTNERSHIP.

Passing off action.]—*See* TRADE & TRADE UNIONS.

PART VII. SECT. 1.

471 l. *Action on contract induced by fraud—Damages for deceit not recoverable—Unless contract repudiated.*]—Without a rescission of a contract, there can be no recovery of amounts paid under it by one party on the ground of alleged misrepresentation by the other party inducing the contract.—YASNE *v.* KRONSON (1907), 7 W. L. R. 119; 17 Man. L. R. 301.—CAN.

SECT. 3.—INNOCENT MISREPRESENTATION.

SUB-SECT. 1.—IN GENERAL.

472. General rule—Remedy lies in rescission—Not in damages.]—A statement may form part of a contract which the party making it promises to be true, or it may be an innocent misrepresentation of fact which he does not promise to be true, but which, if it was untrue in a material particular, & formed part of the inducement to enter into the contract, may give rise to a claim to rescind, but does not give rise to a claim for damages (SCRUTTON, L.J.).—HARRISON *v.* KNOWLES & FOSTER, [1918] 1 K. B. 608; 87 L. J. K. B. 680; 118 L. T. 566; 23 Com. Cas. 282; 14 Asp. M. L. C. 249, C. A.

Whether remedy in damages.]—*See* Sub-sect. 2, *post*.

Equitable remedy.]—*See* Sub-sect. 3, *post*.

Estoppel.]—*See* Sub-sect. 4, *post*.

Misrepresentation of authority.]—*See* AGENCY, Vol. I., pp. 657–667, Nos. 2748–2805.

SUB-SECT. 2.—ACTION FOR DAMAGES.

A. In General.

473. General rule.] — (1) The general rule of law is clear that no action is maintainable for a mere statement, although untrue, & although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it (BRAMWELL, J.).

(2) No action will lie against a man for misrepresentation of facts whereby damage has been occasioned to another person, unless that misrepresentation is fraudulent or careless. But it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness. If it were held that a person is liable for a negligent misrepresentation, however *bonâ fide* made, a great check would be put upon many very useful & honest communications, owing to a fear of being charged, & perhaps untruly charged, with negligence (BRAMWELL, J.).—DICKSON *v.* REUTER'S TELEGRAM CO. (1877), 3 C. P. D. 1; 37 L. T. 370; 42 J. P. 308; 26 W. R. 23; *sub nom.* DIXON *v.* REUTER'S TELEGRAPH CO., LTD., 47 L. J. Q. B. 1, C. A.

Annotations:—*As to* (1) **Refd.** Starkey *v.* Bank of England, [1903] A. C. 114. *Generally*, **Refd.** Coventry, Sheppard & G. E. Ry. (1883), 49 L. T. 641; Firbank's Exors. & Humphreys (1886), 18 Q. B. D. 54; Brown *v.* Law (1895 72 L. T. 779; Edwards *v.* Porter, McNeall *v.* Hawes [1923] 2 K. B. 538. **Mentd.** Cunnington *v.* G. N. Ry (1883), 49 L. T. 392; McNeall *v.* Hawes (1923), 92 L. J. K. B. 729.

See, also, Part VIII., Sect. 1, sub-sect. 2, A., *post*.

B. Where Privity of Contract.

474. Whether action lies — Without privity of contract.]—Tradesman, who contracts with an individual for the sale to him of an article to be used for a particular purpose by a third person, is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article.

A declaration by husband & wife stated, that deft. was the maker & seller of certain lamps, called "The Holliday Lamp" & thereupon the husband bought of him one of those lamps, to be used by his wife & himself in his shop, & deft. then fraudulently warranted that the lamp was reasonably fit & proper for that purpose, whereas the lamp was dangerous & unsafe, by reason whereof, when the wife attempted to use the lamp, it exploded & injured her. At the trial, it appeared that the accident arose from the defective construction of the lamp, but there was no proof that deft. knew of the defect; & the jury found that he was not guilty of any fraudulent or deceitful representation:—*Held:* the action could not be maintained by the wife, there being no misfeasance towards her independently of the contract, which was with the husband alone.—LONGMEID *v.* HOLLIDAY (1851), 6 Exch. 761; 20 L. J. Ex. 430; 17 L. T. O. S. 243; 155 E. R. 752.

Annotations:—**Distd.** George *v.* Skivington (1869), L. R. 5 Exch. 1. **Consd.** Heaven *v.* Pender (1883), 11 Q. B. D. 503. **Folld.** Preist *v.* Last (1903), 89 L. T. 33. **Distd.** Earl *v.* Lubbock, [1905] 1 K. B. 253. **Consd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533. **Refd.** Collins *v.* Cave (1859), 4 H. & N. 225; Playford *v.* United Kingdom Electric Telegraph Co. (1867), 17 L. T. 243; Thompson *v.* Lucas (1868), 17 W. R. 520; Lawrence *v.* Jenkins (1873), L. R. 8 Q. B. 274; Cavalier *v.* Pope, [1905] 2 K. B. 757; Bates *v.* Batey, [1913] 3 K. B. 351. **Mentd.** Farrant *v.* Barnes (1862), 11 C. B. N. S. 553; Francis *v.* Cockrell (1870), L. R. 5 Q. B. 184.

See, further, SALE OF GOODS.

475. —— ——.] — A representation made by A. to B. on the faith of which C. acts, is a *nudum pactum*, & cannot be enforced against A. or his estate.—DASHWOOD *v.* JERMYN (1879), 12 Ch. D. 776; 27 W. R. 868.

Annotations:—**Mentd.** Alderson *v.* Maddison (1880), 5 Ex. D. 293; Ashwell & Nesbit *v.* Stanton (1900), 16 T. L. R. 399.

476. —— ——.]—CANN *v.* WILLSON (1888), 39 Ch. D. 39; 57 L. J. Ch. 1034; 59 L. T. 723; 37 W. R. 23; 4 T. L. R. 588; 32 Sol. Jo. 542.

Annotations:—**N.F.** Scholes *v.* Brook (1891), 63 L. T. 837. **Overd.** Le Lievre *v.* Gould, [1893] 1 Q. B. 491. **Consd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533. **Refd.** Dennis *v.* Gould (1892), 9 T. L. R. 19.

477. —— ——.] — Where there is no contractual relation between a mtgee. of property & the valuer on whose valuation the mtgee. has relied, the valuer is not laible to the mtgee. in damages by reason of the valuation having been made without due skill & care. An action in such a case could not succeed, except as an action for deceit, in which case, after the decision of the House of Lords in *Derry* v. *Peek*, No. 185, *ante*, it would be necessary to show fraud.—SCHOLES *v.* BROOK (1891), 63 L. T. 837; 7 T. L. R. 214; *affd.*, 64 L. T. 674, C. A.

Annotations:—**Folld.** Le Lievre & Dennes *v.* Gould, [1893] 1 Q. B. 491. **Refd.** Earl *v.* Lubbock (1904), 74 L. J. K. B. 121; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533.

478. —— ——.] — LE LIEVRE *v.* GOULD, No. 187, *ante*.

479. —— ——.] — MALONE *v.* LASKEY, [1907] 2 K. B. 141; 76 L. J. K. B. 1134; 97 L. T. 324; 23 T. L. R. 399; 51 Sol. Jo. 356, C. A.

Annotations:—**Refd.** Blacker *v.* Lake & Elliott (1912), 106 L. T. 533; White *v.* Steadman (1913), 109 L. T. 249.

PART VII. SECT. 3, SUB-SECT. 1.

e. *General rule — Remedy lies in rescission.*]—GROGAN *v.* "THE ASTOR," LTD. (1925), 25 S. R. N. S. W. 409; 42 N. S. W. W. N. 102.—**AUS.**

f. —— ——.] — An executory contract induced by innocent misrepresentation can be set aside.—KINSMAN *v.* KINSMAN (1912), 22 O. W. R. 979; 3 O. W. N. 966; 4 O. W. N. 20; 5 D. L. R. 871.—**CAN.**

g. —— —— *When relief can be given.*]—When rescission of a contract is sought on the ground of innocent misrepresentation, the rules to be applied are those applicable to a case of mutual mistake so that no relief can be given on this ground unless there is a complete difference between what was intended to be & what actually was taken.—HYNES *v.* BYRNE (1899), 9 Q. L. J. 154, 198.—**AUS.**

PART VII. SECT. 3, SUB-SECT. 2.—A.

473 i. *General rule.*]—HALL *v.* PHARAZYN (1886), 7 N. Z. L. R. 283.—**N.Z.**

473 ii. ——.]—Damages for misrepresentation cannot be recovered unless the misrepresentation is wilful.—KERR *v.* RHODES (1888), 6 N. Z. L. R. 515.—**N.Z.**

473 iii. ——.]—BOYD & FORREST *v.* GLASGOW & SOUTH WESTERN RY. CO., [1915] S. C. (H. L.) 20.—**SCOT.**

Sect. 3.—*Innocent misrepresentation: Sub-sect.* 2, *B., C., D. & E.; sub-sect.* 3, *A. & B.*]

480. —— ——.]—Pltfs. made a contract with a firm of shipbuilders that the firm was to build for pltfs. a steamship in conformity with Lloyd's Rules & in accordance with a specification providing that it was to be 100 A1 with widely spaced hold pillars. The management committee of Lloyd's Register approved of the plans & supervised the building & gave a certificate that the vessel was of the 100 A1 class with widely spaced hold pillars. On her first voyage the foundations of some of the hold pillars gave way & the vessel was thereby injured. In an action by pltfs. against the chairman, deputy-chairman, & trustees of Lloyd's Register for damages for alleged breach of duty or negligence in passing the vessel as being in accordance with Lloyd's Rules when she was not:—*Held:* pltfs. had no contract with defts., & defts. owed no duty to pltfs., & therefore pltfs. were not entitled to recover.—AUSTRALIAN STEAM SHIPPING CO., LTD. *v.* DEVITT (1917), 33 T. L. R. 178.

Implied contract to indemnify.]—*See* Sub-sect. 2, C., *post.*

See, also, CONTRACT, Vol. XII., pp. 49, 50, Nos. 269–276.

C. Misrepresentation Amounting to Warranty.

481. Action lies for warranty—Not for innocent misrepresentation.]—ANON. (1507), Keil. 91; 72 E. R. 254.

Annotations:—**Refd.** Barr *v.* Gibson (1838), 1 Horn & H. 70; Burnby *v.* Bollett (1847), 16 M. & W. 644.

482. —— ——.]—HARVEY *v.* YOUNG (1602), Yelv. 21; 80 E. R. 15.

Annotations:—**Refd.** Leakins *v.* Chissel (1663), 1 Sid. 162; Cross *v.* Gardner (1688), 1 Show. 68; Lysney *v.* Selby (1704), 2 Ld. Raym. 1118; Pasley *v.* Freeman (1789), 3 Term Rep. 51.

483. —— ——.]—EARLY *v.* GARRET, No. 531, *post.*

484. —— ——.]—RAWLINGS *v.* BELL, No. 135, *ante.*

485. —— ——.]—JOLIFFE *v.* BAKER, No. 537, *post.*

486. —— ——.]—The question whether an affirmation made by the vendor at the time of sale constitutes a warranty depends on the intention of the parties to be deduced from the whole of the evidence, & the circumstance that the vendor assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention, is not conclusive of the question.—HEILBUT, SYMONS & CO. *v.* BUCKLETON, [1913] A. C. 30; 82 L. J. K. B. 245; 107 L. T. 769; 20 Mans. 54, H. L.

Annotations:—**Refd.** Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623; Harrison *v.* Knowles & Foster, [1918] 1 K. B. 608; Niblett *v.* Confectioners' Materials Co., [1921] 3 K. B. 387; Collins *v.* Hopkins, [1923] 2 K. B. 617. **Mentd.** Jacobs *v.* Batavia & General Plantations Trust, [1924] 2 Ch. 329.

487. —— ——.]—Deft., being desirous of selling his house, employed for this purpose a firm of house agents, & in advertising the house for sale they stated that it was in good order throughout. Pltf. relying upon this statement, purchased the house, but on going into possession found that repairs were required. In an action to recover the cost of the repairs on the ground of an innocent misrepresentation as to the condition of the house:—*Held:* though an innocent misrepresentation might justify a purchaser in not going on with the contract, yet, if he went on with it, he could not recover damages unless the innocent misrepresentation amounted to a warranty forming a contractual part of the bargain, &, as an advertisement by house agents, did not constitute a warranty in this sense, the action failed.—LAWRENCE *v.* HULL (1924), 41 T. L. R. 75.

By landlord as to fitness of premises.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 177–181, Nos. 3094–3160.

—— **Sale of animals.**]—*See* ANIMALS, Vol. II., pp. 271, 272, Nos. 486–496.

—— **Sale of goods.**]—*See* SALE OF GOODS.

Charter of ship.]—*See* SHIPPING.

Representation distinguished from warranty.]—*See* Part I., Sect. 9, *ante.*

D. Duty Not to Deceive.

See, generally, NEGLIGENCE.

488. No action lies—Apart from duty to take care.]—(1) Speaking of *Derry* v. *Peek*, No. 185, *ante*, broadly, I take it that it has settled once for all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained. There was considerable authority to the effect that it could, & there was considerable authority to the effect that it could not; &, as I understand *Derry* v. *Peek*, No. 185, *ante*, it settles that question in this way: that an action for a negligent, as distinguished from a fraudulent, misrepresentation in a company's prospectus cannot be supported; I think it is perfectly impossible to read the judgments which were delivered in that case, especially Lord Herschell's, to which I will allude presently, without seeing that that is the broad proposition of law which *Derry* v. *Peek*, No. 185, *ante*, has settled, & settled for good (LINDLEY, L.J.).

(2) Not caring, in that context, does not mean not taking care, it meant indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth (BOWEN, L.J.).

(3) A man may tell a lie about the state of his own mind, just as much as he can tell a lie about the state of the weather, or the state of his own digestion (BOWEN, L.J.).

(4) To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. & this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief (LINDLEY, L.J.).—ANGUS *v.* CLIFFORD, [1891] 2 Ch. 449; 60 L. J. Ch. 443; 65 L. T. 274; 39 W. R. 498; 7 T. L. R. 447, C. A.

Annotations:—*As to* (1) **Distd.** Knox *v.* Hayman (1892), 67 L. T. 137. **Refd.** Watts *v.* Atkinson (1892), 8 T. L. R. 235; Le Lievre & Dennes *v.* Gould, [1893] 1 Q. B. 491; Nocton *v.* Ashburton, [1914] A. C. 932. *Generally,* **Refd.** Pritty *v.* Child (1902), 71 L. J. K. B. 512.

489. —— ——.]—No action will lie against the chairman or committee of Lloyd's Register of British & Foreign Shipping, at the suit of a purchaser of a ship, for an alleged negligent survey or classification of the ship made for the previous owner before the date of the purchase, or for negligently issuing a certificate based upon such survey, whereby a false character was given

PART VII. SECT. 3, SUB-SECT. 2.—C

481 1. *Action lies for warranty—Not for innocent misrepresentation.*]—Damages cannot be recovered for an innocent misrepresentation on a sale of goods where the misrepresentation does not constitute a warranty.—BUCKLE *v.* MORRISON (Man.), [1924] 4 D. L. R. 1252; [1924] 3 W. W. R. 702.—**CAN.**

to the ship through negligence, though not through an intention to deceive, & whereby the purchaser was induced to give a larger price for the ship than he otherwise would have done.—THIODON *v.* TINDALL & LLOYD'S REGISTER OF BRITISH & FOREIGN SHIPPING COMMITTEE (1891), 60 L. J. Q. B. 526; 65 L. T. 343; 7 T. L. R. 581; 7 Asp. M. L. C. 76; *sub nom.* THISDON *v.* TINDALL & LLOYD'S COMMITTEE, 40 W. R. 141, D. C.

Annotation:—**Follg.** Australian Steam Shipping Co. *v.* Devitt (1917), 33 T. L. R. 178.

490. ——.] — LOW *v.* BOUVERIE, No. 254, *ante*.

491. ——.]—LE LIEVRE *v.* GOULD, No. 187, *ante*.

492. ——.]—AUSTRALIAN STEAM SHIPPING CO., LTD. *v.* DEVITT, No. 480, *ante*.

493. —— **Duty arising from fiduciary relationship.**]—Nothing short of proof of a fraudulent intention in the strict sense will suffice to maintain an action of deceit, but an action for damages, for negligence may lie, without evidence if an actual intention to deceive, where a confidential relationship exists, such as that of solr. & client, so that the person to whom a representation was made was entitled to rely, & did in fact rely, upon it, & sustained damage in consequence.

The necessity of proving moral fraud in order to succeed in an action of deceit has not narrowed the scope of this remedy.—NOCTON *v.* ASHBURTON (LORD), [1914] A. C. 932; 83 L. J. Ch. 784; 111 L. T. 641; 30 T. L. R. 602, H. L.

Duty to disclose.]—*See* Part III., Sect. 2, sub-sect. 2, A. (*b*), *ante*.

Negligent misrepresentation.]—*See* Part IV., Sect. 1, sub-sect. 5, *ante*.

E. Misrepresentation of Authority.

See AGENCY, Vol. I., pp. 657–664, Nos. 2748–2790.

SUB-SECT. 3.—RELIEF IN EQUITY.

A. Rescission.

See Part IX., Sect. 1, sub-sect. 2, A., C., *post*.

B. "Making Good" a Representation.

494. Whether remedy available.]—Attorney on sale of an estate not disclosing to the buyer an incumbrance, liable to make satisfaction.—ARNOT *v.* BISCOE (1743), 1 Ves. Sen. 95; 27 E. R. 914.

Annotations:—**Mentd.** Downing *v.* Townsend (1753), Amb. 592; Evans *v.* Bicknell (1801), 6 Ves. 174; Seddon *v.* Connell (1840), 10 Sim. 58; Slim *v.* Croucher (1860), 8 W. R. 347.

495. ——.] — EVANS *v.* BICKNELL, No. 249, *ante*.

496. ——.] — A representation made by one party for the purpose of influencing the conduct of another, & acted on by him, will in general be sufficient to entitle him to the assistance of a ct. of equity, for the purpose of realising such representation.—HAMMERSLEY *v.* DE BIEL (BARON) (1845), 12 Cl. & Fin. 45; 8 E. R. 1312.

Annotations:—**Distd.** Lassence *v.* Tierney (1849), 1 Mac. & G. 551. **Apld.** *Re* King's College Hospital Act, *Ex p.* Pinniger, Surcome *v.* Pinniger (1853), 3 De G. M. & G. 571. **Distd.** Maunsell *v.* Hedges, White (1854), 4 H. L. Cas. 1039; Kay *v.* Crook (1857), 3 Sm. & G. 407. **Apld.** Prole *v.* Soady (1859), 2 Giff. 1; Lautour *v.* A.-G. (1864), 5 New Rep. 102. **Follg.** Williams *v.* Williams (1868), 37 L. J. Ch. 854. **Expld.** *Re* British & American Steam Navigation Co., Ward's Case (1870), L. R. 10 Eq. 659. **Apld.** Thomson *v.* Simpson (1870), L. R. 9 Eq. 497; Coles *v.* Pilkington (1874), L. R. 19 Eq. 174. **Consd.** Viret *v.* Viret (1880), 50 L. J. Ch. 69; Synge *v.* Synge, [1894] 1 Q. B. 466. **Reld.** Moorhouse *v.* Colvin (1851), 15 Beav. 341; Bold *v.* Hutchinson (1855), 20 Beav. 250; Cooper *v.* Wormald (1859), 27 Beav. 266; Loxley *v.* Heath (1860), 27 Beav. 523; Loffus *v.* Maw (1862), 3 Giff. 592; Sands *v.* Soden (1862), 31 L. J. Ch. 870; Traill *v.* Baring (1864), 3 New Rep. 362; Walford *v.* Gray (1865), 5 New Rep. 235; Coverdale *v.* Eastwood (1872), 21 W. R. 216; Erskine *v.* Adeane, Bennett's Claim (1873), 42 L. J. Ch. 349; Dashwood *v.* Jermyn (1879), 12 Ch. D. 776; Maddison *v.* Alderson (1883), 8 App. Cas. 467; Johnstone *v.* Mappin (1891), 60 L. J. Ch. 241; *Re* Fickus, Farina *v.* Fickus, [1900] 1 Ch. 331. **Mentd.** Wood *v.* Midgley (1854), 5 De G. M. & G. 41; Barkworth *v.* Young (1856), 4 Drew. 1; Stronghill *v.* Gulliver (1856), 27 L. T. O. S. 258; Warden *v.* Jones (1857), 23 Beav. 487; Forshaw *v.* Welsby (1860), 30 Beav. 243; Goldicutt *v.* Townsend (1860), 28 Beav. 445; Hargreaves *v.* Pennington (1864), 34 L. J. Ch. 180; *Re* Allen, Hincks *v.* Allen (1880), 49 L. J. Ch. 553; *Re* Badcock, Kingdon *v.* Tagert (1880), 17 Ch. D. 361; McManus *v.* Cooke (1887), 35 Ch. D. 681; Sharman *v.* Sharman (1892), 67 L. T. 834; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360; *Re* Broadwood, Edwards *v.* Broadwood (1912), 56 Sol. Jo. 703 *Re* A Bankruptcy Notice, [1924] 2 Ch. 76.

497. ——.]—Liability of a party to make good the result of his misrepresentations.

Undoubtedly there is an equity that where one party has led another into a loss by his misrepresentations, he should make good his own assertions (ROMILLY, M.R.).—OVERBURY *v.* TEALE (1852), 20 L. T. O. S. 107; 1 W. R. 27.

498. ——.]—JORDEN *v.* MONEY, No. 11, *ante*.

499. ——.]—Testator gave a legacy to A., & appointed B. his exor. On the occasion of A.'s marriage, B. assured A. & the father of the lady that the legacy would be eventually paid. On the faith of this representation A. covenanted with the trustees of the settlement for the payment of the greater part of the legacy by instalments, & an equal sum was brought into the settlement as the lady's portion. Testator's estate proved deficient, & the legacy was never paid. In a suit for the administration of B.'s estate:—*Held:* B. was bound to make good his representations, & A. was entitled to stand as a creditor against B.'s estate for the whole amount of the legacy. —HUTTON *v.* ROSSETER (1855), 3 Eq. Rep. 589; 25 L. T. O. S. 61; 3 W. R. 387, C. A.

500. ——.] — DENTON *v.* GREAT NORTHERN RY. CO., No. 179, *ante*.

501. ——.]—Where a verbal representation of an intended absolute gift of property is made, in order to influence the conduct of another, & is acted on by that person, although it is of the essence of the representation that the gift be made by a revocable instrument, the gift is rendered irrevocable.—LOFFUS *v.* MAW (1862), 3 Giff. 592; 32 L. J. Ch. 49; 6 L. T. 346; 8 Jur. N. S. 607; 10 W. R. 513; 66 E. R. 544.

Annotations:—**Apld.** Coles *v.* Pilkington (1874), L. R. 19 Eq. 174. **Reld.** Traill *v.* Baring (1864), 3 New Rep. 362; M'Askie *v.* M'Cay (1868), 16 W. R. 1187; Maddison *v.* Alderson (1883), 8 App. Cas. 467.

502. ——.]—Circumstances under which, after a contract to grant a lease, actually executed, the ct. held a contracting party liable to make good representations, a promise to allow a right of way, on the faith of which the contract was entered into.—DENDY *v.* CARY (1863), 9 Jur. N. S. 845.

503. ——.]—Pltf., on the faith of the regulations of the Colonial Office, spent money in a colony, so as to entitle himself to large grants of land. On demurrer to a bill filed by leave of the Lord Chancellor, upon a petition of right against the A.-G.:—*Held:* the Crown had entered into a contract with pltf. to grant the land, & the ct. was empowered to make a declaration of pltf.'s right to specific performance, though it could not proceed to a mandatory decree.—LAUTOUR *v.* A.-G. (1864), 5 New Rep. 102; 11 L. T. 563; *sub nom.* LATOUR *v.* A.-G., 11 Jur. N. S. 7; *on appeal* (1865), 5 New Rep. 231, L. JJ.

Sect. 3.—*Innocent misrepresentation: Sub-sect.* 3, *B.; sub-sect.* 4. *Sect.* 4. *Part VIII. Sect.* 1: *Sub-sect.* 1.]

504. ——.]—Where testator, who had adopted his nephew, contracted for the purchase of a warehouse for him, paid part of the purchase-money, caused his nephew's name to be inserted in the agreement, & induced him to sign the agreement, on the faith of his representation that the purchase was for his nephew's benefit, & afterwards died leaving the balance of the purchase-money unpaid, the ct. directed it to be paid out of the assets.—SKIDMORE *v.* BRADFORD (1869), L. R. 8 Eq. 134; 21 L. T. 291; 17 W. R. 1056.

Annotation:—**Mentd.** Rosher *v.* Williams (1875), L. R. 20 Eq. 210.

505. ——.]—THOMSON *v.* SIMPSON (1870), 5 Ch. App. 659; 18 W. R. 1090, L. C. & L. JJ.

Annotation:—**Consd.** Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (1873), L. R. 6 H. L. 352.

506. ——.]—S., a cotton broker of New Orleans, was in the habit of sending cotton over to England, & pltf. was in the habit of accepting his bills in consideration of the assignment to him of bills of lading of the cotton. In 1870, in the course of this business, a bank, to whom two bills of S. on pltf. were endorsed, sent them for pltf.'s acceptance, & with the bills they sent a memorandum, "The bank holds bills of lading for 504 bales of cotton." Pltf. thereupon accepted the bills, & retiring them before they became due, received the bills of lading, & went to the captain of the ship on his arrival & presented the bills of lading, which turned out to be forgeries:—*Held*: notwithstanding the representation contained in the memorandum sent by the bank, pltf. could not call on the bank to repay him the value of the bills.—LEATHER *v.* SIMPSON (1871), L. R. 11 Eq. 398; 40 L. J. Ch. 177; 24 L. T. 286; 19 W. R. 431; 1 Asp. M. L. C. 5.

Annotation:—**Mentd.** Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623.

507. ——.]—CITIZENS' BANK OF LOUISIANA *v.* FIRST NATIONAL BANK OF NEW ORLEANS, No. 12, *ante*.

508. ——.]—COLES *v.* PILKINGTON (1874), L. R. 19 Eq. 174; 44 L. J. Ch. 381; 31 L. T. 423; 23 W. R. 41.

Annotation:—**Refd.** Alderson *v.* Maddison (1880), 5 Ex. D. 293.

509. ——.]—Intestate induced a woman to serve him as his housekeeper without wages for many years & to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, & afterwards signed a will, not duly attested, by which he left her the life estate:—*Held*: there was no contract, & even if there had been & although the woman had wholly performed her part by serving till intestate's death without wages, yet her service was not unequivocally & in its own nature referable to any contract, & was not such a part performance as to take the case out of the operation of Stat. Frauds, s. 4; & she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land.—MADDISON *v.* ALDERSON (1883), 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 47 J. P. 821; 31 W. R. 820, H. L.; *affg.* S. C. *sub nom.* ALDERSON *v.* MADDISON (1881), 7 Q. B. D. 174, C. A.

Annotations:—**Refd.** Gillman, Spencer *v.* Carbutt (1889), 61 L. T. 281; Blackburn *v.* Blackburn (1891), 36 Sol. Jo. 27; Licenses Insce. Corpn. & Guarantee Fund *v.* Lawson (1896), 12 T. L. R. 501; *Re* Fickus, Farina *v.* Fickus, [1900] 1 Ch. 331. **Mentd.** Humphreys *v.* Green (1882), 10 Q. B. D. 148; A.-G. *v.* Hubbuck (1884), 13 Q. B. D. 275; *Re* Beetham, *Ex p.* Broderick (1886), 18 Q. B. D. 380; Miles *v.* New Zealand Alford Estate Co. (1886), 32 Ch. D. 266; McManus *v.* Cooke (1887), 35 Ch. D. 681; Lucas *v.* Dixon (1889), 22 Q. B. D. 357; Davis *v.* Leicester Corpn., [1894] 2 Ch. 208; Hodson *v.* Heuland, [1896] 2 Ch. 428; Coleman *v.* North (1898), 47 W. R. 57; Isaacs *v.* Evans (1899), 16 T. L. R. 113; Miller & Aldsworth *v.* Sharp, [1899] 1 Ch. 622; Thursby *v.* Eccles (1900), 70 L. J. Q. B. 91; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360; Chaproniere *v.* Lambert, [1917] 2 Ch. 356; Banbury *v.* Bank of Montreal, [1918] A. C. 626; Morris *v.* Baron, [1918] A. C. 1; *Re* A Bankruptcy Notice, [1924] 2 Ch. 76; Rawlinson *v.* Ames, [1925] Ch. 96.

510. ——.]—A mere representation that the writer intends to do something in the future is not, though the person to whom it is made relies upon it, sufficient to entitle that person to obtain specific performance or damages. There must be a contract in order to entitle the party to obtain relief. This seems to me to result from the judgments of the House of Lords in *Hammersley* v. *de Biel* (*Baron*), No. 496, *ante*, *Jorden* v. *Money*, No. 11, *ante*, *Maddison* v. *Alderson*, No. 509, *ante* (COZENS-HARDY, J.).—*Re* FICKUS, FARINA *v.* FICKUS, [1900] 1 Ch. 331; 69 L. J. Ch. 161; 81 L. T. 749; 48 W. R. 250; 44 Sol. Jo. 157.

—— **Personal representative.**]—*See* EXECUTORS, Vol. XXIV., pp. 651–658, Nos. 6774–6848.

Representation inducing marriage.]—*See* SETTLEMENTS.

He who comes with equity must come with clean hands.]—*See* EQUITY, Vol. XX., pp. 248–251, Nos. 128–153.

Estoppel by representation.]—*See* Sub-sect. 4, *post*.

See, also, CONTRACT, Vol. XII., pp. 53–55, Nos. 299–307, SPECIFIC PERFORMANCE.

SUB-SECT. 4.—ESTOPPEL.

See ESTOPPEL, Vol. XXI., pp. 285–286, Nos. 993–1009.

SECT. 4.—**COSTS.**

See, generally, PRACTICE.

511. Failure to prove charge of fraud.]—It is a general rule that where deft. has set up charges of fraud against pltf., which have failed, he will be decreed to pay the costs of those charges at the hearing.—WARRIN *v.* THOMAS (1854), 23 L. T. O. S. 185; 2 W. R. 442.

512. ——.]—Charges of fraud contained in a bill & not proved are no bar to relief upon the case stated & proved, but only affect the question of costs.—BAKER *v.* BRADLEY (1855), 7 De G. M. & G. 597; 25 L. J. Ch. 7; 26 L. T. O. S. 160; 2 Jur. N. S. 98; 4 W. R. 78; 44 E. R. 233, L. JJ.

Annotations:—**Mentd.** Wright *v.* Vanderplank (1856), 8 De G. M. & G. 133; Jonner *v.* Jenner (1860), 2 De G. F. & J. 359; Berdoe *v.* Dawson (1865), 34 Beav. 603; Chambers *v.* Crabbe (1865), 11 Jur. N. S. 277; Turner *v.* Collins (1871), 7 Ch. App. 334, n.; Lovell *v.* Wallis (1884), 50 L. T. 681; *Re* Smith, Chapman *v.* Wood (1884), 51 L. T. 501; Barron *v.* Willis, [1899] 2 Ch. 578; De Witte *v.* Addison (1899), 80 L. T. 207; London & Westminster Loan & Discount Co. *v.* Bliton (1911), 27 T. L. R. 184.

513. ——.]—Inasmuch as he [pltf.] had brought forward charges of fraud, which he had failed to prove, the bill must be dismissed with costs.—ROBSON *v.* DEVON (EARL) (1857), 29 L. T. O. S. 300; 3 Jur. N. S. 576; 5 W. R. 724; *affd.*,

511 i. *Failure to prove charge of fraud.*]—BEERE *v.* NORTHERN BANK (N. W. P.) (1908), 6 W. L. R. 642; 1 Alta. L. R. 228.—CAN.

30 L. T. O. S. 225; 4 Jur. N. S. 245; 6 W. R. 203, L. C. & L. JJ.

Annotation:—**Reld.** Towle *v.* National Guardian Insce. Soc. (1861), 7 Jur. N. S. 618.

514. ——.]—Deft., who by his answer had raised charges of forgery & fraud against pltf., which were negatived by the verdict of a jury, was ordered to pay the costs of pltf., although the latter had persisted until his examination in ct. upon the trial, in false statements, so as to give deft. reasonable grounds for suspicion, & for trying the question.—THEYER *v.* TOMBS (1864), 12 W. R. 512.

515. ——.]—Deft. whom the ct. held, on the chief point in issue, to have been guilty of a fraudulent misrepresentation, was, though successful on another point, ordered to pay the whole costs.—WHEELER & WILSON MANUFACTURING CO. *v.* SHAKESPEAR (1869), 39 L. J. Ch. 36.

Annotations:—**Mentd.** Singer Manufacturing Co. *v.* Loog (1882), 52 L. J. Ch. 481; Barlow & Jones *v.* Johnson (1890), 7 R. P. C. 395; Armstrong Oiler Co. *v.* Patent Axlebox & Foundry Co. (1910), 27 R. P. C. 362.

516. Whether costs taxed on higher scale.]—An allegation by pltf. in an action for recovery of land, of fraud on the part of deft., is not of itself sufficient to take the case out of Additional Rules, Aug. 1875, Ord. 6, r. 1, so as to entitle pltf.'s solr. to costs on the higher scale, even where the action is brought in the Ch. Div.—*Re* TERRELL (1882), 22 Ch. D. 473; 47 L. T. 588; 31 W. R. 208, C. A.

517. ——.]—An action to recover damages, more than £3,000, for an alleged fraudulent misrepresentation upon the sale of a public-house was tried with a special jury, the trial lasting five days. The misrepresentation relied upon was that the "legitimate takings" of the house were represented by the vendor to £500 per week, whereas the takings-book shown to the purchaser was concocted, & the takings were not legitimate, but were brought about by giving over-measure to the customers & a quality of liquor superior to that which was usual in the trade. About thirty witnesses, chiefly customers at the public-house before & since the sale, were called. The jury found a verdict for deft., & the judge gave judgment for him, with costs on the higher scale: —*Held*: there were no special grounds arising out of the nature & importance or the difficulty of the case to warrant giving costs on the higher scale.—PAINE *v.* CHISHOLM, [1891] 1 Q. B. 531; 60 L. J. Q. B. 413; 39 W. R. 353; 7 T. L. R. 366, C. A.

Annotations:—**Apld.** Assets Development Co. *v.* Close, [1900] 2 Ch. 717. **Reld.** Rivington *v.* Garden, [1901] 1 Ch. 561.

518. ——.]—The fact that the amount at stake in an action is large & the question of fact & law difficult is not enough to justify the allowance of costs on the higher scale under R. S. C., Ord. 65, r. 9, even when serious allegations of fraud are unsuccessfully made, & the hearing of the case occupies a lengthy period.

An action was brought to set aside certain agreements on the ground of duress & fraud. The amount at stake was large, & although defts. called no evidence, the trial lasted nine days, during which an enormous mass of documents & correspondence was read & some witnesses examined. The action was dismissed, but costs on the higher scale were refused.—ASSETS DEVELOPMENT CO., LTD. *v.* CLOSE BROTHERS & CO., [1900] 2 Ch. 717; 69 L. J. Ch. 715; 83 L. T. 162; 48 W. R. 699; 44 Sol. Jo. 657; *on appeal* (1901), 46 Sol. Jo. 12, C. A.

Annotation:—**Reld.** Rivington *v.* Garden, [1901] 1 Ch. 561.

——.]—*See* R. S. C., Ord. 65, r. 9.

Part VIII.—Action for Damages for Fraud.

SECT. 1.—IN GENERAL.

SUB-SECT. 1.—CONCURRENT JURISDICTION AT LAW AND IN EQUITY.

519. Jurisdiction in equity—Same principles as at common law.]—All frauds cognisable in equity as well as at law.—COLT *v.* WOOLLASTON (1723), 2 P. Wms. 154; 24 E. R. 679.

Annotations:—**Folld.** Green *v.* Barrett (1826), 1 Sim. 45. **Consd.** Blain *v.* Agar (1828), 2 Sim. 289; Thompson *v.* Barclay (1831), 9 L. J. O. S. Ch. 215. **Apprvd.** Blair *v.* Bromley (1847), 2 Ph. 354. **Consd.** Ramshire *v.* Bolton (1869), L. R. 8 Eq. 294; Hill *v.* Lane (1870), L. R. 11 Eq. 215. **Reld.** Cridland *v.* De Mauley (1847), 1 De G. & Sm. 459; Stewart *v.* Austin (1866), L. R. 3 Eq. 299.

520. —— ——.]—CLIFFORD *v.* BROOKE, No. 466, *ante*.

521. —— ——.]—GREEN *v.* BARRETT (1826), 1 Sim. 45; 5 L. J. O. S. Ch. 6; 57 E. R. 495.

Annotations:—**Consd.** Thompson *v.* Barclay (1831), 9 L. J. O. S. Ch. 215. **Reld.** Hill *v.* Lane (1870), L. R. 11 Eq. 215. **Mentd.** Stewart *v.* Austin (1866), 15 W. R. 122.

522. —— ——.]—Although pltf. may have a right of action at law for the money, he has also a concurrent remedy, on the ground of fraud, in equity.—BLAIR *v.* BROMLEY (1847), 2 Ph. 354; 16 L. J. Ch. 495; 11 Jur. 617: 41 E. R. 979, L. C.

Annotations:—**Consd.** Ramshire *v.* Bolton (1869), L. R. 8 294. **Reld.** Ingram *v.* Thorp (1848), 7 Hare, 67; Wi *v.* Short (1848), 6 Hare, 366; Imperial Gas Light & Co. *v.* London Gas Light Co. (1854), 10 Exch. 39; *v.* Croucher (1860), 8 W. R. 347; Gibbs *v.* Guild (1882), 9 Q. B. D. 59; Hughes *v.* Twisden (1886), 55 L. J. Ch. 481; Moore *v.* Knight, [1891] 1 Ch. 547; Thorne *v.* Heard, [1894] 1 Ch. 599. **Mentd.** Coomer *v.* Bromley (1852), 5 De G. & Sm. 532; Bishop *v.* Jersey (1854), 2 Drew. 143; Hunter *v.* Gibbons (1856), 1 H. & N. 459; Bourdillon *v.* Roche (1858), 27 L. J. Ch. 681; Essell *v.* Hayward (1860), 24 J. P. 819; Eager *v.* Barnes & Bridger (1862), 7 L. T. 408; *Re* Cameron's Coalbrook, etc. Co., *Ex p.* Hunt (1863), 2 New Rep. 50; Alliance Bank *v.* Tucker (1867), 17 L. T. 13; Sawyer *v.* Goodwin (1867), 36 L. J. Ch. 578; St. Aubyn *v.* Smart (1868), 3 Ch. App. 646; Plumer *v.* Gregory (1874), L. R. 18 Eq. 621; Eccl. Comrs. for England *v.* N. E. Ry. (1877), 4 Ch. D. 845; Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394; Biggs *v.* Bree (1881), 51 L. J. Ch. 64; *Re* Mutual Aid Permanent Benefit Bldg. Soc., *Ex p.* James (1883), 49 L. T. 530; Betjemann *v.* Betjemann (1895), 73 L. T. 2; Mara *v.* Browne, [1895] 2 Ch. 69; Whitwam *v.* Watkin (1898), 78 L. T. 188; *Re* Fountaine, Fountaine *v.* Amherst (1909), 78 L. J. Ch. 648.

523. —— ——.]—Pltf. at the request of deft. advanced on a bill of exchange a moiety of £500 upon a statement by deft. that he would advance the other half, & that the drawer & acceptor were men of property, & well able to meet their engagements. The bill of exchange was dishonoured. Pltf. alleged that deft. had induced him by misrepresentations which he knew to be false as to the position & solvency of the drawer & acceptor, to advance the money, & further, that no money ever was, in fact, advanced by deft.; but that, knowing the bill to be worthless, it was a scheme on his part to obtain money for his own purposes. Pltf. sought repayment personally from deft.:

—— in such a case this ct. had concurrent jurisdiction with the cts. of law.—RAMSHIRE *v.*

Sect. 1.—*In general: Sub-sects.* 1 *&* 2, *A., B. & C.*]

BOLTON (1869), L. R. 8 Eq. 294; 38 L. J. Ch. 594; 21 L. T. 50; 17 W. R. 986.

Annotations:—**Folld.** Fennelly *v.* Ranscelot (1871), 19 W. R. 966. **Reld.** Hill *v.* Lane (1870), L. R. 11 Eq. 215.

524. —— ——.]—FENNELLY *v.* RANSCELOT (1871), 19 W. R. 966.

525. —— ——.]—PEEK *v.* GURNEY, No. 119, *ante*.

526. —— ——.]—SCHROEDER *v.* MENDL, No. 172, *ante*.

527. —— ——.]—ARKWRIGHT *v.* NEWBOLD, No. 114, *ante*.

528. —— ——.]—SMITH *v.* CHADWICK, No. 106, *ante*.

529. —— ——.]—DERRY *v.* PEEK, No. 185, *ante*.

530. —— **Distinguished from legal jurisdiction.**]—Distinction between legal & equitable jurisdiction upon fraud; which at law must be proved, not presumed, & the equitable jurisdiction may be exercised upon an instrument unduly obtained, where a ct. of law could not enter into the question.—FULLAGAR *v.* CLARK (1812), 18 Ves. 481; 9, L. C.

Annotations:—**Mentd.** Ridgway *v.* Roberts (1844), 4 Hare, 106; Lancashire *v.* Lancashire (1846), 9 Beav. 259.

SUB-SECT. 2.—ESSENTIALS OF ACTION.

A. Fraud.

See, also, Part IV., *ante*.

531. General rule—Proof of fraud necessary.]—The purchaser of an estate cannot recover back his purchase-money on the ground of a concealment of a defect in the title by the vendor, without proving that such concealment was fraudulent; & the question of fraud is properly one for the jury.

A fraudulent concealment is as bad as a wilful misrepresentation. A fraudulent concealment by the seller of a fact which he ought to communicate, will undoubtedly vitiate the sale; but in order to have that effect the concealment must be fraudulent (BAILEY, J.).

The *scienter*, or fraud, is the gist of the action where there is not a warranty; where there is a warranty, the party takes upon himself the knowledge of the title of the article & of his qualities (LITTLEDALE, J.).—EARLY *v.* GARRET (1829), 9 B. & C. 928; 4 Man. & Ry. K. B. 687; 8 L. J. O. S. K. B. 76; 109 E. R. 345.

Annotations:—**Reld.** Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542; Morley *v.* Attenborough (1849), 3 Exch. 500; Eichholz *v.* Bannister (1864), 17 C. B. N. S. 708.

532. —— ——.]—A declaration being founded upon deceit, in the absence of fraud, the action cannot be sustained.—THOM *v.* BIGLAND (1853), 8 Exch. 725; 1 C. L. R. 38; 22 L. J. Ex. 243; 21 L. T. O. S. 62; 1 W. R. 290; 155 E. R. 1544.

Annotations:—**Consd.** Connecticut Fire Insce. *v.* Kavanagh, [1892] A. C. 473. **Reld.** Jolliffe *v.* Baker (1883), 11 Q. B. D. 255; Nocton *v.* Ashburton, [1914] A. C. 932. **Mentd.** Liverpool Adelphi Loan Assocn. *v.* Fairhurst (1854), 9 Exch. 422.

533. —— ——.]—Deft. as attorney for P., who had obtained judgment against W. F., took out a writ of *fi. fa.* against W. F., which was indorsed in the usual form, the indorsement being followed by these words: "deft. is a" [blank] "& resides at Redcar, in your bailiwick." Pltf. in the present action was sheriff of Yorkshire, & he issued a warrant, setting out the indorsement of the writ verbatim. His officer went with the warrant to Redcar, where W. F., the son of the W. F. named in the writ, lived. The son informed the officer that he was not the person against whom the writ was issued, but that his father, who lived at Coatham, an adjacent village, probably was; & the father subsequently came & admitted the fact. The officer, however, seized the goods of W. F., the son, at Redcar, who afterwards recovered damages against pltf., as sheriff, for the wrongful seizure. Pltf. brought this action to recover from deft. the amount of the said damages & costs. The first count of the declaration alleged that deft., by the indorsement, & with the intent that pltf. should act upon the statement, falsely represented to pltf. that the W. F. named in the writ resided at Redcar, whereby pltf. was induced to seize:—*Held:* the action was not maintainable, the representation alleged in the first count not having been fraudulently made.—CHILDERS *v.* WOOLER (1860), 2 E. & E. 287; 29 L. J. Q. B. 129; 2 L. T. 49; 6 Jur. N. S. 444; 8 W. R. 321; 121 E. R. 109.

Annotations:—**Mentd.** Smith *v.* Keal (1882), 9 Q. B. D. 340; Thomas *v.* Rowlands (1886), 3 T. L. R. 148; Morris *v.* Salberg (1889), 22 Q. B. D. 614; Sheffield Corpn. *v.* Barclay, [1903] 2 K. B. 580.

534. —— ——.]—HUNTINGFORD *v.* MASSEY, No. 317, *ante*.

535. —— ——.]—DICKSON *v.* REUTER'S TELEGRAM CO., No. 473, *ante*.

536. —— ——.]—Defts., the trustees of Lloyd's Register of Shipping, had, on the request of the owner of the barque *Midas*, to have the vessel surveyed & reclassed, caused a survey of the vessel to be made by one of their surveyors, & after such survey the society issued a certificate in the usual form, in which they stated that the vessel was in a good & efficient state, & that she had been classed & entered in the register with the character A.1 for seven years. The fees for this classification were paid by the owner. After the date of this classification & certificate pltf. bought the *Midas* from the owner, & he did so in reliance upon the statement in the certificate as to the condition of the vessel. Defects were soon afterwards discovered in the condition of the vessel, by reason whereof pltf. suffered damage. It was admitted, for the purpose of the case, that the survey was negligently made, & that but for such negligence the defects in such vessel would have been discovered, & pltf. saved from the loss which he sustained. In an action by pltf. against the trustees of the society to recover damages from the loss so sustained:—*Held:* even assuming the negligence of the classification & the false character given to the vessel thereby, pltf. was not entitled to recover against defts., as his action could not be based upon contract, there being no privity of contract between pltf. & defts., & it could not be based upon misrepresentation, as there was no misrepresentation of a fraudulent character.—BRAGINGTON *v.* CHAPMAN (1878), 60 L. J. Q. B. 528, n.; 65 L. T. 344, n.

Annotations:—**Folld.** Thiodon *v.* Tindall & Lloyd's Register of British & Foreign Shipping Committee (1891), 60 L. J. Q. B. 526. **Reld.** Australian Steam Shipping Co. *v.* Devitt (1917), 33 T. L. R. 178.

537. —— ——.]—In an action for damages for a misrepresentation with reference to the subject matter of a contract, in the absence of any

PART VIII. SECT. 1, SUB-SECT. 2.—A.

531 i. *General rule—Proof of fraud necessary.*]—To obtain an action for deceit actual fraud must be proved.—GARLAND *v.* THOMPSON (1885), 9 O. R. 376.—**CAN.**

531 ii. —— ——.]—KLINGENSTEIN *v.* WALTERS (1884), 3 N. Z. L. R. C. A. 18.—**N.Z.**

531 iii. —— ——.]—MURRAY *v.* BOWRING (1886), 7 Nfld. L. R. 143.—**NFLD.**

breach of contract or warranty, fraud is an essential element of the cause of action. There is no such thing as "legal" fraud in the absence of moral fraud.—JOLIFFE *v.* BAKER (1883), 11 Q. B. D. 255; 48 L. T. 966; 47 J. P. 678; *sub nom.* JOLLIFFE *v.* BAKER, 52 L. J. Q. B. 609; 32 W. R. 59.

Annotations:—**Refd.** Nash *v.* Wooderson (1884), 52 L. T. 49. **Mentd.** Palmer *v.* Johnson (1884), 13 Q. B. D. 351; Saunders *v.* Cockrill (1902), 87 L. T. 30.

538. —— ——.]—SCHOLES *v.* BROOK, No. 477, *ante*.

539. —— ——.]—LOW *v.* BOUVERIE, No. 254, *ante*.

540. —— ——.]—REID *v.* HOOLEY (1897), 13 T. L. R. 449, C. A.

541. —— ——.]—In an action for deceit it is incumbent on pltf. to prove actual fraud.—TACKEY *v.* MCBAIN, [1912] A. C. 186; 81 L. J. P. C. 130; 106 L. T. 226, P. C.

542. —— ——.]—NOCTON *v.* ASHBURTON (LORD), No. 493, *ante*.

—— —— **Contracts of insurance.**]—*See* INSURANCE, Vol. XXIX., pp. 61–63, Nos. 208–218.

—— —— **Representations by landlord.**]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 176, 177, Nos. 3082–3088.

Contracts for sale of goods.]—*See* SALE OF GOODS.

— **Contracts for sale of land.**]—*See* SALE OF LAND.

Representation as to credit of third party.]—*See* Sect. 2, *post*.

B. Damage.

543. General rule—Proof of damage necessary.]—Pltf. being desirous to dispose of his interest in certain buildings, trade, & stock, in which trade he was engaged with deft., pending a treaty between them for the purchase by deft., the latter falsely & deceitfully represented to pltf., that he was about to enter into partnership in the same trade with other persons whose names he would not disclose, & that those persons would not consent to his giving pltf. more for his interest than a certain sum: whereas in truth neither A. & B., with whom he was then about to enter into partnership, nor any other intended partners of his, had refused to give more than that sum, but had then agreed with deft. that he should make the best terms he could with pltf., & would have given him a larger sum, & in fact deft. charged them with a larger price in account for the purchase of pltf.'s interest:—*Held:* (1) an action on the case did not lie for this false & deceitful representation by the bidder of the seller's probability of getting a better price for his property; for it was either a mere false representation of another's intention, or at most a gratis dictum of the bidder, upon a matter which he was not under any obligation to the seller to disclose with accuracy, & on which it was the folly of the seller to rely; (2) at any rate the count was bad, in not showing that pltf. had been damaged by such false representation; inasmuch as it was not alleged that the other intended partners of deft. would have bid at all without him, or that he would have joined in giving the additional price.—VERNON *v.* KEYS (1810), 12 East, 632; 104 E. R. 246; *affd.* (1812), 4 Taunt. 488, Ex. Ch.

544. —— ——.]—An untrue claim or pretence may give a cause of action, as all false & untrue statements may, if all the circumstances should concur in respect to it which are necessary to make a false representation actionable, &, amongst others, if it had been followed by any special damage (PARKE, B.).—TANCRED *v.* LEYLAND (1851), 16 Q. B. 669; 20 L. J. Q. B. 316; 17 L. T. O. S. 53; 15 J. P. 815; 15 Jur. 394; 117 E. R. 1036, Ex. Ch.; *revsg.* S. C. *sub nom.* LEYLAND *v.* TANCRED (1850), 16 Q. B. 664.

Annotations:—**Mentd.** Schreger *v.* Carden (1852), 11 C. B. 851; Perren *v.* Monmouthshire Ry. (1853), 11 C. B. 855; Stevenson *v.* Newnham (1853), 13 C. B. 285; Churchill *v.* Siggers (1854), 3 E. & B. 929; French *v.* Phillips (1856), 1 H. & N. 564; Glynn *v.* Thomas (1856), 11 Exch. 870; Phillips *v.* French (1856), 5 W. R. 114; Fell *v.* Whittaker (1871), L. R. 7 Q. B. 120; Thwaites *v.* Wilding (1883), 52 L. J. Q. B. 734.

545. —— ——.]—A bill drawn on the Royal Surrey Gardens co., by a shareholder in that co., was accepted. "W. Ellis, secretary, by order of the R. S. G. co." This acceptance was in fact written by order of certain directors of that co. At the time when the bill became due the co. was insolvent. In an action by a second indorsee of the bill, who did not show that either he, or the first indorsee had given value to the drawer, against the directors, who authorised the acceptance, alleging in one count that they accepted the bill, & in another charging them with falsely representing that they had authority on behalf of the co. to accept it:—*Held:* (1) defts. were not liable as acceptors; (2) assuming there had been a false representation, pltf. not having proved that he thereby sustained damage, deft. was entitled to a verdict.—EASTWOOD *v.* BAIN (1858), 3 H. & N. 738; 28 L. J. Ex. 74; 32 L. T. O. S. 109; 7 W. R. 90; 157 E. R. 665.

546. —— ——.]—HYDE *v.* BULMER, No. 582, *post*.

547. —— ——.]—In order that a representation may be actionable, it must not only be untrue but cause damage to the person who complains of it (STIRLING, J.).—AJELLO *v.* WORSLEY, [1898] 1 Ch. 274; 67 L. J. Ch. 172; 77 L. T. 783; 46 W. R. 245; 14 T. L. R. 168; 42 Sol. Jo. 212.

Annotations:—**Refd.** Spalding *v.* Gamage & Benetfink (1914), 110 L. T. 530; Spalding *v.* Gamage (1918), 35 R. P. C. 101.

548. —— —— **Immediate damage.**]—BARRY *v.* CROSKEY, No. 370, *ante*.

Damage must be natural consequence of representation.]—*See* Sub-sect. 5, B., *post*.

C. Concurrence of Fraud and Damage.

549. Fraud & damage must concur.]—Damage without fraud gives no cause of action; but where these two do concur & meet together, there an action lies (COOKE, J.).—BAILY *v.* MERRELL (1615), as reported in 3 Bulst. 94; 81 E. R. 81.

Annotations:—**Apld.** Pasley *v.* Freeman (1789), 3 Term Rep. 51. **Refd.** Brass *v.* Maitland (1856), 6 E. & B. 470; Smith *v.* Chadwick (1884), 9 App. Cas. 187; Derry *v.* Peek (1889), 14 App. Cas. 337; Nash *v.* Calthorpe, [1905] 2 Ch. 237.

550. ——.]—PASLEY *v.* FREEMAN, No. 163, *ante*.

551. ——.]—HAYCRAFT *v.* CREASY, No. 26, *ante*.

552. ——.]—BARLEY *v.* WALFORD, No. 18, *ante*.

PART VIII. SECT. 1, SUB-SECT. 2.—C.

549 i. *Fraud & damage must concur.*]—In an action to recover damages for fraudulent misrepresentation inducing a contract, pltf. must prove that the misrepresentation was fraudulent, that the contract actually entered into was in fact induced by the misrepresentation, & that he suffered actual loss by entering into the contract.—HOLMES *v.* JONES (1907), 4 C. L. R. 1692.—**AUS.**

549 ii. ——.]—FRENCH *v.* SKEAD (1876), 24 Gr. 179.—**CAN.**

549 iii. ——.]—ROYAL INSURANCE CO. *v.* BYERS (1885), 9 O. R. 120.—**CAN.**

549 iv. ——.]—ABDULLAH KHAN *v.* ABDUL RAHMAN BEG (1896), I. L. R. 18 All. 322.—**IND.**

Sect. 1.—*In general: Sub-sect.* 2, *C.; sub-sects.* 3 4, *A. (a) & (b), B., C., D. & E.; sub-sect.* 5,.

553. ——.] — A fraudulent misrepresentation, whereby the purchaser is prejudiced, is the foundation of a special action for deceit (ERLE, J.).—JOYSON *v.* GARFIT (1846), 8 L. T. O. S. 116.

554. ——.] — (1) A promoter & managing director of the Iberian Silver Lead Ore co. issued a prospectus of the co., stating (amongst other things) that the promoters did not hesitate to guarantee to the bearers & holders of shares in the co. a minimum annual dividend of 33 per cent: —*Held:* he was liable to be sued for fraud, deceit, etc., by a person who was induced by the statement to become a bearer of shares in the co., the representation being false, to the knowledge of deft., & it having caused damage & loss to pltf.

(2) A representation that a mine will yield so much is a representation of its present state (ERLE, J.).—GERHARD *v.* BATES (1853), 2 E. & B. 476; 1 C. L. R. 868; 22 L. J. Q. B. 364; 22 L. T. O. S. 64; 17 Jur. 1097; 1 W. R. 383; 118 E. R. 845.

Annotations:—*As to* (1) **Consd.** Glamorganshire Iron & Coal Co. *v.* Irvine (1866), 4 F. & F. 947; Peek *v.* Gurney (1873), L. R. 6 H. L. 377. **Reld.** Richardson *v.* Silvester (1873), L. R. 9 Q. B. 34. *Generally,* **Reld.** Eastwood *v.* Bain (1858), 28 L. J. Ex. 74; Dutton *v.* Powles (1861), 2 B. & S. 174. **Mentd.** Rogers *v.* Rajendro Dutt (1860), 13 Moo. P. C. C. 209; Neville *v.* Kelly (1862), 12 C. B. N. S. 740; R. *v.* Most (1881), 7 Q. B. D. 244; Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.

555. ——.]—BEHN *v.* KEMBLE, No. 180, *ante.*

556. ——.]—BARRY *v.* CROSKEY, No. 370, *ante.*

557. ——.]—SMITH *v.* CHADWICK, No. 106, *ante.*

558. ——.]—DERRY *v.* PEEK, No. 185, *ante.*

SUB-SECT. 3.—ONUS OF PROOF.

559. On plaintiff.]—GLASIER *v.* ROLLS, No. 198, *ante.*

560. —— **As to damage.**]—The *onus* of proving damage, that is, of proving that the shares when purchased were of less value than the price given, is undoubtedly initially on pltfs. (VAUGHAN WILLIAMS, L.J.).—TRECHMANN *v.* CALTHORPE, DE LA COUR *v.* CLINTON, TAIT *v.* MACLEAY (1904), 91 L. T. 474; 20 T. L. R. 706, C. A.; *on appeal, sub nom.* MACLEAY *v.* TAIT, [1906] A. C. 24, H. L.

Annotation:—**Reld.** Shepheard *v.* Bray, [1906] 2 Ch. 235.

SUB-SECT. 4.—DEFENCES.

A. Representee's Knowledge of Truth.

(a) In General.

561. Defence to action.]—VIGERS *v.* PIKE, No. 726, *post.*

562. ——.] — EAGLESFIELD *v.* LONDONDERRY (MARQUIS) (1878), 38 L. T. 303; 26 W. R. 540, H. L.

Annotations:—**Reld.** Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394; Cargill *v.* Bower (1878), 10 Ch. D. 502. **Mentd.** Yorkshire Railway Waggon Co. *v.* Maclure & Cornwall Minerals Railway Co. (1881), 45 L. T. 747; Deeley *v.* Lloyds Bank, [1912] A. C. 756.

563. —— **Representation made to agent — Agent aware of truth.**]—If a person employs an agent to take orders, & a representation is made to him of the solvency of a person whom he advises his employers to trust for goods, if he at the time knew that such a person was not solvent, though he did not communicate it to his employers, they cannot maintain an action against the person who made such false representation.—COWEN *v.* SIMPSON (1795), 1 Esp. 290; 170 E. R. 361, N. P.

—— ——.]—*See* AGENCY, Vol. I., pp. 610–613, Nos. 2395–2415; INSURANCE, Vol. XXIX., pp. 60, 61, Nos. 199–206.

Intention to induce without actual inducement.]—*See* Part V., Sect. 1, sub-sect. 2, B., *ante.*

Knowledge of representee in proceedings for rescission.]—*See* Part IX., Sect. 3, sub-sect. 1, *post.*

(b) Representee with Means of Knowledge.

564. Failure to use means of knowledge — No defence to action.]—(1) If by false & fraudulent representations a party is induced to enter into a written agreement, & is thereby damnified, he may maintain case for the deceit, & give parol evidence of the representations, although they are not noticed in the written contract.

(2) The jury were directed to consider whether the representation was false & fraudulent; & they found a verdict for the purchaser:—*Held:* the ct. would not disturb that verdict on the suggestion that the purchaser had the means of ascertaining whether the representation was true or not.—DOBELL *v.* STEVENS (1825), 3 B. & C. 623; 5 Dow. & Ry. K. B. 490; 3 L. J. O. S. K. B. 89; 107 E. R. 864.

Annotations:—*As to* (1) **Apld.** Besant *v.* Richards (1830), Taml. 509. **Apprvd.** Attwood *v.* Small (1838), 6 Cl. & Fin. 232. **Apld.** Ingram *v.* Thorp (1848), 7 Hare, 67. **Consd.** Price *v.* Macauley (1852), 2 De G. M. & G. 339. *As to* (2) **Consd.** Attwood *v.* Small (1838), 6 Cl. & Fin. 232; Reynell *v.* Sprye (1852), 1 De G. M. & G. 660. **Distd.** Robson *v.* Devon (1857), 5 W. R. 724. **Consd.** Clarke *v.* Mackintosh, Mackintosh *v.* Clarke (1862), 4 Giff. 134; Central Ry. of Venezuela *v.* Kisch (1867), L. R. 2 H. L. 99; Mathias *v.* Yetts (1882), 46 L. T. 497. *Generally,* **Reld.** Panama & South Pacific Telegraph Co. *v.* Indiarubber, Gutta Percha, & Telegraph Works Co. (1875), 32 L. T. 238.

565. —— ——.]—If the declaration state that deft. falsely represented that in his public-house "his returns had averaged, & then averaged £300 a month." This allegation is proved by evidence that he said he was "doing £300 a month in the house": the fact, that he named his brewer, & kept a pass book of his beer & spirits, & that pltfs. neither inquired of the brewer, nor asked for the pass book, do not go in bar of the action but are fit matter for the consideration of the jury, on the question, whether deft. practised a fraud & deceit on pltf.—BOWRING *v.* STEVENS (1826), 2 C. & P. 337, N. P.

566. —— ——.] — BARLEY *v.* WALFORD, No. 18, *ante.*

567. —— ——.] — The mere possession by a purchaser of the means of knowledge does not prevent the vendor's liability for a false representation.—FERRIER *v.* PEACOCK (1861), 2 F. & F. 717, N. P.

PART VIII. SECT. 1, SUB-SECT. 3.

559 i. *On plaintiff.*]—A purchaser of a business who seeks damages on the ground that he was induced to purchase by reason of a fraudulent representation as to the expense of running the business cannot succeed unless he satisfies the *onus probandi* which rests upon him by strictly proving the fraud alleged.—KERT *v.* STARLAND (1914), 29 W. L. R. 759; 24 Man. L. R. 832; 20 D. L. R. 16.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 4.—A. (b).

564 i. *Failure to use means of knowledge—No defence to action.*]—SAGER *v.* MANITOBA WINDMILL & PUMP CO. (1913), 24 W. L. R. 725; 4 W. W. R. 1078; 13 D. L. R. 203; 6 Sask. L. R. 102; *affd.* (1914), 27 W. L. R. 656; 6 W. W. R. 265; 7 Sask. L. R. 51; 16 D. L. R. 577.—**CAN.**

564 ii. —— ——.]—STANLEY *v.* M'GAURAN (1882), 11 L. R. Ir. 314, 321.—**IR.**

564 iii. —— ——.]—The fact that pltf. had an opportunity, of which he did not avail himself, of ascertaining the true state of the facts is no answer to a claim for rescission of a contract on the ground of misrepresentation.—YOUNG *v.* BUTLER (1902), 22 N. Z. L. R. 407.—**N.Z.**

568. —— ——.]—Where there has been fraudulent misrepresentation or wilful concealment of facts, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, that he might have known the truth by inquiry.—CENTRAL RY. CO. OF VENEZUELA (DIRECTORS, ETC.) *v.* KISCH (1867), L. R. 2 H. L. 99; 36 L. J. Ch. 849; 16 L. T. 500; 15 W. R. 821, H. L.; *affg.* S. C. *sub nom.* KISCH *v.* CENTRAL RY. CO. OF VENEZUELA, LTD. (1865), 3 De G. J. & Sm. 122, L. JJ.

Annotations:—**Consd.** Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n. **Apld.** Mathias *v.* Yetts (1882), 46 L. T. 497. **Reld.** Langham *v.* East Wheal Rose Consolidated Silver-Lead Mining Co. (1868), 37 L. J. Ch. 253. **Mentd.** Denton *v.* MacNeil (1866), L. R. 2 Eq. 352; Ross *v.* Estates Investment Co. (1866), L. R. 3 Eq. 122; *Re* Cachar Co., Lawrence's Case, *Re* Russian (Vyksounsky) Iron Works Co., Kincaid's Case (1867), 2 Ch. App. 412; Henderson *v.* Lacon (1867), L. R. 5 Eq. 249; Kent *v.* Freehold Land & Brickmaking Co. (1867), L. R. 4 Eq. 588; *Re* Madrid Bank, Wilkinson's Case (1867), 36 L. J. Ch. 489; Oakes *v.* Turquand & Harding, Peck *v.* Same, *Re* Overend, Gurney (1867), L. R. 2 H. L. 325; *Re* Reese River Silver Mining Co., Smith's Case (1867), 2 Ch. App. 604; *Re* Anglo-Danubian Steam Navigation & Colliery Co., Walker's Case (1868), L. R. 6 Eq. 30; *Re* Canadian Native Oil Co., Fox's Case (1868), L. R. 5 Eq. 118; Chester *v.* Spargo (1868), 18 L. T. 314; Hodgkinson *v.* Kelly (1868), L. R. 6 Eq. 496; *Re* Estates Investment Co., *Ex p.* Pawle (1869), 38 L. J. Ch. 318; *Re* Estates Investment Co., *Ex p.* Ashley, Scholey *v.* Venezuela Central Ry. (1870), 39 L. J. Ch. 354; *Re* Estates Investment Co., McNeil's Case (1870), L. R. 10 Eq. 503; Cargill *v.* Bower (1878), 10 Ch. D. 502; Blenkhorn *v.* Penrose (1880), 43 L. T. 668; *Re* Scottish Petroleum Co. (1883), 23 Ch. D. 413; Bellairs *v.* Tucker (1884), 13 Q. B. D. 562; Newlands *v.* National Employers' Accident Assocn. (1885), 54 L. J. Q. B. 428; Symonds *v.* City Bank (1886), 34 W. R. 364; Scott *v.* Snyder Dynamite Projectile Co. (1892), 67 L. T. 104; Aaron's Reefs *v.* Twiss (1896), A. C. 273; Byrne *v.* Millom & Askam Hæmatite Iron Co. (1901), 46 Sol. Jo. 85.

As to equitable doctrine of notice generally, *see* EQUITY, Vol. XX., pp. 310 *et seq.*

B. Agreement to waive Inquiry.

569. Clause disclaiming responsibility for inaccuracy of representations—No defence if representation fraudulent.]—PEARSON (S.) & SON, LTD. *v.* DUBLIN CORPN., No. 83, *ante.*

Waiver of defence of fraud.]—*See* CONTRACT, Vol. XII., p. 254, No. 2078.

Waiver clause in prospectus.]—*See* COMPANIES, Vol. IX., pp. 111, 112, Nos. 526–529.

Sale of goods.]—*See* SALE OF GOODS.

Sale of land.]—*See* SALE OF LAND.

C. Representations as to Credit.

Necessity for writing.]—*See* GUARANTEE, Vol. XXVI., pp. 31–33, Nos. 186–203.

See, also, Sect. 2, *post.*

D. Misrepresentation by Agent for Own Benefit.

See, AGENCY, Vol. I., pp. 588, 591, 592, 595, 596, Nos. 2246, 2267, 2268, 2284, 2288.

E. Res judicata.

See, generally, ESTOPPEL, Vol. XXI., pp. 159 *et seq.*

Two causes of action—Judgment for rescission against co-defendant—No defence to action for damages.]—*See* ESTOPPEL, Vol. XXI., p. 222, No. 568.

SUB-SECT. 5.—DAMAGES RECOVERABLE.

A. In General.

See, generally, DAMAGES, Vol. XVII., pp. 130 *et seq.*

570. Representation as to credit — Reasonable damages.]—HUTCHINSON *v.* BELL, No. 610, *post.*

571. Where loss doubtful—Nominal damages.]—Where a tenant from year to year, having no authority from his landlord to let in a new tenant, falsely represented to pltf. that he had, & thereby induced him to pay £100 for allowing him to enter into possession, & also to take the stock at a valuation; but the landlord refusing to accept him as tenant, he had to leave after a year's occupation, & it was left doubtful, on the evidence, whether, on the whole, pltf. had become a loser or gainer; & deft. had paid the first half of the year's rent to the landlord; the jury, in an action for the false representation, were directed that they were at liberty, finding for pltf. to give a sum less than the £100, or even nominal damages. —CRACKNELL *v.* DAVY, DAVY *v.* CRACKNELL (1858), 1 F. & F. 57.

Action against director of company.]—*See* COMPANIES, Vol. IX., pp. 110, 485, 486, Nos. 518, 3186.

Breach of contract to transfer shares.]—*See* COMPANIES, Vol. IX., p. 358, Nos. 2268–2275.

B. Directness and Remoteness.

See, generally, DAMAGES, Vol. XVII., pp. 95 *et seq.*

572. Damage must be natural result of representation.]—In an action on the case, in the nature of deceit, proof of any one of the facts charged will be sufficient to maintain the action, provided the injury which is charged appears to have resulted from that one fact.—BRENNING *v.* STEVENS (1826), 5 L. J. O. S. K. B. 48.

573. ——.]—A tradesman can only recover against a person making a false representation of the means of one who referred to him, such damage as is justly & immediately referable to the false representation.—CORBETT *v.* BROWN (1832), 5 C. & P. 363, N. P.

574. ——.]—Declaration stated that pltf. had bought of C. & Son certain goods for a sum mentioned, which deft. had lent pltf. on his personal credit, without agreement for any lien on them in respect thereof; which sum pltf. paid to C. & Son, who accepted it in payment for the goods; yet that deft. falsely & wrongfully pretending that he was entitled to such lien, & had a right of preventing their delivery to pltf. till the said loan should be repaid, wrongfully & maliciously & without reasonable or probable cause in that behalf, but under colour of the said pretended lien, ordered C. & Son not to deliver the said goods to pltf., but to keep them till they received further orders; in consequence whereof C. & Son refused to deliver them to him. Plea, that pltf. never paid C. & Son:—*Held:* the action was maintainable, for after putting the averment of payment which had been traversed out of consideration, it appeared sufficiently that deft. knew that there was no agreement for a lien on the goods, & that there was no obligation on C. & Son to deliver the goods to pltf. without payment; & that their refusal so to deliver the goods to pltf. arose from deft.'s statement, & the damage directly resulted from that act of his.—GREEN *v.* BUTTON (1835), 2

PART VIII. SECT. 1, SUB-SECT. 4.—B.

569 i. *Clause disclaiming responsibility for inaccuracy of representations—No defence if representation fraudulent.*]—A provision in a contract that the parties are to rely solely on their own judgment in entering into it is no answer to a charge that the contract was induced by fraud.—CAMPBELL *v.* HAMILL, [1925] 4 D. L. R. 958; [1925] 3 W. W. R. 628.—CAN.

Sect. 1.—*In general: Sub-sect.* 5, *B., C. & D.*]

Cr. M. & R. 707; 1 Gale, 349; Tyr. & Gr. 118; 5 L. J. Ex. 81; 150 E. R. 299.

Annotations:—**Refd.** Lumley *v.* Gye (1853), 2 E. & B. 216; Lynch *v.* Knight (1861), 5 L. T. 291; Wren *v.* Weild (1869), L. R. 4 Q. B. 730; Miller *v.* David (1874), 30 L. T. 58; Allen *v.* Flood, [1898] A. C. 1.

575. ——.]—MILNE *v.* MARWOOD, No. 155. *ante.*

576. ——.]—A declaration, alleging that pltf., deft., & C. entered into a joint speculation in railway shares, C. advancing £6,000, £2,000 on his own behalf, £2,000 as a loan to pltf., & £2,000 on behalf of deft.; that C. being desirous of retiring from the adventure, deft. offered to take upon himself the whole of the adventure & debt, provided pltf. would consent to abandon his share of it to deft., & C. would accept deft. as his debtor in the place of pltf., for £2,000; that pltf. did so abandon, etc., & deft. agreed to take upon himself, etc., & C., on the faith of such agreement, consented to accept deft. as debtor in place of pltf.; nevertheless deft., knowing that he alone was capable of proving pltf. to have assented to the arrangement, fraudulently, etc., before the passing of Evidence Act, 1851 (c. 99), & in order to induce C. to believe that the joint adventure had never been put an end to, & to induce C. to sue pltf. for £2,000 & to deter pltf. from calling deft. as a witness, & to destroy his credit as a witness if he were called, wrote & sent to C. a letter purporting to be addressed to pltf., but being in fact directed to C. wherein he fraudulently & falsely pretended to expostulate with pltf., & asserted that pltf. had positively refused to concur in the arrangement; by means whereof C. was induced to & did believe that pltf. had never agreed to retire from the adventure, & that, acting on such belief, C. brought an action against pltf. to recover the £2,000, which action was referred to an arbitrator, upon the terms that neither pltf. nor deft. should be examined as witnesses; & that the arbitrator awarded against pltf. for £2,486 which pltf. was compelled to pay; discloses no cause of action, the damage alleged not being shown to be a natural result of the wrongful act of deft. Judgment affirmed.—COLLINS *v.* CAVE (1860), 6 H. & N. 131; 30 L. J. Ex. 55; 6 Jur. N. S. 1160; 8 W. R. 586; 158 E. R. 54, Ex. Ch.

Annotations:—**Refd.** Fitzjohn *v.* Mackinder (1861), 7 Jur. N. S. 1283; Spedding *v.* Nevell (1869), 38 L. J. C. P. 133.

577. ——.]—RICHARDSON *v.* DUNN, No. 592, *post.*

578. ——.]—BARRY *v.* CROSKEY, No. 370, *ante.*

579. ——.]—In an action for fraudulent misrepresentation pltf. may recover damages for any injury which is the direct & natural consequence of his acting on the faith of deft.'s representations. Therefore, where a cattle dealer sold to pltf. a cow, & fraudulently represented that it was free from infectious disease when he knew that it was not, & pltf. having placed the cow with five others, they caught the disease & died:—*Held:* pltf. was entitled to recover as damages the value of all the cows.—MULLETT *v.* MASON (1866), L. R. 1 C. P. 559; Har. & Ruth. 779; 35 L. J. C. P. 299; 14 L. T. 558; 12 Jur. N. S. 547; 14 W. R. 898.

Annotations:—**Consd.** Smith *v.* Green (1875), 1 C. P. D. 92. **Refd.** Wright *v.* Hetton Downs Co-op. Soc. (1884), Cab. & El. 200.

580. ——.]—RICHARDSON *v.* SILVESTER, No. 284, *ante.*

581. ——.]—ANDREWS *v.* MOCKFORD, No. 376, *ante.*

582. Costs incurred on discovering falsity of representation—Too remote.]—Costs incurred upon the discovery of the falsehood of a representation in order to reverse the consequences of the representation, are too remote an injury to be included in a verdict upon an action of fraud. It devolves upon pltf. to show actual loss to himself in such an action, & without proof of that loss, a verdict cannot be entered for nominal damages.—HYDE *v.* BULMER (1868), 18 L. T. 293.

Mental shock resulting from misrepresentation.]—*See* DAMAGES, Vol. XVII., p. 100, No. 150.

C. Actual Amount of Loss.

583. General rule.]—One of several partners in a banking house, being also a co-trustee with other persons, such trustees being entitled to certain stock & the dividends thereon, forged a power of attorney to transfer the stock, which was sold & transferred under such forged power. After the transfer he made false entries in the partnership books, by which he regularly credited the trustees with the supposed dividends upon the stock. It did not appear that any account recognising such false entries had been delivered to the trustees by the partners before their bkpcy. They, however, paid checks drawn on the credit of the dividends supposed to have been received, & which checks were duly paid:—*Held:* as the trustees were entitled to recover the dividends at the Bank of England, they could not treat the amount of those dividends as money had & received to their use by defts., the bankers, although the bankers might be liable to an action on the case for deceit, in which damages might be recovered in proportion to the injury arising from their untrue representation, that they had received the dividends for the use of the trustees.—HUME *v.* BOLLAND (1832), 1 Cr. & M. 130; 2 Tyr. 575; 149 E. R. 343.

Annotation:—**Consd.** Coles *v.* Bank of England (1839), 10 Ad. & El. 437.

584. ——.]—To a declaration for a false representation, whereby pltf. was induced to pay £2,000 & "sustained great loss & became & was adjudicated bkpt. & suffered great personal annoyance & was put to great trouble & inconvenience & was greatly injured in character & credit," deft. except as to the claim in respect of the adjudication in the bkpcy., & the remainder of the personal damage alleged, pleaded that before action, pltf. had been adjudicated bkpt., that the loss sustained was a pecuniary loss, & that the right to sue for it passed to his assignees:—*Held:* the only damage recoverable was a direct pecuniary loss, the right to sue for which passed to the assignees, & therefore the plea was a good answer to the whole declaration & might have been so pleaded.—HODGSON *v.* SIDNEY (1866), L. R. 1 Exch. 313; 4 H. & C. 492; 35 L. J. Ex. 182; 14 L. T. 624; 30 J. P. 615; 12 Jur. N. S. 694; 14 W. R. 923.

Annotations:—**Consd.** Morgan *v.* Stoble (1872), L. R. 7 Q. B. 611; Kellaway *v.* Bury (1892), 66 L. T. 599. **Refd.** Rose *v.* Buckett, [1901] 2 K. B. 449.

585. ——.]—A first mtgee., under his power of sale, sold some building land. The particulars, which were prepared by the auctioneers, stated that the roads on the property were kerbed & sewered, but this statement was found to be

583 i. *General rule.*]—SYNDICAT LYONNAIS DU KLONDYKE *v.* BARRETT (1905), 36 S. C. R. 279.—**CAN.**

583 ii. ——.]—The measure of damages is the amount which pltf. has lost by acting on the representation.—EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES *v.* BERTIE (1890), 8 N. Z. L. R. 579.—**N.Z.**

incorrect, & the purchaser claimed & obtained compensation. The second mtgee. brought this action against the first mtgee. for an account, & he claimed that the first mtgee. was liable to be charged with the amount actually allowed for compensation :—*Held :* the measure of damage was the amount of the actual loss occasioned by the mis-statement.—TOMLIN *v.* LUCE (1889), 43 Ch. D. 191 ; 59 L. J. Ch. 164 ; 62 L. T. 18 ; 54 J. P. 486 ; 38 W. R. 323 ; 6 T. L. R. 103, C. A.

586. ——.]—MCCONNEL *v.* WRIGHT, No. 396, *ante.*

587. Including compensation for time lost — Not anticipated profit.]—Where a principal employs an agent to procure an engagement, & the principal is able to show that he was induced to take up the engagement by the negligence or innocent misrepresentation of the agent, the true measure of damage is the principal's actual loss & not his anticipated profit ; but a sum may be awarded for compensation for time lost as part of his actual loss.—JOHNSTON *v.* BRAHAM & CAMPBELL, LTD., [1917] 1 K. B. 586 ; 86 L. J. K. B. 613 ; 116 L. T. 188 ; 61 Sol. Jo. 233, C. A.

D. Difference between Actual Value and Price Paid.

588. General rule.]—The measure of damages in this case is the difference between the real value of the property & the sum which pltf. was induced to give for it (ABBOTT, C.J.).—PEARSON *v.* WHEELER (1825), Ry. & M. 303, N. P.

589. ——.] — Pltf. purchased an hotel from deft. upon certain representations which turned out to be false & fraudulent. Upon finding out the fraud pltf. did not rescind the contract, but kept on the hotel for two years. In an action to recover damages for the fraudulent misrepresentations :—*Held :* the measure of damages was the difference between the price paid by pltf. & the real value of the hotel, & special damage occurring after the discovery of the fraud, when pltf. might have rescinded the contract, could not be recovered.—HAMER *v.* JAMES (1886), 2 T. L. R. 852, C. A. ; *subsequent proceedings* (1887), 4 T. L. R. 24, C. A.

Annotation :—**Refd.** Peek *v.* Derry (1887), 37 Ch. D. 541.

590. ——.]—ARNISON *v.* SMITH, No. 374, *ante.*

591. ——.]—DUNCAN *v.* SCAIFE (1888), 4 T. L. R. 716.

592. Additional sum for time lost.] — Pltf. being desirous of purchasing a public-house, A. introduced him to C. who had one to dispose of, & who referred pltf. to her agent B. A. volunteered to see B. on the subject, & accordingly went to him & afterwards told pltf. that B. represented the receipts of the house to average a certain sum daily ; upon faith of which statement pltf. bought the house for £400. It turned out that the value of the business had been grossly exaggerated, & pltf. without any notice to A., & without making any inquiry, brought an action against C. charging her with a deceitful representation on the sale. B. swore at the trial that he never made any such representation as A. stated ; & the jury being satisfied that A.'s statement was false, returned a verdict for deft.

Pltf. then sued A. for damages he had sustained from his false representation, when the jury gave him £300, being the difference between the price he gave for the business & the sum for which he afterwards sold it, £100 for loss of time, & £151 5*s.* the costs of the abortive action against C. :—*Held :* —the action was maintainable so far as related to the £300 & the £100 ; but the costs of the first action were not, under the circumstances, the natural & proximate consequence of A.'s misrepresentation, & therefore were not recoverable.—RICHARDSON *v.* DUNN (1860), 8 C. B. N. S. 655 ; 30 L. J. C. P. 44 ; 2 L. T. 430 ; 8 W. R. 582 ; 141 E. R. 1323.

593. Date of ascertainment of value—Date of purchase.]—If a man is induced by misrepresentation to buy an article, & while it is in his possession it becomes destroyed or damaged, he can only recover the difference between the value represented & the real value at the time he bought (COCKBURN, C.J.).—TWYCROSS *v.* GRANT (1877), 2 C. P. D. 469 ; 46 L. J. Q. B. 636 ; 36 L. T. 812 ; 25 W. R. 701, C. A. ; *subsequent proceedings* (1878), 4 C. P. D. 40, C. A.

Annotations :—**Apld.** Waddell *v.* Blockey (1879), 4 Q. B. D. 678 ; Capel *v.* Sim's Ships Compositions Co. (1888), 57 L. J. Ch. 713. **Refd.** Arkwright *v.* Newbold (1881), 17 Ch. D. 301 ; Peek *v.* Derry (1887), 37 Ch. D. 541 ; Shaw *v.* Holland (1900), 82 L. T. 782 ; Calthorpe *v.* Trechmann, Macleay *v.* Tait (1905), 75 L. J. Ch. 90. **Mentd.** *Re* Caerphilly Colliery Co., Ormerod's Case (1877), 37 L. T. 244 ; Craig *v.* Phillips (1877), 7 Ch. D. 249 ; Emma Silver Mining Co. *v.* Lewis (1879), 4 C. P. D. 396 ; Sullivan *v.* Metcalfe (1880), 5 C. P. D. 455 ; *Re* Great Wheal Polgooth Co. (1883), 53 L. J. Ch. 42 ; Samway *v.* Winch (1893), 9 T. L. R. 552 ; Baty *v.* Keswick (1901), 85 L. T. 18 ; Cackett *v.* Keswick, [1902] 2 Ch. 456 ; Broome *v.* Speak, [1903] 1 Ch. 586 ; Watts *v.* Bucknall, [1903] 1 Ch. 766 ; Shepheard *v.* Broome, [1904] A. C. 342 ; Stevens *v.* Hoare (1904), 20 T. L. R. 407 ; Nash *v.* Calthorpe, [1905] 2 Ch. 237 ; Marshall *v.* Morrison, [1907] W. N. 29.

594. —— ——.]—Pltf., a shareholder, claimed damages against defts. for non-disclosure in the prospectus of a contract, in breach of Cos. Act, 1867 (c. 131), s. 38. The co., a copper co., was incorporated on May 29, 1899, & was in liquidation. Deft., K., was chairman of the directors & partner in the firm of M., of high reputation in the copper trade, & defts., C., another director, & W., were both promoters. In the course of the promotion C. wrote to M. & co., on Mar. 10, 1899, that in consideration of their underwriting 10,000 shares, they were to receive 12,000 vendors' shares as commission, they were to be appointed commercial agents, the office of the co. was to be at their address, & K. was to go on the prospectus as chairman. In fact, 2,000 shares only were attributable to commission, the balance being for the use of the names of M. & K. This contract was not disclosed in the prospectus. There was no fraudulent intention, but the omission was due to a misunderstanding between counsel & the solr. as to the nature of the contract :—*Held :* the measure of damages was the difference between the amount paid for the shares & their actual value the day after allotment.—CACKETT *v.* KESWICK, [1902] 2 Ch. 456 ; 85 L. T. 14 ; 50 W. R. 10 ; *sub nom.* CACKETT *v.* KESWICK, BATY *v.* KESWICK, (1901) 17 T. L. R. 664 ; 45 Sol. Jo. 671 ; *on appeal*, [1902] 2 Ch. 469, C. A.

Annotations :—**Mentd.** Watts *v.* Bucknall, [1903] 1 Ch. 766 ; De La Cour *v.* Clinton, Trechmann *v.* Calthorpe (1904), 90 L. T. 615 ; Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234 ; Nash *v.* Calthorpe, [1905] 2 Ch. 237.

PART VIII. SECT. 1, SUB-SECT. 5.—D.

588 i. *General rule.*]—JELLETT *v.* PHILLIPS (1877), 3 V. L. R. (L.) 209.—**AUS.**

588 ii. ——.]—FAWCETT *v.* JOHNSON [illegible], 15 S. R. N. S. W. 51.—**AUS.**

iii. ——.]—JOHNSTONE *v.* HALL (1894), 10 Man. L. R. 161.—**CAN.**

588 iv. ——.]—The only damages recoverable in an action of deceit based upon false representations inducing pltf. to purchase property are the difference between the price paid for the thing purchased & its real value.—ROSEN *v.* LINDSAY (1907), 7 W. L. R. 115 ; 17 Man. L. R. 251.—**CAN.**

588 v. ——.]—KELLY *v.* BRADLEY (1916), 33 W. L. R. 747.—**CAN.**

588 vi. ——.]—HASPER *v.* SHAUER (1922), 65 D. L. R. 516 ; 15 Sask. L. R. 410 ; [1922] 2 W. W. R. 212.—**CAN.**

588 vii. ——.]—SISSONS *v.* HASSARD (Alta.), [1923] 4 D. L. R. 186 ; [1923] 3 W. W. R. 105.—**CAN.**

Sect. 1.—*In general: Sub-sect.* 5, *D. Sect.* 2. *Part IX. Sect.* 1: *Sub-sect.* 1.]

595. —— ——.]—In Dec. 1896, a promoting co. in the name of R. agreed to purchase two music halls for £24,000, with a view to sell them at an enhanced price to a theatre co. which it intended to promote for the purpose. On Feb. 1, 1897, R. agreed to sell the music halls to C. as trustee for the intended theatre co. for £75,000, to be paid partly in cash & partly by mtges., debentures, & fully paid shares, the vendor undertaking to pay all preliminary expenses & to expend some £5,000 in repairs. Both R. & C. were mere nominees of the promoting co. On Feb. 2, the theatre co. was incorporated, & on Feb. 4, the directors of the theatre co., who were all nominated by the promoting co., approved the prospectus & adopted the purchase by C., which was subsequently carried out. The business failed, & the music halls were sold by the mtgees. The promoting co. was the promoter of the theatre co., & was responsible for the prospectus, which concealed the fact that the promoting co. was the true owner, & further contained fraudulent misrepresentations: —*Held:* the promoting co. was liable in damages to the theatre co., the measure of which was the difference in value between the consideration paid by the theatre co. & the actual value at the date of the purchase of the properties which it acquired.—*Re* LEEDS & HANLEY THEATRES OF VARIETIES, LTD., [1902] 2 Ch. 809; 72 L. J. Ch. 1; 87 L. T. 488; 51 W. R. 5; 46 Sol. Jo. 648; 10 Mans. 72, C. A.

Annotations:—**Mentd.** *Re* Darby, *Ex p.* Brougham, [1911] 1 K. B. 95; Omnium Electric Palaces *v.* Barnes, [1914] 1 Ch. 332.

596. —— —— **Subsequent depreciation not considered.**]—L. ordered deft. to buy for him rupee paper; deft. sold rupee paper of his own to L., whilst he fraudulently led L. to believe that it belonged to third persons. The value of rupee paper afterwards became considerably less, but L. held for many months what deft. had sold to him, & ultimately resold it at a loss of £43,000:—*Held:* the measure of damages was not the amount of the loss ultimately sustained by L., but the difference between the price which he paid for the rupee paper & the price which he would have received if he had resold it in the market forthwith after purchasing it.—WADDELL *v.* BLOCKEY (1879), 4 Q. B. D. 678; 48 L. J. Q. B. 517; 41 L. T. 458, 27 W. R. 931, C. A.

Annotation:—**Mentd.** Cavendish-Bentinck *v.* Fenn (1887), 57 L. T. 773.

597. —— —— —— .]—HAMER *v.* JAMES, No. 589, *ante.*

Actions against directors of companies.]—*See* COMPANIES, Vol. IX., pp. 110, 127, 129, Nos. 517, 518, 659–661, 678.

SECT. 2.—PARTICULAR INSTANCES.

Against auctioneers.]—*See* AUCTION & AUCTIONEERS, Vol. III., pp. 43, 44, Nos. 303–312.

Against banks.]—*See* BANKERS, Vol. III., pp. 161, 162, 172, Nos. 239, 240, 295, 296.

Against building societies.]—*See* BUILDING SOCIETIES, Vol. VII., p. 491, Nos. 224, 225.

Against companies & officers of companies.]—*See* COMPANIES, Vol. IX., pp. 62, 122–129, 248, 484–487, 501, Nos. 178, 626–682, 1553, 3179–3195, 3283–3286.

598. On contract — Representations inducing contract.]—DOBELL *v.* STEVENS, No. 564, *ante.*

599. Commission of criminal offence.]—BURROWS *v.* RHODES, No. 455, *ante.*

On guarantee in fraud of creditor.]—*See* GUARANTEE, Vol. XXVI., pp. 98, 99, Nos. 676–680.

Against infants.]—*See* INFANTS, Vol. XXVIII., p. 180, Nos. 396–402.

On insurance contracts—Recovery of premiums.]—*See* INSURANCE, Vol. XXIX., pp. 61–63, 370–372, Nos. 208–218, 2972–2982, 2986.

600. Obtaining money by counterfeit letter—Right of action of master for fraud on servant.]—An action on the case for deceit lies for a master against a person for obtaining his money from the hands of his servant by means of a counterfeit letter, & the contents of the letter need not be shown.—TRACY *v.* VEAL (1609), Cro. Jac. 223; 79 E. R. 194; *sub nom.* TRACY'S CASE, Jenk. 315.

Against partners.]—*See* PARTNSERHIP.

—— **Liability on bill of exchange.**]—*See* BILLS OF EXCHANGE, Vol. VI., p. 98, Nos. 689, 690.

601. For personation.]—THOMSON *v.* GARDNER (1596), Moore, K. B. 538; 72 E. R. 743.

Annotation:—**Mentd.** Manby *v.* Scott (1662), O. Bridg. 229.

602. On promise—Absence of consideration immaterial.]—SMITH *v.* EDMUNDS (1589), cited 1 Leon. 186; 74 E. R. 171.

603. Representation as to credit of third party—Necessity for proof of fraud.]—SCOTT *v.* LARA, No. 337, *ante.*

604. —— —— .]—In an action on the case, for giving a false character, it is not sufficient to charge deft. with knowledge that the party recommended was in bad circumstances, that he, deft., had himself arrested him; & deft. may go into evidence to explain the circumstances.—WOOD *v.* WAIN (1796), 1 Esp. 441; Peake, Add. Cas. 79; 170 E. R. 413, N. P.

605. —— —— .]—HAYCRAFT *v.* CREASY, No. 26, *ante.*

606. —— ——.]—EYRE *v.* DUNSFORD, No. 144, *ante.*

607. —— ——.]—TAPP *v.* LEE, No. 125, *ante.*

608. —— —— .]—Arbitrator, to whom an action on the case for a fraudulent representation of the circumstances of A. was referred, found that deft., knowing the object of pltfs.' inquiries, had omitted to state the material facts of the existence of debts due by A. to him, & of his holding A.'s warrant of attorney, & that therefore he did not give a fair representation of what he knew concerning A.'s credit; & that deft., although he did not mean to hold out any inducement to pltfs. to trust A., thereby misled pltfs., & created in them a false confidence in the circumstances of A. Arbitrator acquitted deft. of all collusion with A., & of all fraud at the time of making the representation, but feeling himself compelled by adjudged cases, which he mentioned, to decide that the knowledge of the falsehood of the thing asserted was in itself fraud & deceit, he awarded in favour of pltfs. The ct. set aside the award, on the ground that the arbitrator had, on the face of it, acquitted the deft. of fraud & deceit.—AMES *v.* MILWARD (1818), 8 Taunt. 637; 2 Moore, C. P. 713; 129 E. R. 532.

609. ——.]—If a man, by a false representation, induces another to supply goods on the credit of a third person, & enters into a collateral undertaking, not in writing, to pay for them, he is not liable as for goods sold, but must be sued in an action of deceit.—THOMPSON *v.* BOND (1807), 1 Camp. 4; 170 E. R. 856, N. P.

610. ——.]—If A. make an inquiry of B. as to the circumstances of C. with respect to opening an account with him as a general customer, & B., fraudulently misrepresents them, in consequence of which A. sells C. goods from time to time, & is afterwards a loser by him, an action lies for the deceit, although the buyer pays for the first parcels of goods, on the purchase of which the reference is made. But deft. is liable only within a reasonable time, & to a reasonable amount. If one who has sold goods on the representation of another concerning the buyer's circumstances, afterwards tells the buyer he will sell him no greater amount without further references, & after that entrusts him to a greater amount, the author of the misrepresentation is not liable beyond the sum due at the date of pltf.'s declaration.—HUTCHINSON *v.* BELL (1809), 1 Taunt. 558; 127 E. R. 950.

Annotation:—**Refd.** De Graves *v.* Smith (1810), 2 Camp. 533.

611. ——.]—If A. inquires generally of B. concerning the circumstances of C., A. cannot maintain an action against B. for a deceitful representation upon this subject if C. pays A. for the goods which it was in contemplation to sell when the representation was made, although C. becomes insolvent & is indebted to A. for other goods subsequently sold. *Aliter* if A. had inquired of B. whether C. was worthy to be trusted as a general customer, or if there had been any conspiracy between B. & C. to cheat A. by paying for the first parcel of goods.—DE GRAVES *v.* SMITH (1810), 2 Camp. 533; 170 E. R. 1242, N. P.

612. ——.]—Effect of wilful misrepresentation as to credit; giving a remedy by way of damages on the ground of fraud; but administered with great caution.—*Ex p.* CARR (1814), 3 Ves. & B. 108; 35 E. R. 420.

—— **Necessity for writing.**]—*See* GUARANTEE, Vol. XXVI., pp. 31–33, Nos. 186–203.

—— **Action against bank.**] — *See* BANKERS, Vol. III., pp. 163–165, 305, Nos. 250–254, 991, 992.

613. On sale of business—Sale must be proved.]—In case for a fraudulent representation on the sale of a commission business, the declaration alleged that pltf. bargained with deft. to buy of him his interest in a certain lease, & a certain lease, & certain fixtures, etc., & the goodwill of a certain business, for £700, & that deft., by then falsely, fraudulently, & deceitfully pretending & representing to pltf. that the amounts received for commission in the course of the business, & the net profits of the trade, were of a certain amount, then sold to pltf. the lease, fixtures, etc., & the goodwill of the business at & for a certain sum, & it then went on to allege that the representation was false, & a consequent damage to pltf.:—*Held:* under not guilty, pltf. was bound to prove a sale, by production of the agreement between the parties, which appeared to be in writing, as well as a false & fraudulent representation, & it was not enough to prove an assignment of the lease, etc.—MUMMERY *v.* PAUL (1845), 1 C. B. 316; 4 L. T. O. S. 373; 135 E. R. 561.

On sale of goods.]—*See* SALE OF GOODS

On sale of land.]—*See* SALE OF LAND.

614. On sale of tithes—Misrepresentation as to title.]—An action of deceit will not lie against a person for falsely affirming that he was incumbent of such a vicarage, & had a right to the tithes, & afterwards selling them, although the vendee lost the tithes thus purchased by their being taken by the lawful incumbent; for the seller could not have them without title, & the buyer is at his peril to see it.—ROSWEL *v.* VAUGHAN (1607), Cro. Jac. 196; 79 E. R. 171.

Annotations:—**Distd.** Medina *v.* Stoughton (1699), 1 Ld. Raym. 593. **Refd.** Cross *v.* Gardner (1688), 1 Show. 68; Pasley *v.* Freeman (1789), 3 Term Rep. 51. **Mentd.** Burnby *v.* Bollett (1847), 16 M. & W. 644.

615. For work & labour—Misrepresentation as to amount.]—A. engaged to convey away certain rubbish for B. at a specified sum, under a fraudulent representation by B. as to the quantity of the rubbish which was to be so conveyed:—*Held:* in an action for the value of the work actually done A. could recover only according to the terms of the special contract; although, when he discovered the fraud, he might have repudiated the contract, & sued B. for deceit.—SELWAY *v.* FOGG (1839), 5 M. & W. 83; 8 L. J. Ex. 199; 151 E. R. 36.

Part IX.—Proceedings for Rescission.

SECT. 1.—NATURE AND CONDITIONS OF RIGHT TO RESCIND.

SUB-SECT. 1.—IN GENERAL.

Remedies for misrepresentation generally.]—*See* Part VII., *ante*.

616. Right to rescind—Contract induced by misrepresentation.]—There are two sorts of rules calculated to defeat fraud, one to protect good & innocent people, by rescinding a fraudulent agreement, into which they are drawn (LORD MANSFIELD).—CLARKE *v.* JOHNSON & Co. (1773), Lofft, 756; 98 E. R. 903; *sub nom.* CLARKE *v.* SHEE & JOHNSON, 1 Cowp. 197.

Annotations:—**Refd.** King *v.* Scrape (1795), 1 Esp. 432; Abbotts *v.* Barry (1820), 2 Brod. & Bing. 369; Banque Belge pour l'Etranger Soc. Anon. *v.* Hambrouck, Spanoghe, etc. (1920), 123 L. T. 495. **Mentd.** Lowndes *v.* Anderson (1810), 13 East, 130; Fielding *v.* Kymer (1821), 2 Brod. & Bing. 639; Sinclair *v.* Brougham, [1914] A. C. 398.

617. —— ——.]—OAKES *v.* TURQUAND & HARDING, PEEK *v.* SAME, *Re* OVEREND, GURNEY & Co., No. 130, *ante*.

618. —— ——.]—The owner of an estate agreed to sell it for £250,000, representing it to

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PART IX. SECT. 1, SUB-SECT. 1.

616 i. *Right to rescind—Contract induced by misrepresentation.*]—STAR KIDNEY PAD CO. *v.* GREENWOOD (1884), 5 O. R. 28.—**CAN.**

616 ii. —— ——.]—HUTCHINSON *v.* CALDER (1884), 1 Man. L. R. 46.—**CAN.**

616 iii. —— ——.]—If the representation is untrue, & made recklessly, & without reasonable ground for belief in its truth, the contract might be rescinded.—WATSON MANUFACTURING CO. *v.* STOCK (1889), 6 Man. L. R. 146.—**CAN.**

616 iv. —— ——.]—An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation.—COLE *v.* POPE (1898), 29 S. C. R. 291.—**CAN.**

616 v. —— ——.]—Misrepresentation is no ground for setting aside an executed contract unless there is fraud or misrepresentation amounting to fraud.—ABREY *v.* VICTORIA PRINTING CO. (1912), 21 O. W. R. 444; 3 O. W. N. 868; 2 D. L. R. 208.—**CAN.**

616 vi. —— ——.]—FRANZ *v.* HANSEN (Alta.), [1917] 3 W. W. R. 77; 36 D. L. R. 349.—**CAN.**

616 vii. —— ——.]—An innocent misrepresentation on a material point, inducing the entering into a contract, is a ground for rescission of the contract.—PARKE *v.* HAMMAN, [1907] T. H. 47.—**S. AF.**

Sect. 1.—Nature and conditions of right to rescind: Sub-sects. 1 & 2, A., B. & C.]

contain 1,530 acres. The purchaser agreed to sell it to a co. for £350,000, of which £150,000, was paid to him, £75,000 in cash, & bonds for £75,000, & he paid the vendor of the estate £50,000 as a deposit. It appeared that the estate contained less that 1,100 acres, & the co., having at the time only £1,536 in hand, complained to the purchaser of the deficiency, & he then wrote to the vendor decling to complete. The co. afterwards rescinded the contract:—*Held:* the co. were entitled to rescind on the ground of misrepresentation though they might have been able to ascertain the extent of the estate—ABERAMAN IRONWORKS *v.* WICKENS (1868), 4 Ch. App. 101; 20 L. T. 89; 17 W. R. 211, L. C.

Annotations:—**Reld.** Torrance *v.* Bolton (1872), L. R. 14 Eq. 124. **Mentd.** Fenwick *v.* Bulman (1869), L. R. 9 Eq. 165; Goodford *v.* Stonehouse & Nailsworth Ry. (1869), 38 L. J. Ch. 307; Mycock *v.* Beatson (1879), 13 Ch. D. 384; Fleming *v.* Loe, [1901] 2 Ch. 594.

619. ——.]—CREE *v.* STONE (1907), *Times*, May 10.

620. —— —— **Relief granted against one partner—Damages already recovered against other.**]—RAWLINS *v.* WICKHAM, No. 271, *ante*.

621. —— —— **Misrepresentation made to public—Acted on by plaintiff.**]—STEWART & CO. *v.* WEBER (1903), *Times*, Dec. 8, C. A.

622. —— —— **General statement—Where no duty to disclose.**]—Where two parties are negotiating at arm's length, a general communication, which is in fact untrue, made where there was no duty of disclosure on the party making it, is not such a misrepresentation as to be ground for the rescission of a contract.—KELLY *v.* ENDERTON, [1913] A. C. 191; 82 L. J. P. C. 57; 107 L. T. 781, P. C.

—— —— **Contract to take shares.**]—*See* COMPANIES, Vol. IX., pp. 117 *et seq.*

—— —— **Principle applied to gifts.**]—*See* GIFTS, Vol. XXV., p. 523, No. 163.

—— —— **Contracts of insurance.**]—*See* INSURANCE, Vol. XXIX., p. 371, Nos. 2977–2982.

Setting aside—Awards.]—*See* ARBITRATION, Vol. II., p. 551, Nos. 1828–1835.

—— **Judgments or orders.**]—*See* PRACTICE.

SUB-SECT. 2.—PROOF OF FRAUD.

A. Where Relief sought on Ground of Misrepresentation.

623. Proof of fraud not necessary.]—Pltf. was a single lady, about fifty-three years of age, & the heiress-at-law of her deceased brother. Deft. had been the brother's agent, & managed his property for him till his death, & for pltf. afterwards. Pltf. knew nothing of her brother's affairs. Soon after the brother's death deft. informed pltf. that her brother had left some land, to which she was entitled as his heiress-at-law, & asked her what she meant to do with it, adding, that her brother often said deft. & his daughter were to have it, but he never in any way made it over to them. Pltf. then asked deft. what was the value of the land, & he answered, "£100, may be a trifle more or less"; & asked her whether she was willing that he should purchase it at that price. On her saying yes, deft. further added that all his property would come to his daughter, & that he should have it made over to her. Deft. then asked pltf. whether she would like to consult any one on the subject, & she replied that she did not want that, because she had perfect confidence in him. The property was really worth about £750 or £800. Pltf. executed a conveyance of it to deft.'s daughter in fee, for the expressed consideration of £500; but was paid only £100 on the transaction.

Deft. explained the amount of the consideration money by alleging, but not proving, that there were moneys due to him from pltf.'s brother, which, if taken into account, would have reduced the value of her interest in the property to the £100.

Pltf., on ascertaining the truth, filed a bill to set aside the sale on the grounds of, first, inadequate consideration; second, misrepresentation; third, the fiduciary relationship of the parties; fourth, the confidence naturally & justly reposed by her in deft., & her ignorance of the facts, except so far as he, & he alone, could inform her of them; & fifth, undue influence on his part:—*Held:* the transaction was a sale, & not a gift; there was no such fiduciary relationship between the parties as incapacitated them to bargain for the property; but on the simple ground of the misrepresentation made by deft., the sale must be declared void, & the conveyance set aside.

Semble, if the transaction had been a gift, & not a sale, the result would on that ground have been the same.—HAYGARTH *v.* WEARING (1871), L. R. 12 Eq. 320; 40 L. J. Ch. 577; 24 L. T. 825; 36 J. P. 132; 20 W. R. 11.

Annotation:—**Reld.** Fry *v.* Lane, *Re* Fry, Whittet *v.* Bush (1888), 40 Ch. D. 312.

624. ——.]—There is no general rule that actual fraud is necessary to induce a ct. of equity to rescind a contract for sale. The ct. acts on the same principle in rescinding contracts for sale as in setting aside other contracts & dealings which it considers unconscientious.—TORRANCE *v.* BOLTON (1872), 8 Ch. App. 118; 42 L. J. Ch. 177; 27 L. T. 738; 37 J. P. 164; 21 W. R. 134, L. JJ.

Annotations:—**Consd.** Blaiberg *v.* Keeves, [1906] 2 Ch. 175; Nocton *v.* Ashburton, [1914] A. C. 932. **Reld.** Carlish *v.* Salt, [1906] 1 Ch. 335.

625. ——.]—REDGRAVE *v.* HURD, No. 417, *ante*.

626. ——.]—As to the circumstances in which the untrue statement was made, it seems to me to be immaterial to consider whether it was untrue to the knowledge of deft. or not, as the action is brought for rescission, & is not an action of deceit (NORTH, J.).—NASH *v.* WOODERSON (1884), 52 L. T. 49; 33 W. R. 301.

627. ——.]—DERRY *v.* PEEK, No. 185, *ante*.

628. ——.]—STEWART *v.* KENNEDY (No. 2), No. 61, *ante*.

629. ——.]—The House of Lords set aside deeds & documents by which the entailed estates of M. & R. were disentailed & resettled on the ground that the heir in entail had been induced to enter into the transactions by representations inconsistent with the facts made to him, not fraudulently nor with intent to deceive, by his father's legal adviser.—MENZIES *v.* MENZIES (1893), 9 T. L. R. 347, H. L.

630. ——.]—A deed of covenant of 1851, relating to a building estate, after forbidding certain offensive & noisy trades & businesses, provided that there should not be carried on "any trade or business or occupation whatsoever whereby any injurious offensive or disagreeable noise or nuisance shall or may be occasioned caused or

633 1. *Proof of fraud not necessary.*]—NEW ZEALAND LOAN & MERCANTILE AGENCY CO. *v.* HOWES (1891), 4 Q. L. J. 73.—**AUS.**

made." Pltf. entered into a contract for the purchase from deft. of a house on this estate for the purpose of a boys' school, on the representation of deft.'s agent that there was nothing in this deed which would prevent him from carrying on such a school on this property. On an action for rescission of the contract:—*Held:* the carrying on of pltf.'s school in an ordinary & reasonable way would be within the wording of the restrictive covenant, which could not be limited to trades or businesses *ejusdem generis* with those specifically mentioned; & pltf. having been induced by a misrepresentation of fact, & not a mere statement of law, made by deft.'s agent to enter into this contract, was entitled in equity to rescission, even though the representation had not been made fraudulently.—WAUTON *v.* COPPARD, [1899] 1 Ch. 92; 68 L. J. Ch. 8; 79 L. T. 467; 47 W. R. 72; 43 Sol. Jo. 28.

631. ——.]—WEISER *v.* SEGAR (No. 2) (1904), 48 Sol. Jo. 457, C. A.

632. ——.]—ARMSTRONG *v.* JACKSON, No. 645, *post.*

633. ——.]—HARRISON *v.* KNOWLES & FOSTER, No. 472, *ante.*

634. ——.]—In an action for rescission & return of the money paid, pltf. need not prove fraud, but will succeed if he establish an innocent misrepresentation (PICKFORD, L.J.).—GOLDREI, FOUCARD & SON *v.* SINCLAIR & RUSSIAN CHAMBER OF COMMERCE IN LONDON, [1918] 1 K. B. 180; 87 L. J. K. B. 261; 118 L. T. 147; 34 T. L. R. 74, C. A.

Annotation:—**Mentd.** Parr *v.* Snell, [1923] 1 K. B. 1.

635. ——.]—FIRST NATIONAL REINSURANCE CO. *v.* GREENFIELD, No. 646, *post.*

636. ——.]—(1) In Feb. 1920, applts., who had contracted with a firm of shipbuilders for the building of a steamer, assigned the contract to resps. on representations, which though false were not fraudulent:—*Held:* resps.' contract with applts. ought to be rescinded.

(2) Election to affirm must, if to be gathered from action, be gathered from unequivocal acts. It is not conclusive that the act in itself was trivial, but the triviality of the act may easily affect the inferences to be drawn from it (LORD DUNEDIN).—ABRAM S.S. CO. *v.* WESTVILLE SHIPPING CO., [1923] A. C. 773; 93 L. J. P. C. 38; 130 L. T. 67, H. L.

See, also, MISTAKE, pp. 122-127, *post.*

B. Where Fraud relied on as Ground for Relief.

637. Onus of proof on plaintiff.]—The *onus* of showing that a compromise has been fraudulently obtained by intimidation & false representation, is cast upon those who seek to impeach the validity of their own deed.—RAJUNDER NARAIN RAE *v.* BIJAI GOVIND SING (1839), 2 Moo. Ind. App. 181; 18 E. R. 269, P. C.

Annotations:—**Mentd.** Keerut Sing *v.* Koolahul Sing (1840), 2 Moo. Ind. App. 331; Bhugwandeen Doobey *v.* Myna Baee (1868), 11 Moo. Ind. App. 487; Venkata Narasimha Appa Row *v.* Court of Wards, Venkata Ramalakshmi Garu *v.* Gopala Appa Row, *Ex p.* Rajah Gopala Appa Row (1886), 11 App. Cas. 660.

638. ——.]—It is the duty of the ct. in suits for the cancellation of agreements on the ground of fraud, to maintain the principle that no relief be given unless a sufficient case of fraud is distinctly alleged in the pleadings, & proved as alleged.—MARTYN *v.* WESTBROOK (1862), 7 L. T. 449, L. C.

639. —— **Strict proof required.**]—Where pltf. seeks to set aside a transaction on the ground of fraud of a particular description, the *onus probandi* is upon him, & he will be bound strictly to prove his case as it is laid in his bill.—MOWATT *v.* BLAKE (1858), 31 L. T. O. S. 387, H. L.; *revsg.* S. C. *sub nom.* BLAKE *v.* MOWATT (1856), 21 Beav. 603.

Annotation:—**Reld.** Armstrong *v.* Jackson, [1917] 2 K. B. 822.

640. —— ——.]—The salutary rule of this ct. is, that whenever a suitor alleges fraud as a ground of relief, he must be held bound to prove it by the clearest possible evidence (STUART, V.-C.).—KISCH *v.* CENTRAL RY. CO. OF VENEZUELA, LTD. (1865), 12 L. T. 295; 11 Jur. N. S. 646; *on appeal, sub nom.* CENTRAL RY. CO. OF VENEZUELA (DIRECTORS, ETC.) *v.* KISCH (1867), L. R. 2 H. L. 99, H. L.

Annotations:—**Reld.** Cargill *v.* Bower (1878), 10 Ch. D. 502; Symonds *v.* City Bank (1886), 34 W. R. 364. **Mentd.** Denton *v.* MacNeil (1866), L. R. 2 Eq. 352; Ross *v.* Estates Investment Co. (1866), L. R. 3 Eq. 122; *Re* Cachar Co., Lawrence's Case, *Re* Russian (Vyksounsky) Iron Works Co., Kincaid's Case (1867), 2 Ch. App. 412; Henderson *v.* Lacon (1867), L. R. 5 Eq. 249; Kent *v.* Freehold Land & Brickmaking Co. (1867), L. R. 4 Eq. 588; *Re* Madrid Bank, Wilkinson's Case (1867), 36 L. J. Ch. 489; Oakes *v.* Turquand & Harding, Peek *v.* Same, *Re* Overend, Gurney & Co. (1867), L. R. 2 H. L. 325; *Re* Reese River Silver Mining Co., Smith's Case (1867), 2 Ch. App. 604; *Re* Anglo-Danubian Steam Navigation & Colliery Co., Walker's Case (1868), L. R. 6 Eq. 30; *Re* Canadian Native Oil Co., Fox's Case (1868), L. R. 5 Eq. 118; Chester *v.* Sparge (1868), 18 L. T. 314; Hodgkinson *v.* Kelly (1868), L. R. 6 Eq. 496; Langham *v.* East Wheal Rose Consolidated Silver-Lead Mining Co. (1868), 37 L. J. Ch. 253; *Re* Estates Investment Co., *Ex p.* Pawle (1869), 38 L. J. Ch. 318; *Re* Estates Investment Co., *Ex p.* Ashley, Scholey *v.* Venezuela Central Ry. (1870), 39 L. J. Ch. 354; *Re* Estates Investment Co., McNeill's Case (1870), L. R. 10 Eq. 503; Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.; Blenkhorn *v.* Penrose (1880), 43 L. T. 668; Mathias *v.* Yetts (1882), 46 L. T. 497; *Re* Scottish Petroleum Co. (1883), 23 Ch. D. 413; Bellairs *v.* Tucker (1884), 13 Q. B. D. 562; Newlands *v.* National Employers' Accident Assocn. (1885), 54 L. J. Q. B. 428; Scott *v.* Snyder Dynamite Projectile Co. (1892), 67 L. T. 104; Aaron's Reefs *v.* Twiss, [1896] A. C. 273; Byrne *v.* Millon & Askam Hematite Iron Co. (1901), 46 Sol. Jo. 85.

641. —— ——.]—In every case where pltf. comes to ct. to set aside a deed on the ground of fraud, it is necessary that there should be clear & unequivocal proof of the facts which are said to constitute the fraud, & it must be shown that the facts are such as in the eye of the ct. amount to fraud.—LUMLEY *v.* DESBOROUGH (1870), 22 L. T. 597.

Failure to prove fraud—Whether relief available on other grounds.]—*See* Sub-sect. 2, D., *post.*

C. Where Contract Completely Executed.

642. Whether rescission available if fraud not proved.]—JONES *v.* PRICE, No. 712, *post.*

643. ——.]—A bill was filed by a *cestui que trust* to set aside a purchase by a trustee of a legacy, on the ground that the trustee had improperly alleged that the interest was contingent:—*Held:* as the allegation of fraud was not substantiated, & the parties had dealt with one another, on equal terms, the sale ought not to be

PART IX. SECT. 1, SUB-SECT. 2.—B.

639 i. *Onus of proof on plaintiff—Strict proof required.*]—JOOMNA PERSHAD SOOKOOL *v.* JOYRAM LALL MAHTO (1878), 2 C. L. R. 26.—**IND.**

PART IX. SECT. 1, SUB-SECT. 2.—C.

642 i. *Whether rescission available if fraud not proved.*]—ALBERTA NORTH-WEST LUMBER CO., LTD. *v.* LEWIS, [1917] 3 W. W. R. 1007; 38 D. L. R. 228; 24 B. C. R. 564.—**CAN.**

642 ii. ——.]—In an action for rescission of a contract transferring timber licenses on the ground of misrepresentation as to title:—*Held:* the contract was an executed one & fraud had not been proved &, therefore, pltf. was not entitled to succeed.—FOULGER *v.* LEWIS, [1917] 3 W. W. R. 1015; 24 B. C. R. 556.—**CAN.**

642 iii. ——.]—FREEAR *v.* GILDERS (1921), 64 D. L. R. 274; 50 O. L. R. 217.—**CAN.**

Sect. 1.—Nature and conditions of right to rescind: Sub-sect. 2, C. & D.; sub-sect. 3, A.]

set aside.—LUFF *v.* LORD (1865), 11 L. T. 695; 11 Jur. N. S. 50, L. C.

Annotations :—**Consd.** *Re* Biel's Estate, Gray *v.* Warner (1873), L. R. 16 Eq. 577. **Reld.** Plowright *v.* Lambert (1885), 52 L. T. 646. **Mentd.** Lord *v.* Lord (1867), 2 Ch. App. 782.

644. ——.]—A.-G. *v.* RAY, No. 23, *ante*.

645. ——.]—(1) It is undoubted law that when a vendor has procured the sale of his property by misrepresentation the purchaser can set aside the contract of purchase, prior to completion, even though the misrepresentation be innocent (MCCARDIE, J.).

(2) If the contract has been executed by the completion of a conveyance or lease, or the formal assignment of a chattel, then rescission cannot be obtained on the ground of innocent misrepresentation by the vendor or lessor. When the contract is so completed, fraud must be proved before rescission can be granted (MCCARDIE, J.).

(3) The right of the party defrauded is not affected by the mere lapse of time so long as he remains in ignorance of the fraud (MCCARDIE, J.). —ARMSTRONG *v.* JACKSON, [1917] 2 K. B. 822; 86 L. J. K. B. 1375; 117 L. T. 479; 33 T. L. R. 444; 61 Sol. Jo. 631.

Annotation :—*Generally*, **Reld.** Collins *v.* Hopkins, [1923] 2 K. B. 617.

646. ——.]—If a shareholder desires to avoid his contract to take shares it is not necessary that he should prove fraud; it is enough if he proves a misrepresentation of fact. If a contract has been executed & property has passed, then in order that the conveyance shall be set aside, fraud must be shown (MCCARDIE, J.).—FIRST NATIONAL REINSURANCE CO. *v.* GREENFIELD, [1921] 2 K. B. 260; 90 L. J. K. B. 617; 125 L. T. 171; 37 T. L. R. 235.

Annotation :—**Reld.** Humphrey & Denman (In Liquidation) *v.* Kavanagh (1925), 41 T. L. R. 378.

—— **Restitutio in integrum.**]—*See* Sect. 2, sub-sect. 1; Sect. 3, sub-sect. 6, *post*.

647. Application of rule — Executed leases.]—An agreement for a lease, duly perfected by a deed, cannot be set aside for innocent misrepresentation (JOYCE, J.).—MILCH *v.* COBURN (1910), 27 T. L. R. 170; 55 Sol. Jo. 170; *revsd.* on other grounds, 27 T. L. R. 372, C. A.

—— ——.]—*See, also*, LANDLORD & TENANT, Vol. XXX., p. 479, Nos. 1408-1410.

—— **Sale of company shares.**]—*See* COMPANIES, Vol. IX., p. 354, No. 2237.

—— **Sale of land.**]—*See* SALE OF LAND.

Conveyances in fraud of charity.] — *See* CHARITIES, Vol. VIII., p. 362, Nos. 1617, 1618.

As to rescission on ground of mistake.]—*See* MISTAKE, pp. 122-127, *post*.

D. Unproved Allegations of Fraud.

648. Whether ground for dismissing entire action.]—If a bill makes a case of actual fraud, &, at the hearing, the fraud is disproved or not established, the ct. will not in general allow the bill to be used for any secondary or inferior kind of relief to which pltf. might otherwise have been entitled, but will dismiss it at once.—GLASCOTT *v.* LANG (1847), 2 Ph. 310; 16 L. J. Ch. 429; 9 L. T. O. S. 490; 11 Jur. 642; 41 E. R. 962, L. C.

Annotations :—**Expld.** Archbold *v.* Charitable Bequests for Ireland Comrs. (1849), 2 H. L. Cas. 440. **Reld.** Price *v.* Berrington (1851), 3 Mac. & G. 486; Barnard *v.* Hunter (1856), 5 W. R. 92. **Mentd.** The Royal Arch (1857), Sw. 269; Sultan (Cargo Ex) (1859), Sw. 504; The Bonita (1861), 30 L. J. P. M. & A. 145; The Olivier (1862), Lush. 484; Duranty *v.* Hart (1863), 2 Moo. P. C. C. N. S. 289; The Hamburg (1864), Brown. & Lush. 253.

649. ——.] — Where a purchaser seeks to be relieved against the purchase on the ground of personal fraud by the vendor, & the alleged fraud is not proved, he is not entitled to relief on any other grounds.—WILDE *v.* GIBSON (1843), 1 H. L. Cas. 605; 12 Jur. 527; 9 E. R. 897, H. L.; *revsg.* S. C. *sub nom.* GIBSON *v.* D'ESTE, 2 Y. & C. Ch. Cas. 542.

Annotations :—**Consd.** Espey *v.* Lake (1852), 10 Hare, 260; Reynell *v.* Sprye (1852), 1 De G. M. & G. 660. **Expld.** Parr *v.* Jewell (1855), 1 K. & J. 671. **Consd.** Robson *v.* Devon (1857), 29 L. T. O. S. 300; Joliffe *v.* Baker (1883), 11 Q. B. D. 255; Seddon *v.* North Eastern Salt Co., [1905] 1 Ch. 326; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Reld.** Price *v.* Berrington (1851), 3 Mac. & G. 486; Bilsset *v.* Daniel (1853), 18 Jur. 122; Chadwick *v.* Chadwick (1854), 23 L. T. O. S. 108; Barnard *v.* Hunter (1856), 5 W. R. 92; Udell *v.* Atherton (1861), 7 H. & N. 172; Traill *v.* Baring (1864), 4 De G. J. & Sm. 318; Boss *v.* Helsham (1866), 4 H. & C. 642; Brett *v.* Clowser (1880), 5 C. P. D. 376; Brownlie *v.* Campbell (1880), 5 App. Cas. 925; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; Debenham *v.* Sawbridge, [1901] 2 Ch. 98. **Mentd.** Griggs *v.* Staplee (1848), 2 De G. & Sm. 572; Marshall *v.* Sladden (1849), 7 Hare, 428; Benham *v.* Keane (1861), 5 L. T. 261; Carlish *v.* Salt, [1906] 1 Ch. 335.

650. ——.]—If a bill alleges fraud, which is not proved, & also alleges other matters, which, being proved, are grounds for a decree, the proper course is to dismiss so much of the bill as is not proved, & to give so much relief, under the circumstances, as pltf. may be entitled to.—ARCHBOLD *v.* CHARITABLE BEQUESTS FOR IRELAND COMRS. (1849), 2 H. L. Cas. 440; 13 L. T. O. S. 249; 9 E. R. 1159, H. L.

Annotations :—**Apld.** Hickson *v.* Lombard (1866), L. R. 1 H. L. 324. **Consd.** Nocton *v.* Ashburton, [1914] A. C. 932. **Reld.** Bromley *v.* Smith, Boustead *v.* Bromley, Smith *v.* Bromley (1859), 26 Beav. 644; Traill *v.* Baring (1864), 4 De G. J. & Sm. 318.

651. ——.]—The ct. will not refuse relief to a pltf. merely on the ground that he has superadded to the circumstances of the case, which would entitle him to relief, allegations of fraud which are not established.—ESPEY *v.* LAKE (1852), 10 Hare, 260; 22 L. J. Ch. 336; 20 L. T. O. S. 203; 16 Jur. 1106; 1 W. R. 59; 68 E. R. 923.

Annotation :—**Consd.** Parr *v.* Jewell (1855), 1 K. & J. 671.

652. ——.] — (1) It is well established, that if, after striking out allegations [of fraud] in a plea, that which is the material part be left, the plea is good, & deft. sustains it by proving that part (PARKE, B.).

(2) With respect to the costs which counsel stated that pltfs. had been put to in order to repel the charge of fraud, I apprehend that would be a question for the master, & that he would not allow all the expenses as to the fraud, inasmuch as the pleas were supported on a different ground (PARKE, B.).—ANDERSON *v.* THORNTON (1853), 8 Exch. 425; 20 L. T. O. S. 250; 155 E. R. 1415.

Annotations :—*As to* (1) **Apld.** Thom *v.* Bigland (1853), 8 Exch. 725. *Generally*, **Mentd.** Towle *v.* National Guardian Assce. Soc. & Albert Life Assce. & Guarantee Co. (1861), 5 L. T. 193.

653. ——.] — If a case of fraud is made by a bill, & is not established by the evidence, & another case for relief is alleged in the same bill & proved, so much only of the bill as relates to the case of fraud is dismissed, & relief may be given upon the other part of it.—PARR *v.* JEWELL (1855), 1 K. & J. 671; 3 W. R. 567; 69 E. R. 629.

Annotation :—**Consd.** Parker *v.* Lewis (1873), 28 L. T. 91.

654. ——.]—If a declaration discloses a state of facts upon which an action may be mainained although there be neither malice nor fraud, pltf. is not bound to prove either, though both be alleged, & may recover on the liability which the facts disclose though both fraud & malice be disproved.—SWINFEN *v.* CHELMSFORD (LORD) (1860),

5 H. & N. 890; 29 L. J. Ex. 382; 2 L. T. 406; 6 Jur. N. S. 1035; 8 W. R. 545; 157 E. R. 1437.

Annotations:—**Distd.** Connecticut Fire Insce. *v.* Kavanagh, [1892] A. C. 473. **Consd.** Nocton *v.* Ashburton, [1914] A. C. 932; Goldrei, Foucard *v.* Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180. **Mentd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677; Strauss *v.* Francis (1866), L. R. 1 Q. B. 379; Matthews *v.* Munster (1887), 20 Q. B. D. 141; Neale *v.* Lennox, [1902] 1 K. B. 838.

655. ——.]—If the relief sought by the bill is based on fraud, the failure to prove it is fatal; but if by striking out of the bill the charge of fraud there is sufficient equity stated & proved, & the charge of fraud is only subsidiary, it is a matter only affecting costs.—LONDON CHARTERED BANK OF AUSTRALIA *v.* LEMPRIÈRE (1873), L. R. 4 P. C. 572; 9 Moo. P. C. C. N. S. 426; 42 L. J. P. C. 49; 29 L. T. 186; 21 W. R. 513; 17 E. R. 574, P. C.

Annotations:—**Reld.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391. **Mentd.** Adamson *v.* Hammond (1873), L. R. 3 P. & D. 141; Outram *v.* Hyde (1875), 24 W. R. 268; Wainford *v.* Heyl (1875), L. R. 20 Eq. 321; Mayd *v.* Field (1876), 3 Ch. D. 587; *Re* Grissell, *Ex p.* Jones (1879), 12 Ch. D. 484; *Re* Harvey's Estate, Godfrey *v.* Harben (1879), 13 Ch. D. 216; Pike *v.* Fitzgibbon, Martin *v.* Fitzgibbon (1881), 17 Ch. D. 454; Paul *v.* Paul (1882), 51 L. J. Ch. 839; *Re* Hastings, Hallett *v.* Hastings (1887), 35 Ch. D. 94; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717.

656. ——.]—A bill to set aside a deed containing charges of fraud which the ct. deems not to be proved will be dismissed as to those charges, but need not be dismissed altogether, if there are other charges which the ct. deems to constitute what amounts to great irregularity & legal fraud, & to require the granting of the relief prayed.—HILLIARD *v.* EIFFE (1874), L. R. 7 H. L. 39, H. L.

Annotations:—**Reld.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391; Alexander *v.* Automatic Telephone Co., [1900] 2 Ch. 56. **Mentd.** Yeatman *v.* Yeatman (1877), 7 Ch. D. 210.

657. ——.]—In this case it is of the essence of pltfs.' declaration that resp. was guilty of fraud, & that is not proved. If the allegations of fraud & wilful misrepresentation were expunged, it is exceedingly doubtful whether there would remain an intelligible charge of negligence (LORD WATSON).—CONNECTICUT FIRE INSURANCE CO. *v.* KAVANAGH, [1892] A. C. 473; 61 L. J. P. C. 50; 67 L. T. 508; 57 J. P. 21; 8 T. L. R. 752, P. C.

Annotations:—**Mentd.** Banbury *v.* Bank of Montreal, [1918] A. C. 626; North Staffordshire Ry. *v.* Edge, [1920] A. C. 254; Yorkshire Insce. *v.* Craine, [1922] 2 A. C. 541.

658. Whether relief granted on other grounds.]—JONES *v.* PRICE, No. 712, *post*.

659. ——.]—When pleadings in equity are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to pltf., if he fails in establishing the fraud, to pick out, from the allegations in the bill, facts which might, if not put forward as proofs of fraud, have warranted pltf. in asking, & the ct. in granting, relief.

It is the duty of the judge to determine whether the two are so interwoven with each other, that, on the failure of the proof of fraud, it is impossible to treat the other facts as separate allegations justifying a separate mode of dealing with them.—HICKSON *v.* LOMBARD (1866), L. R. 1 H. L. 324.

Annotations:—**Consd.** Parker *v.* M'Kenna (1874), 44 L. J. Ch. 425. **Apld.** McElroy *v.* Murphy (1874), 22 W. R. 501; Tabor *v.* Cunningham (1875), 24 W. R. 153. **Consd.** Nocton *v.* Ashburton, [1914] A. C. 932. **Reld.** Traill *v.* Baring (1864), 4 De G. J. & Sm. 318. **Mentd.** Guthrie *v.* Abool Mozuffer (1871), 14 Moo. Ind. App. 53; Bettyes *v.* Maynard (1883), 49 L. T. 389.

660. ——.]—A bill impeaching a security upon charges of actual fraud which were not sustained dismissed with costs so far as related to the charges of fraud, although the security was set aside on the ground of undue influence.—TABOR *v.* CUNNINGHAM (1875), 24 W. R. 153.

661. Whether visited with costs.]—ANDERSON *v.* THORNTON, No. 652, *ante*.

662. ——.]—The question of costs considered, where pltf. fails in establishing a case of fraud forming a distinct ground for relief.—PLEDGE *v.* BUSS (1860), John. 663; 6 Jur. N. S. 695; 70 E. R. 585.

Annotations:—**Mentd.** Campbell *v.* Rothwell (1877), 47 L. J. Q. B. 144; Davies *v.* London & Provincial Marine Insce. (1878), 38 L. T. 478; Forbes *v.* Jackson (1882), 19 Ch. D. 615.

663. ——.]—Where pltfs., whose remedy was by action at law, for goods sold & delivered, filed their bill, alleging fraud, & upon the faith of this allegation obtained an injunction to restrain defts. from parting with the goods, & the allegation of fraud was afterwards disproved, the ct. ordered pltfs. to pay the whole of the costs of the suit, although the injunction was dissolved upon defts. paying the price of the goods.—STRAKER *v.* EWING (1865), 34 Beav. 147; 11 L. T. 588; 11 Jur. N. S. 127; 13 W. R. 286; 2 Mar. L. C. 156; 55 E. R. 590.

664. ——.]—LONDON CHARTERED BANK OF AUSTRALIA *v.* LEMPRIÈRE, No. 655, *ante*.

SUB-SECT. 3.—WHETHER CONTRACT VOIDABLE OR VOID.

A. In General.

665. General rule—Contract voidable not void.]—MURRAY *v.* MANN, No. 177, *ante*.

666. —— ——.]—STEVENSON *v.* NEWNHAM, No. 687, *post*.

667. —— —— .]—(1) I consider that by the law of England fraud cuts down everything (POLLOCK, C.B.).

(2) The rule that applies to a case simply of fraud where there has been a contract imposed upon a man by fraud, & which he may adopt or not as he pleases, is a very simple rule, & if he adopt it he cannot afterwards repudiate it (POLLOCK, C.B.).—ROGERS *v.* HADLEY (1863), 2 H. & C. 227; 32 L. J. Ex. 241; 9 L. T. 292; 9 Jur. N. S. 898; 11 W. R. 1074; 159 E. R. 94.

Annotations:—*Generally*, **Mentd.** Bolckow *v.* Seymour (1864), 17 C. B. N. S. 106; Kempson *v.* Boyle (1865), 3 H. & C. 763; Clever *v.* Kirkman (1875), 33 L. T. 672.

668. —— ——.]—OAKES *v.* TURQUAND & HARDING, PEEK *v.* SAME, *Re* OVEREND, GURNEY & CO., No. 130, *ante*.

669. —— ——.]—(1) We think that a plea might be framed, stating that the goods had been sold to Adams, & delivered by the London Pianoforte co. to the railway co., for the purpose of being delivered to pltf. under a contract induced by the fraud of Adams, to which pltf. was priory (MELLOR, J.).

(2) The fact that the contract was induced by fraud did not render the contract void, or prevent

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PART IX. SECT. 1, SUB-SECT. 3.—A.

h. *General rule.*]—A contract induced by fraud is not void but voidable merely at the option of the party affected or prejudiced thereby.—WALTON *v.* SIMPSON (1884), 6 O. R. 213.—**CAN.**

k. ——.]—Fraud does not make a transaction void, but only voidable at the instance of the person defrauded.—RANGNATH SAKHARAM *v.* GOVIND NARSINV (1904), I. L. R. 28 Bom. 639.—**IND.**

l. ——.]—GANESH *v.* VISHNU (1907) I. L. R. 32 Bom. 37.—**IND.**

m. ——.]—MEADE *v.* WEBB (1744), 1 Bro. Parl. Cas. 308.—**IR.**

Sect. 1.—*Nature and conditions of right to rescind: Sub-sect.* 3, *A., B., C., D. & E.*]

the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract & resume his property.

(3) We further agree that the contract continues valid till the party defrauded has determined his election by avoiding it (MELLOR, J.).

(4) If it can be shown that the London Pianoforte co. have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined for ever (MELLOR, J.).

(5) We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract (MELLOR, J.). —CLOUGH *v.* LONDON & NORTH WESTERN RY. CO. (1871), L. R. 7 Exch. 26; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189, Ex. Ch.

Annotations:—As to (2) *&* (3) **Consd.** United Shoe Machinery Co. of Canada *v.* Brunet, [1909] A. C. 330. *As to* (4) **Apprvd.** Abram S.S. Co. *v.* Westville Shipping Co., [1923] A. C. 773. **Reid.** Law *v.* Law, [1905] 1 Ch. 140. *As to* (5) **Consd.** Erlanger *v.* New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; Wakefield & Barnsley Banking Co. *v.* Normanton L. B. (1881), 44 L. T. 697. **Apld.** Dickson *v.* Murray (1887), 3 T. L. R. 637. **Consd.** *Re* Snyder Dynamite Projectile Co., Skelton's Case (1893), 68 L. T. 210. **Apld.** Aaron's Reefs *v.* Twiss, [1896] A. C. 273. **Consd.** Gordon *v.* Street, [1899] 2 Q. B. 641. **Reid.** Allcard *v.* Skinner (1887), 36 Ch. D. 145; Armstrong *v.* Jackson, [1917] 2 K. B. 822. *Generally*, **Reid.** Morrison *v.* Universal Marine Insce. (1873), L. R. 8 Exch. 197; R. *v.* Middleton (1873), L. R. 2 C. C. R. 38; James *v.* Young (1884), 27 Ch. D. 652. **Mentd.** Rankin *v.* Potter (1873), L. R. 6 H. L. 83; Scarf *v.* Jardine (1882), 7 App. Cas. 345; *Re* Railway Time Tables Publishing Co., *Ex p.* Sandys (1889), 42 Ch. D. 98; Cornwall *v.* Henson, [1900] 2 Ch. 298; Boston Fruit Co. *v.* British & Foreign Marine Insce., [1906] A. C. 336; R. *v.* Paulson, [1921] 1 A. C. 271; Bennett *v.* Whitehead, [1926] 2 K. B. 380.

670. ——— ———.]—DAWES *v.* HARNESS, No. 778, *post.*

671. ——— ———.]—URQUHART *v.* MACPHERSON, No. 747, *post.*

672. ——— ———.]—C., a solr., fraudulently induced N., the trustee of a will, to execute a conveyance of an equity of redemption under the trust for sale in the will:—*Held:* the deed was not void, though possibly voidable as between N. & C. —LLOYDS BANK, LTD. *v.* BULLOCK, [1896] 2 Ch. 192; 65 L. J. Ch. 680; 74 L. T. 687; 44 W. R. 633; 12 T. L. R. 435; 40 Sol. Jo. 545.

Annotations:—**Reid.** King *v.* Smith, [1900] 2 Ch. 425; Capell *v.* Winter, [1907] 2 Ch. 376. **Mentd.** Hunt *v.* Luck (1900), 49 W. R. 155.

673. ——— ———.]—A contract between a transferor & transferee of shares which has been induced by misrepresentation is not void but voidable.—*Re* DISCOVERERS FINANCE CORPN., LTD., LINDLAR'S CASE, [1910] 1 Ch. 207; 79 L. J. Ch. 193; 101 L. T. 672; 26 T. L. R. 98; 17 Mans. 46; *affd.*, [1910] 1 Ch. 312, C. A.

674. ——— ———.]—UNITED SHOE MACHINERY CO. OF CANADA *v.* BRUNET, No. 776, *post.*

Misrepresentation in company prospectus.]—*See* COMPANIES, Vol. IX., pp. 112 *et seq.*

Contracts for sale of shares.]—*See* COMPANIES, Vol. IX., pp. 354 *et seq.*

Fraudulent transfers of shares.]—*See* COMPANIES, Vol. IX., pp. 386 *et seq.*

Contracts for sale of land.]—*See* SALE OF LAND.

Contracts for sale of goods.]—*See* SALE OF GOODS.

As to avoidance of illegal contracts, *see* CONTRACTS, Vol. XII., pp. 234 *et seq.*; BILLS OF SALE, Vol. VII., pp. 105 *et seq.*; GAMING & WAGERING, Vol. XXV., pp. 397 *et seq.*; INFANTS, Vol. XXVIII., pp. 154 *et seq.*; MONEY & MONEY-LENDING, pp. 201, 208, *post.*

B. Misrepresentation as to Character of Instrument.

675. Contract void ab initio.] — In trespass *quare clausum fregit*, deft. pleaded a release from pltf. to J. S., & justified as servant to the feoffee of J. S.; pltf. replied that he was a layman, not lettered, & that at the time of the release made, divers arrearages of an annuity were due to him; & that one J. W. took the deed, while it was reading, & said to him "you will better understand it by hearing than by reading," & taking it in his hand, said, "it is but a release of the arrearages"; & he said, "if it be so, I am contented":—*Held:* (1) a deed executed by an illiterate person does not bind him, if read falsely either by the grantee or a stranger; (2) if an illiterate man execute a deed which is falsely read, or the sense declared differently from the truth, it does not bind him; & that though it be by a friend of his, unless there be covin.—THOROUGHGOOD'S CASE, THOROUGHGOOD *v.* COLE (1584), 2 Co. Rep. 9 a; 1 And. 129; 76 E. R. 408; *sub nom.* THROWGOOD *v.* TURNOR, Moore, K. B. 148.

Annotations:—As to (1) **Apld.** Bright *v.* Eynon (1757), 1 Burr. 390; Foster *v.* Mackinnon (1869), L. R. 4 C. P. 704; Favell *v.* Wright (1891), 64 L. T. 85. **Consd.** Howatson *v.* Webb, [1908] 1 Ch. 1. *As to* (2) **Consd.** National Provincial Bank of England *v.* Jackson (1886), 33 Ch. D. 1. *Generally*, **Consd.** Simons *v.* G. W. Ry. (1857), 2 C. B. N. S. 620. **Reid.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1871), 7 Ch. App. 75; Bagot *v.* Chapman, [1907] 2 Ch. 222; Carlisle & Cumberland Banking Co. *v.* Bragg (1910), 104 L. T. 121.

676. ———.]—In 1854 A., a co-trustee with B., conferred together as to the investment of a portion of the trust moneys. The sum proposed to be lent was sold out & received by B. A mtge. deed was prepared by B., who was a solr., purporting to be a mtge. of an estate belonging to R. to whom B. was also solr., for securing the repayment of the money so sold out. R. executed this deed under the influence & from the confidence reposed by him in his solr. without knowing the contents of it; he had never given instructions to B. authorising him to mortgage this estate, nor had ever received any of the alleged mtge. moneys, which had been retained by B. for his own purposes. B. afterwards became bkpt., & the mtge. deed came into the hands of A. his co-trustee. A. thereupon brought an action on R.'s covenant. Upon bill filed by R. to restrain this action & to set aside the mtge. deed:—*Held:* the mtge. was fraudulent & void, the money not having been advanced by A. upon the execution of the mtge. deed, but upon the false representation of B. & the action was restrained.—RUSHOUT *v.* TURNER (1857), 30 L. T. O. S. 89; 5 W. R. 670.

Annotation:—**Reid.** Wall *v.* Cockerell (1860), 29 L. J. Ch. 816

677. ———.]—The original mtgee. thought when she signed the deed that she was only signing a lease of the property, & she did not intend to deal with her mtge. or with her possession thereunder: —*Held:* the mind of the mtgee. did not go with the deed which she signed, & as she had not been guilty of any negligence the deed was void.—FAVELL *v.* WRIGHT (1891), 64 L. T. 85.

678. ———.]—BAGOT *v.* CHAPMAN, No. 51 *ante.*

679. ——.]—CARLISLE & CUMBERLAND BANKING CO. *v.* BRAGG, No. 52, *ante*.

——.]—*See* BILLS OF EXCHANGE, Vol. VI., p. 166, Nos. 1053, 1054.

C. Misrepresentation as to Effect or Contents of Instrument.

680. Whether contract invalidated.]—EDWARDS *v.* BROWN, No. 57, *ante*.

681. ——.]—If a party executes a deed under a false representation as to its effect or contents, it is avoided by fraud.—CONSOLS INSURANCE ASSOCN. *v.* NEWALL (1862), 3 F. & F. 130.

682. ——.]—To obtain the execution of a deed by saying it is a mere form, where the person executing knows it has something to do with the property affected, cannot be such a misrepresentation as to avoid the deed.—HUNTER *v.* WALTERS, CURLING *v.* WALTERS, DARNELL *v.* HUNTER (1871), 7 Ch. App. 75; 41 L. J. Ch. 175; 25 L. T. 765; 20 W. R. 218, L. C. & L. JJ.

Annotations:—**Apld.** Lloyds Bank *v.* Bullock, [1896] 2 Ch. 192; King *v.* Smith, [1900] 2 Ch. 425. **Consd.** Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489. **Reld.** Ortigosa *v.* Brown (1878), 47 L. J. Ch. 168; Favell *v.* Wright (1891), 64 L. T. 85; Onward Bldg. Soc. *v.* Smithson, [1893] 1 Ch. 1; Howatson *v.* Webb, [1908] 1 Ch. 1. **Mentd.** *Re* Russell Road Purchase Moneys (1871), L. R. 12 Eq. 78; R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420; *Re* Vernon, Ewens (1886), 33 Ch. D. 402.

683. ——.]—A deed is invalidated by a fraudulent misrepresentation as to its legal effect.—HIRSCHFELD *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO. (1876), 2 Q. B. D. 1; 46 L. J. Q. B. 94; *sub nom.* HERSCHFIELD *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., 35 L. T. 473.

684. ——.]—STEWART *v* KENNEDY (No. 2), No. 61, *ante*.

685. ——.]—Two trustees advanced money on a mtge. of realty. S., one of the trustees, paid the money to E., a solr., who produced to him the mtge. deed executed by K. as the mtgor. The deed, which contained the usual receipt for the money in the body of it, was handed over by E. to S., who retained it. K., who was not a man of much education, & employed E. from time to time in relation to his property, & had implicit confidence in E., had signed the deed on his advice, but did not know that it was a mtge. & had not instructed E. to obtain a mtge. E. misappropriated the money & absconded. On discovery of the fraud K. brought an action against the trustees to set aside the mtge.:—*Held*: in the circumstances K. was estopped by his conduct from denying that the mtge. was valid.—KING *v.* SMITH, [1900] 2 Ch. 425; 69 L. J. Ch. 598; 82 L. T. 815; 16 T. L. R. 410.

Annotation:—**Reld.** Howatson *v.* Webb, [1907] 1 Ch. 537.

686. ——.]—Deft., a solr. who was formerly a managing clerk to one H., acted as his nominee in a building speculation relating to certain property at E., of which H. was the owner. Shortly after leaving H.'s employment he was requested by H. to execute certain deeds & on asking what those deeds were he was told by H. that they were deeds transferring the E. property. Deft. thereupon signed them. One of the deeds so signed was a mtge. between deft., as mtgor. of the one part & W. of the other part & contained the usual covenant by the mtgor. for payment of principal & interest. In an action by a transferee of the mtge. for payment of the principal debt & interest deft. pleaded *non est factum*:—*Held*: the misrepresentation being only as to the contents of a deed known by deft. to deal with the property, the plea failed & deft. was liable on the covenant.—HOWATSON *v.* WEBB, [1908] 1 Ch. 1; 77 L. J. Ch. 32; 97 L. T. 730; 52 Sol. Jo. 11, C. A.; *affg.*, [1907] 1 Ch. 537.

Annotations:—**Distd.** Bagot *v.* Chapman, [1907] 2 Ch. 222. **Consd.** Carlisle & Cumberland Banking Co. *v.* Bragg, [1911] 1 K. B. 489. **Reld.** Browne *v.* Lewis (1916), 86 L. J. K. B. 326.

D. Misrepresentation as to Identity of Other Party.

See MISTAKE, pp. 97–99, Nos. 64–75, *post*; SALE OF GOODS.

E. Right of Election in Representee.

687. General rule.]—It must be considered, therefore, as established, that fraud only gives a right to avoid a contract or purchase; that the property vests until avoided; & that all mesne dispositions to persons not parties to, or, at least, not cognisant of the fraud, are valid (PARKE, B.).—STEVENSON *v.* NEWNHAM (1853), 13 C. B. 285; 22 L. J. C. P. 110; 20 L. T. O. S. 279; 17 Jur. 600; 138 E. R. 1208, Ex. Ch.; *revsg.* S. C. *sub nom.* NEWNHAM *v.* STEVENSON (1851), 10 C. B. 713.

Annotations:—**Distd.** Hardman *v.* Booth (1863), 32 L. J. Ex. 105. **Reld.** Jeffries *v.* G. W. Ry. (1856), 5 E. & B. 802; Young *v.* Billiter (1860), 8 H. L. Cas. 682; Marks *v.* Feldman (1869), L. R. 4 Q. B. 481; Clough *v.* L. & N. W. Ry. (1871), L. R. 7 Exch. 26; *Re* Meldrum, *Ex p.* Butcher (1874), 9 Ch. App. 595; London & County Banking Co. *v.* London & River Plate Bank (1887), 4 T. L. R. 179; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393. **Mentd.** Morgan *v.* Couchman (1853), 2 C. L. R. 53; Monk *v.* Sharp (1857), 2 H. & N. 540; Paull *v.* Best (1863), 3 B. & S. 537; Topping *v.* Keysell (1864), 16 C. B. N. S. 258; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26; *Re* O'Sullivan, *Ex p.* Baller (1892), 61 L. J. Q. B. 228; Allen *v.* Flood, [1898] A. C. 1; Quinn *v.* Leathem, [1901] A. C. 495; Fitzroy *v.* Cave, [1905] 2 K. B. 364; Valentine *v.* Hyde, [1919] 2 Ch. 129; Sorrell *v.* Smith, [1925] A. C. 700.

688. ——.]—ROGERS *v.* HADLEY, No. 667, *ante*.

689. ——.]—CLOUGH *v.* LONDON & NORTH WESTERN RY. CO., No. 669, *ante*.

690. ——.]—The holder of a policy of insurance being minded to give up paying the premiums was persuaded to continue the payments by a false representation of the insurance co.'s agent that if she paid the premiums for a certain time she would receive a free policy. The representation was made without the authority or knowledge of the co., & the co. refused to grant a free policy, but retained the premiums:—*Held*: the holder of the policy was entitled to recover from the co. the premiums paid upon the faith of the representation.—REFUGE ASSURANCE CO., LTD. *v.* KETTLEWELL, [1909] A. C. 243; 78 L. J. K. B.

PART IX. SECT. 1, SUB-SECT. 3.—E.

687 i. *General rule.*]—Where representees without full knowledge of their rights only threaten to claim damages they are not barred from their right to have the agreement rescinded.—HARVEY *v.* LAWRENCE (1915), 32 W. L. R. 297; 9 W. W. R. 91; 25 D. L. R. 706.—**CAN.**

687 ii. ——.]—Where fraud is alleged in the making of a contract the party complaining may affirm or disaffirm the contract.—ELLIOTT *v.* BARRY, [1920] 1 W. W. R. 777; 15 Alta. L. R. 339.—**CAN.**

687 iii. ——.]—A misrepresentation may consist in the concealment of that which should be disclosed; if the concealment is unintentional it is none the less a misrepresentation though an innocent one, & the transaction induced thereby is voidable at the option of the representee who on discovery of the truth has a right to elect whether he will affirm or disaffirm it.—STEARNS *v.* STEARNS, [1921] 1 W. W. R. 40; 56 D. L. R. 700.—**CAN.**

687 iv. ——.]—DOBBIE *v.* DUNCANSON (1872), 10 Macph. (Ct. of Sess.) 810.—**SCOT.**

687 v. ——.]—Where a person who has entered into a contract discovers that statements made to him by the other party to the contract with the object of inducing him to enter into the contract or with the object of concealing from him facts, the knowledge of which would be calculated to induce him to refrain from entering into the contract, were false, & can show that, acting with ordinary prudence & discretion, he would not have entered into the contract if he had known the truth, he is entitled within a reasonable time to elect whether he will abide by the contract or claim a rescission thereof.—WOODSTOCK MUNICIPAL COUNCIL *v.* SMITH (1909), 26 S. C. 681; 19 C. T. R. 1073.—**S. AF.**

Sect. 1.—*Nature and conditions of right to rescind: Sub-sect.* 3, *E.; sub-sect.* 4. *Sect.* 2: *Sub-sects.* 1, 2, 3 *&* 4, *A. & B.*]

519; 100 L. T. 306; 25 T. L. R. 395; *sub nom.* KETTLEWELL *v.* REFUGE ASSURANCE CO., LTD., 53 Sol. Jo. 339, H. L.; *affg.*, [1908] 1 K. B. 545; 77 L. J. K. B. 421; 97 L. T. 896; 24 T. L. R. 216; 52 Sol. Jo. 158, C. A.

Annotations:—**Refd.** Evanson *v.* Crooks (1911), 106 L. T. 264; Hughes *v.* Liverpool Victoria Legal Friendly Society, [1916] 2 K. B. 482; Armstrong *v.* Jackson, [1917] 2 K. B. 822; Parkinson *v.* College of Ambulance & Harrison, [1925] 2 K. B. 1. **Mentd.** Collins *v.* Hopkins, [1923] 2 K. B. 617.

691. Irrevocable once exercised.] — ROGERS *v.* HADLEY, No. 667, *ante.*

692. ——.] — CLOUGH *v.* LONDON & NORTH WESTERN RY. CO., No. 669, *ante.*

SUB-SECT. 4.—CONTRACTS BETWEEN HUSBAND AND WIFE.

Effect of fraud on consent of parties.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 39, Nos. 155–160.

693. Marriage settlement induced by fraud—No complicity on part of wife.]—Settlement in consideration of marriage procured by fraud & imposition in which the wife was not concerned, shall not be set aside.—BARROW *v.* BARROW (1774), 2 Dick. 504; 21 E. R. 365.

694. —— **Misrepresentations by wife.**] — Husband claimed to set aside an ante-nuptial settlement made by him, on the ground of misrepresentations made to him by his then intended wife as to her divorce from a previous husband, on the faith of which he had executed the settlement & married her:—*Held:* the statement of claim disclosed no reasonable ground of action.—JOHNSTON *v.* JOHNSTON (1884), 52 L. T. 76; 33 W. R. 239, C. A.

695. Deed of separation — Alleged fraudulent misrepresentations of wife—Not relied on by husband.]—A deed of separation & annuity will not be set aside at the instance of the husband on the ground of fraudulent representations by the wife as to her innocence which were discredited by him at the time of its execution, nor on the ground of subsequent adultery, when the deed contains no condition as to chastity.—WASTENEYS *v.* WASTENEYS, [1900] A. C. 446; 69 L. J. P. C. 83, H. L.

696. —— **Concealment of husband's means.**]—HULTON *v.* HULTON, No. 755, *post.*

SECT. 2.—FORM AND EXTENT OF RELIEF.

SUB-SECT. 1.—IN GENERAL.

697. Rescission must be in toto.] — The deed may be set aside *in toto* . . . but I cannot make a new bargain for the parties (LORD LOUGHBOROUGH, C.).—MYDDLETON *v.* KENYON (LORD) (1794), 2 Ves. 391; 30 E. R. 689, L. C.

Annotations:—**Mentd.** Towart *v.* Sellars (1817), 5 Dow, 231; Ford *v.* Stuart (1852), 15 Beav. 493; Foulkes *v.* Davies (1868), L. R. 7 Eq. 42.

698. ——.] — CLARKE *v.* DICKSON, No. 742, *post.*

699. —— **Unless parts clearly severable.**] — BAGOT *v.* CHAPMAN, No. 51, *ante.*

700. —— ——.]—UNITED SHOE MACHINERY CO. OF CANADA *v.* BRUNET, No. 776, *post.*

701. —— ——.] — Where a purchaser separately acquires two lots of property at an auction, in reliance on an innocent misrepresentation of the vendor as to the second lot, entitling the purchaser to rescission as to that lot, he cannot also rescind the contract for the first lot, unless from the circumstances known & understood by both parties at the time of sale the ct. can infer that the two transactions were to the knowledge of both interdependent.—HOLLIDAY *v.* LOCKWOOD, [1917] 2 Ch. 47; 86 L. J. Ch. 556; 117 L. T. 265; 61 Sol. Jo. 525.

—— ——.]—*See* COMPANIES, Vol. IX., p. 599, No. 3998; Vol. X., p. 1103, No. 7741

702. —— **Partial interest only affected.**]— A person partially interested in an estate, may maintain a suit to set aside a conveyance of such interest fraudulently obtained from him, without making the other persons interested in the estate parties.—HENLEY *v.* STONE (1840), 3 Beav. 355; 49 E. R. 139.

703. Effect of rescission — Restitutio in integrum.]—When a contract is rescinded for fraud or misrepresentation, it is the same as if no contract had ever existed, & the parties are restored to the situation in which they were before the contract, as nearly as possible.—SMALL *v.* ATTWOOD (1832), You. 507; 2 L. J. Ex. Eq. 1; 159 E. R. 1092; *subsequent proceedings* (1834), 1 Y. & C. Ex. 39; *sub nom.* ATTWOOD *v.* SMALL (1838), 6 Cl. & Fin. 232, H. L.

Annotations:—**Mentd.** Bodenham *v.* Hoskyns (1852), 2 De G. M. & G. 903; Morrell *v.* Wootten (1852), 16 Beav. 197.

704. —— ——.] — I consider it a maxim of law that where a fraud has been practised upon a person, he should be replaced in the same position as he was before such fraud was practised upon him (LORD CAMPBELL, C.J.).—HOLT *v.* ELY (1853), 1 E. & B. 795; 1 C. L. R. 420; 17 Jur. 892; 118 E. R. 634.

——.]—*See, further,* Sect. 3, sub-sect. 6, *post.*

705. To what date rescission referable.]—REESE RIVER SILVER MINING CO., LTD. *v.* SMITH, No. 274, *ante.*

706. Abatement of debt — On pretence of poverty.]—If one under pretence of being insolvent get an abatement of a debt, it will be set aside in equity.—MONGER *v.* KETT (1701), 12 Mod. Rep. 558; 88 E. R. 1517.

707. —— ——.]—The obligor on payment of £20 to the obligee, procured a bond & notes for money to be delivered up to him, upon pretence that he was poor, & nearly related to the obligee; but that not being proved, he was ordered to account for the bond & notes.—LUCAS *v.* ADAMS (1724), 9 Mod. Rep. 118; 2 Eq. Cas. Abr. 482; 88 E. R. 352.

PART IX. SECT. 2, SUB-SECT. 1.

697 i. *Rescission must be in toto.*]—Generally speaking there can only be rescission where the transaction can be rescinded *in toto.*—O'CONNOR *v.* STURGEON LAKE LUMBER CO. (1914), 27 W. L. R. 813; 6 W. W. R. 701; 17 D. L. R. 316; 6 Sask. L. R. 60.—**CAN.**

703 i. *Effect of rescission—Restitutio in integrum.*]—If a person is induced by misrepresentation without fraud, to enter into a contract, he may avoid the contract, & he is entitled to be put back in the position he was at the time he entered into the contract.—WURZ *v.* DEVLIN, [1920] 2 W. W. R. 338; 52 D. L. R. 414; 13 Sask. L. R. 256.—**CAN.**

703 ii. —— ——.]—Rescission of a contract involves a restitution of the parties to their original rights & property, &, generally speaking, rescission will be granted only so long as this can be done.—FLEMING *v.* MAIR, [1921] 2 W. W. R. 421; 14 Sask. L. R. 248; 58 D. L. R. 318.—**CAN.**

703 iii. —— ——.]—MCKINNON *v.* BROCKINTON, [1921] 2 W. W. R. 437; 31 Man. L. R. 237.—**CAN.**

703 iv. —— ——.]—Fraud in the performance of a contract, apart from its making, is no ground for rescission & restoration of the parties to the position in which they were before the contract was entered into.—JAMSETJI NASSARWANJI *v.* HIRJIBHAI NAOROJI (1912), I. L. R. 37 Bom. 158.—**IND.**

SUB-SECT. 2.—RESTITUTIO IN INTEGRUM.

When relief available—Where contract completely executed.]—*See* Sect. 1, sub-sect. 2, C. *ante*.

Rescission must be in toto.]—*See* Sect. 2, sub-sect. 1, *ante*.

Impossibility of specific restitution—As defence.—*See* Sect. 3, sub-sect. 6, *post*.

SUB-SECT. 3.—IN PARTICULAR INSTANCES.

Agent selling own property to principal.]—*See* AGENCY, Vol. I., pp. 469, 470, Nos. 1540, 1541.

Animals.]—*See* ANIMALS, Vol. II., pp. 263 268, 269, Nos. 416, 467, 476.

Arbitration—Setting aside award.]—*See* ARBITRATION, Vol. II., p. 551, Nos. 1828–1837.

Bankruptcy—Setting aside composition with creditor.]—*See* BANKRUPTCY, Vol. V., p. 1131 Nos. 9189–9191.

Charitable trusts.]—*See* CHARITIES, Vol. VIII., p. 281, No. 555.

Companies—Misrepresentation in prospectus.]—*See* COMPANIES, Vol. IX., pp. 117–122, Nos. 576–624.

Contract to take shares.]—*See* COMPANIES, Vol. IX., p. 247, Nos. 1552 *et seq.*

—— **Shares of companies.**]—*See* COMPANIES, Vol. IX., p. 354, Nos. 2237 *et seq.*; p. 386, Nos. 2441 *et seq.*; Vol. X., p. 1103, Nos. 7740, 7741.

Family arrangements.]—*See* FAMILY ARRANGEMENTS, Vol. XXIV., pp. 957–959, Nos. 110–126.

Guarantee.]—*See* GUARANTEE, Vol. XXVI., pp. 108, 109, Nos. 758–760.

Separation deeds.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 227, Nos. 1981 *et seq.*

Infant settlement.]—*See* INFANTS, Vol. XXVIII., pp. 331, 332, Nos. 1998–2000.

Insurance policies.]—*See* INSURANCE, Vol. XXIX., pp. 48–52, 160–163, 323–326, 350–353, 370, 371, Nos. 112–151, 1164–1186, 2649–2660, 2836–2856, 2972–2982.

Lease of land.]—*See* LANDLORD & TENANT, Vol. XXX., pp. 478–480, Nos. 1394–1416.

Partnership agreements.]—*See* PARTNERSHIP.

Sale of goods.]—*See* SALE OF GOODS.

Sale of land.]—*See* SALE OF LAND.

—— **Under order of court.**]—*See* SALE OF LAND.

—— **Under Vendor & Purchaser Act, 1874.**]—*See* SALE OF LAND.

Sale of ship.]—*See* SHIPPING.

SUB-SECT. 4.—ANCILLARY RELIEF.

A. Delivery up for Cancellation of Instrument.

See, generally, EQUITY, Vol. XX., pp. 285–288, Nos. 440–465.

708. When ordered.] — If there is a legal instrument which has no defect on the face of it, making it impossible to sue at law, or which states the only possible objection for suing at law, this ct. will not interfere. But if there be a legal instrument having no defect, which, from various circumstances, it would be inequitable to allow a person to sue upon, or if there be a good defence at law, but time may cause the person charged under that instrument to lose the evidence of his defence, the ct. will cause the instrument to be delivered up (ROMILLY, M.R.).—COOPER *v.* JOEL (1859), 27 Beav. 313; 1 L. T. 351; 54 E. R. 122; *on appeal*, 1 De G. F. & J. 240, L. C.

Annotations:—**Consd.** Brooking *v.* Maudslay & Field (1888), 38 Ch. D. 636. **Mentd.** Glegg *v.* Gilbey (1877), 46 L. J. Q. B. 325.

Insurance policy.] — *See* INSURANCE, Vol. XXIX., pp. 49, 370, Nos. 114–116, 2972 *et seq.*

See, also, RENTCHARGES; SALE OF LAND.

B. Repayments and Reconveyances.

709. Repayment—By representee.] — WALLER *v.* DALE (1677), Cas. *temp.* Finch, 295; 1 Cas. in Ch. 276; 1 Dick. 8; 23 E. R. 162.

710. —— ——.]—LONG *v.* FLETCHER (1708), 2 Eq. Cas. Abr. 5; 22 E. R. 4.

711. —— ——.]—B. purchased a reversionary interest of A. at a gross undervalue, & in circumstances which rendered the transaction void in equity. C. had notice of the invalidity of the contract, but ten years afterwards he purchased the reversion of B., paying to B. the full value; A. joined in the conveyance & confirmed the sale. The ct., being of opinion that C. had not taken proper steps to protect A. in the second transaction, set it aside, & decreed a reconveyance, on repayment of the consideration given by B. to A. in the first transaction.—ADDIS *v.* CAMPBELL (1841), 4 Beav. 401; 10 L. J. Ch. 284; 49 E. R. 394.

712. —— ——.]—On a bill filed by the assignor of a reversionary interest to set aside the assignment on the ground of inadequacy of consideration & misrepresentation on the part of the purchaser, who was his solr., the Vice-Chancellor, on the assignor repaying the purchase-money with interest, ordered the deed to be delivered up & cancelled, & this decree was on appeal affirmed.

The ct. will not set aside the sale of a reversion on account of inadequacy of price, unless amounting in itself to conclusive & decisive fraud.

Where fraud is charged & not proved, the ct. will not grant relief on any other ground; except where the relief is granted upon what may be termed a species of fraud.—JONES *v.* PRICE (1852), 20 L. T. O. S. 49, L. C.

713. —— ——.]—HOWCHIN *v.* DAVIS (1885), 1 T. L. R. 318.

714. —— **By representor.**]—If a lease for years, worth £200 a year, belong to two coparceners, & one of them, upon a false suggestion that a fine of £250 was to be paid for the renewal of it, obtain an assignment of the other's moiety for a consideration of £20 equity will set aside this conveyance as fraudulent, & order the assignee to account for a moiety of the profits.—EVANS *v.* HOSKINS & GLOUCESTER CITY (1724), 9 Mod. Rep. 83; 2 Eq. Cas. Abr. 88; 88 E. R. 330.

715. —— ——.]—Where a bond is void, a repayment of interest which has been paid on the supposition of its being valid, will be decreed.—HITCHCOCK *v.* GIDDINGS (1817), Dan. 1; 4 Price, 135; Wils. Ex. 32; 146 E. R. 418.

Annotations:—**Refd.** Clare *v.* Lamb (1875), L. R. 10 C. P. 334; Jolliffe *v.* Baker (1883), 11 Q. B. D. 255; *Re* Tyrell, Tyrell *v.* Woodhouse (1900), 82 L. T. 675.

716. —— ——.]—Certain persons who were owners of a concession for working the guano upon an island, fraudulently sold the concession:—*Held*: the vendors must repay the whole of the purchase-money.—PHOSPHATE SEWAGE CO. *v.* HARTMONT (1877), 5 Ch. D. 394; 46 L. J. Ch. 661; 37 L. T. 9, C. A.; *affg.* (1876), 45 L. J. Ch. 465.

Annotations:—**Refd.** Nant-Y-Glo & Blaina Ironworks Co. *v.* Grave (1878), 12 Ch. D. 738; Rees *v.* De Bernardy, [1896] 2 Ch. 437. **Mentd.** New Sombrero Phosphate Co. *v.* Erlanger (1876), 35 L. T. 309; Metzler *v.* Wood (1877), 47 L. J. Ch. 139; *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807.

—— **Of purchase-money.**]—*See* SALE OF LAND.

—— **Return of deposit.**]—*See* SALE OF GOODS; SALE OF LAND.

Sect. 2.—Form and extent of relief: Sub-sect. 4, B., C., D. & E.; sub-sect. 5, A., B. & C. Sect. 3: Sub-sects. 1, 2, 3, 4 & 5, A.]

Repayment of capital in partnership cases.]—*See* PARTNERSHIP.

717. Reconveyance.]—ADDIS *v.* CAMPBELL, No. 711, *ante*.

C. Indemnity.

Rescission of partnership agreement.] — *See* PARTNERSHIP.

718. Indemnity granted — Not damages.] — Where a vendor, having reason to believe that part at least of his property was copyhold, sold & conveyed the same to a purchaser as freehold, there being nothing on the abstract to show that any part was copyhold & the property turned out to be all copyhold:—*Held:* the purchaser was entitled to have the sale set aside & the purchase-money repaid, with the costs attending his purchase, but was not entitled to damages in respect of expenses to which he had gone with the view of selling the property again.—HART *v.* SWAINE (1877), 7 Ch. D. 42; 47 L. J. Ch. 5; 37 L. T. 376; 26 W. R. 30.

Annotations:—**Distd.** Manson *v.* Thacker (1878), 7 Ch. D. 620; Brett *v.* Clowser (1880), 5 C. P. D. 376; Jolliffe *v.* Baker (1883), 11 Q. B. D. 255. **Expld.** Soper *v.* Arnold (1887), 37 Ch. D. 96. **Refd.** Brownlie *v.* Campbell (1880), 5 App. Cas. 925; Mathias *v.* Yetts (1882), 46 L. T. 497; Nash *v.* Wooderson (1884), 52 L. T. 49; Palmer *v.* Johnson (1884), 13 Q. B. D. 351; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392.

719. ——— ———.]—In an action for rescission of a lease on the ground of innocent misrepresentation pltf., if entitled to anything, is only entitled to an indemnity as to what was expended under the actual terms of the lease.—WHITTINGTON *v.* SEALE-HAYNE (1900), 82 L. T. 49; 16 T. L. R. 181; 44 Sol. Jo. 229.

Annotation:—**Refd.** Milch *v.* Coburn (1910), 27 T. L. R. 176.

D. Injunction.

Rescission of contract to take share.]—*See* COMPANIES, Vol. IX., p. 340, Nos. 2149–2152.

E. Accounts and Receivers.

720. Accounts — No account to fraudulent party.]—Where a transaction is set aside, on the ground of fraud, no account will be allowed by the ct. to the parties to the fraud, of what they have laid out or advanced or expended in the committing of that fraud.—PINNING *v.* RUSHWORTH (1833), 2 L. J. Ch. 176.

———.]—*See, generally,* EQUITY, Vol. XX., pp. 266 *et seq.*; & Titles *passim*.

Receivers.]—*See* RECEIVERS; & Titles *passim*.

SUB-SECT. 5.—ANALOGOUS PROCEEDINGS.

A. Money Had and Received.

See, generally, CONTRACT, Vol. XII., pp. 539–571.

721. Gaming contract induced by fraud.]—EMERSON *v.* DIXON (1853), 21 L. T. O. S. 64.

Recovery of deposits.]—*See* AUCTIONS, Vol. III., pp. 23–27; BUILDING CONTRACTS, Vol. VII., pp. 332, 333, No. 10; SALE OF GOODS; SALE OF LAND.

Compositions in bankruptcy.]—*See* BANKRUPTCY, Vol. V., p. 1143–1145, Nos. 9281–9292.

Recovery of premium.]—*See* INSURANCE, Vol. XXIX., pp. 45, 46, 301–305, 370–372.

Money paid on application for shares.] — *See* COMPANIES, Vol. IX., pp. 50–52, 133–135.

B. Trover.

See TROVER.

C. Repudiation on Discovery of Fraud.

722. General rule.]—In an action on a contract of sale signed by deft.:—*Held:* if, as he stated, pltf. had obtained his signature by leading him to understand that his attorney had prepared it, & approved of the security, & that turning out not to be the fact, & the contract having been repudiated immediately, the contract was avoided.—ROLPH *v.* BARTON (1859), 1 F. & F. 473.

723. —— **Physical resumption of property.**]—CLOUGH *v.* LONDON & NORTH WESTERN RY. CO., No. 669, *ante*.

724. —— ———.]—Where a bkpt. has obtained goods on credit without any intention of paying for them the vendor is entitled to treat the contract of sale as having been induced by fraud, & to disaffirm the contract & take back his goods after notice of act of bkpcy. provided that he disaffirms the contract within a reasonable time of his discovery of the fraud.

As soon as they discovered that he had bought the goods with no intention at all of paying for them, they were entitled to treat the contract as a contract induced by fraud, induced that is to say by a representation which the purchaser knew to be untrue, that he meant to pay for the goods (BIGHAM, J.).—*Re* EASTGATE, *Ex p.* WARD, [1905] 1 K. B. 465; 74 L. J. K. B. 324; 92 L. T. 207; 53 W. R. 432; 21 T. L. R. 198; 12 Mans. 11.

Annotation:—**Folld.** Tilley *v.* Bowman, [1910] 1 K. B. 745.

725. —— ———.]—A sale of goods upon credit was induced by the fraud of the purchaser, who upon obtaining them pledged them with a pawnbroker. After the purchaser had paid part of the price a receiving order in bkpcy. was made against him. The vendor then discovered the fraud & disaffirmed the contract, retaking possession of the goods upon payment to the pawnbroker of the sum advanced upon them. The purchaser having been adjudicated bkpt., his trustee in bkpcy. brought an action against the vendor, claiming to recover the goods or their value after giving credit for the sum paid to the pawnbroker to redeem them:—*Held:* the trustee acquired the property in the goods subject to the right of the vendor to disaffirm the contract of sale & to retake possession of the goods; the vendor had a right to disaffirm the contract after the date of the receiving order; & therefore the trustee was not entitled to recover the goods or their value.—TILLEY *v.* BOWMAN, LTD., [1910] 1 K. B. 745; 79 L. J. K. B. 547; 102 L. T. 318; 54 Sol. Jo. 342; 17 Mans. 97.

See, also, CONTRACT, Vol. XII., pp. 332 *et seq.*

SECT. 3.—DEFENCES TO PROCEEDINGS.

SUB-SECT. 1.—REPRESENTEE'S KNOWLEDGE OF TRUTH.

726. Valid defence.]—In a case depending on alleged misrepresentation of value, there cannot be a more effectual bar to pltf. than by showing that he was from the beginning cognisant of all the matters complained of, or, after full information of them, continued to deal with the property.—VIGERS *v.* PIKE (1842), 8 Cl. & Fin. 562; 8 E. R. 220.

Annotations:—**Refd.** Wilde *v.* Gibson (1848), 1 H. L. Cas. 605; Erlanger *v.* New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218.

727. —— If clearly proved.]—Where a representation calculated to induce a belief in the value of property not warranted by the circumstances is made by a person, the inaccuracy of which might have been known to him, it will be considered as a fraud in equity, disentitling him to specific performance. *Semble*, a purchaser, knowing the real state of facts would have no right to complain, but a vendor would have to show his knowledge very clearly.—PRICE *v.* MACAULAY (1852), 2 De G. M. & G. 339; 19 L. T. O. S. 238; 42 E. R. 903, C. A.

Annotations :—**Reld.** Leyland *v.* Illingworth, *Ex p.* Walker (1860), 29 L. J. Ch. 613, n.; *Re* Fawcett & Holmes' Contract (1889), 42 Ch. D. 150.

728. —— ——.]—REDGRAVE *v.* HURD, No. 417, *ante*.

729. —— Knowledge of representee's agent.]—ATTWOOD *v.* SMALL, No. 363, *ante*.

730. —— ——.]—If the purchaser had at once taken the objection as to the misdescription of this house as being in Pall Mall, he would have been entitled to avoid the contract on that ground. But he did not do so, he proceeded to investigate the title, & his solr. examined the title deeds, in a part of that very building which was the subject of the contract; & I think it is now too late for him to ask the ct. to rescind the contract on that ground (WOOD, V.-C.).—STANTON *v.* TATTERSALL (1853), 1 Sm. & G. 529; 1 Eq. Rep. 543; 21 L. T. O. S. 333; 17 Jur. 967; 1 W. R. 502; 65 E. R. 231.

Annotation :—**Reld.** Torrance *v.* Bolton (1872), L. R. 14 Eq. 124.

731. —— ——.]—Consequently, where pltf. who had entered into an agreement with one of two defts. for the purchase of a business, filed his bill for relief on the ground that the fact of deft. & co-deft. being in partnership in the business was fraudulently concealed from him; & it appeared, as the result of evidence that the agent of pltf. was aware of the fact of the partnership & of a power which deft. possessed under the partnership deed, of buying up the acquiescence of his co-partner & further, that pltf. was contracting on behalf of himself & other persons, the latter of whom were fully aware of the state of the partnership, the bill was dismissed, with costs.—BURDETT *v.* HAY (1863), 4 De G. J. & Sm. 41; 33 L. J. Ch. 41; 11 L. T. 259; 9 Jur. N. S. 1260; 12 W. R. 61; 40 E. R. 829, L. C.

—— ——.]—*See, further*, AGENCY, Vol. I., pp. 610–614, 685, 686, Nos. 2393–2420, 2946–2955; EQUITY, Vol. XX., pp. 311–316, Nos. 624–647; INSURANCE, Vol. XXIX., pp. 60, 61, Nos. 199–206.

732. ——.]—Deft., who practised at R., had some time acted as solr. to pltf., & it was arranged that he should take pltf.'s brother-in-law G., who was under twenty-one years of age, as his articled clerk. The usual articles were accordingly prepared, to which pltf. was a party, whereby G., with the consent of his guardian, bound himself clerk to deft. for five years. There was no covenant in any way restricting G. from practising as a solr. at the expiration of the articles. Simultaneously a bond was executed by pltf. binding himself to pay £1,000 to deft. in case G. should within ten years of the expiration of the articles carry on his profession as a solr. in R. or within ten miles thereof, without the written consent of deft. Shortly after the expiration of the articles G. was admitted a solr. Deft. then insisted that G. should not practise in R., or within ten miles thereof, & threatened to enforce the bond in case G. should commence to practise within that radius. Pltf. thereupon brought an action against deft. claiming a declaration that the bond was obtained by misrepresentation & undue influence & without consideration, & was void, & that he was entitled to have the same set aside :—*Held :* there had been no undue influence or misrepresentation, but pltf. was perfectly well aware what the object of the bond was when he executed it.—RICHARDS *v.* WHITHAM (1892), 66 L. T. 695, C. A.

——.]—*See* COMPANIES, Vol. IX., pp. 119, 120, Nos. 589–601.

SUB-SECT. 2.—AGREEMENT TO WAIVE INQUIRIES.

See SALE OF LAND; & Titles *passim*.
See Part VIII., Sect. 1, sub-sect. 4, B., *ante*.

SUB-SECT. 3.—AGREEMENT TO ACCEPT COMPENSATION IN LIEU OF RESCISSION.

See SALE OF LAND; & Titles *passim*.

SUB-SECT. 4.—AGREEMENT TO WAIVE BOTH COMPENSATION AND RESCISSION.

See SALE OF LAND; & Titles *passim*.

SUB-SECT. 5.—AFFIRMATION OF CONTRACT WITH KNOWLEDGE OF MISREPRESENTATION.

A. In General.

733. Right to rescind barred.]—The right to repudiate the contract is not afterwards revived by the discovery of another incident in the same fraud.—CAMPBELL *v.* FLEMING (1834), 1 Ad. & El. 40; 3 Nev. & M. K. B. 834; 3 L. J. K. B. 136; 110 E. R. 1122.

Annotations :—**Reld.** Wontner *v.* Sharp (1847), 4 C. B. 404; East Anglian Rys. *v.* Eastern Counties Ry. (1851), 11 C. B. 775; Stevenson *v.* Newnham (1853), 13 C. B. 285; Horsfall *v.* Thomas (1862), 6 L. T. 462; London & County Banking Co. *v.* London & River Plate Bank (1887), 4 T. L. R. 179; Imperial Ottoman Bank *v.* Trustees Executors & Securities Insce. Corpn. (1895), 13 R. 287; *Re* Duncan, Terry *v.* Sweeting, [1899] 1 Ch. 387. **Mentd.** Ricketts *v.* Bowhay (1847), 3 C. B. 889; Steele *v.* Williams (1853), 1 C. L. R. 258.

734. ——.] —ATTWOOD *v.* SMALL, No. 363, *ante*.

735. ——.]—VIGERS *v.* PIKE, No. 726, *ante*.

736. ——.]—CLOUGH *v.* LONDON & NORTH WESTERN RY. CO., No. 669, *ante*.

737. ——.]—A solr. took money of his client's, & pretended to have invested it upon four mtges. After his death it was discovered that three of these mtges. were absolutely valueless, & the client took no steps as regards them. He brought an action to enforce the other, which resulted in a compromise out of which he obtained part of the money due :—*Held :* as regards this last one he had affirmed the contract, & could not now repudiate the mtge., but as regards the other three he could.—*Re* MURRAY, DICKSON *v.* MURRAY (1887), 57 L. T. 223; *sub nom.* DICKSON *v.* MURRAY, 3 T. L. R. 637.

Annotation :—**Distd.** Molloy *v.* Mutual Reserve Life Insce. (1905), 22 T. L. R. 59.

738. ——.] — If the vendor on discovering that certain material facts have been concealed

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PART IX. SECT. 3, SUB-SECT. 5.—A.

733 1. ***Right to rescind barred.***]—*Semble :* a person alleging misrepresentation loses his right to rescind a contract upon such ground if he elects to carry out the contract after becoming aware of the falsity of any material representation.—SAMSON *v.* COLLINS (1910), 29 N. Z. L. R. 1163.—N.Z.

Sect. 3.—Defences to proceedings: Sub-sect. 5, A. & B.; sub-sects. 6, 7, 8 & 9.]

from him by the purchaser, & though believing that there has been a concealment of further material facts nevertheless does acts constituting a deliberate election on his part not to insist on his right to a full disclosure, he is bound by that election, & neither he nor his representatives after his death can afterwards, on discovering the full extent of the concealment, repudiate the sale.—LAW *v.* LAW, [1905] 1 Ch. 140; 21 T. L. R. 102; *sub nom. Re* LAW, LAW *v.* LAW, 74 L. J. Ch. 169; 92 L. T. 1; 53 W. R. 227; 49 Sol. Jo. 118, C. A.

739. Onus of proof.]—Fraud being established against a party, it is for him, if he allege laches in the other party, to show when the latter acquired a knowledge of the truth & prove that he knowingly forbore to assert his right.—LINDSAY PETROLEUM CO. *v.* HURD (1874), L. R. 5 P. C. 221; 22 W. R. 492, P. C.

Annotations:—**Refd.** Aaron's Reefs *v.* Twiss, [1896] A. C. 273; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; *Re* Taylor, Atkinson *v.* Lord (1900), 81 L. T. 812; Anchor Trust Co. *v.* Bell, [1926] Ch. 805. **Mentd.** Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.; Bagnall *v.* Carlton (1877), 6 Ch. D. 371; Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394; Erlanger *v.* New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; Allcard *v.* Skinner (1887), 36 Ch. D. 145; *Re* Bennett, Masonic & General Life Assce. *v.* Sharpe (1891), 8 T. L. R. 194.

Misrepresentation in prospectus—Loss of right by acquiescence.]—*See* COMPANIES, Vol. IX., pp. 132, 133, 142, 143, 256, Nos. 705–719, 792–798, 1590–1594.

Repudiation of lease—Extoppel of landlord.]—*See* LANDLORD & TENANT, Vol. XXX., pp. 361–365, Nos. 238–284.

Impeachable conveyance.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 279–281, pp. 1050–1066.

See, also, PARTNERSHIP; SALE OF GOODS; SALE OF LAND; & Titles *passim.*

B. Necessity for Unequivocal Acts of Affirmation.

740. General rule.]—ABRAM S.S. CO. *v.* WESTVILLE SHIPPING CO., No. 636, *ante.*

741. Act merely incidental to contract.]—The purchaser of a mare at an auction was induced to buy her by the description that she had been hunted with certain hounds. The conditions of sale provided that horses not answering the description must be returned before a specified time, otherwise the purchaser must keep them with all faults. The purchaser paid the price & was casually told that the description was untrue; nevertheless he removed the mare to his own stables; & while being so removed she ran away & injured herself severely, without any negligence on pltf.'s part. The description was, in fact, untrue, & on that ground the purchaser returned her to the seller within the specified time:—*Held:* since the purchaser had in removing her done no more than he was entitled to do under the contract & since the injuries were not owing to any negligence on his part he had not lost his right to rescind the contract & could recover the price from the seller in an action for money had & received.—HEAD *v.* TATTERSALL (1871), L. R. 7 Exch. 7; 41 L. J. Ex. 4; 25 L. T. 631; 20 W. R. 115.

Annotations:—**Consd.** Elphick *v.* Barnes (1880), 5 C. P. D. 321. **Refd.** Chapman *v.* Withers (1887), 4 T. L. R. 132.

SUB-SECT. 6.—IMPOSSIBILITY OF SPECIFIC RESTITUTION.

742. General rule.] — A person induced by fraud to enter into a contract under which he pays money may, at his option, rescind the contract, & recover back the price, as money had & received, if he can return what he has received under it. But, when he can no longer place the parties *in statu quo*, as if he has become unable to return what he has received in the same plight as that in which he received it, the right to rescind no longer exists; & his remedy must be by an action for deceit, & not for money had & received.

If you are fraudulently induced to buy a cake you may return it & get back the price, but you cannot both eat your cake & return your cake (CROMPTON, J.).

Pltf. must rescind *in toto* or not at all. He cannot both keep the shares & recover the whole price. That is founded on the plainest principles of justice (CROMPTON, J.).—CLARKE *v.* DICKSON (1858), E. B. & E. 148; 27 L. J. Q. B. 223; 31 L. T. O. S. 97; 4 Jur. N. S. 832; 120 E. R. 463.

Annotations:—**Consd.** R. *v.* Saddlers' Co. (1863), 10 H. L. Cas. 404; Western Bank of Scotland *v.* Addie, Addie *v.* Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145. **Apld.** Savage *v.* Canning (1867), 16 W. R. 133. **Distd.** Head *v.* Tattersall (1871), 41 L. J. Ex. 4. **Apprvd.** Urquhart *v.* Macpherson (1878), 3 App. Cas. 831. **Consd.** London & County Banking Co. *v.* London & River Plate Bank (1887), 4 T. L. R. 179. **Dbtd.** Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Refd.** *Re* Royal British Bank (1859), 3 De G. & J. 387; Horsfall *v.* Thomas (1862), 1 H. & C. 90; *Re* Overend, Gurney, Oakes *v.* Turquand, Peek *v.* Same (1867), L. R. 2 H. L. 325; Clough *v.* L. & N. W. Ry. (1871), 25 L. T. 708; Heilbutt *v.* Hickson (1872), L. R. 7 C. P. 438; Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394; Sheffield Nickel Co. *v.* Unwin (1877), 2 Q. B. D. 214; Erlanger *v.* New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; Aaron's Reefs *v.* Twiss, [1896] A. C. 273; *Re* Duncan, Terry *v.* Sweeting [1899] 1 Ch. 387. **Mentd.** Nicholson *v.* Ricketts (1860), 2 E. & E. 497; Anderson *v.* Costello (1871), 19 W. R. 628; Salomon *v.* Salomon, Salomon *v.* Salomon, [1897] A. C. 22.

743. ——.]—If a person seeks to set aside a sale of various kinds of property, on the ground of fraud, the contract must be rescinded *in toto* or not at all; & if pltf. is unable to restore any one of the kinds of property included in the contract relief cannot be given.—MATURIN *v.* TREDINNICK (1864), 4 New Rep. 15; 10 L. T. 331; 28 J. P. 744; 12 W. R. 740.

Annotation:—**Refd.** *Re* Mount Morgan West Gold Mine, *Ex p.* West (1887), 56 L. T. 622.

744. ——.]—WESTERN BANK OF SCOTLAND *v.* ADDIE, ADDIE *v.* WESTERN BANK OF SCOTLAND, No. 214, *ante.*

745. ——.]—CLOUGH *v.* LONDON & NORTH WESTERN RY. CO., No. 669, *ante.*

746. ——.]—A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*. For a contract cannot be rescinded in part & stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages (LUSH, J.).—SHEFFIELD NICKEL CO. *v.* UNWIN (1877), 2 Q. B. D. 214; 46 L. J. Q. B. 299; 36 L. T. 246; 25 W. R. 493, D. C.

747. ——]—Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be injured by the fraud, subject to the condition that the other party, if the contract be disaffirmed, can be remitted to his former state.

PART IX. SECT. 3, SUB-SECT. 6.

742 i. ***General rule.***—A person induced by fraud to enter into a contract cannot, after he has acted under it so that the parties can no longer be placed *in statu quo*, avoid the contract.—LLOYD *v.* UNION INSURANCE CO. (1875), 15 N. B. R. (2 Pug.) 498.—**CAN.**

—URQUHART *v.* MACPHERSON (1878), 3 App. Cas. 831, P. C.

748. ——.]—It is clear on principles of general justice, that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put *in statu quo* (LORD BLACKBURN, C.). —ERLANGER *v.* NEW SOMBRERO PHOSPHATE CO. (1878), 3 App. Cas. 1218; 48 L. J. Ch. 73; 39 L. T. 269; 27 W. R. 65, H. L.; *affg.* S. C. *sub nom.* NEW SOMBRERO PHOSPHATE CO. *v.* ERLANGER (1877), 5 Ch. D. 73, C. A.

Annotations:—**Expld.** Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Apld.** Hulton *v.* Hulton, [1917] 1 K. B. 813. **Refd.** Ladywell Mining Co. *v.* Brookes, Ladywell Mining Co. *v.* Huggons (1886), 35 Ch. D. 400; *Re* Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 582. **Mentd.** Bagnall *v.* Carlton (1877), 6 Ch. D. 371; Phosphate Sewage Co. *v.* Hartmont (1877), 25 W. R. 743; Emma Silver Mining Co. *v.* Lewis (1879), 4 C. P. D. 396; *Re* Pepperell, Pepperell *v.* Chamberlain (1879), 27 W. R. 410; *Re* Rica Gold Washing Co. (1879), 27 W. R. 715; *Re* Ambrose Lake Tin & Copper Mining Co., *Ex p.* Moss, *Ex p.* Taylor (1880), 49 L. J. Ch. 457; *Re* British Seamless Paper Box Co. (1881), 17 Ch. D. 467; *Re* Scottish Petroleum Co. (1881), 29 W. R. 372; *Re* Cape Breton Co. (1885), 29 Ch. D. 795; *Re* Incorporated Law Soc. & Four Solicitors (1891), 7 T. L. R. 672; *Re* Sharpe, *Re* Bennett, Masonic & General Life Assce. *v.* Sharpe, [1892] 1 Ch. 154; *Re* Gallard, *Ex p.* Gallard, [1897] 2 Q. B. 8; Larocque *v.* Beauchemin, [1897] A. C. 358; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196; Salomon *v.* Salomon, Salomon *v.* Salomon, [1897] A. C. 22; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; Gluckstein *v.* Barnes, [1900] A. C. 240; Burland *v.* Earle, [1902] A. C. 83; *Re* Leeds & Hanley Theatres of Varieties, [1902] 2 Ch. 809; The Birnam Wood, [1907] P. 1; United Shoe Machinery Co. of Canada *v.* Brunet, [1909] A. C. 330; A.-G. for Dominion of Canada *v.* Standard Trust Co. of New York, [1911] A. C. 498; Omnium Electric Palaces *v.* Baines, [1914] 1 Ch. 332; Jubilee Cotton Mills *v.* Lewis, [1924] A. C. 958; Anchor Trust Co. *v.* Bell, [1926] Ch. 805.

749 ——.]—MACDONALD *v.* TURNER (1892), 8 T. L. R. 715.

750. ——.]—A voidable contract cannot be rescinded or set aside after the position of the parties has been changed, so that they cannot be restored to their former position. Fraud may exclude the application of this principle, but I know of no other exception (LINDLEY, M.R.).—LAGUNAS NITRATE CO. *v.* LAGUNAS SYNDICATE, [1899] 2 Ch 392; 68 L. J. Ch. 699; 81 L. T. 334; 48 W. R. 74; 15 T. L. R. 436; 43 Sol. Jo. 622; 7 Mans. 165, C. A.

Annotations:—**Mentd.** *Re* National Bank of Wales, [1899] 2 Ch. 629; Merchants' Fire Office *v.* Armstrong (1901), 17 T. L. R. 709; Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234; Ammonia Soda Co. *v.* Chamberlain, [1918] 1 Ch. 266; Piercy *v.* Mills, [1920] 1 Ch. 77; *Re* City Equitable Fire Insce., [1925] Ch. 407.

751. ——.]—A claim by contractors for the rescission of a contract for the construction of a railway on the plea that the contract had been entered into under essential error induced by the innocent misrepresentation of the railway co. as to the nature of the strata through which the railway passed rejected on the ground that *restitutio in integrum* had become impossible by reason of the completion of the railway by the contractors after full knowledge of the facts.—GLASGOW & SOUTH WESTERN RY. CO. *v.* BOYD & FORREST, [1915] A. C. 526; 84 L. J. P. C. 157, H. L.

Annotation:—**Mentd.** I. R. Comrs. *v.* Ballantine (1924), 8 Tax Cas. 595.

752. Exception to rule — Fraud.] — LAGUNAS NITRATE CO. *v.* LAGUNAS SYNDICATE, No. 750, *ante*.

753. Alteration in character of subject-matter—Mining property worked.]—ATTWOOD *v.* SMALL, No. 363, *ante*.

754. Failure of business — Through inherent vice.]—Resp. was induced by misrepresentations made without fraud by applts. to become a partner in a business which either belonged to them or in which they were partners, & which was in fact insolvent. The business having afterwards, owing to its own inherent vice, entirely failed with large liabilities:—*Held:* resp. was entitled to rescission of the contract & repayment of his capital though the business which he restored to applts. was worse than worthless, & the contract being rescinded applts. could not recover against him for money lent & goods sold by them to the partnership.—ADAM *v.* NEWBIGGING (1888), 13 App. Cas. 308; 57 L. J. Ch. 1066; 59 L. T. 267; 37 W. R. 97, H. L.; *affg.* S. C. *sub nom.* NEWBIGGING *v.* ADAM (1886), 34 Ch. D. 582, C. A.

Annotations:—**Consd.** Whittington *v.* Seale-Hayne (1900), 82 L. T. 49. **Refd.** Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; Armstrong *v.* Jackson, [1917] 2 K. B. 822; Hulton *v.* Hulton, [1917] 1 K. B. 813; Compagnie Chemin de Fer Paris-Orleans *v.* Leeston Shipping Co. (1919), 36 T. L. R. 68.

755. Separation deed.] — In 1910 a deed of separation was executed by a husband & wife under which the husband agreed to pay to the wife during her life or until she should marry again the annual sum of £500. & the wife agreed to maintain herself & to keep indemnified the husband against her debts & torts, & not to take proceedings for restitution of conjugal rights nor for divorce or judicial separation in respect of any previous marital offence; & it was also agreed that all letters between the parties should be destroyed. The letters were accordingly destroyed & the husband paid his wife the £500 a year. In 1915 the wife brought an action against the husband claiming to have the deed rescinded upon the ground that she had been induced to execute it by his false & fraudulent representations & concealment as to his means.

The ct. ordered the deed to be rescinded though the letters had been destroyed & could not be restored to the respective parties, & refused to make it a condition of rescission that the wife should repay to the husband the annual sums of £500, which he had paid to her under the deed, the husband having received corresponding benefits under the deed.—HULTON *v.* HULTON, [1917] 1 K. B. 813; 86 L. J. K. B. 633; 116 L. T. 551; 33 T. L. R. 197; 61 Sol. Jo. 268, C. A.

also, Sect. 1, sub-sect. 2, C.; Sect. 2, sub-sect. 1, *ante*.

SUB-SECT. 7.—INTERVENTION OF JUS TERTII.

756. Right to rescind barred.] —CLOUGH *v.* LONDON & NORTH WESTERN RY. CO., No. 669, *ante*.

——.]—*See* COMPANIES, Vol. IX., pp. 95, 257, 258, Nos. 400, 1600–1605.

SUB-SECT. 8.—WINDING UP OF COMPANY.

Contract to take shares—Right to rescind barred.] —*See* COMPANIES, Vol. IX., pp. 133–135, Nos. 720–732.

SUB-SECT. 9.—ACQUIESCENCE, LACHES, AND DELAY.

757. Whether bar to relief—Delay.]—Upon a bill by the vendor, seeking to rescind the sale, on

PART IX. SECT. 3, SUB-SECT. 9.

757 i. *Whether bar to relief—Delay.*] —GARDINER *v.* BICKLEY (1905), 2 W. L. R. 146.—CAN.

757 ii. —— ——.]—Mere delay does not disentitle deft. to relief.—PIONEER TRACTOR CO., LTD. *v.* PEEBLES (1913), 26 W. L. R. 503; 5 W. W. R. 989; 15 D. L. R. 278; 6 Sask. L. R. 339. —CAN.

757 iii. —— ——.]—A purchaser of lands who wishes to repudiate his

Sect. 3.—*Defences to proceedings: Sub-sect.* 9. *Sect.* 4. *Part X. Sects.* 1, 2 & 3: *Sub-sect.* 1.]

the ground of fraud & oppression in the transaction, & error in the accounts, although the prayer to rescind the sale was refused, the account was opened after a considerable lapse of time.—M'NEILL *v.* CAHILL (1820), 2 Bli. 228; 4 E. R. 311, H. L.

Annotations:—**Reld.** Daniel *v.* Falmouth, Turner *v.* Falmouth (1835), 5 L. J. Ch. 69. **Mentd.** Hosking *v.* Terry (1862), 15 Moo. P. C. C. 493.

758. —— ——.]—(1) There can be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept by the conduct of the party in whose favour it is made, unaware of the invalidity of the first transaction, & has not, at the time of the supposed ratification, the means of forming an independent judgment.

(2) Bill to set aside transactions [of 1835] was not filed till 1847:—*Held:* the delay was no answer to R.'s title to relief.—SAVERY *v.* KING (1856), 5 H. L. Cas. 627; 25 L. J. Ch. 482; 27 L. T. O. S. 145; 2 Jur. N. S. 503; 4 W. R. 571; 10 E. R. 1046, H. L.; *varying* S. C. *sub nom.* KING *v.* SAVERY (1853), 1 Sm. & G. 271.

Annotations:—*As to* (1) **Reld.** Hoblyn *v.* Hoblyn (1889), 60 L. T. 499. *As to* (2) **Apld.** Allcard *v.* Skinner (1887), 36 Ch. D. 145. *Generally*, **Mentd.** Barnard *v.* Hunter (1856), 28 L. T. O. S. 152; Turner *v.* Collins (1871), 7 Ch. App. 334, n.; Pisani *v.* A.-G. for Gibraltar (1874), L. R. 5 P. C. 516; De Witte *v.* Addison (1899), 80 L. T. 207; Moody *v.* Cox & Hatt (1917), 116 L. T. 740.

759. —— ——.]—A man is not at liberty to play fast & loose as to a misrepresentation of which he complains, to bide his time until he can see whether it is more for his benefit to remain in the society or to set himself free from it, & to come at any time when he thinks the balance is in favour of retirement & ask to be allowed to retire. Any man who claims to retire from a co. on the ground that he was induced to become a member by misrepresentation, is bound to come at the earliest possible moment after he becomes aware of the misrepresentation (PEARSON, J.).—*Re* LONDON & STAFFORDSHIRE FIRE INSURANCE CO. (1883), 24 Ch. D. 149; 31 W. R. 781; *sub nom. Re* LONDON & STAFFORDSHIRE FIRE INSURANCE CO., WALLACE'S CASE, 53 L. J. Ch. 78; 48 L. T. 955.

Annotation:—**Reld.** *Re* Metropolitan Coal Consumers' Assocn., Karberg's Case, [1892] 3 Ch. 1.

760. —— ——.]—ARMSTRONG *v.* JACKSON, No. 645, *ante*.

761. —— —— **Evidence of affirmation.**]—CLOUGH *v.* LONDON & NORTH WESTERN RY. CO., No. 669, *ante*.

762. —— —— **Representor's delay in enforcing contract.**]—If pltf. in a suit for specific performance has delayed for a length of time to enforce the agreement, acquiescence in a breach of the agreement, or in a misrepresentation on the faith of which deft. entered into the agreement, will not be imputed to deft. by reason of a similar delay on his part in repudiating it, though accompanied by possession.—LAMARE *v.* DIXON (1873), L. R. 6 H. L. 414; 43 L. J. Ch. 203; 22 W. R. 49, H. L.; *affg.* S. C. *sub nom.* DIXON *v.* LAMARE (1871), 19 W. R. 942.

Annotations:—**Consd.** Abram S.S. Co. *v.* Westville Shipping Co., [1923] A. C. 773. **Reld.** Hembrow *v.* Talbot (1892), 36 Sol. Jo. 712; Jones *v.* Joseph (1918), 87 L. J. K. B. 510.

—— ——.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 524, 525, Nos. 1808–1810.

—— ——.]—*See, further*, COMPANIES, Vol. IX., pp. 130–132, 143, 144, Nos. 686–704, 800–810; EQUITY, Vol. XX., pp. 524 *et seq.*; Nos. 2488 *et seq.*; EVIDENCE, Vol. XXII., pp. 175–179, Nos. 1526–1544; LIMITATION OF ACTIONS, Vol. XXXII., pp. 520 *et seq.*

—— **Acquiescence.**]—*See* COMPANIES, Vol. IX., pp. 132, 133, 142, 143, 256, 257, Nos. 705–719, 792–799, 1590–1598; FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 215, 216, Nos. 497–500.

SECT. 4.—PARTIES TO PROCEEDINGS.

General rule—Parties to the representation.]—*See* Part VI., *ante*.

Infants.]—*See* INFANTS, Vol. XXVIII., pp. 295 *et seq.*

Bankrupts.]—*See* BANKRUPTCY, Vol. V., pp. 971 *et seq.*

Lunatics.]—*See* LUNATICS, Vol. XXXIII., pp. 128 *et seq.*; pp. 230 *et seq.*

Married women.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 248 *et seq.*

Personal representatives.]—*See* EXECUTORS, Vol. XXIV., pp. 649, 650, 716 *et seq.*, Nos. 6763–6767.

Assignees.]—*See* BANKRUPTCY, Vol. V., pp. 630 *et seq.*, 1014, No. 8274; CHOSES IN ACTION, Vol. VIII., pp. 432, 433, 488–491, Nos. 97–99, 565–586; CONTRACT, Vol. XII., pp. 596–607.

See, also, AUCTION, Vol. III., pp. 41 *et seq.*; COMPANIES, Vol. IX., pp. 135, 136, 354–356, Nos. 759–745, 2237–2248; PARTNERSHIP.

Part X.—Misrepresentation as a Defence.

SECT. 1.—IN GENERAL.

763. Fraud of plaintiff—Bar to action.]—BEGBIE *v.* PHOSPHATE SEWAGE CO., No. 772, *post*.

764. Whether available to person participating in fraud—General rule.]—WEARE *v.* DEARE, No. 801, *post*.

765. —— **In answer to plea of release.**]—Defts. being indebted to pltf. for goods, & being indebted also to other persons, had entered into a composition with their creditors. Pltf. had refused to join unless defts. would pay him dividends at a rate exceeding that which was accepted by the others; & this was agreed upon between pltf. & defts. without the knowledge of the other creditors. Defts. had stated to pltf., as an inducement for his making this contract,

agreement upon the ground of misrepresentation must do so promptly when knowledge of misrepresentation comes to him.—FRANCO-BELGIAN INVESTMENT CO. *v.* SMALL (1916), 34 W. L. R. 857; 10 W. W. R. 924.—**CAN.**

757 iv. —— ——.]—Delay or laches of themselves do not constitute a defence to an action for rescission of a sale of land because of misrepresentation.—WRIGHT *v.* WEEKS (Alta.), [1919] 2 W. W. R. 27; 14 Alta. L. R. 467; 46 D. L. R. 322.—**CAN.**

757 v. —— ——.]—MEIKLEJOHN *v.* HUGO (Alta.), [1924] 1 D. L. R. 272.—**CAN.**

757 vi. —— ——.]—IRVINE *v.* KIRKPATRICK (1850), 7 Bell, Sc. App. 186; 22 Sc. Jur. 634; *revsg.* (1848), 10 Dunl. (Ct. of Sess.) 367.—**SCOT.**

n. —— *Acquiescence.*]—CLARK *v.* CLARK (1882), 8 V. L. R. 303.—**AUS.**

PART X. SECT. 1.

a. Fraud of plaintiff — Bar to action—Not unless repudiation & restatement of plaintiff pleaded.]—ANDERSON *v.* COSTELLO (1871), 19 W. R. 628.—**IR.**

that no other creditor had a similar preference. Pltf. received securities from defts. on account of the composition bargained for by him. The statement, that no other creditors had been preferred equally with pltf., was false within the knowledge of defts.:—*Held:* (1) (WIGHTMAN, J.) in this action, the plaintiff might allege the deception put upon him by defts. in answer to their plea of release; (2) (COLERIDGE & ERLE, JJ.) he could not so allege a deception practised on himself by defts. in the execution of a fraud by himself & them upon other parties.—MALLALIEU *v.* HODGSON (1851), 16 Q. B. 689; 20 L. J. Q. B. 339; 15 Jur. 817; 117 E. R. 1045; *sub nom.* MALALIEU *v.* HODGSON, 17 L. T. O. S. 37.

Annotations:—*As to* (2) **Consd.** Mayhew *v.* Boyes (1910), 103 L. T. 1. *Generally*, **Refd.** *Re* Harvey, *Ex p.* Phillips, [1888] W. N. 88.

766. —— Party obtaining benefit.]—IRLAM *v.* MIDLAND RY. Co., No. 771, *post.*

——.]—*See* ESTOPPEL, Vol. XXI., pp. 276, 277, Nos. 931–935; EQUITY, Vol. XX., pp. 248 *et seq.*

Defence by way of estoppel.]—*See, generally,* ESTOPPEL, Vol. XXI., pp. 290–404.

Right to begin.]—*See* EVIDENCE, Vol. XXII., p. 44, No. 201.

SECT. 2.—**AGAINST ASSIGNEE OF REPRESENTOR.**

767. Assignee of chose in action.]—In the first place, I hold it to be a proposition that cannot be questioned that the assignee of a debt, whether it is a debt created by covenant or by bond, or a debt created by a parol agreement, stands in no better position than the assignor. He takes no further rights than the assignor had, who assigned the debt, & he acquires no other rights unless the debtor, after knowing of the defence which he has, lies by so long as to induce a reasonable inference that he elects not to take advantage of the fraud, but to confirm the assignment, or notifies to the assignor of the debt that he elects to affirm it, or does something equal to that (LUSH, L.J.).—WAKEFIELD & BARNSLEY BANKING CO. *v.* NORMANTON LOCAL BOARD (1881), 44 L. T. 697; 45 J. P. 601, C. A.

——.]—*See* CHOSES IN ACTION, Vol. VIII., p. 494, No. 607.

—— **Debt on building lease.**]—*See* BUILDING CONTRACTS, Vol. VII., p. 361, No. 117.

—— **Payment by trustees of infant.**]—*See* INFANTS, Vol. XXVIII., p. 178, No. 378.

Assignee of insurance policy.]—*See* INSURANCE, Vol. XXIX., pp. 91, 373, Nos. 490, 2989.

Assignee for value without notice.]—*See* Part XI., *post.*

Assignment of goods.]—*See* SALE OF GOODS.

SECT. 3.—**PARTICULAR INSTANCES.**

SUB-SECT. 1.—ACTIONS ON CONTRACTS.

768. Whether fraud a good defence—General rule.]—COLLINS *v.* WILLES (1597), Moore, K. B. 468; Owen, 63; Cro. Eliz. 774; 72 E. R. 701.

769. —— —— Quantity of fraud immaterial.]—**The quantity of fraud is immaterial.** The issue raised is, whether the note was obtained by fraud; & that is proved (*per* CUR.).—STAPLES *v.* CLAY (1847), 9 L. T. O. S. 222.

770. —— —— Though not relating directly to subject matter—Inducement by misrepresentation.]—A contract may be avoided by a false & fraudulent representation, though not relating directly to the nature or character of its subject-matter, if it is so closely connected with the contract as that the party sued upon it would not, but for the representation, have entered into it, & was induced to enter into it, to the knowledge of the other party, by such representation.—CANHAM *v.* BARRY (1855), 15 C. B. 597; 3 C. L. R. 487; 24 L. J. C. P. 100; 1 Jur. N. S. 402; 139 E. R. 558.

Annotations:—**Mentd.** Bally *v.* De Crespigny (1869), L. R. 4 Q. B. 180; Fisher *v.* Tully (1878), 3 App. Cas. 627.

771. —— —— Though benefit obtained by party defrauded.]—A general allegation of fraud is on demurrer a good answer to an alleged contract, although the pleading alleging the contract shows that the person defrauded took a special benefit under the contract.—IRLAM *v.* MIDLAND RY. Co. (1875), 23 W. R. 660.

772. —— ——.]—Defts., a limited co., had patented in England a process for utilising sewage. Pltf., acting ostensibly on his own account, but really on account of the co., bought from defts. for £15,000, a grant of the exclusive right to use their process in Berlin. Pltf. then conveyed his interest to L. for £30,000, & L. conveyed it for £30,000 to H.'s clerk, in trust for the intended Berlin co. The Berlin co. was formed & issued a prospectus, stating that they had the exclusive right to use defts.' process in Berlin. The £30,000 was paid to H., who kept £15,000 & paid £15,000 to defts. in satisfaction of pltf.'s obligations. The object of the scheme was to float the Berlin co., in which H. was interested. No exclusive right had been or could be obtained in Berlin, & pltf. & H. knew this, but defts.' directors did not. In an action to recover the £15,000 paid to defts.:—*Held:* pltf. was not entitled to recover, because, knowing that there was no Berlin patent, he had only bargained for an ostensible grant, which he had got, & because his claim was founded on fraud, & a rule to enter the verdict for defts. was made absolute.—BEGBIE *v.* PHOSPHATE SEWAGE CO. (1876), 1 Q. B. D. 679; 35 L. T. 350; 25 W. R. 85, C. A.

Annotations:—**Apld.** Scott *v.* Brown, Doering, McNab, Slaughter & May *v.* Brown, Doering, McNab, [1892] 2 Q. B. 724. **Refd.** *Re* Robinson's Settlmt., Gant *v.* Hobbs, [1912] 1 Ch. 717.

773. —— Not when contract executed—Unless misrepresentation as to nature of contract.]—Where an agreement has been fully executed, it is no answer to an action arising out of it that deft. was induced to enter into it by fraud, unless the fraud be such as to have induced deft. to make a contract different from that which he thought he was making.—FERET *v.* HILL (1854), 15 C. B. 207; 2 C. L. R. 1366; 23 L. J. C. P. 185; 23 L. T. O. S. 158; 18 Jur. 1014; 2 W. R. 493; 139 E. R. 400.

Annotations:—**Consd.** Canham *v.* Barry (1855), 15 C. B. 597; R. *v.* Saddlers' Co. (1863), 10 H. L. Cas. 404. **Refd.** Taylor *v.* Chester (1869), L. R. 4 Q. B. 309. **Mentd.** Anderson *v.* Radcliffe & Walker (1858), 5 Jur. N. S. 704; Fisher *v.* Tully (1878), 3 App. Cas. 627; Morley *v.* Rennoldson (1895), 12 R. 158; Gordon *v.* Metropolitan Police Chief Comr., [1910] 2 K. B. 1080.

774. —— Not mere fraudulent conduct—Action on bill of exchange.]—The fraudulent manner in which pltf. obtained possession of the bills of lading held not to bar his right to relief, but only

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PART X. SECT. 3, SUB-SECT. 1.

773 1. *Whether fraud a good defence—Not when contract executed—Unless misrepresentation as to nature of contract.*]—The ordinary rule does not apply where a man incapable of reading is induced to sign a contract, it being represented that it is an entirely different document.—AMERICAN-ABELL CO. *v.* TOUROUND (1909), 10 W. L. R. 413.—CAN.

Sect. 3.—Particular instances: Sub-sects. 1 & 2. Part XI.]

to affect the question of costs.—DRESSER *v.* HOARE (1856), 26 L. J. Ch. 51; 28 L. T. O. S. 1; 2 Jur. N. S. 1151, L. JJ.; *revsd.* on other grounds, *sub nom.* HOARE *v.* DRESSER (1859), 7 H. L. Cas. 290, H. L.

Annotation:—**Mentd.** *Re* Walt, [1926] Ch. 962.

775. —— Fraud of third party—Privity of plaintiff.]—CLOUGH *v.* LONDON & NORTH WESTERN RY. CO., No. 669, *ante.*

776. What must be proved—General rule.]—(1) A contract into which a person may have been induced to enter by false & fraudulent representation is not void, but merely voidable at the election of the person defrauded after he has had notice of the fraud. Unless & until he makes his election & by word or act repudiates the contract or expresses his determination not to be bound by it the contract remains as valid & binding as if it had not been tainted with fraud; (2) the party defrauded cannot avoid one part of a contract & affirm another part unless the parts are so severable from each other as to form two independent contracts.

(3) To maintain the first [plea of false representation], the burden rested on resps. of establishing, either by the admission of applts. or by the findings of the jury, the following conclusions of fact: (*a*) that the representations complained of were made by applts. to resps.; (*b*) that these representations were false in fact; (*c*) that applts., when they made them, either knew they were false or made them recklessly without knowing whether they were false or true; (*d*) that resps. were thereby induced to enter into the covenants contained in the leases; & (*e*) that immediately on or at least within a reasonable time after their discovery of the fraud which had been practised on them they elected to avoid the leases & accordingly repudiated them.

Of these, the last is the most vital, in the sense that it is the condition precedent which must be fulfilled before resps. can escape from the obligations of the contracts they have entered into, however fraudulent those contracts may be (LORD ATKINSON).—UNITED SHOE MACHINERY CO. OF CANADA *v.* BRUNET, [1909] A. C. 330; 78 L. J. P. C. 101; 100 L. T. 579; 25 T. L. R. 442; 53 Sol. Jo. 396, P. C.

777. —— Variation of liability under the contract.]—GREEN *v.* GOSDEN, No. 159, *ante.*

Alteration of position.]—*See* Part V., Sect. 3, *ante.*

778. —— Repudiation of contract—Whether repudiation implied from plea of fraud.]—(1) A contract cannot be avoided for fraud unless the person defrauded has disaffirmed the contract & reinstated as far as possible the opposite party. Allegations of such matters are implied in the general plea of fraud, & are put in issue by a joinder of issue without a special replication.

(2) A contract induced by fraud is voidable & not void.—DAWES *v.* HARNESS (1875), L. R. 10 C. P. 166; 44 L. J. C. P. 194; 32 L. T. 159; 23 W. R. 398.

Annotation:—*Generally*, **Refd.** Irlam *v.* Mid. Ry. (1875), 23 W. R. 660.

779. —— —— ——.]—AARON'S REEFS *v.* TWISS, No. 16, *ante.*

780. —— —— ——.]—UNITED SHOE MACHINERY CO. OF CANADA *v.* BRUNET, No. 776, *ante.*

—— —— Contract to take shares in company.]—*See* COMPANIES, Vol. IX., p. 116, Nos. 565–568.

SUB-SECT. 2.—OTHER CASES.

Action against administration.]—*See* EXECUTORS, Vol. XXIV., p. 568, No. 6060.

Action on bill of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 122, 166–172, Nos. 814, 815, 1053–1075.

Action on bond.]—*See* BONDS, Vol. VII., p. 249, No. 921.

Action for breach of promise.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 30, 31, Nos. 66–70.

Action on charterparty.]—*See* SHIPPING.

Action on a deed.]—*See* DEEDS, Vol. XVII., pp. 230–232, Nos. 448–456; ESTOPPEL, Vol. XXI., pp. 273, 295, Nos. 906, 1053.

Action on deed of separation.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 227, 228, Nos. 1981–1993.

Action to enforce reference to arbitration.]—*See* ARBITRATION, Vol. II., pp. 368, 369, Nos. 354–359.

Action to enforce foreign judgment.]—*See* CONFLICT OF LAWS, Vol. XI., p. 457, Nos. 1132–1135.

Action on guarantee.]—*See* GUARANTEE, Vol. XXVI., pp. 187, 211–220, Nos. 1439, 1665–1716, 1733–1743.

Actions by infants.] — *See* INFANTS, Vol. XXVIII., pp. 175–178, Nos. 360–380

Action for infringement of copyrights.]—*See* COPYRIGHT, Vol. XIII., p. 168, Nos. 59, 60.

Action on insurance policy.]—*See* INSURANCE, Vol. XXIX., pp. 49–52, 62, 160–175, 350–353, 359, 360, Nos. 114–129, 144–151, 213, 214, 1164–1317, 2836–2856, 2910–2914.

Action on money-lending contract.] — *See* MONEY & MONEY-LENDING, p. 205, No. 310, *post.*

Action on sale of goods.]—*See* SALE OF GOODS.

Action on sale of land.]—*See* SALE OF LAND.

Action against shareholder of company.]—*See* COMPANIES, Vol. IX., pp. 116, 117, 247–258, Nos. 565–575, 1552–1605.

Action for specific performance.]—*See* SPECIFIC PERFORMANCE.

Action for wrongful execution.]—*See* EXECUTION, Vol. XXI., p. 546, No. 1219.

Registration of resolution for liquidation by arrangement.]—*See* BANKRUPTCY, Vol. V., p. 1069, Nos. 8748–8753.

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776 l. *What must be proved—General rule.*]—In order to successfully resist an action on a contract induced by material false representation, deft. is entitled to succeed if he can establish that the misrepresentation was a material one, & that he entered into the contract in reliance on the truth thereof.—VILJOEN *v.* HILLIER, [1904] T. S. 312.—**S. AF.**

p. Innocent but material misrepresentations.]—An action by a vendor to enforce a contract for the sale of a business fails where it appears that the purchasers were induced to enter into the contract by the material misrepresentations of the vendor, though innocently made.—KIDD *v.* NELSON (1913), 18 B. C. R. 217; 12 D. L. R. 417.—**CAN.**

Part XI.—Effect of Fraud on Innocent Parties.

781. Interest acquired by innocent third party.] —Interests obtained through fraud cannot be maintained by third persons, although not themselves parties to the imposition.—BRIDGMAN *v.* GREEN (1757), 2 Ves. Sen. 627; Wilm. 58; 28 E. R. 399, L. C.

Annotations :—**Apld.** Huguenin *v.* Baseley (1807), 14 Ves. 273; Cooke *v.* Lamotte (1851), 15 Beav. 234; Cockell *v.* Taylor, Collett *v.* Preston, Preston *v.* Collett (1852), 15 Beav. 103; Smith *v.* Kay (1859), 7 H. L. Cas. 751; *Re* Yates, *Ex p.* Brown (1879), 27 W. R. 651. **Reld.** Vane *v.* Vane (1873), 8 Ch. App. 383; Allcard *v.* Skinner (1887), 36 Ch. D. 145; Morley *v.* Loughnan, [1893] 1 Ch. 736; *Re* McCallum, McCallum *v.* McCallum, [1901] 1 Ch. 143; John *v.* Dodwell, [1918] A. C. 565. **Mentd.** Dent *v.* Bennett (1839), 4 My. & Cr. 269; Reynell *v.* Sprye, Spryе *v.* Reynell (1852), 21 L. J. Ch. 633; Cox *v.* Bruton (1857), 5 W. R. 544; Lyon *v.* Home (1868), L. R. 6 Eq. 655; Coultwas *v.* Swan (1871), 19 W. R. 485; Baker *v.* Loader (1872), L. R. 16 Eq. 49; Moxon *v.* Payne (1873), 8 Ch. App. 881; Berry *v.* Glazebrook (1891), 7 T. L. R. 574; Turnbull *v.* Duval, [1902] A. C. 429.

782. ——.]—Interests obtained through the fraud of another person cannot be maintained.—HUGUENIN *v.* BASELEY (1807), 14 Ves. 273; 33 E. R. 526, L. C.

Annotations :—**Distd.** Harrison *v.* Wiltshire (1834), 4 L. J. Ch. 30 (*see* 4 L. J. Ch. 260). **Apld.** Scholefield *v.* Templer (1859), John. 155; Topham *v.* Portland (1863), 1 De G. J. & Sm. 517; Coxon *v.* Schofield (1893), 9 T. L. R. 290; Morley *v.* Loughnan, [1893] 1 Ch. 736. **Expld.** John *v.* Dodwell, [1918] A. C. 563. **Reld.** Harris *v.* Tremenheere (1808), 15 Ves. 34; Lloyd *v.* Passingham (1815), Coop. G. 152; Cockell *v.* Taylor, Collett *v.* Preston, Preston *v.* Collett (1852), 15 Beav. 103; Russell *v.* Jackson (1852), 10 Hare, 204; Tee *v.* Ferris (1856), 2 K. & J. 357; *Re* Royal British Bank, Nicol's Case (1859), 3 De G. & J. 387; Rhodes *v.* Bate (1865), 4 Giff. 670; Natal Land & Colonization Co. *v.* Good (1868), L. R. 2 P. C. 121; Vane *v.* Vane (1873), 8 Ch. App. 383; Allcard *v.* Skinner (1887), 36 Ch. D. 145; *Re* Stead, Whitham *v.* Andre (1899), 69 L. J. Ch. 49; *Re* McCallum, McCallum *v.* McCallum, [1901] 1 Ch. 143; Manks *v.* Whiteley, [1911] 2 Ch. 448. **Mentd.** Lloyd *v.* Passingham (1809), 16 Ves. 59; Pratt *v.* Barker, Pretty *v.* Barker (1825), 1 Sim. 1; Maccabe *v.* Hussey (1831), 5 Bli. N. S. 715; Nicol *v.* Vaughan (1832), 6 Bli. N. S. 104; Hunter *v.* Atkins (1834), Coop. *temp.* Brough. 464; Nicol *v.* Vaughan (1834), 7 Bli. N. S. 395; Dent *v.* Bennett (1839), 4 My. & Cr. 269; Middleton *v.* Sherburne (1841), 4 Y. & C. Ex. 358; Hoghton *v.* Hoghton (1852), 15 Beav. 278; Reynell *v.* Sprye (1852), 1 De G. M. & G. 660; Wallgrave *v.* Tebbs (1855), 2 K. & J. 313; Talbot *v.* Hope Scott (1858), 4 K. & J. 96; Forshaw *v.* Welsby (1860), 30 Beav. 243; Nottidge *v.* Prince (1860), 2 Giff. 246; Brown *v.* Kennedy (1863), 33 Beav. 133; Toker *v.* Toker (1863), 3 De G. J. & Sm. 487; Lyon *v.* Home (1868), L. R. 6 Eq. 655; Coutts *v.* Acworth (1869), L. R. 8 Eq. 558; Galway Borough Case (1869), 1 O'M. & H. 303; Topham *v.* Portland (1869), 5 Ch. App. 40; Turner *v.* Collins (1871), 7 Ch. App. 334, n.; Baker *v.* Loader (1872), L. R. 16 Eq. 49; Galway County Case (1872), 2 O'M. & H. 46; Hall *v.* Hall (1873), 8 Ch. App. 430; Moxon *v.* Payne (1873), 8 Ch. App. 881; Burstall *v.* Beyfus (1884), 32 W. R. 418; Berry *v.* Glazebrook (1891), 7 T. L. R. 574; Barron *v.* Willis, [1900] 2 Ch. 121; Powell *v.* Powell, [1900] 1 Ch. 243; Wilton *v.* Osborn, [1901] 2 K. B. 110; Bischoff's Trustee *v.* Frank (1903), 89 L. T. 188; Cavendish *v.* Strutt (1903), 19 T. L. R. 483; Wright *v.* Carter, [1903] 1 Ch. 27; Howes *v.* Bishop, [1909] 2 K. B. 390; Lloyd *v.* Coote & Ball, [1915] 1 K. B. 242; Moody *v.* Cox & Hatt, [1917] 2 Ch. 71; Shears *v.* Jones (1922), 128 L. T. 218.

783. ——.]—The principle is established that interests obtained through fraud cannot be maintained by third persons, although not themselves parties to the fraud (JAMES, L.J.).—*Re* YATES, *Ex p.* BROWN (1879), as reported in 27 W. R. 651, C. A.

Annotations :—**Mentd.** *Re* Harrison, *Ex p.* Harrison (1880), 49 L. J. Bcy. 30; *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169; Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747.

784. —— **Third party a bonâ fide purchaser for value.]**—A man, already married, performed the ceremony of marriage with G. W., & joined with her in executing an assignment of her life interest in a trust fund to a purchaser. The fraud practised upon G. W. by the person acting in the character of her husband did not affect the validity of the assignment, nor was it necessary to make the supposed husband a party to a suit instituted by the purchaser to obtain the benefit of the assignment.—STURGE *v.* STARR (1833), 2 My. & K. 195; 39 E. R. 918.

785. —— ——.]—An innocent party cannot derive any benefit from a fraud unless there has been some consideration moving from himself.—SCHOLEFIELD *v.* TEMPLER (1859), 4 De G. & J. 429; 34 L. T. O. S. 36; 7 W. R. 635; 45 E. R. 166, L. C. & L. JJ.

Annotations :—**Distd.** *Re* McCallum, McCallum *v.* McCallum, [1901] 1 Ch. 143. **Consd.** Stoddart *v.* Union Trust (1911), 81 L. J. K. B. 140. **Reld.** Heath *v.* Crealock (1874), 31 L. T. 650; Manks *v.* Whiteley, [1911] 2 Ch. 448.

786. —— ——.]—A title cannot be derived under a fraud upon a power in the absence of valuable consideration.—TOPHAM *v.* PORTLAND (DUKE) (1863), 1 De G. J. & Sm. 517; 1 New Rep. 496; 32 L. J. Ch. 257; 8 L. T. 180; 11 W. R. 507; 46 E. R. 205, L. JJ.; *on appeal, sub nom.* PORTLAND (DUKE) *v.* TOPHAM (LADY) (1864), 11 H. L. Cas. 32, H. L.; *subsequent proceedings, sub nom.* TOPHAM *v.* PORTLAND (DUKE) (1869), 5 Ch. App. 40, L. C. & L. J.

Annotations :—**Mentd.** Ranking *v.* Barnes (1864), 3 New Rep. 660; Eglinton *v.* Lamb (1867), 15 L. T. 657; Cooper *v.* Cooper (1869), 5 Ch. App. 203; Preston *v.* Preston (1869), 21 L. T. 346; Thacker *v.* Key (1869), L. R. 8 Eq. 408; *Re* Huish's Charity (1870), L. R. 10 Eq. 5; Roach *v.* Trood (1876), 3 Ch. D. 429; Palmer *v.* Locke (1880), 15 Ch. D. 294; Whelan *v.* Palmer (1888), 39 Ch. D. 648; *Re* Somers, Cocks *v.* Somerset (1895), 39 Sol. Jo. 705; Viant *v.* Cooper (1897), 76 L. T. 768; Molyneux *v.* Fletcher, [1898] 1 Q. B. 648; Saunders *v.* Shafto (1904), 91 L. T. 282; A.-G. *v.* Richmond (No. 1), [1908] 2 K. B. 729; Cloutte *v.* Storey, [1911] 1 Ch. 18; *Re* Holland, Holland *v.* Clapton, [1914] 2 Ch. 595.

787. —— ——.]—D. & co. deposited certain goods with pltfs. as security for an advance; they afterwards obtained possession of the goods by fraudulently representing to pltfs. that they had sold them to defts. & would hand over to pltfs. the money to be received in payment. D. & co. obtained an advance from defts. & deposited the goods, with a power of sale, with them :—*Held* : as pltfs. had parted with their special property in the goods to D. & co., they could not recover them, in an action, from defts. who had obtained them *bonâ fide* & for a good consideration.—BABCOCK *v.* LAWSON (1880), 5 Q. B. D. 284; 49 L. J. Q. B. 408; 42 L. T. 289; 28 W. R. 591, C. A.

Annotations :—**Consd.** Nash *v.* De Freville, [1900] 2 Q. B. 72. **Reld.** Farquharson *v.* King (1902), 71 L. J. K. B. 667.

788. —— **Sale or pledge before election to avoid contract.]**—Where the owner of goods suffers another to have possession of them, or of the documents which are the evidence of property therein, on a sale to him, obtained by means of fraudulent representation, & avoidable at the option of the owner, a sale or pledge by such party, before the owner has exercised his option, & without notice to the subsequent purchaser, is binding; but this is not so when a party has merely obtained the goods by means of false pretences, without any contract of sale to himself; as when he falsely &

PART XI.

q. *Interest acquired by innocent third party—For valuable consideration.]* —If a deed be obtained by fraud, a person innocently taking under it for valuable consideration will be protected.—MATTHEWSON *v.* HENDERSON (1864), 15 C. P. 90.—**CAN.**

r. —— ——.]—A person cannot retain a benefit obtained by the fraud of another, even though himself innocent of the fraud, unless a valuable

fraudulently represents that another person has authorised him to purchase the goods. & in such case, the original owner can recover the goods from a party to whom they have been sold or pledged by the person who fraudulently obtained them, before any notice of the fraud, or any disaffirmance of the transaction by the real owner.—HIGGONS *v.* BURTON (1857), 26 L. J. Ex. 342 ; 29 L. T. O. S. 165 ; 5 W. R. 683.

Annotations :—**Distd.** Johnson *v.* Credit Lyonnais Co., Johnson *v.* Blumenthal (1877), 3 C. P. D. 32. **Consd.** Cundy *v.* Lindsay (1878), 3 App. Cas. 459. **Refd.** Gobind Chunder Sein *v.* Ryan (1861), 15 Moo. P. C. C. 230 ; Hardman *v.* Booth (1863), 32 L. J. Ex. 105 ; G. W. Ry. *v.* London & County Banking Co., [1901] A. C. 414. **Mentd.** Richards *v.* Johnson (1859), 33 L. T. O. S. 206 ; R. *v.* Central Criminal Court JJ. (1886), 55 L. T. 486.

789. ——.]—CLOUGH *v.* LONDON & NORTH WESTERN RY. CO., No. 669, *ante*.

——.]—*See, also,* TROVER ; SALE OF GOODS.

790. One of two innocent parties forced to suffer by fraud—Whether one enabling fraud to be committed bears the loss.]—Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two gave him credit ought to bear the loss.—FITZHERBERT *v.* MATHER (1785), 1 Term Rep. 12 ; 99 E. R. 944.

Annotations :—**Refd.** Proudfoot *v.* Montefiore (1867), L. R. 2 Q. B. 511. **Mentd.** Huckman *v.* Fernie (1838), 3 M. & W. 505 ; Cornfoot *v.* Fowke (1840), 6 M. & W. 358 ; Wheelton *v.* Hardisty (1857), 8 E. & B. 232 ; Stribley *v.* Imperial Marine Insce. (1876), 1 Q. B. D. 507 ; Blackburn, Low *v.* Vigors (1887), 12 App. Cas. 531.

791. —— ——.]—Where one of two innocent persons is to suffer from the fraud of a third, he who has enabled such third person to commit the fraud must bear the loss (KEATING, J.).—PHILLIPS *v.* IM THURN (1866), L. R. 1 C. P. 463 ; Har. & Ruth. 499 ; 35 L. J. C. P. 220 ; 14 L. T. 406 ; 14 W. R. 653.

Annotation :—**Mentd.** Vagliano *v.* Bank of England (1889), 23 Q. B. D. 243.

792. —— ——.]—H., a merchant dealing in tobacco & a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the K. dock. The warrants for them had been issued to him. Pltf. bought the tobacco from H. & paid for it, but he left the dock warrants in the possession of H., & took no steps to have any change made in the books of the dock co. as to the ownership of the tobacco. H. being the ostensible owner of the tobacco fraudulently obtained advances on the pledge of a portion of the tobacco from defts. respectively, & handed to them the dock warrants. Both defts. acted in good faith, & took fresh dock warrants from the dock co. :—*Held :* H. was not entrusted by pltf. as his factor or agent with the documents of title, within 6 Geo. 4, c. 94, s. 2 ; & the conduct of pltf., in leaving the indicia of title in H.'s hands & thus enabling him to obtain advances on the security of the goods, was not such as to disentitle pltf. to recover its value from defts.—JOHNSON *v.* CREDIT LYONNAIS CO., JOHNSON *v.* BLUMENTHAL (1877), 3 C. P. D. 32 ; 47 L. J. Q. B. 241 ; 37 L. T. 657 ; 42 J. P. 548 ; 26 W. R. 195, C. A.

Annotations :—**Refd.** Attenborough *v.* St. Katherine's Dock Co. (1878), 3 C. P. D. 450 ; Scholfield *v.* Londesborough, [1895] 1 Q. B. 536 ; Farquharson *v.* King, [1902] A. C. 325 ; Longman *v.* Bath Electric Tramways, [1905] 1 Ch. 646. **Mentd.** Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262.

793. —— ——.]—The owner of goods lying at a warehouse was induced by the fraud of F. to instruct the warehouseman to transfer the goods to the order of F., & the goods were accordingly placed at F.'s disposal. F. then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods at the purchaser's order. On the discovery of F.'s fraud, the warehouseman refused to deliver the goods to the purchaser. In an action by the purchaser against the warehouseman :—*Held :* the warehouseman, having attorned to the purchaser, was estopped from impeaching his title.

The true owner, having enabled F. to hold himself out as the owner, could not set up his title against that of the purchaser (LORD HALSBURY).—HENDERSON & CO. *v.* WILLIAMS, [1895] 1 Q. B. 521 ; 64 L. J. Q. B. 308 ; 72 L. T. 98 ; 43 W. R. 274 ; 11 T. L. R. 148 ; 14 R. 375, C. A.

Annotations :—**Consd.** Farquharson *v.* King, [1902] A. C. 325. **Refd.** Herdman *v.* Wheeler, [1902] 1 K. B. 361. **Mentd.** Compania Naviera Vasconzada *v.* Churchill & Sim, Same *v.* Burton, [1906] 1 K. B. 237.

794. —— ——.]—Applts., who were timber merchants, warehoused with a dock co. the timber they imported, & instructed the dock co. to accept all transfer or delivery orders signed by their clerk. The clerk had their authority to make limited sales to their known customers. The clerk under an assumed name fraudulently sold timber of applts. to resps., who knew nothing of applts. or of the clerk under his real name, & who bought & paid the clerk for the timber in good faith. The clerk carried out the sales by giving the dock co. orders for the transfer of timber into his assumed name, & then in that name giving delivery orders to resps. :—*Held :* applts., not having held out the clerk to resps. as their agent to sell to resps., were not estopped from denying the clerk's authority to sell ; the clerk, having no title or apparent authority himself, could not give resps. any title ; & applts. were entitled to recover from resps. the value of the timber.—FARQUHARSON BROTHERS & CO. *v.* KING & CO., [1902] A. C. 325 ; 71 L. J. K. B. 667 ; 86 L. T. 810 ; 51 W. R. 94 ; 18 T. L. R. 665 ; 46 Sol. Jo. 584, H. L.

Annotations :—**Distd.** Commonwealth Trust *v.* Akotey, [1926] A. C. 72. **Consd.** Jones *v.* Waring & Gillow, [1926] A. C. 670. **Refd.** Herdman *v.* Wheeler, [1902] 1 K. B. 361 ; Rimmer *v.* Webster, [1902] 2 Ch. 163 ; Weiner *v.* Gill, Same *v.* Smith, [1906] 2 K. B. 574 ; Truman *v.* Attenborough (1910), 103 L. T. 218 ; Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439 ; Bradford *v.* Price (1923), 92 L. J. K. B. 871.

795. —— ——.]—CARLISLE & CUMBERLAND BANKING CO. *v.* BRAGG, No. 52, *ante*.

—— ——.]—*See, also,* ESTOPPEL, Vol. XXI., pp. 399–402, Nos. 1595–1618 ; MORTGAGE, Part III., Sect. 3, sub-sect. 2, A. (*c*), *post*.

—— **Priority generally.**]—*See* EQUITY, Vol. XX., pp. 296 *et seq.*

Right of innocent party to repudiate transaction—On discovery of fraud.]—*See* Part IX., Sect. 1, sub-sect. 3, E., Sect. 2, sub-sect. 5, C., *ante*.

Jus tertii.]—*See* Part IX., Sect. 3, sub-sect. 7, *ante*.

What is innocent misrepresentation.] — *See* Part IV., Sect. 2, *ante*.

Remedies for innocent misrepresentation.]—*See* Part VII., Sect. 3, *ante*.

Liability of innocent principal — Misrepresentation by agent for own benefit.]—*See* AGENCY, Vol. I., pp. 558, 591, 595, 596, Nos. 2246, 2267, 2268, 2288.

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consideration has been given.—CLYDESDALE BANKING CO. *v.* PAUL (1877), 4 R. (Ct. of Sess.) 626 ; 14 Sc. L. R. 403.—**SCOT.**

790 i. *One of two innocent parties forced to suffer by fraud—Whether one enabling fraud to be committed bears the loss.*]—Of two innocent parties, one of whom must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss.—MERCHANTS BANK OF CANADA *v.* MCKAY (1886), 12 O. R. 498 ; 15 S. C. R. 672.—**CAN.**

t. *Contract void.*]—*Semble :* an action cannot be supported on a contract made between two persons in fraud of third parties.—SHARP *v.* MCKEEN (1844), 2 Kerr, 524.—**CAN.**

Part XII.—Fraud Other than Fraudulent Misrepresentation.

SECT. 1.—IN GENERAL.

796. Effect of fraud—Vitiates all transactions.]—Fraud vitiates all transactions, as well judicial as others, whether temporal or ecclesiastical.—FERMOR'S CASE (1602), 3 Co. Rep. 77 a; 76 E. R. 800; *sub nom.* FARMOR *v.* SMITH, Toth. 101.

Annotations:—**Refd.** Le Neve *v.* Le Neve (1747), Amb. 436; Taylor d. Atkyns *v.* Horde (1755), 1 Keny. 143; Bright *v.* Eynon (1757), 1 Burr. 390; Doe d. Hitchins *v.* Lewis (1758), 1 Burr. 614; Doe *v.* Horde (1777), 2 Cowp. 689; R. *v.* Saddlers' Co. (1863), 32 L. J. Q. B. 337. **Mentd.** Podger's Case (1612), 9 Co. Rep. 104 a; Printise *v.* Hodgskin (1613), 2 Bulst. 138; Blower *v.* Ketchmere (1666), 2 Keb. 31; Freeman *v.* Barnes (1670), 1 Vent. 80; Parkhurst *v.* Smith (1741), Willes, 327; Garth *v.* Cotton (1750), 1 Ves. Sen. 546; Pomfret *v.* Windsor (1752), 2 Ves. Sen. 472; Buckinghamshire *v.* Drury (1762), Wilm. 177; Fairclaim *v.* Shackleton (1770), 5 Burr. 2604; Doe d. Tarrant *v.* Hellier (1789), 3 Term Rep. 162; Reece *v.* Trye (1847), 1 De G. & Sm. 273; Weller *v.* Stone (1885), 54 L. J. Ch. 497.

797. —— ——.]—Fraud will vitiate any transaction, though the principal do not personally take any part in the fraud, if his agent do; for the principal is civilly responsible for the acts of his agent.—DOE *v.* MARTIN (1790), 4 Term Rep. 39; 100 E. R. 882.

Annotations:—**Refd.** Cornfoot *v.* Fowke (1839), 9 L. J. Ex. 297; Udell *v.* Atherton (1861), 7 H. & N. 172. **Mentd.** Doe d. Tanner *v.* Dorvell (1794), 5 Term Rep. 518; Smith *v.* Camelford (1795), 2 Ves. 698; Goodtitle *v.* Otway (1796), 1 Bos. & P. 576; Owen *v.* Smyth (1796), 2 Hy. Bl. 594; Roe *v.* Briggs (1812), 16 East, 406; Driver *v.* Frank (1814), 3 M. & S. 25; Roper *v.* Hallifax (1817), 8 Taunt. 845; Cholmeley *v.* Paxton (1825), 3 Bing. 207; Cockerell *v.* Cholmeley (1830), 10 B. & C. 564; Thornton *v.* Bright (1836), 2 My. & Cr. 230; Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583; Ricketts *v.* Loftus (1849), 14 Q. B. 482; Watkins *v.* Williams (1851), 3 Mac. & G. 622; Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Dresser *v.* Norwood (1863), 11 W. R. 624; Wickham *v.* Wing (1865), 6 New Rep. 21; Lambert *v.* Thwaites (1866), L. R. 2 Eq. 151; *Re* Master's Settlmt., Master *v.* Master, [1911] 1 Ch. 321; *Re* Llewellynes Settlmt., Official Solicitor *v.* Evans, [1921] 2 Ch. 281.

798. —— ——.]—It is a common saying in our law books that fraud vitiates everything (BULLER, J.).—MASTER *v.* MILLER (1791), 4 Term Rep. 320; 100 E. R. 1042; *affd.* (1793), 2 Hy. Bl. 141, Ex. Ch.

Annotations:—**Mentd.** Shaw *v.* Jakeman (1803), 4 East, 201; Knill *v.* Williams (1809), 10 East, 431; Paton *v.* Winter (1809), 1 Taunt. 420; Bathe *v.* Taylor (1812), 15 East, 412; Powell *v.* Divett (1812), 15 East, 29; Sanderson *v.* Symonds (1819), 1 Brod. & Bing. 426; *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179; Saunders *v.* Smith (1838), 7 L. J. Ch. 227; Davidson *v.* Cooper (1843), 11 M. & W. 778; Parry *v.* Nicholson (1845), 13 M. & W. 778; Agricultural Cattle Insce. *v.* Fitzgerald (1851), 16 Q. B. 432; Burchfield *v.* Moore (1854), 3 E. & B. 683; Gardner *v.* Walsh (1855), 5 E. & B. 83; Fazakerly *v.* M'Knight & Abbinett (1856), 2 Jur. N. S. 1020; Balfour *v.* Sea Fire Life Assce. (1857), 3 C. B. N. S. 300; *Re* Smith, *Ex p.* Yates (1857), 27 L. J. Bcy. 10, n.; *Re* North British Australasian Co., *Ex p.* Swan (1859), 7 C. B. N. S. 400; Noble *v.* Ward (1867), L. R. 2 Exch. 135; Aldous *v.* Cornwell (1868), L. R. 3 Q. B. 573; *Re* Cambrian Mining Co. (1882), 48 L. T. 114; Suffell *v.* Bank of England (1882), 9 Q. B. D. 555; Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1; *Re* Salomon & Naudszus (1899), 81 L. T. 325; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655; Fitzroy *v.* Cave (1905), 93 L. T. 499; Holden *v.* Thompson, [1907] 2 K. B. 489.

799. —— ——.]—ROGERS *v.* HADLEY, No. 667, *ante*.

800. Right of action—Procuring another to levy excess execution.]—SMITH *v.* TONSTALL (1687), Carth. 3; 90 E. R. 607.

Annotation:—**Refd.** Castrique *v.* Behrens (1861), 3 E. & E. 709.

801. —— **Not available to party guilty of fraud—Against companion in fraud.**]—(1) A ct. of justice will not assist a party to a fraud who is proceeding against his companion in fraud. Neither party is to be assisted.

(2) Where a fraud had only been contemplated, in order to make a pretended transfer of goods, & had not been carried into effect, either by a formal instrument, or by change of possession:—*Held:* the owner of the goods was not precluded from maintaining an action of trespass against a third person who had forcibly taken possession of the goods.—WEARE *v.* DEARE (1827), 5 L. J. O. S. K. B. 125.

802. —— **Cutting timber.**]—A. agreed with B. for the purchase of timber, & together with C. entered into a bond, that A. his exors. & administrators, should not cut any timber under a particular size; but A.'s name was only made use of in this agreement for C. C. cuts down timber under the size stipulated; but as there could be no remedy against C. upon the bond, it was held to be a fraud upon B. the seller, & therefore relievable in equity.—BUTLER *v.* PRENDERGAST (1720), 4 Bro. Parl. Cas. 174; 2 Eq. Cas. Abr. 185; 2 E. R. 119.

803. Relief in equity—Contract with government not recognised by this country.]—It is illegal to purchase obligations or securities purporting to be granted by the government of a foreign country, which govt. has not been recognised by the King of England. A ct. of equity will not relieve against fraud where the transaction in which the fraud was practised was a contract for the purchase of securities purporting to be granted by a foreign govt. not recognised by our own.—TOMPSON *v.* BARCLAY (1828), Coop. Pr. Cas. 501; 47 E. R. 619; *sub nom.* THOMPSON *v.* BARCLAY, 2 State Tr. N. S. App. 999; 6 L. J. O. S. Ch. 93; *affd.* (1831), 9 L. J. O. S. Ch. 215, L. C.

Annotations:—**Mentd.** British South Africa Co. *v.* Companhia de Mocambique, [1893] A. C. 602; Aksionalrnoye Obschestvo A. M. Luther *v.* Sagor, [1921] 1 K. B. 456.

Contribution between joint tortfeasors.]—*See* TORT.

Fraudulent and voidable conveyances.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 149 *et seq.*

Concealed fraud.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 520 *et seq.*

Statute of Frauds.]—*See* CONTRACT, Vol. XII., pp. 520 *et seq.*

SECT. 2.—PARTICULAR INSTANCES.

SUB-SECT. 1.—NON-DISCLOSURE.

See Part III., Sect. 2, *ante*.

SUB-SECT. 2.—ABUSE OF INFLUENCE AND OPPRESSION.

See CONTRACT, Vol. XII., pp. 92–112, Nos. 566–738; FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 253–265, Nos. 802–896.

PART XII. SECT. 1.

a. *What amounts to fraud.*]—There is no such thing as legal fraud as distinguished from actual fraud. A transaction which is honest in fact, which transgresses no law, & by which no one is injured, cannot be held to be fraudulent.—UNION BANK OF AUSTRALIA, LTD. *v.* PATON (1897), 8 Q. L. J. 28.—**AUS.**

Sect. 2.—Particular instances: Sub-sect. 3, A. & B.; sub-sects. 4, 5 & 6.]

SUB-SECT. 3.—FRAUD ON THIRD PERSONS.

A. On Individuals.

Right of action for damages—Wrongful use of trade name or trade mark.]—*See* TRADE MARKS.

804. Right of action for money lent—Securities obtained from agent by fraud.]—Deft. employed a stockbroker to obtain a loan on the security of bonds, which were transferable by delivery. The broker, accordingly, borrowed a sum from pltf., but he wrongfully applied a part to his own use. The broker was unable to redeem the bonds, & deft., with knowledge of the circumstances, promised & agreed to call & give the broker his cheque for the deficiency on receiving back the bonds. The broker, acting on the faith of this promise, gave a crossed cheque to pltf., & redeemed the bonds. On the same day deft., by a trick, obtained possession of the bonds without giving his cheque; & the broker's crossed cheque was consequently returned, & he became a defaulter:—*Held:* deft. was responsible to pltf. for the fraud, & the bonds in his hands were still liable to repay pltf. his debt.—MOCATTA *v.* BELL (1857), 24 Beav. 585; 27 L. J. Ch. 237; 30 L. T. O. S. 239; 4 Jur. N. S. 77; 53 E. R. 483.

805. Right to impeach judgment.]—Where it is discovered that a judgment was obtained by fraud, or that new matter has been discovered which would have entitled pltf. under the old practice to file a bill of review, the proper course for pltf. to adopt is to commence an original action in the High Ct. of Justice impeaching the decree.

Semble: when a decree is impeached on the ground of fraud it is not necessary to obtain any special leave before commencing the action.—FLOWER *v.* LLOYD (1877), 6 Ch. D. 297; 46 L. J. Ch. 838; 37 L. T. 419; 25 W. R. 793, C. A.; *subsequent proceedings* (1879), 10 Ch. D. 327, C. A.

Annotations:—**Refd.** *Re* Swire, Mellor *v.* Swire (1885), 30 Ch. D. 239; Boswell *v.* Coaks (No. 2) (1894), 86 L. T. 365, n.; Preston Banking Co. *v.* Allsup, [1895] 1 Ch. 141.

Right to impeach fraudulent conveyance.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 225–253.

Arbitration award improperly obtained.]—*See* ARBITRATION, Vol. II., p. 551, Nos. 1828–1837.

B. On Public.

806. Right to relief—Dishonest literary work.]—Pltfs. alleged that deft. had agreed that his name should not appear on the title page of a work as the author of it: deft. alleged that it was part of the agreement that his name should so appear. Pltf. proposed to publish the book with a title page, stating that it was "Edited by K., assisted by M.," deft. K. was known as having published other books of a similar description & had allowed pltfs. to make use of his name, but he had taken no part whatever in the compilation:—*Held:* the proposed title page would be a fraud on the public.—POST *v.* MARSH (1880), 16 Ch. D. 395; 50 L. J. Ch. 287; 43 L. T. 628; 29 W. R. 198.

——— ———.]—*See* COPYRIGHT, Vol. XIII., p. 168, Nos. 59, 60.

Improper use of trade mark or description.]—*See* TRADE MARKS.

SUB-SECT. 4.—STATUTORY FRAUD.

Acts amounting to acts of bankruptcy—Under Bankruptcy Act, 1914 (c. 59), s. 1.]—*See* BANKRUPTCY, Vol. IV., pp. 52 *et seq.*

Conveyance in fraud of creditors—Under Law of Property Act, 1925 (c. 20), ss. 170, 207.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 150 *et seq.*

Fraudulent preferences—Under Bankruptcy Act, 1914 (c. 59), s. 44.]—*See* BANKRUPTCY, Vol. V., pp. 852 *et seq.*

SUB-SECT. 5.—CRIMINAL FRAUD.

Abduction.]—*See* CRIMINAL LAW, Vol. XV., pp. 857–862.

Larceny.]—*See* CRIMINAL LAW, Vol. XV., pp. 865–918.

Embezzlement.]—*See* CRIMINAL LAW, Vol. XV., pp. 921–935.

Fraudulent conversion.]—*See* CRIMINAL LAW, Vol. XV., pp. 935–938.

Frauds by officers of public companies.]—*See* CRIMINAL LAW, Vol. XV., pp. 939, 940.

Falsification of accounts.]—*See* CRIMINAL LAW, Vol. XV., pp. 940, 941.

Common law cheats.]—*See* CRIMINAL LAW, Vol. XV., pp. 977, 980.

Obtaining by false pretences.]—*See* CRIMINAL LAW, Vol. XV., pp. 980–1010.

Cheating at play.]—*See* CRIMINAL LAW, Vol. XV., pp. 1010, 1011.

Obtaining credit by fraud.]—*See* CRIMINAL LAW, Vol. XV., pp. 1011, 1012.

Fraudulent conveyances.]—*See* CRIMINAL LAW, Vol. XV., pp. 1012, 1013.

Destruction & concealment of documents.]—*See* CRIMINAL LAW, Vol. XV., p. 1013.

Personation.]—*See* CRIMINAL LAW, Vol. XV., pp. 1013, 1014.

Conspiracy to defraud.]—*See* CRIMINAL LAW, Vol. XV., pp. 1015–1020.

Forgery.]—*See* CRIMINAL LAW, Vol. XV., pp. 1041–1074.

Fortune-telling, witchcraft, etc.]—*See* CRIMINAL LAW, Vol. XV., pp. 1074–1076.

Offences against Weights & Measures Act, 1889 (c. 21).]—*See* WEIGHTS & MEASURES; CRIMINAL LAW, Vol. XIV., pp. 35, 41, Nos. 58, 109, 110.

Offences against Food & Drugs Acts.]—*See* FOOD & DRUGS, Vol. XXV., pp. 79–131.

Offences against Railway Clauses Act, 1845 (c. 20)—False account of goods.]—*See* CARRIERS, Vol. VIII., pp. 206, 207, Nos. 1320–1323.

Offences against Medical Act, 1858 (c. 90).]—*See* MEDICINE & PHARMACY, Vol. XXXIV., pp. 553–555, *ante*.

SUB-SECT. 6.—OTHER CASES.

Fraud in administration of estates.]—*See* EXECUTORS, Vols. XXIII. & XXIV., pp. 74, 227, 237, 649, 651, Nos. 591–598, 2743, 2881, 2882, 6763, 6764.

Fraud of agent.]—*See* AGENCY, Vol. I., pp. 467–486, Nos. 1522–1647.

Fraud on banks.]—*See* BANKERS, Vol. III., pp. 124–126, 130, 131, 230–237, Nos. 17–25, 61–71, 628–664.

PART XII. SECT. 2, SUB-SECT. 3, A.

805 i. ***Right to impeach judgment.***]—A judgment recovered at law by the fraudulent acquiescence of deft. in the action, will be inquired into in the ct. of ch. at the instance of a subsequent judgment creditor; although the rule at law is, that only the party to the action can move against the judgment there.—MCDONALD *v.* BOICE (1865), 12 Gr. 48.—**CAN.**

Fraud in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 121, 331, 332, 468, 486, 562–568, 581, 582, Nos. 1098, 1099, 3106–3113, 4216–4223, 4365, 5189–5228, 5329–5338.

Fraud in regard to bills of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 166–172, Nos. 1053–1075.

Fraudulent bill of sale.]—*See* BILLS OF SALE, Vol. VII., pp. 41, 149, Nos. 211, 811.

Fraud in regard to bonds.]—*See* BONDS, Vol. VII., pp. 170, 171, 178, Nos. 83–85, 168.

Fraud in regard to building contracts.]—*See* BUILDING CONTRACTS, Vol. VII., pp. 361–363, Nos. 113–126.

Fraud on carrier.]—*See* CARRIERS, Vol. VIII., p. 126, No. 852.

Fraud in regard to copyright.]—*See* COPYRIGHT, Vol. XIII., p. 419, No. 1391.

Fraud in regard to deeds.]—*See* DEEDS, Vol. XVII., pp. 230, 231, Nos. 448–456.

Collusive distress.]—*See* DISTRESS, Vol. XVIII., p. 339, Nos. 738–740.

Fraudulent execution.]—*See* EXECUTION, Vol. XXI., pp. 472, 517, 532, Nos. 527–529, 931, 932, 1066.

Fraud in respect of fidelity guarantee.]—*See* GUARANTEE, Vol. XXVI., pp. 188–190, Nos. 1448–1465.

Fraud of infants.]—*See* INFANTS, Vol. XXVIII., p. 180, Nos. 396–402.

Orders in matrimonial causes obtained by fraud.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 566, Nos. 6247–6249.

Fraud of partner.]—*See* PARTNERSHIP.

Fraudulent pledges.]—*See* PAWNS & PLEDGES.

Fraud on a power.]—*See* POWERS.

Fraudulent registration of land.]—*See* REAL PROPERTY.

Fraud on revenue.]—*See* REVENUE.

Fraud of solicitors.]—*See* SOLICITORS.

Fraud of trustees.]—*See* TRUSTS & TRUSTEES.

MISTAKE.

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Avoidance of Instruments *See* CONTRACT; DEEDS; EXECUTORS; WILLS; & TITLES *passim*.
Crime, Mistake in relation to . . . ,, CRIMINAL LAW.
Fraud . . . ,, FRAUDULENT AND VOIDABLE CONVEYANCES; MISREPRESENTATION AND FRAUD.
Misrepresentation . ,, MISREPRESENTATION AND FRAUD.
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Wills, Mistake in relation to . . . ,, WILLS.

Part I.—Nature of Mistake.

SECT. 1.—IN GENERAL.

1 **Ignorance.**] — Agreement relating to distribution of personal estate set aside, although ratified; the value appearing to be greater than was known at the time of the agreement.

Though there is no very great evidence of undue influence, yet the ct. will always look with a jealous eye upon a transaction between a parent & a child just come of age, & interpose if any advantage is taken. The mother plainly knew more than the daughter; & only says in general, she believes she concealed nothing from her (STRANGE, M.R.).—COCKING *v.* PRATT (1750), 1 Ves. Sen. 400; 27 E. R. 1105.

Annotations:—**Refd.** M'Carthy *v.* Decaix (1831), 2 Russ. & M. 614; Clifton *v.* Cockburn (1834), 3 My. & K. 76; Watkin & Bligh *v.* Brent (1836), 1 Curt. 264; *Re* Roberts, Roberts *v.* Roberts, [1905] 1 Ch. 704.

2. ——.] — Decree upon the evidence of a single witness against the positive contradiction of the answer, containing circumstances giving greater credit to the deposition: deft. declining an issue. Relief upon an instrument, that had been delivered up, under the ignorance of one party, & with the knowledge of the other, as to a fact, upon which the right attached.—EAST INDIA CO. *v.* DONALD (1804), 9 Ves. 275; 32 E. R. 608, L. C.

3. ——.]—Reference ordered to the master to ascertain the sum due for principal & interest in an action on a bond, upon motion on the part of defts. Money paid for interest on bond by representatives of an obligor, through misrepresentation of the terms of the condition, which provided that the property tax should be deducted from the interest, of which, not having obtained sight of the bond, the exors. were not aware:—*Held:* to have been improperly paid, & they were entitled to be allowed it by the master on such reference. *Aliter* as to so much of the interest as had been paid by the obligor himself.—SMITH *v.* ALSOPP (1824), 13 Price, 823; M'Cle. 622; 147 E. R. 1167.

4. ——.] — Defts., the East India co., being entitled by escheat to real property of S. in India, in consequence of his will not being executed to pass such estate, & he being illegitimate granted it, together with all the rents & profits which had arisen between the death of testator & the date of the grant, to pltfs., in trust for the persons entitled to the personal estate. To a declaration on this grant, averring that the co. held & enjoyed the land, & took & had & received to their use the rents & profits of the land from testator's death to the date of the grant, & alleging the non-payment to pltfs., as a breach, & also to a count, alleging that the Crown, being entitled by escheat, had granted to pltfs. the rents due from defts., defts. pleaded, as an equitable defence, that testator, by will, appointed P. his exor. in India, who agreed with the officers of the co. to grant a lease of the property, & they, without the co.'s knowledge, entered into occupation, & the rent was paid, to the date of the grant, by the Govt. of India, to P. during his life, &, after his death, to T., his exor., & that the Govt. of India & the co. were ignorant of the fact that the will of testator was invalid, & that the property had escheated to the Crown or to the co., & that notwithstanding pltfs. were aware of such payment, they were now suing deft. for the amount of such rents, & that the parties interested in the will were the same persons as those represented by pltfs., & that the co. were induced to make the grant sued upon in consequence of, & upon the faith of, the statements in a petition, on behalf of pltfs. setting out all the facts, & alleging that the Crown had refused to entertain any memorial as to the escheated property until the concurrence of the co. had been obtained, & which petition stated, among other things, that T. was then in possession of the rents & profits; & the plea averred that the directors, at the time of the grant, had no knowledge that the co. had been in possession:—*Held:* the plea was an answer to the action.—BILLING *v.* EAST INDIA CO. (1861), 31 L. J. Ex. 240.

—— **Of private rights.**]—*See* Part III., Sect. 2, sub-sect. 2, *post.*

—— **Recovery of money paid.**]—*See* Part VI., Sect. 2, sub-sect. 3, *post.*

5. **Forgetfulness.**] — A lease contained covenant not to underlet without consent in writing of lessor first obtained, but such consent not to be withheld arbitrarily. Lessee's solr. prepared an underlease, but omitted to look at the head-lease & no lessor's consent had been obtained:—*Held:* this was not a mistake which equity would relieve against but was due to negligence or forgetfulness, which was not included in the principle of exemption.

Now, I can find no definition of what "mistake" is; but if you treat mistake in its ordinary sense in the English language, is mere forgetfulness mistake? Can you, in English, say, "I forgot?" & is that the same thing as saying "I was mistaken?" I think not. Both those questions depend on something happening in the mind of the person, & you have to see what it is that happens in his mind. If he merely forgets, he does not assume that one state of things exists whereas some other state of things exists; it is mere passive state of mind; he has forgotten—he has not thought that one thing was in existence, whereas something else was in existence. I should say that mere forgetfulness is not mistake at all in ordinary language. I cannot find any decision in Cts. of Equity which has ever stated that mere forgetfulness is mistake against which equity would relieve (LORD ESHER, M.R.).

It is an easily arguable question whether mere forgetfulness of such a covenant, even if not negligent, can properly be called mistake. The case of *Kelly* v. *Solari*, No. 487, *post*, however, & the observations of LORD BLACKBURN in *Brownlie* v. *Campbell*, No. 249, *post*, establish that in an action to recover money paid by mistake it is sufficient to prove that at the time of payment the person paying was actually ignorant that the money was not due although he had the means of knowledge, & it was owing to his own carelessness or forgetfulness that he was in fact ignorant. . . . I feel great difficulty in saying that if this be mistake at law it would not be considered mistake in equity (KAY, L.J.).—BARROW *v.* ISAACS & SON, [1891] 1 Q. B. 417; 60 L. J. Q. B. 179; 64 L. T. 686; 55 J. P. 517; 39 W. R. 338; 7 T. L. R. 175, C. A.

Annotations:—**Folld.** Eastern Telegraph Co. *v.* Dent, [1899] 1 Q. B. 835. **Consd.** Hood of Avalon *v.* Mackinnon, [1909] 1 Ch. 476; Matthews *v.* Smallwood, [1910] 1 Ch. 777.

Sect. 1.—*In general. Sects.* 2 & 3: *Sub-sects.* 1 & 2. *Part II. Sects.* 1 & 2: *Sub-sect.* 1.]

Reld. Ellis *v.* Allen, [1914] 1 Ch. 904; Upjohn *v.* Macfarlane, [1922] 2 Ch. 256. **Mentd.** Harman *v.* Ainslie, [1904] 1 K. B. 698; *Re* Copal Varnish Co., [1917] 2 Ch. 349; Mills *v.* Cannon Brewery Co., [1920] 2 Ch. 38; Fuller's Theatre & Vaudeville Co. *v.* Rofe, [1923] A. C. 435; Abrahams *v.* Mac Fisheries, [1925] 2 K. B. 18; Houldcr *v.* Gibbs, [1925] Ch. 575.

6. ——.]—In a lease for years the lessees covenanted not to underlet, assign, or part with the possession of the premises, or any part thereof, without the consent in writing of the lessors, such consent not to be unreasonably withheld. The lease contained a power to re-enter upon breach of any of the covenants. The lessees, without asking for the consent of the lessors, underlet a part of the premises to a tenant who already occupied under the lessors, & to whom no objection could have been reasonably taken. In an action by the lessors to recover possession of the premises for breach of covenant:—*Held:* the fact that the breach of covenant had been committed through forgetfulness, or because the lessees thought it unimportant, did not form a ground for giving them equitable relief against forfeiture for breach of the covenant, & pltfs. were entitled to succeed in the action.—EASTERN TELEGRAPH CO., LTD. *v.* DENT, [1899] 1 Q. B. 835; 68 L. J. Q. B. 564; 80 L. T. 459; 15 T. L. R. 296; 43 Sol. Jo. 366, C. A.

Annotations:—**Reld.** Greville *v.* Parker, [1910] A. C. 335. **Mentd.** De Soysa *v.* De Pless Pol, [1912] A. C. 194; Fuller's Theatre & Vaudeville Co. *v.* Rofe, [1923] A. C. 435; Abrahams *v.* Mac Fisheries, [1925] 2 K. B. 18.

7. ——.] — (1) An appointment by deed poll, made in entire forgetfulness by the appointor of an earlier appointment to the same person, may be rescinded & set aside on the ground of mistake.

(2) If the ct. comes to the conclusion that pltf. is entitled to relief, then whether the proper relief be reformation or rescission is really immaterial because whatever is the proper & necessary relief the ct. is bound to give it (EVE, J.).

(3) It seems to me that when a person has forgotten the existence of a pre-existing fact & assumes that such fact did not pre-exist, he is labouring under a mistake & he acts on the footing that the fact really did not pre-exist. I should have thought a man makes a mistake in forgetting an existing fact quite as much as he does in assuming a state of things to exist which does not in fact exist (EVE, J.).

(4) I think that it would be a wise expedient if there was now indorsed on the original settlement a note of the three appointments which have been made & which stand & also a note of the appointment with which I am now dealing & a copy of the order which I am now making rescinding that last appointment, & I so direct (EVE, J.).—HOOD OF AVALON (LADY) *v.* MACKINNON, [1909] 1 Ch. 476; 78 L. J. Ch. 300; 100 L. T. 330; 25 T. L. R. 290; 53 Sol. Jo. 269.

Annotation:—*As to* (1) **Apld.** Ellis *v.* Ellis (1909), 26 T. L. R. 166.

8. ——.]—A husband transferred securities of large value to his wife intending them as a gift to her absolutely. When he made the gift he knew of his marriage settlement, but did not realise that the gift would come within the operation of a clause therein under which his wife covenanted to settle all after acquired property. It having been decided that the gift came within the operation of that clause, the husband brought this action for the purpose of obtaining a revocation of the gift upon the ground that it was made under a mistake of fact:—*Held:* the gift being voluntary, & having been made under a mistake of fact, the husband was entitled to have it set aside.

Here there was a mistake of fact in this, that when the husband thought that he was giving the securities to his wife the gift was in reality hit by a document which the donor had at the moment forgotten & the effect of which he had probably never realised at all (WARRINGTON, J.). —ELLIS *v.* ELLIS (1909), 26 T. L. R. 166.

—— **Recovery of money paid.**]—*See* Part VI., Sect. 2, sub-sect. 4, *post.*

Mistake of law.]—*See* Part II., *post.*

Mistake resulting from matter of law.]—*See* Nos. 53–61, *post.*

Mistake on question of mixed law & fact.]—*See* Nos. 62, 63, *post.*

Mistake as to nature of transaction.] — *See* Part III., Sect. 2, sub-sect. 1, *post.*

Mistake as to nature of private rights.]—*See* Part III., Sect. 2, sub-sect. 2, *post.*

Mistake as to identity of other party.]—*See* Part III., Sect. 2, sub-sect. 3, *post.*

Mistake as to identity of subject-matter.]—*See* Part III., Sect. 2, sub-sect. 4, *post.*

Mistake as to existence of subject-matter.]—*See* Part III., Sect. 2, sub-sect. 5, *post.*

Mistake as to qualities of subject-matter.]—*See* Part III., Sect. 2, sub-sect. 6, *post.*

Mistake as to price of or consideration for subject-matter.]—*See* Part III., Sect. 2, sub-sect. 7, *post.*

Mistake as to quantity or extent of subject-matter.]—*See* Part III., Sect. 2, sub-sect. 8, *post.*

SECT. 2.—MUTUAL MISTAKE.

As to qualities of subject-matter.]—*See* Part III., Sect. 2, sub-sect. 6, A., *post.*

As to quantity of subject-matter.]—*See* Part III., Sect. 2, sub-sect. 8, A., *post.*

Instrument in terms contrary to intention.]—*See* Part IV., Sect. 1, sub-sect. 1, B., *post.*

As ground for rescission.]—*See* Part V., Sect. 3, sub-sect. 1, B., *post.*

As ground for rectification.] — *See* Part V., Sect. 3, sub-sect. 2, A. (*a*), *post.*

SECT. 3.—UNILATERAL MISTAKE.

SUB-SECT. 1.—INDUCED BY OTHER PARTY.

Fraudulently induced.]—*See* MISREPRESENTATION & FRAUD, pp. 57 *et seq.*, *ante*

Innocently induced.]—*See* MISREPRESENTATION & FRAUD, pp. 53 *et seq.*, *ante.*

SUB-SECT. 2.—NOT INDUCED BY OTHER PARTY.

As to identity of subject-matter.]—*See* Part III., Sect. 2, sub-sect. 4, B., *post.*

As to quality of subject-matter.]—*See* Part III., Sect. 2, sub-sect. 6, B., *post.*

As ground for rescission.]—*See* Part V., Sect. 3, sub-sect. 1, C., *post.*

Instrument in terms contrary to intention.]—*See* Part IV., Sect. 1, sub-sect. 1, C., *post.*

As ground for rectification.] — *See* Part V. Sect. 3, sub-sect. 2, A. (*b*), *post.*

Part II.—Mistake of Law.

SECT. 1.—IN GENERAL.

9. Distinction between mistake of law & fact —Not clearly defined.]—(1) A ct. of equity will not direct payments made under a mistaken construction of a doubtful clause in a settlement to be refunded, after many years of acquiescence by all parties, & after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction.

(2) I do not feel it necessary to argue, upon the present question, the distinction between payment made in error of law & in error of fact. The distinction, it may be observed, is somewhat more easy to lay down in general terms than to follow out in particular cases, even as regards the application of the rule, admitting it to be a correct one; & I think I could, without much difficulty, put cases in which a ct. of justice, but especially a ct. of equity, would find it an extremely hard matter to hold by the rule, & refuse to relieve against an error of law (LORD BROUGHAM, C.).—CLIFTON *v.* COCKBURN (1834), 3 My. & K. 76; 40 E. R. 30, L. C.

Annotation :—As to (2) **Consd.** Rogers *v.* Ingham (1876), 3 Ch. D. 351.

10. —— ——.]—(1) In the absence of special agreement simple interest only can be charged in a mtge. account. Where such mtge. account had been settled on the footing of compound interest with half yearly rents, both parties wrongly understanding the mtge. deed to require the same: —*Held:* such settled account might be re-opened.

(2) Undoubtedly there are cases in the cts. of common law in which it has been held that money paid under a mistake of law cannot be recovered, & it has been further held that, under certain circumstances, the giving credit in account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the subject of set-off. But in equity the line between mistakes in law & mistakes in fact has not been so clearly & sharply drawn (*per* CUR.).—DANIELL *v.* SINCLAIR (1881), 6 App. Cas. 181; 50 L. J. P. C. 50; 44 L. T. 257; 29 W. R. 569, P. C.

Annotations :—As to (1) **Reld.** Ward *v.* Sharp (1884), 53 L. J. Ch. 313; *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648; Yourell *v.* Hibernian Bank, [1918] A. C. 372.

Mistake of law on face of award.]—*See* ARBITRATION, Vol. II., pp. 526–528, Nos. 1626–1647.

Recovery of money paid under mistake.]—*See* Part VI., Sect. 2, *post.*

See, also, MISREPRESENTATION & FRAUD, pp. 10, 11, *ante.*

SECT. 2.—WHEN RELIEF GRANTED.

SUB-SECT. 1.—IN GENERAL.

11. Whether mistake of law ground for relief.]—That maxim of law, *ignorantia juris non excusat*, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases (LORD KING, C.).—LANSDOWN *v.* LANSDOWN (1730), as reported in Mos. 364; 25 E. R. 441, L. C.

Annotations :—**Consd.** Stewart *v.* Stewart (1839), 6 Cl. & Fin. 911. **Reld.** Orrell *v.* Coppock (1856), 26 L. J. Ch. 269.

12. ——.] — Specific performance of a parol agreement as to land: the effect of a family compromise of doubtful rights; with part performance by possession, & improvements; & acquiescence near nineteen years: a third person being permitted to act upon his conception of the rights, not questioned at the time by deft.; who cannot object, that he acquiesced under expectations from that person, which were in part disappointed. Family compromise favoured; if reasonable, & upon a doubtful right; even in the strongest case; as where one party was drunk at the time. *Qu.:* whether upon a mere supposition of right, proving erroneous.—STOCKLEY *v.* STOCKLEY (1812), 1 Ves. & B. 23; 35 E. R. 9, L. C.

Annotations :—**Consd.** Clifton *v.* Cockburn (1834), 3 My. & K. 76. **Reld.** Stewart *v.* Stewart (1839), 6 Cl. & Fin. 911; Ashhurst *v.* Mill, Mill *v.* Ashhurst (1848), 7 Hare, 502; Reynell *v.* Spryc, Spryc *v.* Reynell (1849), 8 Hare, 222; Hoghton *v.* Hoghton (1852), 15 Beav. 278. **Mentd.** Williams *v.* Williams (1865), 2 Drew. & Sm.

13. ——.] — A husband who allows his wife a separate maintenance, promises to pay the amount of a debt which she contracts in a state of separation; he cannot afterwards recede from his promise, on the ground that pltf. knew that he allowed his wife a separate maintenance, & that he made the promise under a misapprehension of law.—HORNBUCKLE *v.* HORNBURY (1817), 2 Stark. 177, N. P.

Annotation :— **Mentd.** Burge *v.* Jones (1828), 7 L. J. O. S. K. B. 59.

14. ——.] — A party who, under a misapprehension of his legal rights, parts with his property for a *bonâ fide* & valuable, but not an adequate consideration, cannot have the transaction set aside on the mere ground of mistake.—MARSHALL *v.* COLLETT (1835), 1 Y. & C. Ex. 232; 160 E. R. 94.

15. ——.] — The liquidator of a bank which was being wound up brought an action against one of the directors upon a personal guarantee signed by deft. & nine other directors, in the following words: "We hereby severally acknowledge ourselves responsible to the bank for the sum, etc." The money guaranteed was ordered by the directors to be given as compensation to certain of the directors of another bank which had been amalgamated with pltfs. for not being appointed members of the amalgamated board, & it was the intention of all parties at the time that each guarantor should be liable only for his share of the whole sum. Deft. & two others each paid their shares, & the secretary cancelled their names from the document. The action was brought for the balance:—*Held:* the document must be considered to have been in the custody

PART II. SECT. 2, SUB-SECT. 1.

11 i. *Whether mistake of law ground for relief.*]—HINNERLEY *v.* GOULD (1824), Tay. 143.—**CAN.**

11 ii. ——.]—CUSHEN *v.* HAMILTON CORPN. (1902), 4 O. L. R. 265; 1 W. R. 441; 22 C. L. T. 282.—**CAN.**

11 iii. ——.]—KIPPEN *v.* KIPPEN'S TRUSTEE (1874), 1 R. (Ct. of Sess.) 1171; 11 Sc. L. R. 686.—**SCOT.**

11 iv. ——.]—In June, 1906, a landlord intended to execute, & did execute, an agreement for further lease to a tenant for five years on the same terms as an existing agreement for a lease made in 1900, but misapprehended the legal effect of the existing lease, & consequently of the new lease, in believing that the lease was a personal lease to the tenant, & would come to an end at her death. This misapprehension was in no way caused by the tenant:—*Held:* the landlord was not entitled to have the agreement rescinded on the ground of such misapprehension.—PATERSON *v.* GORE (1908), 27 N. Z. L. R. 718.—**N.Z.**

Sect. 2.—When relief granted: Sub-secls. 1 & 2.]

of pltfs. rather than deft., & therefore the alteration by erasure put an end to deft.'s liability, & the mistake of the secretary that the payment of the share only was a satisfaction of the bank's claim upon each guarantor was a mistake of law & not of fact; & therefore did not prevent the destruction of the validity of the guarantee caused by the alteration.—BANK OF HINDUSTAN, CHINA & JAPAN, LTD. *v.* SMITH (1867), 36 L. J. C. P. 241; 16 L. T. 518.

16. ——.]—I think, in the first place, that the mistake was one which related to the existing rights & interests under the settlement within the meaning of the law as laid down by LORD WESTBURY in *Cooper* v. *Phibbs*, No. 27, *post*. . . . In the next place, I observe that it is not accurate to say that relief can never be given in respect of a mistake of law (STIRLING, J.).—ALLCARD *v.* WALKER, [1896] 2 Ch. 369; 65 L. J. Ch. 660; *sub nom.* ALLCARD *v.* WALKER, *Re* LUCAS, WALKER *v.* LUPTON, 74 L. T. 487; 44 W. R. 661; 40 Sol. Jo. 499.

Annotations:—**Consd.** Carnell *v.* Harrison, [1916] 1 Ch. 328. **Mentd.** Tremayne *v.* Rashleigh, [1908] 1 Ch. 681.

17. ——.] —Where the Divorce Ct. ordered a husband to secure by deed to be settled by conveyancing counsel of the ct. the payment to his wife of an annuity & that all payments under the order should be free of income tax, & subsequently by a deed drawn up in pursuance of the order the husband settled property upon trust that the trustees should pay that annuity to his wife free of all deductions whatsoever, including income tax, such a provision for the payment by the trustees of the annuity free of income tax contravenes the prohibitions of the Income Tax Acts & is void, but the wife is entitled to have the provision rectified so as to provide that the trust fund shall be held by the trustees as security for the payment to the wife of the annuity free of income tax.—BURROUGHES *v.* ABBOTT, [1922] 1 Ch. 86; 91 L. J. Ch. 157; 126 L. T. 354; 38 T. L. R. 167; 66 Sol. Jo. 141.

Annotations:—**Mentd.** Smith *v.* Smith, [1923] P. 191; *Re* Gordon's Settlmt., Hunt *v.* Mortimer, [1924] 1 Ch. 146.

18. —— **Rule in equity.**] — It is said they might know the fact, & yet not know the consequence in law: but if parties are entering into an agreement, & the very will out of which the forfeiture arose is lying before them & their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with consequence of law as to this point, & shall not be relieved under a pretence of being surprised with such strong circumstances attending it (LORD HARDWICKE, C.). —PULLEN *v.* READY (1743), 2 Atk. 587; 26 E. R. 751, L. C.

Consd. Stockley *v.* Stockley (1812), 1 Ves. & B. 23; Stewart *v.* Stewart (1839), 6 Cl. & Fin. 911. **Refd.** Hoghton *v.* Hoghton (1852), 15 Beav. 278. **Mentd.** Baker *v.* Bradley (1855), 7 De G. M. & G. 597.

19. —— ——.] — (1) A ct. of equity relieves against a defective execution of a power, only when the defect consists in the want of some circumstance in the manner of execution: & it will reform a deed where the intention of the parties is mistaken by the drawer, but will not correct an error in an instrument occasioned by the ignorance of the parties in matter of law.

(2) In order to work confirmation, the party said to confirm must know the law as well as the fact.—COCKERELL *v.* CHOLMELEY (1830), 1 Russ. & M. 418; Taml. 435; 39 E. R. 161; *affd.* (1832), 6 Bli. N. S. 120, H. L.

Annotations:—*Generally*, **Refd.** Doe d. Blewitt *v.* Phillips (1841), 1 Q. B. 84. **Mentd.** Doe d. Strickland *v.* Woodward (1847), 1 Exch. 273; Kekewich *v.* Marken (1851), 3 Mac. & G. 311; Buckley *v.* Howell (1861), 29 Beav. 546; *Re* Rutland's S. E., Rutland *v.* Bristol, [1900] 2 Ch. 206.

20. —— ——.] — *Ignorantia legis* may be a good plea in equity, though not at law (BRUCE, L.J.).—WATSON *v.* MARSTON (1853), 4 De G. M. & G. 230; 1 W. R. 362; 43 E. R. 495, L. JJ.

Annotations:—**Refd.** Carroll *v.* Keays, Keays *v.* Carroll (1873), 22 W. R. 243; Hickman *v.* Berens, [1895] 2 Ch. 638. **Mentd.** Falcke *v.* Gray (1859), 4 Drew. 651; Stevens *v.* Theatres, [1903] 1 Ch. 857.

21. —— —— **Plaintiff's conduct determined by mistake—Necessity for proof.**]—A husband survived his wife, who was one of several equitable tenants in common. He was advised by counsel that he had no title as tenant by the curtesy, his wife never having been in possession, & that if he intended to set up such a title, he ought not to sue with his infant daughter in a partition suit which was then in contemplation. The suit was nevertheless instituted by him as the next friend of the daughter & in 1830 a decree was obtained. A partition was made under the decree, & the legal estate in the daughter's share conveyed to the use of the father during the infancy of the daughter, in trust for her maintenance, & afterwards to her own use in fee. The daughter attained twenty-one in 1843 & married in 1847. In 1852 the father filed a bill to be relieved from the trusts on the ground of mistake, & to have his title as tenant by the curtesy established:—*Held:* (1) length of time & acquiescence, & the marriage of the daughter, although without the father's consent, before the father disputed the daughter's title, constituted a sufficient answer to the suit. (2) the ct. had power to relieve against mistakes in law as well as against mistakes in fact; but where relief was sought against the consequences of mistakes in law, the ct. must be satisfied that pltf.'s conduct had been determined by those mistakes.

The ground on which he founds his title to the relief is, that in the year 1826 he was erroneously advised that his equitable title could not be maintained; & I assume that the advice so given to him was erroneous, & that this ct. has power, as I feel no doubt that it has, to relieve against mistakes in law as well as against mistakes in fact. . . . Parties may be erroneously advised as to the law, but they may be told on what circumstances the question of law depends, & in what mode it may be tried, & they may determine that, whether the advice which they have received be well or ill founded, they will give up the question in favour of the party with whom it arises. Cases of this nature, therefore, require the most careful examination, & particularly when they arise between parent & child (TURNER, L.J.).—STONE *v.* GODFREY (1854), 5 De G. M. & G. 76; 2 Eq. Rep. 866; 23 L. J. Ch. 769; 23 L. T. O. S. 289; 18 Jur. 524; 43 E. R. 798, L. JJ.

Annotations:—*As to* (1) **Consd.** Bill *v.* Richards (1857), 2 H. & N. 311. *As to* (2) **Apld.** *Re* Saxon Life Assce. Soc. (1862), 2 John. & H. 408. **Consd.** Rogers *v.* Ingham (1876), 3 Ch. D. 351; Gas Light & Coke Co. *v.* Met. Ry. (1892), 9 T. L. R. 98; Allcard *v.* Walker, [1896] 2 Ch. 369; Carnell *v.* Harrison, [1916] 1 Ch. 328; *Re* Musgrave, Machell *v.* Parry, [1916] 2 Ch. 417; Burroughes *v.* Abbott, [1922] 1 Ch. 86. *Generally*, **Mentd.** *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 60 L. T. 888.

22. —— ——.]—(1) Mistake as to a contract is a ground for equitable relief, but it must be a mistake in fact, not in law.

Mistake is undoubtedly one of the grounds for equitable interference & relief, but then it must be a mistake, not in matter of law, but a mistake of fact. The construction of a contract is clearly

matter of law; & if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be to recover at law (LORD CHELMSFORD, C.).

(2) Mutual mistake as to its construction will not entitle either party to relief in equity.

(3) Where the law has declared the construction of a contract, a ct. of equity will not interfere to aid either of the parties merely on the ground of their own or their agents' dealings under it, for that would be to make a new contract, which can only be done by mutual consent, by persons properly authorised & in due form.—MIDLAND GREAT WESTERN RY. OF IRELAND (DIRECTORS, ETC.) *v.* JOHNSON (1858), 6 H. L. Cas. 798; 31 L. T. O. S. 240; 4 Jur. N. S. 643; 10 E. R. 1509; *sub nom.* MIDLAND GREAT WESTERN RY. OF IRELAND CO. *v.* KINDER, 6 W. R. 510, H. L.

Annotation:—As to (3) **Consd.** Stanley *v.* Nuneaton Corpn. (1913), 108 L. T. 986.

23. —— ——.]—(1) A question has sometimes arisen how far this ct. can interfere to rectify a mistake in law, but having regard to all the authorities & especially to *Stone* v. *Godfrey*, No. 21, *ante*, I have no doubt of the jurisdiction (PAGE WOOD, V.-C.).

(2) The claim . . . can stand only on the ground of a common mistake. But then the question arises, whether the parties can be replaced in their original situation; & this creates an insuperable difficulty . . . the claim of the Era Society must, therefore, be disallowed (PAGE WOOD, V.-C.).—*Re* SAXON LIFE ASSURANCE SOCIETY (1862), 2 John. & H. 408; 32 L. J. Ch. 206; 7 L. T. 22; 10 W. R. 724; 70 E. R. 1117; *on appeal, sub nom. Re* SAXON LIFE ASSURANCE CO., ERA LIFE & FIRE ASSURANCE CO.'S CASE, 1 De G. J. & Sm. 29, L. JJ.

24. —— —— **Necessity for proof of mistake.**]—A mistake in law, in order to be relieved against, must be distinctly stated & proved in the bill, & on the evidence.

The ct. no doubt will relieve against mistake, & that without reference to the manner in which the legal maxim was construed in the House of Lords in the case referred to, *Cooper* v. *Phibbs*, No. 27, *post*, but in order to found relief on the ground of mistake, it must be alleged & proved in such manner as to satisfy the ct. that there was such mistake (BACON, V.-C.).—KILVINGTON *v.* PARKER (1872), 21 W. R. 121.

Annotation:—**Mentd.** Bristow *v.* Masefield (1882), 52 L. J. Ch. 27.

25. —— ——.]—There being a dispute on the construction of a will as to how a fund should be divided between two legatees, both parties took counsel's advice, & the exor. divided the fund in accordance with such advice, the dissatisfied legatee assenting in order to avoid litigation. Two years afterwards the dissatisfied legatee filed a bill against the exor. & the other legatee to have the will construed by the ct., & the money received by the other legatee repaid:—*Held:* as the fund had been divided by consent with a perfect knowledge of the facts on both sides, & as the mistake, if any, was a mistake of law, the suit could not be maintained.

There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; & I think it is equally clear that, as a general rule, the ct. of equity did not, in such cases, interfere with the cts. of law. Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might, years afterwards, be recovered, because perhaps some ct. of justice, upon a similar contract, gave to it a different construction from that which the parties had put on it. I think there is no doubt that the rule at law is in itself an equitable & just rule which is not interfered with by cts. of equity; but, on the other hand, I think that, no doubt, as was said by TURNER, L.J., "This ct. has power, as I feel no doubt that it has, to relieve against mistakes in law as well as against mistakes in fact," in *Stone* v. *Godfrey*, No. 21, *ante*, that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it (MELLISH, L.J.).—ROGERS *v.* INGHAM (1876), 3 Ch. D. 351; 35 L. T. 677; 25 W. R. 338, C. A.

Annotations:—**Consd.** Allcard *v.* Walker, [1896] 2 Ch. 369; Stanley *v.* Nuneaton Corpn. (1913), 108 L. T. 986; Carnell *v.* Harrison, [1916] 1 Ch. 328. **Reid.** Baylis *v.* London (Bp.), [1913] 1 Ch. 127. **Mentd.** *Re* Bowman, Whytehead *v.* Bolton (1889), 37 W. R. 583; Sinclair *v.* Brougham, [1914] A. C. 398.

26. —— ——.] — DANIELL *v.* SINCLAIR, No. 10, *ante*.

Mistake of general law.]—*See* Part II., Sect. 2, sub-sect. 2, *post*.

Ignorance of private rights.]—*See* Part III., Sect. 2, sub-sect. 2, *post*.

Divorce proceedings—Concealment of petitioner's adultery.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 483, No. 5123.

Mistake by magistrates—Rejection of evidence.]—*See* MAGISTRATES, Vol. XXXIII., p. 427, Nos. 1395–1397.

Lapse of patent—Restoration.]—*See* PATENTS.

SUB-SECT. 2.—MISTAKE OF GENERAL LAW.

27. General rule — "Ignorantia juris haud excusat."]—(1) Where two parties, under a mistake of fact, enter into an agreement, either of them has a title to come to equity to be relieved from it. That relief will be given on the principle of good conscience alone.

(2) It is said "*Ignorantia juris haud excusat*"; but in that maxim the word "*jus*" is used in the sense of denoting general law, the ordinary law of the country. But when the word "*jus*" is used in the sense of denoting a private right, that maxim has no application. Private rights of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake & misapprehension as to their relative & respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake (LORD WESTBURY).—COOPER *v.* PHIBBS (1867), L. R. 2 H. L. 149; 16 L. T. 678; 15 W. R. 1049, H. L.

Annotations:—As to (1) **Consd.** Jones *v.* Clifford (1876), 3 Ch. D. 779; Allen *v.* Richardson (1879), 13 Ch. D.

PART II. SECT. 2, SUB-SECT. 2.

27 i. *General rule — "Ignorantia juris haud excusat."*]—BALDWIN *v.* KINGSTONE (1890), 18 A. R. 63.—CAN.

27 ii. —— ——.]—The ct. cannot rectify or cancel a deed or agreement because its terms operate differently from what the parties intended owing to their mistake as to the general law applicable to the transaction. Rectification is only applicable to a case in which there is an agreement & a subsequent failure to express it as made.—JACKSON *v.* STOPFORD, [1923] 2 I. R. 1.—IR.

a. *Application of rule—Mistake as to extent of obligation incurred.*]—Deft. executed a mtge. in which was

Sect. 2.—When relief granted: Sub-sects. 2, 3 & 4. Part III. Sects. 1 & 2: Sub-sects. 1 & 2.]

524. **Refd.** Bettyes *v.* Maynard (1882), 46 L. T. 766; General Auction Estate & Monetary Co. *v.* Smith (1891), 40 W. R. 106; Huddersfield Banking Co. *v.* Lister, [1895] 2 Ch. 273. *As to* (2) **Apld.** Jones *v.* Clifford (1876), 3 Ch. D. 779. **Consd.** Daniell *v.* Sinclair (1881), 50 L. J. P. C. 50; Allcard *v.* Walker, [1896] 2 Ch. 369. **Refd.** Galway County Case, Trench *v.* Nolan (1872), 27 L. T. 69; Soper *v.* Arnold (1887), 57 L. J. Ch. 145; *Re* Oliver's Settlmt., Evered *v.* Leigh, [1905] 1 Ch. 191; Carnell *v.* Harrison, [1916] 1 Ch. 328; *Generally*, **Refd.** O'Brien *v.* Hearn (1870), 18 W. R. 514; Blenkhorn *v.* Penrose (1880), 43 L. T. 668; Debenham *v.* Sawbridge, [1901] 2 Ch. 98; Scott *v.* Coulson, [1903] 2 Ch. 249. **Mentd.** Briggs *v.* Massey (1881), 29 W. R. 926.

28. —— ——.]—BEAUCHAMP (EARL) *v.* WINN, No. 57, *post*.

29. Application of rule—Mistake as to validity of judgment.]—Certain trust deeds were prepared for the benefit of creditors, & a time was fixed within which the creditors were to execute or be excluded from the benefit of such deeds, the trustees having discretion to allow creditors to sign after the period fixed. A judgment creditor relying upon his claim as paramount to the deeds, declined to execute during twenty-two years. The judgment subsequently turned out to be invalid, & he now petitioned the ct., in a suit instituted for carrying into effect the trusts of the deeds, to be allowed the benefit of such deeds, & offered to execute them:—*Held:* there was no such case of mistake or misapprehension as to constitute an equity, & the petition was dismissed.—BRANDLING *v.* PLUMMER (1857), 27 L. J. Ch. 188; 6 W. R. 117.

30. —— **Legal interpretation of contract.**]—MIDLAND GREAT WESTERN RY. OF IRELAND (DIRECTORS, ETC.) *v.* JOHNSON, No. 22, *ante*.

31. —— ——.] — The ct. will not refuse to decree the specific performance of an agreement on the ground that one of the contracting parties has mistaken its legal effect.

Deft. by his agent has adopted a certain form of agreement, & when he finds out that it gives certain rights which he did not intend, he wishes to put an end to it. But this ct. considers that every one entering into such a contract is bound to know what the law is, & as the deft. entered into it with his eyes open he cannot set it aside because he finds the construction of it is against him (LORD ROMILLY, M.R.).—POWELL *v.* SMITH (1872), L. R. 14 Eq. 85; 41 L. J. Ch. 734; 26 L. T. 754; 20 W. R. 602.

Annotations:—**Consd.** Wilding *v.* Sanderson, [1897] 2 Ch. 534. **Refd.** M'Kenzie *v.* Hesketh (1877), 38 L. T. 171; Eastes *v.* Russ, [1914] 1 Ch. 468.

32. —— ——.]—It is no answer to a suit for specific performance for deft. to say that though he understood what the words of the agreement were, he was under a mistake as to their legal effect.—HART *v.* HART (1881), 18 Ch. D. 670; 50 L. J. Ch. 697; 45 L. T. 13; 30 W. R. 8.

Annotations:—**Mentd.** Bradley *v.* Bradley (1882), 51 L. J. P. 87; Harrison *v.* Harrison (1887), 12 P. D. 130; Wood *v.* Wood (1891), 64 L. T. 586.

33. —— ——.]—An error entertained by one of the parties to a contract of sale as to the legal meaning of the contract is not by itself sufficient to invalidate his consent to the contract.

Applt. made resp. an offer of his entailed estates at a certain price by a letter which contained this stipulation, "The sale is made subject to the ratification of the ct." The offer was accepted. This offer & acceptance, according to their proper construction, constituted an absolute & unconditional sale of the entailed estates:—*Held:* applt. could not claim to have the contract reduced merely because he understood it to be other than it really was.

I think it may be safely said that, 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, will not be sufficient to give him the right [to rescind] unless such belief has been induced by the representations, fraudulent or not of the other party to the contract (LORD WATSON).

It appears to me that the error if it existed was one which affected the substance of the contract (LORD HERSCHELL).—STEWART *v.* KENNEDY (No. 2) (1890), 15 App. Cas. 108, H. L.

Annotations:—**Consd.** Wilding *v.* Sanderson, [1897] 2 Ch. 534. **Mentd.** Shrager *v.* Dighton (1923), 130 L. T. 642.

34. —— ——.]—(1) An order made in an action by consent & based upon & intended to carry out, an agreement come to between the parties, can be set aside on any ground on which an agreement in the terms of the order could be set aside, & one of such grounds is mistake.

(2) A written contract cannot be set aside merely because one of the parties to it put an erroneous construction on the words in which it was expressed; but this principle does not apply to a case where a mistake by one of the parties as to the meaning of the words used has been induced, however innocently, by the other party.—WILDING *v.* SANDERSON, [1897] 2 Ch. 534; 66 L. J. Ch. 684; 77 L. T. 57; 45 W. R. 675; 13 T. L. R. 540; 41 Sol. Jo. 675, C. A.

Annotations:—*As to* (1) **Distd.** Eastes *v.* Russ, [1914] 1 Ch. 468. **Refd.** Debenham *v.* Sawbridge (1901), 70 L. J. Ch. 525. Neale *v.* Gordon Lennox, [1902] 1 K. B. 838; Haydock *v.* Goodier, [1921] 2 K. B. 384. *As to* (2) **Consd.** Stanley *v.* Nuneaton Corpn. (1913), 108 L. T. 986. **Distd.** Eastes *v.* Russ, [1914] 1 Ch. 468. **Apld.** Faraday *v.* Tamworth Union (1916), 86 L. J. Ch. 436. **Refd.** Jennings *v.* Jennings, [1898] 1 Ch. 378; North *v.* Percival (1898), 78 L. T. 615.

35. —— **Invalid issues of shares — Rectification of register.**]—S. applied for shares which a co. was purporting to issue at a discount. They were allotted to her & notice of the allotment communicated to her. Knowing that she was on the register of members she dealt with the shares, selling a portion of them & voting at a meeting of the co. in respect of the remainder. About twelve months after she had agreed to take these shares, a decision of the Ct. of Appeal throwing doubt on the validity of an issue at a discount came to her knowledge, & shortly afterwards, when the co. proposed to make a new issue at a discount, she wrote to the co. that she had been advised that the issue would be illegal & that she should, if necessary, take steps to oppose it. About five months later, *i.e.* on May 10, 1888, the Ct. of Appeal decided that the issue of shares at a discount was invalid. On June 5 S. wrote to the co. referring to this decision, & desiring the co. to remove her name from the register: & on Nov. 15 she applied to the ct. by motion for rectification of the co.'s register by removal therefrom of her name, & this was granted by the judge:—*Held:* there was evidence to show that she had agreed to become a member of the co., & had assented to being on the register; there never was any mistake by her as to the facts,

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the usual covenant for payment. He appended the word "trustee" to his signature, thinking that thereby he pledged himself not personally but in his representative capacity only. When sued upon his covenant:—*Held:* there was no mutual mistake, & therefore no case for rectification, but a unilateral mistake, & that of law only.—BALFOUR *v.* DRUMMOND, 9 C. L. T. Occ. N. 201. —CAN.

but only as to their legal effect, & she could not be relieved from the liability imposed by law to pay for what she had assented to take, & her name must therefore remain on the register.—*Re* RAILWAY TIME TABLES PUBLISHING CO., *Ex p.* SANDYS (1889), 42 Ch. D. 98; 58 L. J. Ch. 504; 61 L. T. 94; 37 W. R. 531; 5 T. L. R. 397; 1 Meg. 208, C. A.

Annotations:—**Mentd.** *Re* Briton Medical & General Life Assocn. (1889), 5 T. L. R. 502; *Re* Johannesburg Hotel Co., *Ex p.* Zoutpansberg Prospecting Co., [1891] 1 Ch. 119; *Re* Eddystone Marine Insce., [1893] 3 Ch. 9; *Re* Macdonald, [1894] 1 Ch. 89; *Re* Veuve Mounier, *Ex p.* Bloomenthal, [1896] 2 Ch. 525; Mother Love Consolidated Gold Mines *v.* Hill (1903), 19 T. L. R. 341; *Re* Pilkin (1916), 85 L. J. Ch. 318.

36. —— Construction of deed—Annuity subject to income tax.]—By indenture made in 1885, after reciting a decree for judicial separation & an order of the Divorce Ct. directing the husband to pay the wife permanent alimony at the rate of £200 *per annum*, the husband covenanted with the wife that he should in substitution for the permanent alimony directed by the order pay to her during her life the sum of £200 *per annum* subject to a provision that if he should make default in so doing the wife should be at liberty to enforce payment by process under the order as well as by action on the covenant, the intention being that the order should be a collateral & additional security for the covenant thereinbefore contained. The husband died in 1907, having by his will bequeathed his residuary estate to his exors. & trustees upon certain trusts in favour of his four sons, one of whom subsequently died, having bequeathed his one-fourth share to the wife absolutely. The husband during his lifetime, & his exors. & trustees after his death, had paid the wife's annuity in full without deducting income tax:—*Held:* past overpayments in respect of income tax having been made under a mistake of law were not recoverable as a debt from the wife & could not be deducted either from future payments of the annuity or from the wife's share in the residuary estate of the husband.—*Re* HATCH, HATCH *v.* HATCH, [1919] 1 Ch. 351; 88 L. J. Ch. 147; 120 L. T. 694; 63 Sol. Jo. 389.

Annotation:—**Mentd.** *Re* Wooldridge, Wooldridge *v.* Coe, [1920] W. N. 78.

SUB-SECT. 3.—IGNORANCE OF PRIVATE RIGHTS.

See Part III., Sect. 2, sub-sect. 2, *post.*

SUB-SECT. 4.—EFFECT OF ACQUIESCENCE.

37. Whether bar to relief.] — COCKERELL *v.* CHOLMELEY, No. 19, *ante.*

38. ——.]—CLIFTON *v.* COCKBURN, No. 9, *ante.*

39. ——.]—STONE *v.* GODFREY, No. 21, *ante.*

40. ——.] — The husband & wife afterwards mtged. the property under a power in the settlement. S., the presumptive heir of the wife, being aware of pltf.'s intention to lend money upon such mtge. before he actually did so, told him that the husband was indebted to him, S., & that he should expect to have his debt paid off out of the money which pltf. was going to lend, & that he doubted whether the husband could mortgage the property; but S. did not state that he had any interest in the property, or that the husband & wife had not power to make the mtge.:—*Held:* such knowledge of & acquiescence in the transaction of the mtge. did not create any equity against S. on his afterwards becoming the heir of A., all parties at the time of making the mtge. being in possession of all the facts of the case, & the mistake being a mistake not of fact but of law.—CROFTS *v.* MIDDLETON (1855), 2 K. & J. 194; 1 Jur. N. S. 1133; 69 E. R. 749; *on appeal* (1856), 8 De G. M. & G. 192.

Annotations:—**Reld.** *Re* White & Hindles Contract (1877), 7 Ch. D. 201; General Finance Mortgage & Discount Co. *v.* Liberator Permanent Benefit Bldg. Soc. (1878), 10 Ch. D. 15; **Mentd.** Pride *v.* Bubb (1871), 7 Ch. App. 64; Jones *v.* Frost, *Re* Fiddey (1872), 7 Ch. App. 773; Carter *v.* Carter, [1896] 1 Ch. 62.

41. ——.]—Where shareholders had acquiesced in an amalgamation, & the dealings had been such that it was impossible to replace the cos. in their original position, it was held to be too late to disturb the arrangement which had been made whether within the power of the directors or not.—*Re* ERA ASSURANCE CO., WILLIAMS' CASE, ANCHOR CASE (1862), 1 Hem. & M. 672; 32 L. J. Ch. 206; 7 L. T. 595; 11 W. R. 204; 71 E. R. 295; *subsequent proceedings* (1863), 1 De G. J. & Sm. 172, L. JJ.

42. ——.] — A wife who in ignorance of her right in equity to enforce a pre-nuptial agreement, for a settlement, accepted a settlement of a far inferior sum, is not by doing so debarred from enforcing her claim to the full amount of property agreed to be settled upon her.—GILCHRIST *v.* HERBERT (1872), 26 L. T. 381; 20 W. R. 348.

43. ——.]—BEAUCHAMP (EARL) *v.* WINN, No. 57, *post.*

44. ——.]—ROGERS *v.* INGHAM, No. 25, *ante.*

See, also, ESTOPPEL, Vol. XXI., pp. 333 *et seq.*

Part III.—Mistake of Fact.

SECT. 1.—**IN GENERAL.**

Distinguished from mistake of law.]—*See* Nos. 9, 10, *ante.*

Mistake as to nature of deed—Induced by misrepresentation.] — *See* MISREPRESENTATION & FRAUD, pp. 70, 71, Nos. 675–686, *ante.*

Plea of non est factum.] — *See* DEEDS, Vol. XVII., p. 235, Nos. 499–501

SECT. 2.—**WHEN RELIEF GRANTED.**

SUB-SECT. 1.—MISTAKE AS TO NATURE OF TRANSACTION.

45. General rule.] — STEWART *v.* KENNEDY (No. 2), No. 33, *ante.*

SUB-SECT. 2.—MISTAKE AS TO NATURE OF PRIVATE RIGHTS.

46. Ignorance arising from lack of information—Release.]—No reason to set aside a release,

PART III. SECT. 2, SUB-SECT. 1.

45 i. *General rule.*] — ROBSON *v.* ROY, [1917] 2 W. W. R. 995; 35 D. L. R. 485; 11 Alta. L. R. 418.—**CAN.**

PART III. SECT. 2, SUB-SECT. 2.

b. *General rule.*]—Where a mistake is as to a private right it should be treated as a mistake of fact, &, if it relates to an essential attribute of the thing sold & affects the substance of the whole consideration, the conveyance based on it will be set aside. —MUTU *v.* MICHEL, [1919] N. Z. L. R. 521.—**N.Z.**

46 i. *Ignorance arising from lack of information — Release.*]—A party

Sect. 2.—When relief granted: Sub-sects. 2 & 3.]

because the party releasing had a right. *Secus*, if ignorant of his right, or if the same was concealed from him.—CANN *v.* CANN (1721), 1 P. Wms. 723; 24 E. R. 586, L. C.

Annotations:—**Consd.** Gordon *v.* Gordon (1819), 3 Swan. 400. **Reld.** Stapilton *v.* Stapilton (1739), 1 Atk. 2; Chesterfield *v.* Janssen (1751), 2 Ves. Sen. 125; Stockley *v.* Stockley (1812), 1 Ves. & B. 23; Stewart *v.* Stewart (1839), 6 Cl. & Fin. 911; Fane *v.* Fane (1875), L. R. 20 Eq. 698. **Mentd.** Standish *v.* Radley (1741), 2 Atk. 177; Pullen *v.* Ready (1743), 2 Atk. 587; Ridout *v.* Pain (1747), 3 Atk. 486; Pickett *v.* Loggon (1807), 14 Ves. 215; Dunnage *v.* White (1818), 1 Swan. 137; Falcke *v.* Scottish Imperial Insce. (1887), 57 L. T. 39.

47. —— ——.]—A release which had been executed by a person ignorant of his rights, & where it was proved that he had no intention of releasing such rights, set aside.—PHELPS *v.* AMCOTT (1869), 21 L. T. 167; 17 W. R. 703.

48. —— ——.]—M. devised & bequeathed the residue of his real & personal estate to trustee upon trust to convert & divide the proceeds equally among his children, with the exception of W., his eldest son & heir-at-law. W. became entitled to a share of the residue which had lapsed in consequence of the death of one of testator's sons in his lifetime. At the time of testator's death there was a debt of W. to him remaining unpaid, recovery of which was, however, barred by Stat. Limitations:—*Held:* the trustees & exors. of M.'s will could retain & impound W.'s debt to testator's estate out of so much of the residue coming to him as represented personal estate, but not out of the real estate which came to him as heir-at-law, & a release which had been executed by W., under a mistaken view of his rights in this respect, must be set aside.—*Re* MILNES, MILNES *v.* SHERWIN (1885), 53 L. T. 534; 33 W. R. 927.

49. —— **Ignorance of parties to conveyance.**]—A conveyance obtained from persons uninformed of their rights set aside, though there was no actual fraud or imposition.—EVANS *v.* LLEWELLYN (1787), 2 Bro. C. C. 150; 1 Cox, Eq. Cas. 333; 29 E. R. 86.

Annotations:—**Consd.** Curson *v.* Belworthy (1852), 3 H. L. Cas. 742. **Apld.** Baker *v.* Monk (1864), 4 De G. J. & Sm. 388. **Reld.** O'Rorke *v.* Bolingbroke (1877), 2 App. Cas. 814; Fry *v.* Lane, *Re* Fry, Whittet *v.* Bush (1888), 40 Ch. D. 312; Barnes *v.* Richards (1902), 71 L. J. K. B. 341. **Mentd.** Watkin & Bligh *v.* Brent (1836), 1 Curt. 264.

50. —— **Compromise induced thereby.**] — If a party, acting in ignorance of a plain & settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a ct. of equity will relieve him from the effect of his mistake (LEACH, V.-C.).—NAYLOR *v.* WINCH (1824), as reported in 1 Sim. & St. 555; 57 E. R. 219; *affd.* (1828), 7 L. J. O. S. Ch. 6, L. C.

Annotations:—**Reld.** Brent *v.* Brent (1840), 10 L. J. Ch. 84; Stone *v.* Godfrey (1853), 1 Sm. & G. 590; Houghton *v.* Lees (1854), 24 L. T. O. S. 201; Lawton *v.* Campion (1854), 18 Beav. 87; *Ex p.* Wyneh (1854), 5 De G. M. & G. 188.

51. —— ——.] — The children of J., a deceased remainderman, insisted as against their uncle C., a prior tenant for life in possession, that they were entitled, under the terms of a settlement, to have their portions raised from the death of their father in 1831. Some discussion took place, & a bill was filed by them. An arrangement was come to by deed, which, proceeding on the foundation of the validity of the claim, compromised the amount of arrears of interest, & settled the amount of the future interest which thereby engaged to pay. It having been afterwards determined, in another suit, that on the true construction of the settlement the claim of the children was unfounded, instituted a suit to set aside the deed:—*Held:* if the right to have the portions raised in 1831 had formed one of the matters compromised, the transaction could not be disturbed, although the claim of the children, had turned out to be wholly unfounded; but the ct., having arrived at the conclusion, that the parties had all proceeded on the foundation of the children's claim being unquestionable, & that all that had been compromised was the amount of arrears payable on that foundation, set aside the deed.—LAWTON *v.* CAMPION (1854), 18 Beav. 87; 23 L. J. Ch. 505; 23 L. T. O. S. 201; 18 Jur. 818; 2 W. R. 209; 52 E. R. 35.

Annotation:—**Reld.** Cloutte *v.* Storey, [1911] 1 Ch. 18.

Compare Nos. 141–146, *post.*

52. —— **Ignorance of parties to a deed—Want of professional adviser.**]—SHORT *v.* RIDGE, [1876] W. N. 47.

53. Ignorance of rights dependent on rules of law—Applied to construction of legal document—Effect of deed.]—MORRIS *v.* BURROUGHS (1737), 2 Eq. Cas. Abr. 272; 1 Atk. 399; West *temp.* Hard. 242; 22 E. R. 230, L. C.

54. —— —— **Effect of will.**]—Deft.'s ancestor & devisor gave a bond in a penal sum, conditioned to pay, after T.'s death, £1,000 to such person or persons as she should, by deed or will, appoint:—*Held:* as the mere act of cutting off her name & seal from the deed was equivocal, it might be explained, & its effect done away by showing, from what was said by her at the time, that she did it under a mistaken notion that she had provided an effectual appointment by her will made after the deed, & that the deed was therefore useless: whereas, in truth, her will could not operate as an appointment; as it contained no direction for raising the money upon the obligor's estate: but proceeded upon the supposition, as therein expressed, that the children of her appointee, who was dead at the time of the will made, "would acquire the said £1,000 under & by virtue of the deed of appointment," & giving all the rest & residue of her estates & effects to them & others, "on the express condition that they, the children, should bring into hotchpot with such residue, etc., the said £1,000"; & whether she mistook the contents of her will at the time she cut off her name & seal, & made the declaration before mentioned; which would be a mistake in fact; or whether she mistook the legal operation of her will; which would be a mistake in law; in either case the mistake annulled the cancellation.—PERROTT *v.* PERROTT (1811), 14 East, 423; 104 E. R. 665.

Annotations:—**Consd.** Beardsley *v.* Lacey (1897), 67 L. J. P. 35. **Reld.** Alsager *v.* Close (1842), 10 M. & W. 576; *Re* Southerden, Adams *v.* Southerden, [1925] P. 177.

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granted a discharge "in full satisfaction of all sums due or claims competent to me by virtue of the obligation therein narrated." Admittedly this discharge was granted *sine causâ* to the extent of upwards of £600. In a reduction of this discharge as having been granted in error, & without full of just value, & while the party was ignorant of his rights:—*Held:* the discharge was reducible so far as granted *sine causâ* by a party ignorant of his legal rights.—DICKSON *v.* HALBERT (1854), 16 Dunl. (Ct. of Sess.) 586; 26 Sc. Jur. 266.—**SCOT.**

46 ii. —— ——.]—A party granting a discharge which he believes to include "all his claims" is entitled to reduce it on its turning out that there were at the time competent to him claims of which he knew nothing.—PURDON *v.* ROWAT'S TRUSTEES (1856), 19 Dunl. (Ct. of Sess.) 206; 29 Sc. Jur. 99.—**SCOT.**

53 i. *Ignorance of rights dependent on rules of law—Applied to construction of legal document—Effect of deed.*]—HOGAN *v.* HOGAN (1879), R. E. D. 334.—**CAN.**

54 i. —— —— *Effect of will.*]—FORSTER *v.* FORSTER, [1918] 1 I. R. 510.—**IR.**

55. —— —— —— Interpretation of counsel's opinion.]—Generally the ct. will support an agreement of compromise entered into after the parties have jointly consulted the family solr., even though the agreement may not be quite in accordance with their rights, the very object of the compromise being to avoid the necessity of having the exact relative rights determined by litigation; but the family solr. is not entitled to keep those consulting him in the dark as to their rights because he thinks it is for the advantage of all parties to compromise & that if they knew their exact rights there would be no chance of a compromise.

Where one party entered into a compromise relating to her interests under a will under a false impression as to her legal rights, arising from a wrong interpretation placed upon counsel's opinion by a common solr. acting for all parties:—*Held:* the compromise was not binding upon her.—*Re* ROBERTS, ROBERTS *v.* ROBERTS, [1905] 1 Ch. 704; 74 L. J. Ch. 483; 93 L. T. 253, C. A.

—— —— Revocation of will made under mistake.]—*See* WILLS.

56. —— —— Doubtful construction of settlement.]—CLIFTON *v.* COCKBURN, No. 9, *ante*.

57. —— —— Doubtful construction of grant.]—(1) Where, in the making of an agreement between two parties, there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interposing to grant relief. The Ct. of Equity will not, if such a ground for relief is clearly established, decline to grant relief merely because, on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition.

(2) What is the nature of a mistake & what has been the cause of it will be considered in determining whether relief ought to be granted. The rule *ignorantia juris neminem excusat* applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of a grant. In the latter case it is not decisively a ground for refusing relief.

(3) Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed.

Resp. urges . . . that the subsequent dealings of the parties with the property prevent their being restored to their former position. . . . If there existed a clear ground of mistake which in itself would have entitled applt. to set the agreement aside . . . I should be unwilling to believe that equity would refuse its aid on account of transactions respecting the exchanged properties which it would not be difficult to adjust so as to place the parties in a position in which they would receive little or no prejudice from what had been done after the exchange (LORD CHELMSFORD).—BEAUCHAMP (EARL) *v.* WINN (1873), as reported in L. R. 6 H. L. 223, H. L.

Annotations:—As to (1) **Refd.** Bettyes *v.* Maynard (1882), 46 L. T. 766; Barrow *v.* Isaacs, [1891] 1 Q. B. 417. *As to* (2) **Refd.** Daniell *v.* Sinclair (1881), 6 App. Cas. 181. *Generally.* **Refd.** Wilding *v.* Sanderson (1897), 77 L. T. 57; Stanley *v.* Nuneaton Corpn. (1913), 108 L. T. 986. **Mentd.** Robinson *v.* Duleep Singh (1879), 11 Ch. D. 798.

58. —— —— Excessive interest charged on mortgage.]—DANIELL *v.* SINCLAIR, No. 10, *ante*.

59. Ignorance resulting from matter of law.]—A misapprehension of right under a deed, not arising from the misconstruction of the deed, is a mistake in fact, & consequently relievable in equity.—DENYS *v.* SHUCKBURGH (1840), 4 Y. & C. Ex. 42; 5 Jur. 21; 160 E. R. 912.

*Annotations:—***Consd.** Baker *v.* Courage, [1910] 1 K. B. 56. **Refd.** Gibbs *v.* Guild (1881), 8 Q. B. D. 296. **Mentd.** Roberts *v.* Eberhardt (1853), 2 Eq. Rep. 780; Eccl. Comrs. for England *v.* N. E. Ry. (1877), 4 Ch. D. 845; Adair *v.* New River Co. & Metropolitan Water Board (1908), 25 T. L. R. 193.

60. ——.]—COOPER *v.* PHIBBS, No. 27, *ante*.

61. ——.]—ALLCARD *v.* WALKER, No. 16, *ante*.

62. Ignorance of rights dependent on mixed question of law & fact—Execution of deed of indemnity—Misapprehension as to liability.]—BROUGHTON *v.* HUTT, No. 272, *post*.

63. —— Fact involving a conclusion of law.]—The man who knows the facts is taken to know the law; but when you state as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact & not of law. . . . It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly a fact which does not involve it (JESSEL, M.R.).—EAGLESFIELD *v.* LONDONDERRY (MARQUIS) (1875), 4 Ch. D. 693; 34 L. T. 113; 24 W. R. 568; *on appeal* (1876), 4 Ch. D. p. 708, C. A.; (1878), 38 L. T. 303, H. L.

*Annotations:—***Refd.** Deeley *v.* Lloyds Bank, [1912] A. C. 756. **Mentd.** Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394; Cargill *v.* Bower (1878), 10 Ch. D. 502; Yorkshire Railway Waggon Co. *v.* Maclure & Cornwall Minerals Ry. (1881), 45 L. T. 747.

See, also, FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 255–257, Nos. 814–831.

SUB-SECT. 3.—MISTAKE AS TO IDENTITY OF OTHER PARTY.

64. General rule.]—Jurists have laid down, as I think rightly, the test to be applied as to whether there is such a mistake as to the party as is fatal to there being any contract at all, or as to whether there is an intention to contract with *a de facto* physical individual, which constitutes a contract that may be induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. *Pothier, Traité des Obligations, section* 19, lays down the principle thus, in a passage adopted by FRY, J., in *Smith* v. *Wheatcroft*, No. 71, *post:* "Does error in regard to the person with whom I contract destroy the consent & annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent & consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, & I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand" (LORD HALDANE).—LAKE *v.* SIMMONS, [1927] A. C. 487, H. L.

PART III. SECT. 2, SUB-SECT. 3.

e. Whether ground for relief—Payment to executor de son tort.]—Payments made to an exor. *de son tort* form no defence to an action by the rightful exor.—HUNTER *v.* WALLACE (1855), 13 U. C. R. 385.—**CAN.**

d. —— Order by predecessor in business—Delivery taken by successor without notice of change.]—KEATING *v.* GRAHAM (1892), 26 O. R. 361.—**CAN.**

e. —— Mistake in name of vendor.] — ALBERTA CENTRAL LAND CORPN. *v.* FORD (Alta.) (1911), 17 W. L. R. 241.—**CAN.**

Sect. 2.—When relief granted: Sub-sects. 3 & 4, A. (a).

65. Whether ground for relief—Contract subsequently treated as subsisting—By party mistaken.]—Where the broker makes a mistake in the contract, describing, in the bought & sold notes, goods to be sold by A., B., & C., which he believed to be the real name of the firm which employed him; which firm, in fact, from a recent alteration that the broker was not privy to, consisted of A., D. & E. only:—*Held:* the purchaser of the goods was not at liberty to avoid the contract on this account, after having treated the contract as subsisting upon a subsequent communication from pltfs., unless he could show that he had been prejudiced, or has lost the benefit of a set-off.—MITCHELL *v.* LAPAGE (1816), Holt, N. P. 253, N. P.

Annotation:—**Refd.** Ramsden & Carr *v.* Chessum & Ward (1912), 107 L. T. 746.

66. —— Order addressed to predecessor in business—Executed by successor without notice of change.]—Defts. who had been in the habit of dealing with B., sent a written order for goods directed to B. Pltf., who on the same day had bought B.'s business, executed the order without giving defts. any notice that the goods were not supplied by B.:—*Held:* pltf. could not maintain an action for the price of the goods against defts.—BOULTON *v.* JONES (1857), 2 H. & N. 564; 27 L. J. Ex. 117; 157 E. R. 232; *sub nom.* BOLTON *v.* JONES, 30 L. T. O. S. 188; 3 Jur. N. S. 1156; 6 W. R. 107.

Annotations:—**Consd.** British Waggon Co. *v.* Lea (1880), 5 Q. B. D. 149. **Refd.** Lindsay *v.* Cundy (1876), 34 L. T. 314; Jaeger's Sanitary Woollen System Co. *v.* Walker (1897), 77 L. T. 180; Said *v.* Butt, [1920] 3 K. B. 497.

67. —— Mistake in name of purchaser.]—H., believing he was dealing with a firm carrying on business as G. & co. agreed to sell goods to a person of the same name, as one of the firm of G. & co. The goods were deposited with an auctioneer who advanced money on them. In an action of trover by pltf. to recover the goods from the auctioneer:—*Held:* there was no contract with the person who was of the same name as the firm, & consequently trover would lie at the suit of pltf. to recover his goods.—HARDMAN *v.* BOOTH (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L. J. Ex. 105; 7 L. T. 638; 9 Jur. N. S. 81; 11 W. R. 239; 158 E. R. 1107.

Annotations:—**Apld.** Hollins *v.* Fowler (1875), L. R. 7 H. L. 757. **Folld.** Cundy *v.* Lindsay (1878), 3 App. Cas. 459. **Refd.** G. W. Ry. *v.* London & County Bank (1901), 85 L. T. 152; Oppenheimer *v.* Frazer & Wyatt, [1907] 2 K. B. 50; Phillips *v.* Brooks, [1919] 2 K. B. 243; Folkes *v.* King, [1923] 1 K. B. 282; Lake *v.* Simmons (1926), 95 L. J. K. B. 586. **Mentd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354; Arnold *v.* Cheque Bank, Same *v.* City Bank (1876), 1 C. P. D. 578; Whitehorn *v.* Davison, [1911] 1 K. B. 463.

68. —— Acceptance by administrator of surviving executor in own name—Sale entered up in name of executors — Sale of shares.] — The directors of a banking co. being empowered to allot shares to existing shareholders, offered certain shares to the exors. of deceased shareholder. The offer was sent to a person who was not one of the exors., but had been in the habit of conducting the affairs of the survivor of them, & it was accepted by him on his own account, but entered in the books in the names of the exors.:—*Held:* his acceptance did not constitute a valid & completed contract between such person & the co., & his name was removed from the list of contributories.—*Re* LEEDS BANKING CO., MALLORIE'S CASE (1866), 2 Ch. App. 181; 15 L. T. 458; *sub nom. Re* LEEDS BANKING CO., *Ex p.* MALLORIE, 36 L. J. Ch. 141; 15 W. R. 270, L. JJ.

Annotation:—**Mentd.** *Re* Leeds Banking Co., *Ex p.* Matthewman (1866), 12 Jur. N. S. 982.

69. —— Mistake in name of insurance company—Liability of company.]—A man entered into a contract with the agent of an insurance co. to insure him, under the impression that he was dealing with the agent of another co.:—*Held:* there was a contract, & the co. whose agent he dealt with was liable.—MACKIE *v.* EUROPEAN ASSURANCE SOCIETY (1869), 21 L. T. 102; 17 W. R. 987.

Annotation:—**Mentd.** Murfitt *v.* Royal Insce. (1922), 38 T. L. R. 334.

70. —— Goods supplied by mistake to bankrupt—Restoration by trustee.] — A liquidating debtor who had not obtained his discharge, engaged in trade. He ordered some goods from a wholesale house, who sent the goods to him in the belief that the order had come from a firm with whom they were acquainted, & whose name resembled that under which the debtor traded. The trustee claimed the goods:—*Held:* the debtor had acquired no property in the goods, & the trustee was bound to return them to the persons who sent them.—*Re* REED, *Ex p.* BARNETT (1876), 3 Ch. D. 123; 45 L. J. Bcy. 120; 34 L. T. 664; 24 W. R. 904.

71. —— Personal considerations entering into contract.]—Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract: not so where the person sought to be bound would have been equally willing to make the same contract with any other person.—SMITH *v.* WHEATCROFT (1878), 9 Ch. D. 223; 47 L. J. Ch. 745; 39 L. T. 103; 27 W. R. 42.

Annotations:—**Apld.** Nash *v.* Dix (1898), 78 L. T. 445. **Consd.** Gordon *v.* Street, [1899] 2 Q. B. 641; Phillips *v.* Brooks, [1919] 2 K. B. 243; Said *v.* Butt, [1920] 3 K. B. 497. **Refd.** Berners *v.* Fleming, [1925] Ch. 264.

72. —— Contracts induced by misrepresentation & fraud.]—L. was a manufacturer in Ireland; Alfred Blenkarn, who occupied a room in a house looking into Wood Street, Cheapside, wrote to L., proposing a considerable purchase of L.'s goods, & in his letter used this address: "37 Wood Street, Cheapside," & signed the letters, without any initial for a Christian name, with a name so written that it appeared to be "Blenkiron & co." There was a respectable firm of that name "W. Blenkiron & co." carrying on business at 123 Wood Street. L. sent letters & afterwards supplied goods, the letters, the goods & the invoices accompanying the goods, being all addressed to "Messrs. Blenkiron & co.," 37 Wood Street." The goods were received by Blenkarn at that place, & disposed of to the defts., who were entirely ignorant of the fraud:—*Held:* no contract was made with Blenkarn, even a temporary property in the goods never passed to him, so that he never had a possessory title which he could transfer to defts., who were consequently liable to the pltfs. for the value of the goods.—CUNDY *v.* LINDSAY (1878), 3 App. Cas. 459; 38 L. T. 573; 42 J. P. 483; 26 W. R. 406; 14 Cox, C. C. 93; *sub nom.* LINDSAY & CO. *v.* CUNDY, 47 L. J. Q. B. 481, H. L.; *affg.* (1877), 2 Q. B. D. 96, C. A.; *revsg.* (1876), 1 Q. B. D. 348, D. C.

Annotations:—**Consd.** Babcock *v.* Lawson (1879), 4 Q. B. D. 394. **Apld.** *Re* International Soc. of Auctioneers & Valuers, Baillie's Case, [1898] 1 Ch. 110. **Consd.** Phillips *v.* Brooks, [1919] 2 K. B. 243; Folkes *v.* King, [1923] 1 K. B. 282. **Refd.** *Re* Reed, *Ex p.* Barnett (1876), 3 Ch. D. 123; Attenborough *v.* London & St. Katharine's Dock Co. (1878), 3 C. P. D. 450; Bentley *v.* Vilmont (1887), 12 App. Cas. 471; Kings Norton Metal Co. *v.* Edridge, Merrett, Same *v.* Roberts (1897), 14 T. L. R. 98; G. W. Ry. *v.* London & County Banking Co., [1901] A. C. 414; Lake *v.* Simmons, [1927] A. C. 487. **Mentd.** Moyce *v.* Newington (1878), 4 Q. B. D. 32; R. *v.* Central Criminal Court JJ. (1886), 18 Q. B. D. 314; Henderson *v.* Williams, [1895] 1 Q. B. 521; Whitehorn *v.* Davison, [1911] 1 K. B. 463; Nanka-Bruce *v.* Commonwealth Trust, [1926] A. C. 77.

73. —— ——.]—In 1895 defts., who were trustees of a Congregational chapel, put up for sale by public auction a building, which had formerly been used as their chapel. The conditions of sale imposed no restrictions on the user of the building. After the sale C. made an offer for the building, but defts. declined to accept it, on the ground that it was made on behalf of a committee of Roman Catholics, who intended to use the building as a Roman Catholic place of worship, & defts. objected to sell for that purpose. The committee then told pltf., who was the manager of a mineral water co., that if he could get the property they would buy it of him at £100 profit. Pltf.'s solrs. wrote to defts.' agent, making an offer for the property "on behalf of our client, the manager of the E. Mineral Water co." After some negotiations, a contract was signed by defts. for sale of the building to pltf. at £1,025 a price less than C.'s offer. No direct statement was made that pltf. was buying for the co., but it was admitted that defts., during the negotiations, believed that he was, & that pltf. knew it. Pltf. signed the contract as principal without protest from defts.' agent. Defts. refused to complete on the ground that pltf. was buying as agent, for the Roman Catholic committee, to whom he knew they would not sell, & had obtained the contract by misrepresentation:—*Held:* pltf. was not buying as agent for the Roman Catholic committee, but for himself with a view to resell to them at a profit; the misrepresentation as to the Mineral Water co. was immaterial because the vendors did not care whether they sold to the co. or pltf., & as between them no consideration of the person with whom they were contracting entered as an element into the contract.—NASH *v.* DIX (1898), 78 L. T. 445.

Annotation:—**Refd.** Dyster *v.* Randall, [1926] Ch. 932.

74. —— ——.]—If, in negotiations for a contract, an agent made a false representation as to the name of his principal, knowing that, if he disclosed the true name the other party would not enter into the contract, the ct. will not order specific performance of the contract.

A. signed a contract for the sale of a house to B. Before signing he asked, "Are you buying for C. or his nominess?" B. answered "No." He was, in fact, buying for nominees of C. to whom he afterwards assigned the contract. He & they brought an action for specific performance:—*Held:* the contract could not be specifically performed.—ARCHER *v.* STONE (1898), 78 L. T. 34.

Annotations:—**Distd.** Nash *v.* Dix (1898), 78 L. T. 445. **Refd.** Said *v.* Butt, [1920] 3 K. B. 497; Dyster *v.* Randall, [1926] Ch. 932.

75. —— ——.]—Shortly before Nov. 1895, B. took steps with a view to becoming a fellow of an old-established society called "The Auctioneers' Institute of the United Kingdom." In Nov. 1895, X., an officer of a recently incorporated society, with unlimited liability, named "The Institute of Auctioneers & Valuers," called on B. & asked him to become a member of it. B. believed the new society to be the old one, & in this belief which was known to & fostered by X., B. applied for membership in the new society, & received a certificate of membership. In answer to his subsequent inquiries of the new society, untruthful statements were made to B. which resulted in his remaining in his error as to the identity of the society:—*Held:* the principle of *Cundy* v. *Lindsay*, No. 72, *ante*, applied; there was not even a voidable contract to become a member, but no contract at all.—*Re* INTERNATIONAL SOCIETY OF AUCTIONEERS & VALUERS, BAILLIE'S CASE, [1898] 1 Ch. 110; 67 L. J. Ch. 81; 77 L. T. 523; 46 W. R. 187; 42 Sol. Jo. 97; 4 Mans. 393.

Novation of contract, *see* CONTRACT, Vol. XII., pp. 596 *et seq.*

SUB-SECT. 4.—MISTAKE AS TO IDENTITY OF SUBJECT-MATTER.

A. When Contract Ambiguous.

(a) In General.

76. General rule—Contract not enforceable.]—(1) Upon the ambiguous terms of a contract, as including or excluding the timber, the purchaser's bill for specific performance dismissed; & having throughout insisted upon his construction, he was not permitted to compel the vendor to convey upon the terms he originally offered.

If there is such a degree of doubt & ambiguity, that the ct. can come to no other conclusion, than that the parties did not rightly understand, what the one meant to buy, & the other to sell, & upon that ground of mistake the one has been let off, that is a ground for refusing in a ct. of equity to perform a contract, the effect of which must be so much injustice to one party or the other (PLUMER, V.-C.).

(2) The Master of the Rolls in forming that conclusion adopts LORD THURLOW'S opinion in *Calverley* v. *Williams*, *Williams* v. *Calverley*, No. 159, *post*, & seems to think, the consequence of such a mistake would be, that in reality there was no agreement between them; that, misunderstanding each other, the one proposing to buy one thing, the other to sell another, a contract, so founded in mistake, cannot consistently with justice be executed (PLUMER, V.-C.).

(3) The rule, admitting evidence in those cases, is intelligible & clear. It is admitted, not to vary an agreement, as it is expressed open to no objection, & therefore upon the letter binding, but to show circumstances of fraud; making it unconscientious in the party, who so obtained it, to insist upon, & unjust in the ct. to decree, the performance. Fraud is not the only head, upon which parol evidence may be received, &, if made out satisfactorily, a specific performance may be refused. Upon clear evidence of mistake or surprise, that the parties did not understand each other, it is introduced, not to explain, or alter, the agreement, but consistently with its terms to show circumstances of mistake or surprise, making a specific performance, as in the case of fraud, unjust; & therefore not conformable to the principles, upon which a ct. of equity exercises this jurisdiction (PLUMER, V.-C.).—CLOWES *v.* HIGGINSON (1813), 1 Ves. & B. 524; 35 E. R. 204.

Annotations:—*As to* (1) **Refd.** Berners *v.* Fleming, [1925] Ch. 264. *As to* (2) **Consd.** Price *v.* Ley (1863), 4 Giff. 235. **Refd.** Douglas *v.* Baynes, [1908] A. C. 477. *As to* (3) **Consd.** Manser *v.* Back (1848), 6 Hare, 443. *Generally*, **Refd.** Dear *v.* Verity (1869), 38 L. J. Ch. 297; Holliday *v.* Lockwood (1917), 86 L. J. Ch. 556.

77. No contract unless evidence clearly shows one—Identification of goods purchased.]—RAFFLES *v.* WICHELHAUS (1864), 2 H. & C. 906; 33 L. J. Ex. 160; 159 E. R. 375.

Annotations:—**Consd.** Smith *v.* Hughes (1871), L. R. 6 Q. B. 597; Van Praagh *v.* Everidge, [1902] 2 Ch. 266.

Sect. 2.—When relief granted: Sub-sect. 4, A. (a) & (b) i. & ii., & B.]

78. —— Bill of lading applicable to two charterparties.]—A charterparty was entered into in London on June 17, 1872, between pltf., as master of a ship lying at London, & R., a ship-broker, to carry 407 tons of iron from H. to G., at freight of 7*s.* 3*d.* per ton. Freight to be paid in London on signing bills of lading, the owner or master to have an absolute lien for freight. On the following day L. chartered the ship to deft. at 8*s.* per ton for the same amount of iron. The charter contained similar clauses as to freight & lien, & the following clause at the end: "The brokerage of 5 per cent. is due on the execution of this charter to R. by whom the vessel is to be entered & cleared at the port of loading." Though deft. thought he was treating with L. as broker for the ship, L. had no authority in fact to act as broker for pltf., or to receive the freight; & neither pltf. nor deft. knew of the charter entered into by the other. The cargo having been put on board by deft., the master signed bills of lading making it deliverable to consignees or assigns, "they paying freight for the said goods as per charterparty." Pltf. did not demand the freight on signing the bills of lading. The cargo was duly delivered at the port of discharge; & in the meantime L. obtained payment of the freight of 8*s.* per ton from deft., & afterwards stopped payment, leaving the 7*s.* 3*d.* per ton unpaid to pltf. Pltf. having sued deft. for the 7*s.* 3*d.* per ton for the carriage of the iron:—*Held:* pltf. could not recover; for pltf. & deft. never were *ad idem*, & consequently there was no express contract between them; & under the circumstances, no contract to pay reasonable freight for the carriage could be implied on the shipment of the goods.—SMIDT *v.* TIDEN (1874), L. R. 9 Q. B. 446; 30 L. T. 891; 22 W. R. 913; 2 Asp. M. L. C. 307; *sub nom.* SCHMIDT *v.* TIDEN, 43 L. J. Q. B. 199.

Annotations:—**Refd.** The Canada (1897), 13 T. L. R. 238. **Mentd.** Furness, Withy *v.* White, [1894] 1 Q. B. 483.

79. Admissibility of evidence — To identify subject-matter intended.]—Deft., by a written contract, agreed to sell the pltf. 60 tons of "Ware potatoes," at £5 a ton. It appeared in evidence that in the neighbourhood three qualities of potatoes were known, "Wares, Middlings, & Chats," Wares being the largest & best:—*Held:* evidence was not admissible to show that pltf. had in fact contracted for the sale to him of a particular kind of Ware potatoes, viz. "Regent's Wares," while those offered to him by deft. were of an inferior kind, viz. "Kidney Wares."

This is not a latent ambiguity. A latent ambiguity is where you show that words apply equally to two different things or subject-matters, & then evidence is admissible to show which of them was the thing or subject-matter intended (ALDERSON, B.).—SMITH *v.* JEFFRYES (1846), 15 M. & W. 561; 15 L. J. Ex. 325; 7 L. T. O. S. 231; 153 E. R. 972.

Annotations:—**Refd.** M'Donald *v.* Longbottom (1859), 5 Jur. N. S. 1102. **Mentd.** Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361.

80. —— ——.]—By a written agreement, pltf. undertook to do work for deft. on the houses "in South Street and Southampton, Street." It appeared that, at the date of the agreement, deft. had land & houses in South Street, but had nothing in Southampton Street:—*Held:* the agreement being unambiguous, evidence was not admissible to show that the word "and" was inserted by mistake; & it was a misdirection to leave it to the jury to say what was the intention of the parties.

There are numerous cases to show that parol evidence may be received for the purpose of explaining what the parties to an agreement meant; but that is only where there is some ambiguity on the face of it. Here, there was none (WILDE, C.J.).—HITCHIN *v.* GROOM (1848), 5 C. B. 515; 17 L. J. C. P. 145; 10 L. T. O. S. 346; 136 E. R. 979.

Ambiguity in will.]—*See* WILLS.

(*b*) *Falsa demonstratio non nocet.*

i. *General Rule.*

Statement of rule—Interpretation of deed.]—*See* DEEDS, Vol. XVII., pp. 277–279.

81. Application of rule—Misdescription in date of bill of exchange.]—It appears upon the evidence that the bill accepted by pltf. was drawn & dated on Oct. 25; & it is contended that deft.'s promise is confined to indemnifying pltf. in respect of a bill dated Oct. 24 & cannot charge him in respect of a bill of a different date. But I think the substance of the transaction was a promise on the part of deft. to stand half the loss that might arise by reason of pltf. having lent his name to Read on a bill for £110 & that the bill is sufficiently identified. Although there is a *falsa demonstratio* in one respect the rest of the surrounding circumstances are abundantly sufficient in my judgment to identify the subject matter of the contract & effect must be given to the substance of the transaction (ERLE, C.J.).—WAY *v.* HEARN (1862), 13 C. B. N. S. 292; 32 L. J. C. P. 34; 6 L. T. 751; 143 E. R. 117.

—— **Interpretation of deeds.**]—*See* DEEDS, Vol. XVII., pp. 279–283.

—— **Insurance policy.**]—*See* INSURANCE, Vol. XXIX., pp. 94, 95.

—— **Wills.**]—*See* WILLS.

—— **Cases to which doctrine does not apply.**]—*See* Sub-sect. 4, A. (*b*) ii., *post.*

ii. *Cases to Which Doctrine does Not Apply.*

82. Words forming essential part of description —Agreement to sell lease.]—Applt. agreed to sell his interest in certain leasehold premises to resp. the premium to be paid by the latter to the former being at the rate of £15 a year for "each & every year of the existing term" of a certain underlease held by applt. of other business premises, which term applt. by a mistake, but in perfect good faith, told resp. was "about four years." Applt., the mistake being discovered, claimed that the premium should be £105, as the lease of the other premises was not "about four years," but seven years unexpired:—*Held:* the words "about four years" were dominant words & were not inserted in the agreement merely as a statement of belief which resp. was not entitled to rely on.—WATKINSON *v.* WILSON (1911), 55 Sol. Jo. 617, H. L.

——.]—*See, further,* DEEDS, Vol. XVII., pp. 284, 285, Nos. 964–967.

—— **Description of legatees in a will.**]—*See* WILLS.

—— **Words denoting extent of estate devised.**]—*See* WILLS.

83. Intention ascertainable from extrinsic evidence—Construction of lease.]—Where in a grant or devise the description of parcels is made

signing, & if it appears that one party signed it in the belief that it had one meaning & the other that it had another meaning, there is no contract, the parties never having been *ad idem*. —GOODFELLOW *v.* LIFE ASSURANCE CO. OF AUSTRALIA, LTD., [1920] V. L. R. 296.—AUS.

up of more than one part, & one part is true & the other false, there, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected as *falsa demonstratio*, & will not vitiate the grant or devise. The doctrine is not to be confined to cases where the first part of the description is true & the latter untrue, it being immaterial in what part of the description the *falsa demonstratio* occurs.

Rooms on the second floor of Nos. 13 & 14, Old Bond Street were demised, together with free ingress & egress for the lessee " through the staircase & passages of No. 13 " to & from the demised premises : there was no staircase in No. 13 leading to the demised premises, but there was a staircase in No. 14 :—*Held :* there had been a common mistake, the intention of the parties being that the lessee should have the use of the staircase of No. 14, & accordingly the doctrine of *falsa demonstratio* did not apply ; but the ct. ordered the lease to be rectified by the substitution of the staircase of " No 14 " for that of " No. 13."—COWEN *v.* TRUEFITT, LTD., [1899] 2 Ch. 309 ; 68 L. J. Ch. 563 ; 81 L. T. 104 ; 47 W. R. 661 ; 43 Sol. Jo. 622, C. A.

Annotations :—**Refd.** Anderson *v.* Berkley, [1902] 1 Ch. 936 ; Eastwood *v.* Ashton, [1915] A. C. 900 ; Watcham *v.* A.-G. of East Africa Protectorate, [1919] A. C. 533 ; Craddock *v.* Hunt, [1923] 2 Ch. 136.

B. When Contract Clear.

84. Unilateral mistake.]—Property was put up for sale under the description of " All that inn with the brewhouse, outbuildings, & premises known as The Ship, together with the saddler's shop & premises adjoining thereto, situate at N., Nos. 454 & 455 on the tithe map, & containing by admeasurement twenty perches more or less." In the saleroom were plans of the property, which consisted of the closes numbered 454 & 455 of the tithe map. At the back of the property were two pieces of garden ground containing together about twenty perches, not belonging to the vendors, one of which had for many years been occupied with the inn & the other with the saddler's shop, & which were hardly at all fenced off from the premises with which they were occupied. Deft., who was acquainted with the property & knew that the gardens were occupied along with the inn & saddler's shop, did not look at the plans, & bought in the belief that he was buying the whole of the property in the occupation of the tenants :—*Held :* the purchaser could not resist specific performance on the ground of mistake.—TAMPLIN *v.* JAMES (1880), 15 Ch. D. 215 ; 43 L. T. 520 ; 29 W. R. 311, C. A.

Annotations :—**Consd.** Goddard *v.* Jeffreys (1881), 51 L. J. Ch. 57 ; Van Praagh *v.* Everidge, [1902] 2 Ch. 266 ; Eastes *v.* Russ, [1914] 1 Ch. 468. **Refd.** Preston *v.* Luck (1884), 27 Ch. D. 497 ; Aspinalls to Powell & Scholefield (1889), 60 L. T. 595 ; Pope & Pearson *v.* Buenos Ayres New Gas Co. (1892), 8 T. L. R. 758 ; *Re* Hare & O'More's Contract, [1901] 1 Ch. 93 ; Hodson *v.* Thetard (1907), 51 Sol. Jo. 482 ; Holliday *v.* Lockwood, [1917] 2 Ch. 47. **Mentd.** Bell *v.* Balls, [1897] 1 Ch. 663.

85. ——.]—The parcels being deficient, the purchasers sued on the covenant. The vendor alleged mutual mistake, & alternatively unilateral mistake on his own part, & counterclaimed for rectification of the conveyance :—*Held :* (1) the written contract & conveyance being unambiguous, parol evidence of mistake was inadmissible after completion either as a defence to the action, to which it afforded no answer, or to support the counterclaim, which amounted to claiming specific performance of a written contract with a parol variation.

(2) I have always understood the law to be that in order to obtain rectification there must be a mistake common to both parties (FARWELL, J.).

(3) Rescission after conveyance of land can only be obtained on the ground of unfair dealing (FARWELL, J.).—MAY *v.* PLATT, [1900] 1 Ch. 616 ; 69 L. J. Ch. 357 ; 83 L. T. 123 ; 48 W. R. 617.

Annotations :—*As to* (1) **Dbtd.** Thompson *v.* Hickman, [1907] 1 Ch. 550 ; Fowler *v.* Sugden (1916), 85 L. J. K. B. 1090 ; Craddock *v.* Hunt, [1923] 2 Ch. 136. **Refd.** Forgiono *v.* Lewis, [1920] 2 Ch. 326.

86. ——.]—At a sale by auction of landed property on Nov. 18, 1901, deft. bid for one lot by mistake for another, & it was knocked down to him. On discovering his mistake he refused to sign the contract, whereupon the auctioneer signed it as his " agent."

The printed particulars, conditions, & an annexed form of contract had been prepared for a sale on " Oct. 17, 1901," which was postponed till Nov. 18, but by inadvertence the original date, though altered in the particulars, remained in the conditions & form of contract :—*Held :* there was no contract within Stat. Frauds, nor, *semble*, any *consensus ad idem*, to support an action by the vendor for specific performance.—VAN PRAAGH *v.* EVERIDGE, [1903] 1 Ch. 434 ; 72 L. J. Ch. 260 ; 88 L. T. 249 ; 51 W. R. 357 ; 19 T. L. R. 220 ; 47 Sol. Jo. 318, C. A.

87. ——.]—A builder entered into a contract with an urban authority for the erection of a number of houses. The contract was sealed by the corpn. in accordance with Public Health Act, 1875 (c. 55), s. 174 (1). The builder assigned the benefit of the contract to a building firm & that firm sought rectification of the contract on the ground that at the time at which the builder entered into the contract he was labouring under a serious mistake :—*Held :* the contract expressed the intention of deft. council, having regard to the provisions of Public Health Act, 1875 (c. 55), s. 174 (1), there was no contract at all between the parties until the seal of the council was affixed to the formal contract, & the ct. had no jurisdiction to grant the relief sought. *Semble :* even if the parties had been labouring under a common mistake, the contract could not have been rectified.

The result is very unfortunate for pltf. & an extreme hardship on him. But can I rectify the contract so as to make it give effect to what was undoubtedly his intention when he entered into the contract ? It appears to me that I cannot. For, in the first place, it follows from what I have said that in my opinion the parties were not labouring under a mutual mistake (ROMER, J.).

There was no contract between these parties at all until the seal of the council was put to the formal contract which was entered into. That being so, I must hold that that contract, & that contract alone, expressed the intention of defts. at the time that defts.' seal was attached. If there had been an earlier parol contract between the parties, & then an attempt had been made to put that parol contract into writing, & in the course of that attempt a blunder had been made so that the written contract did not correctly represent what had been verbally agreed, there is no doubt I could have rectified the written document. But where, as here, there is no precedent contract between the parties, I cannot see that I have any jurisdiction to make a different contract between the parties from the only one which exists, merely because I come to the conclusion that both parties previously to making that contract had intended to make a different one (ROMER, J.).

I need hardly say that in so deciding I do not

Sect. 2.—When relief granted: Sub-sect. 4, B.; sub-sect. 5.]

in the least wish to revive the old suggestion made some years ago that one could never rectify a written contract for the sale of lands so as to conform with a previous parol contract. It is now, I think, settled that in such a case the ct. can rectify the written contract, & there is nothing in Stat. Frauds to prevent it from being done. My difficulty here is not that we have a parol contract between the parties which could not be enforced. The difficulty is that there was no parol contract at all, no contract of any kind at all between the parties until the contract under seal was executed (ROMER, J.).

At any rate, it has not been shown to me that defts. were labouring under any mistake, & of course the *onus* is upon pltf. to prove that fact, if fact it were (ROMER, J.).—HIGGINS (W.), LTD. *v.* NORTHAMPTON CORPN., [1927] 1 Ch. 128; 90 J. P. 82.

Mistake as to property intended to be sold.]—*See* SALE OF LAND.

Mistake by purchaser—Specific performance.]—*See* SPECIFIC PERFORMANCE.

SUB-SECT. 5.—MISTAKE AS TO EXISTENCE OF SUBJECT-MATTER OR FACT MATERIALLY CONNECTED THEREWITH.

88. General rule — Transaction set aside.] — Pltf. has a proper ground of relief, & that on the head of mistake. Here was a will made by Isaac Wells in 1721, but that will was revoked by the settlement afterwards made in 1725. The agreement about levying a fine was founded upon a mistake, the parties taking it for granted, that there was a will in being when there was none. For which reason the acts done under that agreement must be set aside, as being founded upon a mistake (LORD HARDWICKE, C.).—MARTIN *v.* SAVAGE (1740), Barn. Ch. 189; 27 E. R. 608.

Annotation :—**Mentd.** Cave *v.* Holford (1798), 3 Ves. 650.

89. —— ——.] — Reference upon the title: an objection to the specific performance, on the ground, that premises to which no title could be made, were represented as included in the purchase, & were a principal inducement to the purchaser, failing upon the evidence.

Effect of the common mistake of both parties to a contract; & of mistake of one, not occasioned by the other: in the former case avoiding the contract.

Where the contract has proceeded upon the mistake of both parties, that avoids the contract at law as well here (LORD ERSKINE, C.).—STAPYLTON *v.* SCOTT, NICHOLSON *v.* STAPYLTON (1807), 13 Ves. 425; 33 E. R. 353, L. C.; *subsequent proceedings* (1809), 16 Ves. 272, L. C.

Annotation :—**Reid.** Knatchbull *v.* Grueber (1815), 1 Madd. 153.

90. —— ——.]—(1) Where a purchaser buys the interest of a vendor in a remainder in fee, expectant on an estate tail, if, at the time of the contract the tenant in tail had actually suffered a recovery of which both parties were ignorant till after the conveyance had been executed & an absolute bond given for securing payment of the purchase-money; this ct. will interfere to rescind the contract, on the equity that the vendor had no interest in the subject-matter at the time of the sale, & that on the ground of mistake, although there has been no fraud from knowledge, or concealment of the fact on the part of the vendor, & they will not only order such a bond to be delivered up to be cancelled, but that all interest paid on it shall be refunded.

(2) The costs are not allowed on either side in such a case.—HITCHCOCK *v.* GIDDINGS (1817), 4 Price, 135; Dan. 1; Wils. Ex. 32; 146 E. R. 418.

Annotations :—*As to* (1) **Distd.** Clare *v.* Lamb (1875), L. R. 10 C. P. 334. **Reid.** Joliffe *v.* Baker (1883), 11 Q. B. D. 255; *Re* Tyrell, Tyrell *v.* Woodhouse (1900), 82 L. T. 675.

91. —— ——.] — In contemplation of a marriage between A. & B., settlements were made of real estate belonging to B., the intended wife, & of personalty belonging to A., the intended husband, upon uses & trusts, which, after the solemnisation of the marriage, were to arise for the benefit of the husband & wife, & their issue; the marriage ceremony was performed, & the parties lived together as husband & wife; but, after the lapse of more than a year, & before the parties had any children, the marriage was discovered to be void, & they executed deeds purporting to revoke the former settlement: some time afterwards a new settlement, in contemplation of marriage, was made, including the same property as the former, but different from the former in the interests given to the issue, as well as in other provisions; the parties then intermarried, & there was issue of the marriage :—*Held :* the first settlement, being founded on mistake & misapprehension, was not binding on the parties, & the rights of the issue, both as to the real estate & the personalty, were regulated by the second settlement.

This ct. . . . will not hold that a transaction founded entirely on mistake & on the misapprehension of the parties, ought to be considered as binding upon them (LORD LYNDHURST, C.).—ROBINSON *v.* DICKENSON (1828), 3 Russ. 399; 7 L. J. O. S. Ch. 70; 38 E. R. 625, L. C.; *previous proceedings, sub nom.* BOUGHTON *v.* SANDILANDS (1811), 3 Taunt. 342.

Annotations :—**Reid.** Page *v.* Horne (1848), 17 L. J. Ch. 200; Proby *v.* Landor (1860), 28 Beav. 504; Chapman *v.* Bradley (1863), 9 L. T. 495; *Re* Thellusson, *Ex p.* Abdy [1919] 2 K. B. 735.

92. —— ——.] — A. executed a bond to B. & C., conditioned for payment of an annuity of £100 to D. for life, & assigned an annuity of £120 for the life of one M. & a policy of insurance for £700 on M.'s life, to B. & C., upon certain trusts for further securing the annuity of £100.

M. died, & A. died shortly afterwards, having, as was then believed, received the £700 & applied it to his own use. Shortly afterwards D., in consideration of £500, released A.'s personal representative & B. & C. from the annuity of £100 & the securities for it. Some years afterwards it was discovered that A. had placed the £700 in a bank, in the names of B. & C., where it still remained :—*Held :* the release having been executed under a mistake was inoperative, & the £700 remained impressed with the trusts for securing the annuity of £100.—HORE *v.* BECHER (1842), 12 Sim. 465; 11 L. J. Ch. 153; 6 Jur. 93; 59 E. R. 1211.

Annotations :—**Mentd.** Rogers *v.* Acaster (1851), 14 Beav. 445; Fitzgerald *v.* Fitzgerald (1868), L. R. 2 P. C. 83; Widgery *v.* Topper (1877), 38 L. T. 434.

93. —— ——.] — Extent of lien on a fund, where the grantor of an annuity agreed to sell to the grantee the fund on which the annuity was secured, & to repurchase the annuity, but, in consequence of a mutual mistake, the contract for the sale of the fund could not be specifically performed.

A fund was held on trust for one for life, with remainder between B. & C. equally, if living, with benefit of survivorship between them. B. sold his reversionary interest. At the time of the sale,

C. was dead, but the fact was neither known to the vendor nor to the purchaser :—*Held :* the sale could not stand.—COLYER *v.* CLAY (1843), 7 Beav. 188 ; 49 E. R. 1036 ; *sub nom.* COLLYER *v.* CLAY, 1 L. T. O. S. 311.

94. —— ——.] — L., who resided at Sydney, New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to certain trustees to dispose of it for his benefit. Pltf. entered into a correspondence by letter with the trustees, upon the subject of the purchase, & from the various letters which passed between the parties, it appeared that the terms of the purchase were not finally determined upon & settled until Feb. 28, 1849. Upon Feb. 6 the annuitant died. The purchase-money was paid by pltf. in ignorance of the fact, & was ultimately received by the extrix. of deceased :—*Held :* as at the time of the purchase of the annuity it had ceased to exist, pltf. was entitled to recover back the whole of the purchase-money from the extrix. on the ground that the money had been paid without consideration.—STRICKLAND *v.* TURNER (1852), 7 Exch. 208 ; 22 L. J. Ex. 115 ; 155 E. R. 919.

Annotations :—**Consd.** Hastie *v.* Couturier (1853), 9 Exch 102. **Apld.** Huddersfield Banking Co. *v.* Lister, [1895] 2 Ch. 273. **Refd.** Persian Investment Corpn. *v.* Prince Malcolm Khan (1893), 37 Sol. Jo. 340 ; Turner *v.* Green, [1895] 2 Ch. 205.

95. —— ——.]—A cargo of corn was shipped by A. at Salonica in Feb. 1848, for delivery in London. On May 15 it was sold by H. a factor, who made the sale of a *del credere* commission. The contract described the corn as "of average quality when shipped," & the sale was made at "27*s.* per quarter free on board, & including freight & insurance to a safe port in the United Kingdom, payment at, etc., upon handing shipping documents." In fact the corn had, a short time before the date of the contract, been sold at Tunis, in consequence of getting so heated in the early part of the voyage as to render its being brought to England impossible. The contract in England was entered into in ignorance of this fact. When the English purchaser discovered it, he repudiated the contract. In an action for the price brought against the factor :—*Held :* the contract contemplated that there was an existing something to be sold & bought & capable of transfer, which not being the case at the time of the sale by the factor, he was not liable.—COUTURIER *v.* HASTIE (1856), 5 H. L. Cas. 673 ; 25 L. J. Ex. 253 ; 28 L. T. O. S. 240 ; 2 Jur. N. S. 1241 ; 10 E. R. 1065, H. L. ; *affg.* S. C. *sub nom.* HASTIE *v.* COUTURIER (1853), 9 Exch. 102, Ex. Ch.

Annotations :—**Apld.** Griffith *v.* Brymer (1903), 19 T. L. R. 434. **Refd.** Covas *v.* Bingham (1853), 2 E. & B. 836 ; Hall *v.* Conder (1857), 2 C. B. N. S. 22 ; Pritchard *v.* Merchant's Life-Assce. Soc. (1858), 3 C. B. N. S. 622 ; Hare *v.* Browne (1859), 5 Jur. N. S. 711 ; Ralli *v.* Universal Marine Insce. (1862), 4 De G. F. & J. 1 ; The John Bellamy (1870), L. R. 3 A. & E. 129 ; Jeffreys *v.* Fair (1876), 36 L. T. 10 ; Joliffe *v.* Baker (1883), 11 Q. B. D. 255. **Mentd.** Wickham *v.* Wickham (1855), 2 K. & J. 478 ; Risbourg *v.* Bruckner (1858), 30 L. T. O. S. 258 ; Reader *v.* Kingham (1862), 32 L. J. C. P. 108 ; Mallett *v.* Bateman (1864), 16 C. B. N. S. 530 ; Fleet *v.* Murton (1871), L. R. 7 Q. B. 126 ; Mountstephen *v.* Lakeman (1871), 25 L. T. 755 ; Mollett *v.* Robinson (1872), L. R. 7 C. P. 84 ; Sutton *v.* Grey, [1894] 1 Q. B. 285 ; Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778 ; Davys *v.* Buswell, [1913] 2 K. B. 47 ; Gabriel *v.* Churchill & Sim, [1914] 3 K. B. 1272.

96. —— ——.]—A policy was effected, in the usual form on the life of A., in consideration of the payment of certain annual premiums on Oct. 13, in each year, with a condition that the policy should be void, amongst other grounds, "if the premiums were not paid within thirty days after they should respectively become due ; but that the policy might be revived within three calendar months, on satisfactory proof of the health of the party on whose life the insurance was made," & payment of a certain fine.

An annual premium became due on Oct. 13, 1855. The thirty days allowed by the condition for payment of the premium expired on Nov. 12, on which day A. died. On Nov. 14, pltf., for whose benefit the policy was effected, sent the co. a cheque for the premium, for which they on the following day obtained the cash, giving a receipt as for "the premium for the renewal of the policy to Oct. 13, 1856, inclusive," both parties being ignorant that A. was then dead :—*Held :* the payment did not under the circumstances revive the policy.

Both parties were labouring under a mistake, & consequently the transaction was altogether void (WILLIAMS, J.).—PRITCHARD *v.* MERCHANT'S LIFE-ASSURANCE SOCIETY (1858), 3 C. B. N. S. 622 ; 27 L. J. C. P. 169 ; 30 L. T. O. S. 318 ; 4 Jur. N. S. 307 ; 6 W. R. 340 ; 140 E. R. 885.

Annotation :—**Distd.** Stuart *v.* Freeman, [1903] 1 K. B. 47.

97. —— ——.] — A tenant in tail, expectant on the death of a tenant for life who was insolvent, being desirous of preserving the timber on the estate from being cut, signed an agreement with the agent of the assignee of the tenant for life, agreeing that the assignee should have the same right to the timber as if he had actually cut it, on a past day named, which was prior to the death of the tenant for life ; & the assignee agreed to refrain from cutting it for a month. It turned out that the tenant for life was dead at the date of the agreement, although both the tenant in tail & the agent of the assignee were ignorant of the fact :—*Held :* the agreement was founded on a mistake, & was without consideration, & the ct. refused to enforce it.—COCHRANE *v.* WILLIS (1865), 1 Ch. App. 58 ; 35 L. J. Ch. 36 ; 13 L. T. 339 ; 11 Jur. N. S. 870 ; 14 W. R. 19, L. JJ.

Annotations :—**Consd.** Scott *v.* Coulson, [1903] 1 Ch. 453. **Refd.** Jones *v.* Clifford (1876), 3 Ch. D. 779 ; Huddersfield Banking Co. *v.* Lister (1895), 72 L. T. 703 ; *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735.

98. —— ——.]—SMIDT *v.* TIDEN, No. 78, *ante.*

99. —— ——.] — DEBENHAM *v.* SAWBRIDGE, No. 255, *post.*

100. —— ——.]—A contract for the sale of a life policy was entered into by both parties in the belief that the assured was alive, & the contract was completed by assignment. Between the dates of the contract & the assignment the purchaser received information which led him to believe that at the date of the contract the assured was dead, which after the date of the assignment was ascertained to have been the fact, but the purchaser never disclosed his information to the vendor :—*Held :* the vendor was entitled to have the transaction set aside notwithstanding that it had been completed by assignment.

Such a contract may be rescinded even after completion, if pltf. comes promptly & the parties can be restored to the position in which they were before the contract.—SCOTT *v.* COULSON, [1903] 2 Ch. 249 ; 72 L. J. Ch. 600 ; 88 L. T. 653 ; 19 T. L. R. 440, C. A.

101. —— ——.]—If the parties to an agreement make a mutual mistake of fact which is material to the existence of an agreement the agreement is void. Pltf. & deft. believing, as was not the fact, that they were lawfully married, entered into a deed of separation :—*Held :* the deed of separation was void.—GALLOWAY *v.* GALLOWAY (1914), 30 T. L. R. 531, D. C.

Annotation :—**Apld.** Law *v.* Harragin (1917), 33 T. L. R. 381.

Sect. 2.—When relief granted: Sub-sects. 5 & 6, A.]

102. —— —— .]—Deft. had not heard of her first husband for some years, & pltf. believing that she was a widow, went through a form of marriage with her. Afterwards the parties entered into a deed of separation, under which pltf. allowed deft. £300 a year. At the date of the deed neither party believed that deft.'s first husband was alive, but in fact he was alive at that date:—*Held:* as the deed was based on the existence of a valid marriage, the deed was void.—LAW *v.* HARRAGIN (1917), 33 T. L. R. 381; 61 Sol. Jo. 546.

See, also, COMPANIES, Vol. IX., p. 396, Nos. 2523, 2524; CONTRACT, Vol. XII., pp. 368, 369, Nos. 3076–3081.

103. Exceptions to rule — Bond executed—No fraud.]—SMITH *v.* AVERY (1702), 1 Eq. Cas. Abr. 269; 21 E. R. 1037.

Annotation:—**Apld.** Pawlet *v.* Delaval (1755), 2 Ves. Sen. 663.

104. —— **Agreement dependent on contingent event.**]—To decree for you, I must lay it down as a rule, that, where a bargain depends upon a contingent event, which chance both the parties know, if the event turns out against one of the parties he must be discharged from his contract. There never was a case where an agreement was made more fairly. . . . How then is it to be impeached?—that the annuitant died before a payment—that the bargain has turned out all advantageous to one party, which was supposed to be fortuitous (LORD THURLOW, C.).—MORTIMER *v.* CAPPER (1782), 1 Bro. C. C. 156; 28 E. R. 1051.

Annotations:—**Apld.** Kenney *v.* Wexham (1822), 6 Madd. 355. **Refd.** Pritchard *v.* Ovey (1820), 1 Jac. & W. 396; Davies *v.* Cooper (1840), 5 My. & Cr. 270; Bower *v.* Cooper (1843), 2 Hare, 408; Counter *v.* Macpherson (1845), 5 Moo. P. C. C. 83; Strickland *v.* Turner (1852), 7 Exch. 208; Coles *v.* Bristowe (1868), L. R. 6 Eq. 149.

105. —— **Sale by description — Without reference to collateral circumstances.**]—The bargain & sale of chattel, as being of a particular description, does imply a contract that the article sold is of that description . . .; & therefore the sale in this case of a ship implies a contract that the subject of the transfer did exist in the character of a ship; & the express covenant that deft. had power to make the bargain & sale of the subject before-mentioned, must operate as an express covenant to the same effect. That covenant, therefore, was broken, if the subject of the transfer had been, at the time of the covenant, physically destroyed, or had ceased to answer the designation of a ship; but if it still bore that character, there was no breach of the covenant in question, although the ship was damaged, unseaworthy or incapable of being beneficially employed. The contract is for the sale of the subject absolutely, & not with reference to collateral circumstances (PARKE, B.).—BARR *v.* GIBSON (1838), 3 M. & W. 390; 1 Horn & H. 70; 7 L. J. Ex. 124; 150 E. R. 1197.

Annotations:—**Refd.** Hunter *v.* Parker (1840), 7 M. & W. 322; Strickland *v.* Turner (1852), 7 Exch. 208; Hastie *v.* Couturier (1853), 9 Exch. 102; Jones *v.* Just (1868), L. R. 3 Q. B. 197; Harrison *v.* Knowles & Foster, [1917] 2 K. B. 606.

See, further, SALE OF GOODS.

106. —— ——.]—Coal mines were demised at a certain royalty per ton upon the coal which might be got, & also at the rent of £300 a year, or so much thereof as with the royalty should amount to that sum, such rent of £300 to be a minimum rent for the coal demised, & the lessee covenanted to pay the rents, & to work the mine:—*Held:* a ct. of equity would not restrain an action by the lessor for the minimum rent, although the coal proved to be not worth the expense of working; but, if the lessor were to sue upon the lessee's covenant to work the mine, the ct. would interfere.

In applying the rule of *caveat emptor* to the case of leases of coal mines, it must be remembered that every one acquainted with that kind of property is aware that coal mines are liable to be interrupted by faults.—RIDGWAY *v.* SNEYD (1854), Kay, 627; 24 L. T. O. S. 58; 18 J. P. 759; 69 E. R. 266.

Annotation:—**Consd.** Simpson *v.* Ingleby (1872), 26 L. T. 543.

107. —— **Contract relating to property of uncertain extent or value.**]—(1) A contract for the sale & purchase of an uncertain thing, the extent & value of which is understood to be unknown to both parties, is valid, & neither party can resist completing, merely because the reality has turned out to be different from what was anticipated.

(2) But where something different from what is claimed by the purchaser was intended to be sold by the vendor, this ct. will not compel the latter specifically to perform the contract, which, in substance, though not in terms, is really different from that which was entered into.

(3) Where the terms of a contract are ambiguous, &, by adopting the construction of the purchaser, would compel the vendor to convey property not intended or believed by him to be included in the contract, this ct. will not decree a specific performance.—BAXENDALE *v.* SEALE (1855), 19 Beav. 601; 24 L. J. Ch. 385; 24 L. T. O. S. 306; 1 Jur. N. S. 581; 52 E. R. 484.

Annotation:—*As to* (2) **Refd.** Bettyes *v.* Maynard (1882), 46 L. T. 766.

108. —— ——.]—A., on the application of B. & C., agreed to grant them a lease of a vein or seam of coal, called the S. vein, "about 2 feet thick, with the overlying & underlying beds of clay," on & under a farm called X., at £100 *per annum* as certain or dead rent, & royalties of 9*d.* per ton for the coal & 4*d.* per ton for the clay; the lessees to have any part of the farm at the rent of £10 per acre, & to expend not less than £500 in the erection of a manufactory & buildings for the purpose of working the coal & clay; wayleave of 1*d.* per ton for foreign coal & clay; lessees to have power to determine the lease at the end of three years on giving one year's notice.

On action by A. for specific performance, B. & C. alleged that the S. vein did not exist under the farm, & it was proved that on search it had not been found, but counter evidence was given to show that the searches were insufficient:—*Held:* under the agreement, B. & C. had, in consideration of the dead rent reserved, obtained licence to enter & search for the vein, but not a warranty that such vein was to be found; &, accordingly, A. was entitled to specific performance of the contract whether the S. vein existed or not.—JEFFERYS *v.* FAIRS (1876), 4 Ch. D. 448; 46 L. J. Ch. 113; 36 L. T. 10; 25 W. R. 227.

109. —— **Valued policies of insurance.**]—The value of the ship insured, stated in a valued policy, is, in the absence of fraud, conclusive between the parties, however largely in excess of the true value.

A ship was insured by a valued time policy, & its value stated in the policy was £8,000. At the time the policy was made, but unknown to the parties, the ship had been injured in a storm, so that the expense of the repairs would have exceeded its value when repaired. During the continuance of the risk the ship was totally lost. In an action against the underwriters:—*Held:* the policy attached, notwithstanding the previous injury to the ship &, there being no fraud, the value of the

ship as stated in the policy was conclusive between the parties.

The truth is, that the underwriters entered into the contract without caring to know whether the ship was in repair or not (WILLES, J.).—BARKER v. JANSON (1868), L. R. 3 C. P. 303; 37 L. J. C. P. 105; 17 L. T. 473; 16 W. R. 399; 3 Mar. L. C. 28.

Annotations :—**Consd.** Lidgett v. Secretan (1871), L. R. 6 C. P. 616. **Refd.** The Main, [1894] P. 320; Woodside v. Globe Marine Insce., [1896] 1 Q. B. 105; Wilson Shipping Co. v. British & Foreign Insce., [1920] 2 K. B. 25. **Mentd.** Potter v. Rankin (1868), L. R. 3 C. P. 562.

As to conclusiveness of valued policies generally, *see* INSURANCE, Vol. XXIX., pp. 122, 123, Nos. 744–759.

SUB-SECT. 6.—MISTAKE AS TO QUALITIES OF SUBJECT-MATTER.

A. Mutual Mistake Avoiding Contract.

110. Sale of land — Mistake as to amount of ground lease.]—MORSHEAD v. FREDERICK (1806), Sugden's Vendors & Purchasers, 14th ed. pp. 120, 814.

Annotations :—**Refd.** Griffiths v. Jones (1873), 21 W. R. 470.

111. —— Leasehold interest — Misdescription of ground rent.]—MILLS v. ODDY (1834), 6 C. & P. 728, N. P.; *subsequent proceedings* (1835), 2 Cr. M. & R. 103.

Annotation :—**Mentd.** Doe d. Bowdler v. Owen (1837), 8 C. & P. 110.

112. —— Mistake as to restrictive covenants.] — The owner in fee of land sold & conveyed it, during the years 1865, 1866 & 1867, in thirteen lots to different purchasers, each lot being subject to covenants entered into by the purchasers, restricting the use of the land as a brickyard, & in other respects. Deft. subsequently became the purchaser of Lot 11, but the deed of conveyance to him did not contain the restrictive covenants. In 1882 pltfs., a co. for manufacturing bricks, contracted to purchase Lot 11 from deft. under conditions of sale which stated that the property was sold subject to any matter or thing affecting same, whether disclosed at the time of sale or not; & provided that any error or omission in the particulars should not annul the sale, nor entitle the purchaser to compensation. The existence of the restrictive covenants was not mentioned in the contract, but during the negotiations deft. stated that there were covenants restricting the use of the land as a brickyard, but his solr., who was present, & to whom pltfs.' solr. applied for information, stated that he was not aware of any such covenants. Pltfs. paid a deposit upon the purchase money, & having subsequently discovered that there were restrictive covenants, claimed to rescind their contract & sued deft. to recover the amount of the deposit :—*Held :* pltfs., if their contract with deft. were carried out would be bound by the restrictive covenants, & that the owners of the other twelve lots purchased from the original vendor would be entitled to enforce those covenants against pltfs.; pltfs. were not precluded by the terms of the conditions of sale, nor by Conveyancing Act, 1881 (c. 41), s. 3 (3), from refusing to complete the purchase, & that they were therefore entitled to recover the amount of the deposit.—NOTTINGHAM PATENT BRICK & TILE CO. v. BUTLER (1886), 16 Q. B. D. 778; 55 L. J. Q. B. 280; 54 L. T. 444; 34 W. R. 405; 2 T. L. R. 391, C. A.

Annotations :—**Consd.** Simpson v. Gilley (1922), 92 L. J. Ch. 194; Beyfus v. Lodge, [1925] Ch. 350. **Mentd.** Collins v. Castle (1887), 36 Ch. D. 243; Sheppard v. Gilmore (1887), 57 L. J. Ch. 6; Spicer v. Martin (1888), 14 App. Cas. 12; Bower v. Sandford (1889), 5 T. L. R. 570; Saxby v. Thomas (1890), 63 L. T. 695; *Re* Birmingham & District Land Co. & Allday, [1893] 1 Ch. 342; Davis v. Leicester Corpn., [1894] 2 Ch. 208; Nalder & Collyer's Brewery Co. v. Harman (1900), 82 L. T. 594; Rogers v. Hosegood, [1900] 2 Ch. 388; Formby v. Barker, [1903] 2 Ch. 539; Whitehouse v. Hugh, [1906] 1 Ch. 253; Reid v. Bickerstaff, [1909] 2 Ch. 305; Willé v. St. John, [1910] 1 Ch. 84; Kelly v. Barrett, [1924] 2 Ch. 379.

113. —— Nuisance existing thereon.] — Property described as an eligible freehold property for investment & stated to comprise a shop was, unknown to both the vendors & the purchaser, used by the tenant ostensibly as a coffee tavern, but in fact as a disorderly house. The agreement under which the tenant held contained a covenant by him not to use the premises as a disorderly house & a proviso for immediate re-entry upon breach :—*Held :* the purchaser was not entitled to rescission on the ground of mutual mistake as to the subject-matter of the contract.—HOPE v. WALTER, [1899] 1 Ch. 879; 68 L. J. Ch. 359; 80 L. T. 355; 47 W. R. 479; 43 Sol. Jo. 350; *on appeal*, [1900] 1 Ch. 257, C. A.

Annotation :—**Mentd.** *Re* Leyland & Taylor's Contract (1900), 83 L. T. 380.

114. —— Existence of reversionary lease.]— A tenant for life sold a public-house, portion of a settled property. After conveyance it was found that the public-house was subject to a reversionary lease granted by the predecessor in title of the tenant for life, of which all parties were ignorant :—*Held :* this did not furnish any ground for rescission. —*Re* TYRELL, TYRELL v. WOODHOUSE (1900), 82 L. T. 657; 64 J. P. 665.

—.]—*See, generally*, SALE OF LAND.

115. Sale of goods — Vendor & purchaser contemplating different qualities of same material— Mistake by common agent.]—If a broker, employed both by seller & buyer, negotiates a sale, but by mistake delivers to the several parties sale notes differently describing the goods, no contract arises.

A broker employed by pltfs. to sell Petersburg clean hemp, & by deft. to buy hemp, sold to deft., & gave him by mistake a sale note of Riga Rhine hemp, a description of hemp of a different quality from the Petersburg, & gave pltf. a note of the sale of Petersburg clean hemp :—*Held :* no contract for the sale of the hemp in question subsisted between the parties.—THORNTON v. KEMPSTER (1814), 5 Taunt. 786; 1 Marsh. 355; 128 E. R. 901.

Annotations :—**Refd.** Cowie v. Remfry (1846), 5 Moo. P. C. C. 232; Slowewright v. Archibald (1851), 17 Q. B. 103. **Mentd.** Durrell v. Evans (1862), 1 H. & C. 174.

116. —— Mistake as to amount of silver in a bar.]—Where deft. received from his principal abroad a bar of silver, & took it to pltfs., who melted it, & sent a piece to an assayer to be assayed at deft.'s expense, & paid a price for the bar to deft., as for the number of ounces of silver which by the assay it was calculated to contain, which number was afterwards discovered to exceed the true number :—*Held :* pltfs. might, after having offered to return the bar, have money had & received against deft. for the price thus paid to him under a mistake, although deft. had forwarded his account to his principal, & in it had placed the price received to the credit of his principal.—

PART III. SECT. 2, SUB-SECT. 6.—A.

g. General rule.]—A mistake as to existing facts may invalidate a contract; but an erroneous expectation, which events entirely falsify, has no effect.—BABSHETTI v. VENKATARAMANA (1879), I. L. R. 3 Bom. 154.—IND.

115 i. *Sale of goods—Vendor & purchaser contemplating different qualities of same material—Mistake by common agent.*]—MEGAW v. MOLLOY (1878), 2 L. R. Ir. 530.—IR.

h. *Sale of business—Mistake as to amount of liabilities.*]—Where in the

Sect. 2.—When relief granted: Sub-sect. 6, A. & B. (a) & (b).]

COX *v.* PRENTICE (1815), 3 M. & S. 344; 105 E. R. 641.

Annotations:—**Distd.** Beevor *v.* Marler (1898), 14 T. L. R. 289. **Reld.** Aiken *v.* Short (1856), 1 H. & N. 210; Pollard *v.* Bank of England (1871), L. R. 6 Q. B. 623; Continental Caoutchouc & Gutta Percha Co. *v.* Kleinwort (1904), 90 L. T. 474; Baylis *v.* London (Bp.), [1913] 1 Ch. 127. **Mentd.** Bradbury *v.* Anderton (1834), 1 Cr. M. & R. 486; M'Carthy *v.* Colvin (1839), 9, Ad. & El. 607; Devaux *v.* Conolly (1849), 8 C. B. 640; Holland *v.* Russell (1861), 1 B. & S. 424.

117. —— No relief at instance of party causing mistake.]—Declaration for non-delivery of one hundred chests of tea *ex* the ship S., sold by deft. to pltf. at a fixed price, with the usual averments that pltf. was always ready & willing, etc., & that all conditions precedent were fulfilled. Equitable plea, that the tea was bought & sold upon a sample which defts. believed to be a sample of the said tea *ex* the said ship, & that by the said contract defts. agreed that the tea in the said one hundred chests should be equal to the said sample; that the said sample was not a sample at all of the said one hundred chests, but was a sample of a totally different tea; & that defts. afterwards discovered that there had been a mistake respecting the said sample, & forthwith, & before pltf. had in any respect altered his position on account of the said contract having been made, gave notice of such mistake to pltfs., & that defts. would, on account of the said mistake, treat the contract as void; & the contract was entered into solely through the mistaken belief of both parties that the said sample was a sample of the one hundred chests, & would not have been entered into but for the said mistake:—*Held:* the plea was bad, because it failed to show that a ct. of equity would have granted a simple relief in favour of defts. against their liability to deliver the tea *ex* the ship S.—SCOTT *v.* LITTLEDALE (1858), 8 E. & B. 815; 27 L. J. Q. B. 201; 4 Jur. N. S. 849; 120 E. R. 304.

Annotations:—**Consd.** Smith *v.* Hughes (1871), L. R. 6 Q. B. 597. **Mentd.** R. *v.* Hehir (1895), 18 Cox, C. C. 267.

118. —— ——.] — Trader, having sold some silver articles, sent to & seen by the buyer, at a price calculated at a certain rate, on a certain weight of silver, which was paid, afterwards sought to recover the supposed balance of the price, upon double the weight of silver, alleging a manifest mistake in the weight, & setting up fraud in the buyer in taking advantage of it. Fraud being negatived by the jury, the verdict was entered for deft., &, *semble*, there could be no claim on the ground of implied contract.—FALCK *v.* GOOCH (1865), 4 F. & F. 580.

119. —— ——.]—Pltf. saw an advertisement in a newspaper inviting tenders for the supply of certain goods required by a board of guardians. He tendered on a printed form supplied by the guardians for the supply of a certain disinfectant manufactured by him. The tender was accompanied by a sample of the disinfectant labelled "Anite," which was delivered to an officer of defts. On the printed tender defts. had asked for a tender for "Heydozone," & pltf. omitted to alter the word "Heydozone" into the word "Anite" on the tender, so as to make the tender agree with the label on the sample delivered. Defts. accepted the tender of pltf. for the supply of "Heydozone":—*Held:* pltf. had failed to show that the minds of the two contracting parties were not *ad idem*, or that defts. had misled him in any way, & consequently the contract was binding on him.—JOHNSON *v.* ISLINGTON UNION (1909), 73 J. P. 172.

Sale by sample.]—*See* SALE OF GOODS.

120. Alienation of dividends of separate property —Clause against anticipation.]—A married woman having personal property under a will for life & absolutely, a settlement is made of it to her separate use without power of anticipation, with a power of appointment by deed. Without adverting to the clause against anticipation, & in alleged ignorance of its existence, she & her husband grant an annuity in consideration of £215, & an order is made for payment of the dividends of her separate property to the grantee to secure the annuity, & he receives the dividends & hands over the surplus from time to time. The clause against anticipation is then discovered, & the wife petitions for discharge of the order for payment of the dividends to the grantee of the annuity, for restitution of the money received, & for costs against the grantee & his solr.:—*Held:* the order must be discharged, & the restitution not being pressed for, no order made upon that part of the petition, but costs given against the grantee, his solr., & her husband.—FORTY *v.* REAY (1855), 3 W. R. 317.

121. Sale of interest in partnership — Copyholds described as freeholds.]—Pltf. & deft. had been partners in a brewery to which a number of tied houses were attached. In an action between them an order was made for dissolution & sale by tender. By the chief clerk's certificate deft. was declared the purchaser, as being the highest bidder, of the moiety of pltf. The conditions, which were prepared by pltf.'s solr. & approved by deft.'s solr. & deft., provided that the title should be accepted as it stood, the properties being well known to both parties, & nothing was said about compensation. It subsequently transpired that certain of the properties which were to be conveyed as freeholds were copyholds. Negotiations thereupon took place between the parties & their legal advisers, &, as it was feared that there would be delay, the properties being in mtge., a conveyance was executed by pltf. in the form settled by counsel. Deft., having had to pay a large sum in respect of enfranchisement of the copyholds, took out a summons in the action, in which he asked that pltf. might be ordered to pay him one half of that sum in effect by way of compensation:—*Held:* the principle laid down in *Mortlock* v. *Buller* (1804), 10 Ves. 315, & *Castle* v. *Wilkinson* (1870), 5 Ch. 536, which allowed the purchaser to insist on having all the vendor could convey, with a compensation for the difference, was confined to the class of cases where the vendor knew the title & the purchaser did not, & had no application to the present case; therefore, it was unnecessary to consider whether compensation could be enforced by a purchaser after the money was paid & the conveyance executed.—HOPCRAFT *v.* HOPCRAFT (1897), 76 L. T. 341.

122. Settlement — On void marriage.]—A lady having actually married with the consent of guardians named by her deceased putative father, & confirmed by the Ct. of Ch., she suffered a recovery, & declared the uses to the joint appointment of herself & her husband, with remainder in strict settlement. It being discovered that her supposed marriage was void, because at the time thereof her legal father was alive, & did not consent

sale of a business the parties negotiate on the basis of an ascertained amount of liabilities, the inclusion twice, in such amount, of the same item, resulting in the purchaser assuming less in liabilities than was believed at the time of the contract, brings the case within the purview of mutual mistake as to which the ct. should grant equitable relief.—WHITAKER *v.* RUMBLE (Alta.), [1919] 1 W. W. R. 1026.—CAN.

to the marriage, the parties conceived that the settlement & recovery were void, & executed a deed of revocation, & suffered another recovery, after which the lady made a new settlement:—*Held:* the recovery & first settlement were valid, although made under a mistake of the situation in which the parties stood.—BOUGHTON *v.* SANDILANDS (1811), 3 Taunt. 342; 128 E. R. 136.

Annotations:—**Mentd.** Tanner *v.* Babbage (1835), 4 L. J. Ch 101; Proby *v.* Landor (1860), 28 Beav. 504.

B. Unilateral Mistake.

(a) Not Contributed to by Other Party.

123. Whether contract invalidated — Sale of land—Mistake as to county in which property situated.]—SHIRLEY *v.* DAVIS (prior to 1802) cited in 6 Ves. at p. 678; 31 E. R. 1254.

Annotations:—**Consd.** Drewe *v.* Hanson (1802), 6 Ves. 675. **Mentd.** Halsey *v.* Grant (1806), 13 Ves. 73.

124. —— Purchase of leasehold—Mistake as to restrictive covenants.]—Deft. entered into a contract to purchase leaseholds, after his solr. had perused the leases. He intended to apply the property to a purpose which it turned out was prohibited by the lease:—*Held:* whether the vendor knew the purchaser's intention or not, the purchaser was bound specifically to perform his contract.—MORLEY *v.* CLAVERING (1860), 29 Beav 84; 54 E. R. 558; *subsequent proceedings* (1861) 30 Beav. 108.

125. —— Sale of goods — Mistake by buyer known by seller—Passive acquiescence of seller.]—Pltf. offered to sell to deft. oats, & exhibited a sample; deft. took the sample, & on the following day wrote to say that he would take the oats for the price of 34*s.* per quarter. Deft. afterwards refused to accept the oats, on the ground that they were new, & he thought he was buying old oats; nothing, however, was said at the time the sample was shown as to their being old, but the price was very high for new oats. The judge left to the jury the question whether pltf. had believed deft. to believe, or to be under the impression that he was contracting for old oats, & if they were of opinion that pltf. had so believed, he directed them to find for deft. The jury having found for deft.:—*Held:* there must be a new trial (1) (COCKBURN, C.J.) on the ground that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract; (2) (BLACKBURN, J.) on the ground that there is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake not induced by the act of the vendor; & that the direction did not bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, & agreeing to take the oats under the belief that pltf. contracted that they were old; (3) (HANNEN, J.), on the ground that the direction did not sufficiently explain to the jury, that in order to relieve deft. from liability, it was necessary that they should find, not merely that pltf. believed deft. to believe that he was buying old oats, but that pltf. believed deft. to believe that he, pltf., was contracting to sell old oats.

If therefore in the present case pltf. knew that deft., in dealing with him for oats did so on the assumption that pltf. was contracting to sell him old oats, he was aware that deft. apprehended the contract in a different sense to that in which he meant it, & he is thereby deprived of the right to insist that deft. shall be bound by that which was only the apparent & not the real bargain (HANNEN, J.).—SMITH *v.* HUGHES (1871), L. R. 6 Q. B. 597; 40 L. J. Q. B. 221; 25 L. T. 329; 19 W. R. 1059.

Annotations:—*As to* (3) **Consd.** Pope & Pearson *v.* Buenos Ayres New Gas Co. (1892), 8 T. L. R. 758. **Apld.** Ewing & Lawson *v.* Hanbury (1900), 16 T. L. R. 140; Scott *v.* Coulson, [1903] 1 Ch. 453. *Generally*, **Mentd.** Lovell & Christmas *v.* Wall (1911), 104 L. T. 85; Pocahontas Fuel Co. (Incorporated) *v.* Ambatielos (1922), 27 Com. Cas. 148.

(b) Contributed to by Other Party.

126. Whether contract invalidated — Unintentional contribution.]—Specific performance of a contract will not be enforced where deft. has contracted under a mistake to which pltf. has by his acts even unintentionally contributed.—BASKCOMB *v.* BECKWITH (1869), L. R. 8 Eq. 100; 38 L. J. Ch. 536; 33 J. P. 580; 17 W. R. 812; *sub nom.* BASCOMB *v.* BECKWITH, 20 L. T. 862.

Annotation:—**Consd.** Denny *v.* Hancock (1870), 18 W. R. 566.

127. —— Knowledge of other party's mistake.]—SMITH *v.* HUGHES, No. 125, *ante*.

128. —— Property misdescribed by vendor—As to rental.]—In an action upon a contract to purchase leasehold premises, sold by auction on the terms of a prospectus overstating the rental, such false statement, even notwithstanding the usual provision against errors of description, will vitiate the contract.

This is not a mere misdescription, & even if it were by mistake, it is one of those gross mistakes, to the advantage of the party making it, which in law vitiates a contract. . . . It is immaterial whether he [pltf.] misstated it wilfully, if he stated it falsely (WILLES, J.).—WOOD *v.* KEEP (1858), 1 F. & F. 331, N. P.

129. —— —— ——.]—In deciding whether a purchaser is getting substantially that which he bargained for, the ct. is bound to consider every incident by which the property offered to be assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject-matter, then the purchaser can repudiate the contract; if, on the other hand, the subject-matter remains unaffected or so little affected as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract.

By an agreement in writing a vendor agreed to sell, & a purchaser agreed to purchase, thirteen freehold houses let on six leases for a term of ninety-nine years at ground rents amounting in the aggregate to £72. One pair of houses was described in the contract as let at one entire rent of £11 10*s.*, each of the next four pairs at one rent of £11, & the last three houses at one rent of £16 10*s.* The title shown was for twelve houses at a rent of £5 10*s.* each, & one at a rent of £6, each of such rents issuing out of & secured by one of the thirteen houses instead of the six rents described in the agreement. The agreement contained a provision that "if there be any misstatement or error in the description of the premises" no compensation should be allowed or the sale annulled. In an action by the purchaser for rescission of the contract & a return of the deposit on the ground of misdescription:—*Held:* the property which the vendor offered to convey was substantially different from that which the purchaser contracted to buy; the clause providing that a misstatement or error should not annul the

PART III. SECT. 2, SUB-SECT. 6.—B. (b).

k. Whether contract invalidated — Property misdescribed by vendor—As to occupation.]—If the rental state lands to be unoccupied, & the purchaser find them occupied, it will be ground for his being discharged from his purchase even though there be no fraud intended.—*Re* O'BRIEN (1850), 15 L. T. O. S. 527.—IR.

Sect. 2.—*When relief granted: Sub-sect.* 6, *B.* (*b*); 7 & 8, *A. & B.*]

contract did not apply, & the purchaser was entitled to rescission & a return of his deposit.—LEE *v.* RAYSON, [1917] 1 Ch. 613; 86 L. J. Ch. 405; 116 L. T. 536; 61 Sol. Jo. 368.

130. —— ——.] — The conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under a lease to another brewer for a term of which eight years were unexpired:—*Held:* the purchaser was not bound to ascertain from the tenant the terms of his tenancy; in such a case the vendor could not enforce specific performance.—CABALLERO *v.* HENTY (1874), 9 Ch. App. 447; 43 L. J. Ch. 635; 30 L. T. 314; 22 W. R. 446, L. JJ.

Annotations:—**Refd.** Phillips *v.* Miller (1875), L. R. 10 C. P. 420; Manson *v.* Thacker (1878), 7 Ch. D. 620. **Mentd.** L. & N. W. Ry. *v.* Boulton (1890), 62 L. T. 392.

131. —— —— **As to covenants.**]—It is a sufficient defence to a vendor's action for specific performance of an agreement to purchase land that the purchaser was induced or allowed to sign the agreement on the faith of an assumption that the property was not subject to any "unusually restrictive" covenants, whereas in fact it was subject to a covenant to build at the request of the original grantor, such covenant, though probably not enforceable against the purchaser, yet rendering it possible that he might be called upon to allow buildings to be erected, or be harassed by claims to that effect.

A. agreed to purchase from B. a plot of land & dwelling-house, in the neighbourhood of a large town, of which B. was mtgee., with power of sale, & which were held by his mtgor. subject to a covenant "that he, his heirs, exors., administrators, or assigns . . . would, at the request of the original grantor, his heirs or assigns, erect & build upon the said plot of land one or more dwelling-house or dwelling-houses." In the margin of the draft agreement A.'s solrs., who had not seen the deed containing the covenant, had written the following note: "We assume that the covenants . . . include nothing unusually restrictive." This assumption was not negatived by B., & the agreement was eventually signed by A. on the faith of its being correct. Upon the discovery, however, of the existence of the above covenant, A. refused to complete his purchase:—*Held:* in an action by B. for specific performance, A. could not be compelled to complete; since, though he probably could not be forced actively to fulfil the covenant, he might nevertheless be called upon under it to allow B. to build upon the land, or at any rate be harassed by claims to that effect or otherwise under the covenant.—ANDREW *v.* AITKEN (1882), 22 Ch. D. 218; 52 L. J. Ch. 294; 48 L. T. 148; 31 W. R. 425.

As to misleading particulars generally, *see* SALE OF LAND.

SUB-SECT. 7.—MISTAKE AS TO PRICE OF, OR CONSIDERATION FOR SUBJECT-MATTER.

132. Whether ground for relief — General rule.] DUCKENFIELD *v.* WHICHCOTT (1674), 2 Cas. in Ch. 204; 22 E. R. 912.

133. —— ——.] — Deft. by letter, offered to sell some property to pltf. for £1,250; pltf. by letter, accepted the offer. Deft. had, by mistake, inserted £1,250 instead of £2,250 in his letter, & he immediately gave notice of the error. The ct. refused to enforce the contract.—WEBSTER *v.* CECIL (1861), 30 Beav. 62; 54 E. R. 812.

Annotations:—**Distd.** Tamplin *v.* James (1880), 15 Ch. D. 215. **Apld.** Hodson *v.* Thetard (1907), 51 Sol. Jo. 482. **Refd.** Aspinalls to Powell & Scholefield (1889), 60 L. T. 595.

134. —— ——.] — At a sale of an estate by auction under the direction of ct., J., having previously been informed of the value of the timber, purchased lot 2, & agreed to take the timber at the price named by the auctioneer. The chief clerk confirmed the sale & filed his certificate. It was subsequently discovered that the value of the timber on a portion of the lot had been, by the mistake of the auctioneer, omitted:—*Held:* the purchaser was entitled to hold the property without submitting to a valuation of the timber.—GRIFFITHS *v.* JONES (1873), L. R. 15 Eq. 279; 42 L. J. Ch. 468; 37 J. P. 357; 21 W. R. 470.

Annotation:—**Refd.** *Re* Clayton, Smith *v.* The Co., [1920] 1 Ch. 257.

135. .] — POPE & PEARSON *v.* BUENOS AYRES NEW GAS CO. (1892), 8 T. L. R. 758, C. A.

136. —— ——.] — EWING & LAWSON *v.* HANBURY & CO. (1900), 16 T. L. R. 140.

Annotation:—**Refd.** Faraday *v.* Tamworth Union (1916), 86 L. J. Ch. 436.

137. —— ——.] — Defts., in answer to advertisements of pltfs., tendered for a supply of coal for a period of one year, & pltfs. duly accepted the tender in the form prescribed by the Local Govt. Board. On hearing of the acceptance defts. withdrew their tender, on the ground that the price stated therein was so stated by mistake. Pltfs. bought coal elsewhere at a higher price & sued defts. for the difference:—*Held:* the tender & acceptance, in the form prescribed by the Local Govt. Board, constituted a complete contract, defts. were not entitled to withdraw their tender after such acceptance, &, in the absence of evidence of *mala fides*, pltfs. were entitled to hold defts. to the terms of such contract.—ISLINGTON UNION *v.* BRENTNALL & CLELAND (1907), 71 J. P. 407; 5 L. G. R. 1219.

138. —— ——.]—Deft. offered freehold land to pltf. at a price based upon a valuation made in 1895, forgetting the existence of a recent valuation at a much higher figure. Pltf. accepted the offer in terms which were not identical in every respect, but sufficient to constitute an open contract:—*Held:* the ct., in the exercise of its discretion, would not enforce the contract.—HODSON *v* THETARD (1907), 51 Sol. Jo. 483.

139. —— ——.]—The case is, in truth, a case of the purchase & sale of land, where the price to be paid for the land, the thing to be given in exchange for it, is uncertain, not only in value, but in nature & character. . . . In such a case the ct. will not enforce the agreement, though deft. may himself be responsible for the ambiguity, on the ground that "it is against conscience for a man to take advantage of the plain mistake of another, or, at least, that a ct. of equity will not assist him, in doing so." . . . In *Calverley* v. *Williams*, *Williams* v. *Calverley*, No. 159, *post*, LORD THURLOW goes the length of holding that in such cases, there is no contract, the parties misunder-

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PART III. SECT. 2, SUB-SECT. 7.

l. *Whether ground for relief.*]—ANDERSON *v.* OSBORN (N. W. T.) (1906), 5 W. L. R. 24.—**CAN.**

m. ——.]—WILSON *v.* BREADALBANE (MARQUIS) (1859), 21 Dunl. (Ct. of Sess.) 957; 31 Sc. Jur. 525.—**SCOT.**

n. —— *Mistake of mortgagor as to amount of debt secured.*]—MERCHANTS BANK *v.* BOSTWICK (1878), 3 A. R. 24.—**CAN.**

o. —— *Mistake due to clerical error.*]—BENNETT *v.* ADAMS RIVER LUMBER CO. (1910), 15 W. L. R. 383.—**CAN.**

p. —— *Mistake as to currency of payment.*]—BOND & CO. *v.* MARITIME

standing one another, the one proposing to buy one thing, the other to sell another (LORD ATKINSON).—DOUGLAS *v.* BAYNES, [1908] A. C. 477; 78 L. J. P. C. 13; 99 L. T. 599; 24 T. L. R. 896, P. C.

140. —— ——.]—WEDDEL *v.* BOARD OF TRADE (1923), 155 L. T. Jo. 550.

—— **Where specific performance claimed.**]—*See* SPECIFIC PERFORMANCE.

SUB-SECT. 8.—MISTAKE AS TO QUANTITY OR EXTENT OF SUBJECT-MATTER.

A. Mutual Mistake.

141. Whether ground for relief—Sale of land.]—STAPYLTON *v.* SCOTT, NICHOLSON *v.* STAPYLTON, No. 89, *ante*.

142. —— ——.] — On a sale of a leasehold interest of lands, described in the particulars as held for a term of twenty-three years, at a rent of £55, & as comprising a yard, one of the conditions was, that if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made to be settled by arbitration. The yard was not, in fact, comprehended in the property held for the term at £55, but was held by the vendor from year to year, at an additional rent. It was essential to the enjoyment of the property leased for the twenty-three years. It did not appear that the vendor knew of the defect:—*Held:* this defect avoided the sale, & was not a mistake to be compensated for under the above condition; although, after the day named in the conditions for completing the purchase, & before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, & offered it to him.—DOBELL *v.* HUTCHINSON (1835), 3 Ad. & El. 355; 1 Har. & W. 394; 5 Nev. & M. K. B. 251; 4 L. J. K. B. 201; 111 E. R. 448.

Annotations:—**Consd.** *Re* Fawcett & Holmes' Contract (1889), 42 Ch. D. 150. **Mentd.** Ridgway *v.* Wharton (1857), 6 H. L. Cas. 238; Matthews *v.* Baxter (1873), 28 L. T. 669; Peirce *v.* Corf (1874), L. R. 9 Q. B. 210; Thomas *v.* Brown (1876), 45 L. J. Q. B. 811; Cave *v.* Hastings (1881), 7 Q. B. D. 125.

—— ——.]—*See, further*, SALE OF LAND.

143. —— **Mistake as to term of lease — Injunction against reversioner.**]—WILDE *v.* ASHLEY (1838), 2 Jur. 679.

144. —— **Purchase of share in partnership — Mistake in balance sheet prepared by accountant.**]—Pltf. agreed to purchase a share in a partnership business, on the footing of a balance sheet prepared by an accountant employed by the vendor which all parties believed, with the exception of slight errors, to be & was treated as, generally correct. It turned out to be grossly inaccurate in regard to the existing liability. The ct. set aside the contract.—CHARLESWORTH *v.* JENNINGS (1864), 34 Beav. 96; 11 L. T. 439; 55 E. R. 569.

145. —— **Sale of goods — By auction — Mistake as to lots.**]—Pltfs. instructed an auctioneer to sell by auction a number of bales of hemp & of tow. The goods were described in the auctioneer's catalogue as so many bales in different lots with the same shipping marks & without disclosing the difference in the commodities. Before the sale samples of the hemp & tow were on view in a show room on the floor of which the catalogue numbers of the lots of hemp & tow were marked in chalk opposite the respective samples, & defts.' manager examined the hemp but not the tow, as he was not intending to bid for tow. When the lots representing the tow were put up for sale in the auction room, defts.' buyer made a bid which was an extravagant price for tow, & the lots were at once knocked down to him. In an action against defts. for the price of the tow the jury found that the auctioneer intended to sell tow; that defts.' buyer intended to bid for hemp; that the auctioneer believed that the bid was made under a mistake, but that he had reasonable grounds for believing that the mistake was merely as to value; that the form of the catalogue & the negligence of defts.' manager in not more closely examining the samples at the show room & identifying them with the lots in the catalogue contributed to cause the mistake:—*Held:* the parties were never *ad idem* as to the subject-matter of the proposed sale, & there was, therefore, no contract of sale.—SCRIVEN BROTHERS & CO. *v.* HINDLEY & CO., [1913] 3 K. B. 564; 83 L. J. K. B. 40; 109 L. T. 526.

146. —— —— **Inclusion of chattel not owned by vendor.**]—A co. became surety for a borrower & he gave the co. a charge on the proceeds of the sale of a number of pictures, which by mistake included a Vandyck. The Vandyck belonged not to the borrower, but to his wife, who did not know of the charge until after it had been executed. The pictures, including the Vandyck, were sold, & on the following day the borrower's wife claimed her picture. The co. having gone into liquidation:—*Held:* in the circumstances the liquidator was not entitled to retain the proceeds of the sale of the Vandyck.—*Re* CHAPLIN, MILNE, GRENFELL & CO., LTD. (1915), 31 T. L. R. 279.

B. Effect of Conveyance.

147. Too much land comprised in conveyance.]—CLIFFORD *v.* LAUGHTON (1607), Toth. 21; 21 E. R. 111.

148. — —.] — BEAUMONT *v.* BRAMLEY, No. 329, *post*.

149. —— **Mistake of joint agent.**] — Surveyors appointed to make a partition between tenants in common, having, by mistake, allotted to one of them a piece of land which belonged to him exclusively; & several of the allotments having been sold before the mistake was discovered, the ct. decreed a pecuniary compensation to be made to him.—DACRE *v.* GORGES (1825), 2 Sim. & St. 454; 4 L. J. O. S. Ch. 50; 57 E. R. 420.

150. ——.]—Particulars of sale described lot 5 as consisting of a leasehold house, No. 20, of a certain description, with a yard, at the end of which was a coachhouse & stable, & small yard beyond with extra stable; & stated, that the house was occupied by W., the yard, coachhouse, etc., by H. Lot 6 was described as a leasehold house, "No. 21, adjoining lot 5, & of similar design & accommodation. Is now & has been for years in the occupation of T." The two houses were

NAIL CO., LTD. (1923), 51 N. B. R. 343.—**CAN.**

q. —— *Right of vendor to rectification as against assignee of purchaser.*]—THOMPSON *v.* CARR, [1924] 1 D. L. R. 918; [1924] 1 W. W. R. 925; 18 Sask. L. R. 202.—**CAN.**

PART III. SECT. 2, SUB-SECT. 8.—A.

r. *Whether ground for relief—Sale of land—Mistake as to acreage.*]—Ignorance of the vendors as to the exact acreage of a lot is not such a mistake as entitles them to relief.—SEA *v.* MCLEAN & ANDERSON (1884), 1 B. C. R., pt. 2, 67; *revsd.* (1886), 14 S. C. R. 632.—**CAN.**

t. —— *Assignment of lease — Mistake as to ownership of buildings.*]—DUNCAN, GALLOWAY & CO., LTD. *v.* DUNCAN, FALCONER & CO., LTD., [1913] S. C. 265; 50 Sc. L. R. 167; [1912] 2 S. L. T. 420.—**SCOT.**

PART III. SECT. 2, SUB-SECT. 8.—B.

147 i. *Too much land comprised in conveyance.*]—COTTINGHAM *v.* COTTINGHAM (1885), 11 A. R. 624.—**CAN.**

Sect. 2.—When relief granted: Sub-sect. 8, B. & C.]

built on adjoining strips of land, each held under a separate lease. The small yard & extra stable lay behind No. 21, & were comprised in the lease of lot 6. The occupations were as stated in the particulars. Pltf. purchased lot 5, deft., H., lot 6. Pltf. took an assignment from the vendor of the property in the lease of lot 5, & no more. H. on the following day, took an assignment of all the property comprised in the lease of lot 6, thus obtaining the legal estate in the small yard & extra stable:—*Held:* pltf. was entitled to an assignment from H. of the small yard & extra stable, for that, according to the true construction of the particulars, H. had not contracted to purchase them, but pltf. had.—LEUTY *v.* HILLAS (1858), 2 De G. & J. 110; 27 L. J. Ch. 534; 22 J. P. 96; 4 Jur. N. S. 1166; 6 W. R. 217; 44 E. R. 929; *sub nom.* LENTY *v.* HILLAS, 30 L. T. O. S. 299, L. C.; *subsequent proceedings, sub nom.* WILD *v.* HILLAS, 28 L. J. Ch. 170.

Annotations:—**Distd.** Ellis *v.* Hills & Brighton & Preston A. B. C. Permanent Benefit Bldg. Soc. (1892), 67 L. T. 287. **Apld.** Craddock *v.* Hunt, [1923] 2 Ch. 136.

151. Sale of lease at undervalue.] — Where, by the mutual mistake of vendor & purchaser as to the duration of a leasehold interest, it had been sold at a price considerably below its value, & the conveyance had been executed & the purchaser let into possession, upon a bill filed some years afterwards by the vendor against the representatives of purchaser:—*Held:* vendor was not entitled to be relieved against the mistake.—OKILL *v.* WHITTAKER (1847), 1 De G. & Sm. 83; 8 L. T. O. S. 512; 11 Jur. 141; 63 E. R. 981; *on appeal*, 2 Ph. 338, L. C.

Annotations:—**Apld.** Besley *v.* Besley (1878), 9 Ch. D. 103. **Reld.** Manson *v.* Thacker (1878), 7 Ch. D. 620; Allen *v.* Richardson (1879), 13 Ch. D. 524.

152. Assignment of interest in residuary estate —Including fund not known to exist at time of assignment.]—H. was entitled for life to the interest of certain residuary estate, to the principal of which the wife of J. was entitled absolutely. H., being largely indebted to J., executed an indenture assigning to J. all his, H.'s, interest in the residuary estate. It was subsequently discovered that the residuary estate consisted partly of a fund, the existence of which was unknown to either of the parties at the time of the execution of the indenture. H. thereupon filed a bill which, not complaining that the indenture had been executed by fraud, sought to exclude from its operation the additional fund by treating the indenture merely as a security for the amount then due from H. The Lord Chancellor, however, dismissed the bill, holding that the words of the indenture were sufficient to pass the interest of H. in the fund in question, & that no case was made on the pleadings for reforming the instrument.—HOWKINS *v.* JACKSON (1850), 2 Mac. & G. 372; 2 H. & Tw. 301: 19 L. J. Ch. 451; 42 E. R. 144, L. C.

Annotation:—**Distd.** Turner *v.* Turner, Hall *v.* Turner (1880), 14 Ch. D. 829.

153. Release — To be construed according to intention at time of execution.]—It is to my mind impossible to read this deed [of release] without seeing that it is addressed to the state of things & to the amount of property of which the parties were aware & that it has no application & could have no application to property of the existence of which they were unaware. It is an arrangement with regard to a state of things then known (MALINS, V.-C.).—TURNER *v.* TURNER, HALL *v.* TURNER (1880), 14 Ch. D. 829; 42 L. T. 495; 44 J. P. 734; 28 W. R. 859.

Annotation:—**Mentd.** Monk *v.* Arnold (1902), 86 L. T. 580.

154. Mistake as to defect in title to property conveyed—Caveat emptor.]—A. agreed to take an underlease for whatever term B. held. By mistake of B.'s solr. the underlease purported to grant a term seven years longer than that B. held. The underlease contained the usual qualified covenant for quiet enjoyment. A. entered into possession & held it until nearly the end of B.'s term. Then B.'s exors., finding out the mistake wrote to A. that they would be obliged to require him to give up possession at the end of the term which B. really held. A. procured a fresh lease from the ground landlord at an increased rent, & claimed the amount of such increased rent for the seven years as damages for misrepresentation & breach of the covenant for quiet enjoyment:—*Held:* it was the duty of A. to look at the original lease, & not having done so he could not recover damages for the common mistake.—BESLEY *v.* BESLEY (1878), 9 Ch. D. 103; 38 L. T. 844; 42 J. P. 806; 27 W. R. 184.

Annotations:—**Apld.** Allen *v.* Richardson (1879), 13 Ch. D. 524. **Consd.** Joliffe *v.* Baker (1883), 11 Q. B. D. 255. **Overd.** Palmer *v.* Johnson (1884), 13 Q. B. D. 351. **Apprvd.** Clayton *v.* Leech (1889), 41 Ch. D. 103. The language of all the judgments in *Palmer* v. *Johnson*, No. 157, *post*, appears to treat *Besley* v. *Besley* as wrong, but that is erroneous. All that was intended, as I think, was to decide that any expressions in *Besley* v. *Besley* which laid down a principle inconsistent with that laid down in *Palmer* v. *Johnson* were wrong. It had been cited as an authority for the proposition that, in the absence of fraud, no relief for misdescription could be given after conveyance; perhaps the language in it may have been too wide; & so far, if at all, as it supported that proposition, it was overruled. When, however, the fact is looked at, that in *Besley* v. *Besley* there was no agreement for compensation the decision in that case is not inconsistent with *Palmer* v *Johnson*, & in my opinion it was rightly decided (BOWEN L.J.). **Mentd.** Debenham *v.* Sawbridge, [1901] 2 Ch. 98.

155. —— ——.] — Deft., believing his term had thirty years to run, agreed to grant an underlease for twenty-one years to pltf., nothing being said about compensation for misdescription. Pltf. did not investigate deft.'s title, & a year after the lease was granted it was discovered that deft.'s term had only fourteen years to run. Pltf. then brought this action claiming rectification of the lease & compensation:—*Held:* as there was no contract as to compensation, & pltf. claimed in respect of a defect in the title which he might have discovered before he took the lease, he was not entitled to any compensation after he had taken it.—CLAYTON *v.* LEECH (1889), 41 Ch. D. 103; 61 L. T. 69; 37 W. R. 663, C. A.

Annotations:—**Reld.** Debenham *v.* Sawbridge, [1901] 2 Ch. 98; Saunders *v.* Cockrill (1902), 87 L. T. 30. **Mentd.** Baynes *v.* Lloyd, [1895] 1 Q. B. 820.

156. Account taken on wrong basis — Mistake of accountant.]—Applt. advanced £15,000 to resp., to be used in the business of resp. for five years. In return for the advance applt. was to receive interest & 37½ per cent. of the profits of resp.'s business. The contract stipulated that there should be an annual audit of resp.'s business by the firm of M. & co., accountants, & that their certificate as to the profits should be binding on both parties. For four years resp.'s books were audited by G., a member of the firm of M. & co. Subsequently applt. raised this action against resp. for a judicial account on the ground that the audits had not been in terms of the agreement in respect that the auditor did not know that his estimate of the profits was to be binding on applt. & resp. G. swore in his evidence that he did not know of this agreement, & that if he had he would have made out the account in a somewhat different form:—*Held:* there must be a new account taken, the auditor being unaware that his audit was to be final between the parties.—TEACHER *v.* CALDER, [1899] A. C. 451.

157. Conveyance containing express contract for compensation—In case of mistake.]—Pltf. purchased at a sale by auction certain property belonging to deft. described in the particulars of sale as producing a net annual rental of £39, & one of the conditions of sale was, "if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale but compensation shall be allowed by the vendor or purchaser as the case may require." After the conveyance, without any covenants, had been executed by deft. to pltf., it was discovered by pltf. that the rental of £39 was a gross rental, the net rental being considerably less:—*Held:* notwithstanding the error was not discovered until after the conveyance, pltf. was entitled to compensation under the conditions of sale.—PALMER *v.* JOHNSON (1884), 13 Q. B. D. 351; 53 L. J. Q. B. 348; 51 L. T. 211; 33 W. R. 36, C. A.

Annotations:—**Expld.** Clayton *v.* Leech (1889), 41 Ch. D. 103. **Distd.** Greswolde-Williams *v.* Barneby (1900), 49 W. R. 203. **Consd.** Saunders *v.* Cockrill (1902), 87 L. T. 30. **Refd.** *Re* Orange & Wright's Contract (1885), 52 L. T. 606; A.-G. & Hare *v.* Met. Ry. (1893), 69 L. T. 811; Mason *v.* Schuppisser (1899), 81 L. T. 147. **Mentd.** De Lassalle *v.* Guildford, [1901] 2 K. B. 215.

158. —— ——.]—CLAYTON *v.* LEECH, No. 155, *ante*.

See, further, SALE OF LAND.

C. Parties not "ad idem."

159. Sale of land—Purchaser intending to purchase property not intended to be sold.]—Purchaser not entitled to a conveyance of part, though answering the general description in the advertisement of sale, as it was not in the contemplation of either party at the time of the purchase or conveyance; purchaser being referred to a more particular description, which did not include that part; & the surrender having been made according to that & from his own instructions. If one party thought he had purchased *bonâ fide* part of an estate, which the other thought he had not sold, it is a ground to set aside the contract. If both understood the whole was to be conveyed, it must; otherwise if neither understood so.—CALVERLEY *v.* WILLIAMS, WILLIAMS *v.* CALVERLEY (1790), 1 Ves. 210; 30 E. R. 306.

Annotations:—**Folld.** Clowes *v.* Higginson (1813), 1 Ves. & B. 524. **Apld.** Price *v.* Ley (1863), 4 Giff. 235. **Refd.** Manser *v.* Back (1848), 6 Hare, 443; Douglas *v.* Baynes, [1908] A. C. 477.

160. —— ——.] — CLOWES *v.* HIGGINSON, No. 76, *ante*.

161. —— ——.] — A purchaser complaining that his conveyance did not comprise the whole of the property which he had contracted for, filed his bill for a conveyance of the remainder. . . . The bill was dismissed.

The purchaser immediately after the agreement, & before the conveyance, is entitled to have everything which the agreement, strictly interpreted, gives him; & if a conveyance be executed for the purpose of giving effect to & executing the agreement, & that conveyance, by fraud, accident or mistake should give the purchaser less than the agreement entitled him to, I have no doubt that he may effectually call upon the ct. to rectify the defective conveyance & give him all that the agreement compehended (WIGRAM, V.-C.).—HUMPHRIES *v.* HORNE (1844), 3 Hare, 276; 67 E. R. 386.

162. —— ——.] — BAXENDALE *v.* SEALE, No. 107, *ante*.

163. —— ——.]—(1) P., in Aug. 1861, agreed in writing to purchase a house & premises of L. supposing that he was seised in fee, but he subsequently discovered that L. possessed only an agreement from B. for a lease for a short term, of which five years & a half were unexpired, with an option of purchase. P. agreed in writing to purchase for the sum of £2,500 "the benefit of L.'s agreement with his lessor" & he covenanted to perform all L.'s covenants in the agreement for a lease. L. admitted that this contract was erroneous. It was subsequently discovered that B. had not a freehold title to more than three-fourths of the property, & P. consequently refused to complete his purchase. L. brought an action to recover £600, the declaration stating that pltf. in the action sought to recover £500 only under the first count, the sum of £2,500 having been inserted in the agreement by mistake for £500. P. instituted this suit to have the agreement set aside, & to have the action stayed, & dealt with by the ct. On the motion for a decree:—*Held:* the mistake in the agreement rendered it null & void, & ordered it to be delivered up to be cancelled & deft. to pay the costs of the suit & of the action.

(2) Where a written agreement between a vendor & a purchaser did not express the intention of either of the parties, the ct., upon a bill by the purchaser against the vendor to set aside the agreement, admitted parol evidence to show that there was a mistake in the agreement as to the subject-matter of the purchase, & accordingly set the agreement aside.—PRICE *v.* LEY (1862), 4 Giff. 235; 32 L. J. Ch. 530; 7 L. T. 845; 9 Jur. N. S. 295; 11 W. R. 399; 66 E. R. 692; *on appeal* (1863), 11 W. R. 475, L. JJ.

164. —— ——.] — The rule that the ct. will not interfere to rectify an instrument unless it is proved that the mistake was common to both parties, does not apply to the case of a contract which has been executed between parties in the relation of vendor & purchaser, whom it is in the power of the ct. to replace in their original position. Accordingly where, in a conveyance of messuages, the plan on the deed comprised a piece of land not intended by the vendor to be included, a decree was made to rectify the deed, an option being given to the purchaser to have his contract annulled; but, having regard to the conduct of the parties, no costs were given on either side.

With regard to costs in such cases, they must depend on the conduct of the parties. When the mistake is entirely owing to the conduct of pltf., then he must pay all the costs of the suit. When deft. has been aware of the mistake from the beginning, & refused to rectify it, then the costs must be given against him (LORD ROMILLY, M.R.).—HARRIS *v.* PEPPERELL (1867), L. R. 5 Eq. 1; 17 L. T. 191; 32 J. P. 132; 16 W. R. 68.

Annotations:—**Apld.** Paget *v.* Marshall (1884), 49 J. P. 85. **Expld.** May *v.* Platt, [1900] 1 Ch. 616. **Refd.** Baskcomb *v.* Beckwith (1869), L. R. 8 Eq. 100.

165. —— ——.] — The conveyance made in 1866, upon a sale of land by S. to B., contained a reservation to S. of minerals. Four years subsequently B. filed a bill against S., alleging that the reservation was inserted in the conveyance under a mistake common to both parties, & recently discovered by him, & praying for the rectification of

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PART III. SECT. 2, SUB-SECT. 8.—C.

159 i. *Sale of land—Purchaser intending to purchase property not intended to be sold.*]—MURRAY *v.* JENKINS (1898), 28 S. C. R. 565.—**CAN.**

a. —— *Mistake as to existence of lane at back of property—Mutual mistake.*]—PORTER *v.* MARIOTT (Alta.) (1921), 67 D. L. R. 766.—**CAN.**

b. *Sale of shares—Shares of new company bought as shares of old—Effect of opportunity for examination before acceptance.*]—LINDSEY *v.* HERON & Co. (1921), 64 D. L. R. 92; 50 O. L. R. 1.—**CAN.**

c. *Sale of goods—By auction.*]—

Sect. 2.—When relief granted: Sub-sect. 8, C.; sub-sect. 9, A. & B.]

the conveyance by the omission of it. S. put in an answer denying the mistake & claiming the benefit of the reservation; & afterwards died before he could be cross-examined:—*Held:* (1) although in the opinion of the ct., a mistake common to both parties had been made, of which S. sought to take an improper advantage, yet a simple decree for rectification could not be made after the lapse of time & against the oath of one of the parties (2) she [legal personal representative of S.] must have the option either of having the conveyance rectified or having the whole purchase set aside she repaying the purchase money with interest at 4 per cent. *per annum*, & all sums expended by pltf. in repairs & permanent improvements & pltf. being charged with an occupation rent; (3) in the event of the pltf. not choosing to accept the latter alternative, the bill must be dismissed without costs.

As a general rule, the costs of repairing a man's own blunder fall upon himself, & he ought to pay for it; but I am bound to say I do not think this was an honest defence of S.; & that being so, I shall give no costs of the proceedings on either side (LORD ROMILLY, M.R.).—BLOOMER *v.* SPITTLE (1872), L. R. 13 Eq. 427; 41 L. J. Ch. 369; 26 L. T. 272; 20 W. R. 435.

Annotations:—Generally, **Dbtd.** Beale *v.* Kyte, [1907] 1 Ch. 564. **Refd.** McKenzie *v.* Hesketh (1877), 7 Ch. D. 675. **Mentd.** Huddersfield Banking Co. *v.* Lister (1895), L. T. 703.

166. Sale of plantation — Number of trees misunderstood.]—A contract for the sale of a plantation of larches was entered into by a vendor in ignorance of the number of trees contained in it. The purchaser knew the exact number, but was not aware of the mistake made by the vendor. He was, however, prior to signing the contract, told by the vendor's woodman that his master must have made some mistake in reference to the matter:—*Held:* the contract ought to be set aside.—HAMILTON *v.* BOARD (1863), 2 New Rep. 13; 27 J. P. 644.

167. Lease of land — Rent inserted for less sum than was agreed.]—GARRARD *v.* FRANKEL, No. 301, *post.*

168. —— Premises included by mistake — Unilateral mistake.]—PAGET *v.* MARSHALL, No. 291, *post.*

169. Contract for lease — Mistake not affecting essential terms—Mistake of agent.]—MCKENZIE *v.* HESKETH, No. 217, *post.*

170. Contract for sale of goods.] — HAMILTON *v.* BOARD, No. 166, *ante.*

171. —— Mistake in transmission by telegraph.]—Deft. wrote a message for transmission by telegraph to pltfs., ordering three rifles. By mistake the telegraph clerk telegraphed the word "the" for "three"; & pltfs., thereupon, acting upon a previous communication with deft. to the effect that he might perhaps want as many as fifty rifles, sent that number to him. Deft. declined to take more than three. In an action against him to recover the price of the fifty rifles:—*Held:* deft. was not responsible for the mistake of the telegraph clerk, & that therefore pltfs. were not entitled to recover the price of more than three rifles.—HENKEL *v.* PAPE (1870), L. R. 6 Exch. 7; 40 L. J. Ex. 15; 19 W. R. 106; *sub nom.* HENCKEL *v.* PAPE, 23 L. T. 419.

SUB-SECT. 9.—COMPROMISES AND FAMILY ARRANGEMENTS.

A. General Rule as to Binding Effect.

See, generally, CONTRACT, Vol. XII., pp. 197 *et seq.*; FAMILY ARRANGEMENTS, Vol. XXIV., pp. 951 *et seq.*

172. Compromises.] — The ct. refused to set aside a contract entered into by a gas co. & a railway co. under a mistake common to both parties.

Though the law, no doubt, is that when two parties have entered into an agreement under a common mistake, it may be a ground for setting it aside, it is equally clear that if the parties are dealing with one another "at arm's length" & they choose to enter into an agreement for the settlement of rights which are in dispute & which may tend to litigation & they are dealing with one another on equal terms & there is nothing to show that either has been misled by the other, such an agreement must be upheld (WILLS, J.).—GAS LIGHT & COKE CO. *v.* METROPOLITAN RY. CO. (1892), 9 T. L. R. 98.

173. ——.] — A. & B., the owners of adjoining lands, the rights to which were in dispute, "in order to terminate their differences" agreed that A. should cede his asserted claim, & that B. should pay an annuity to A. B. having impeached the agreement, on the ground that A.'s claim was originally unfounded, that his consent was obtained by misrepresentation, & was founded on a mistake both of law & of fact:—*Held:* (1) the *bonâ fide* surrender of a claim, however unfounded, forms a good consideration for a compromise; (2) a general compromise is not affected by a mistake in fact, included in the subject-matter of the agreement, nor by a mistake in law, though prevailing generally at the time.—TRIGGE *v.* LAVALLEE (1863), 15 Moo. P. C. C. 270; 1 New Rep. 454; 8 L. T. 154; 9 Jur. N. S. 261; 11 W. R. 404; 15 E. R. 497, P. C.

Annotations:—As to (2) **Refd.** Pope & Pearson *v.* Buenos Ayres New Gas Co. (1892), 8 T. L. R. 758; Huddersfield Banking Co. *v.* Lister (1895), 72 L. T. 703.

See, further, CONTRACT, Vol. XII., pp. 198 *et seq.*; COMPANIES, Vol. IX., p. 422, No. 2729.

Compromise in court—Authority of counsel.]—*See* BARRISTERS, Vol. III., pp. 342–344, Nos. 322, 327, 334–339.

174. Adjustment of accounts.] — Where parties agree to settle accounts by ascertaining the exact balance, & for that purpose obtain vouchers & give information, if it should afterwards turn out that there were errors in that account, a court of equity will open it up & set it right; but otherwise, if the parties met, not to ascertain the exact balance, but to agree to take a gross sum as such balance. In both cases, however, fraud will vitiate the settlement or compromise.—MCKELLAR *v.* WALLACE (1853), 8 Moo. P. C. C. 378; 5 Moo. Ind. App. 372; 1 Eq. Rep. 309; 22 L. T. O. S. 309; 14 E. R. 144, P. C.

*Annotation:—***Distd.** Perry *v.* Attwood (1856), 6 E. & B. 691.

175. ——.]—In an action for breach of a covenant to pay a certain sum for every ton of ore raised, deft. pleaded that pltf. & deft. met & examined deft.'s books, & agreed on a certain sum as the balance due to pltf., & that pltf. paid that sum before action. Pltf. replied that the accountings were erroneous, certain amounts of tonnage rent having been omitted by mistake, & that the balance agreed was erroneously agreed

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Deft. bid for a mantelpiece under the impression that the mantelpiece & a pier-glass were being sold together. The mantelpiece was knocked down to deft. who, discovering his mistake immediately afterwards, repudiated the purchase:—*Held:* there was a *bonâ fide* mistake, & there being no *consensus ad idem*, there was no contract of sale.—MARITZ *v.* PRATLEY (1894), 11 S. C. 345; 4 C. T. R. 351.—S. AF.

to be that due :—*Held :* the replication was good. —PERRY *v.* ATTWOOD (1856), 6 E. & B. 691 ; 25 L. J. Q. B. 408 ; 27 L. T. O. S. 170 ; 2 Jur. N. S. 1071 ; 4 W. R. 608 ; 119 E. R. 1021.

Annotation :—**Refd.** Camillo Tank S.S. Co. *v.* Alexandria Engineering Works (1921), 38 T. L. R. 134.

176. Family arrangements.] — Family agreements without fraud established, though founded in mistake.—GORDON *v.* GORDON (1819), 3 Swan. 400 ; 36 E. R. 910, L. C.

Annotations :—**Consd.** Hoghton *v.* Hoghton (1832), 15 Beav. 278 ; Fane *v.* Fane (1875), L. R. 20 Eq. 698. **Distd.** Lovell *v.* Wallis (No. 2) (1884), 50 L. T. 681. **Refd.** Stewart *v.* Stewart (1839), 6 Cl. & Fin. 911 ; Smith *v.* Pincombe (1852), 3 Mac. & G. 653 ; Lawton *v.* Campion (1854), 18 Beav. 87 ; Bainbrigge *v.* Moss (1856), 3 Jur. N. S. 58 ; Bentley *v.* Mackay (1862), 31 Beav. 143 ; Micholls *v.* Corbett (1866), 34 Beav. 376 ; Smith *v.* Mogford (1873), 21 W. R. 472. **Mentd.** Watkin & Bligh *v.* Brent (1836), 1 Curt. 264 ; Malone *v.* Malone (1841), 8 Cl. & Fin. 179 ; Nelthorpe *v.* Holgate (1844), 1 Coll. 203 ; Watts *v.* Hyde (1846), 2 Coll. 368 ; Hayward *v.* Purssey (1849), 3 De G. & Sm. 399 ; Baker *v.* Bradley (1855), 7 De G. M. & G. 597 ; Holmes *v.* Powell (1856), 8 De G. M. & G. 572.

177. ——.] — MASON *v.* MASON (1886), 2 T. L. R. 266, C. A.

178. ——.] — *Re* ROBERTS, ROBERTS *v.* ROBERTS, No. 55, *ante*.

179. —— **No written contract.**] — A. died in 1831, possessed of freehold, copyhold, & leasehold estates, & also of stock in trade & goodwill of his business, & considerable personalty ; he left a wife & two sons. He had made a will, by which, after certain provisions for his wife, he gave all his property to his two sons equally ; but this will was not admitted to probate, being incomplete. At an interview between the brothers shortly after the will had been refused probate, the elder brother declared that the invalidity of the will should make no difference, & that the property should not be "mine or thine, but ours." No agreement in writing was ever entered into ; but it appeared that, for twenty years after the death of A., the two sons carried on the partnership together, & dealt with the whole property as if it belonged to them equally ; & the widow, who survived her husband about six years, never insisted on her rights in her husband's property. In 1851 the elder brother gave his younger brother notice of dissolution of partnership. Upon bill by representatives of younger brother who had died, against elder brother :—*Held :* such a course of dealing had been proved as the ct. would uphold, as a family arrangement, notwithstanding there was no written, or formal contract between the parties.—WILLIAMS *v.* WILLIAMS (1867), 2 Ch. App. 294 ; 36 L. J. Ch. 419 ; 16 L. T. 42 ; 15 W. R. 657, L. C. & L. J.

Annotation :—**Mentd.** Sadleir *v.* Butler (1867), 15 W. R. 1219.

—— **Ignorance as affecting validity.**]—*See* FAMILY ARRANGEMENTS, Vol. XXIV., pp. 956, 957, Nos. 102-109.

B. Material Facts not Honestly Disclosed.

180. Family arrangement — Information withheld.]—When parties, whose rights are questionable, have equal knowledge of facts & equal means of ascertaining what their rights really are, & they fairly endeavour to settle their respective claims among themselves, every ct. feels disposed to support the conclusions or agreements to which they may fairly come at the time, & that notwithstanding the subsequent discovery of common error.

An account between an aged tenant for life & the remainderman, who was also exor., which was settled & signed by the tenant for life, under the advice of her solr., set aside, on the ground of the executor not having furnished full information of the account being founded on an erroneous opinion of counsel as to the rights of the parties, obtained *ex parte* by the exor., & of the account being complicated in its form, & though professing to be made in conformity with the opinion, yet containing an addition of a purchase & sale between the parties.—PICKERING *v.* PICKERING (1839), 2 Beav. 31 ; 8 L. J. Ch. 336 ; 3 Jur. 331 ; 48 E. R. 1090 ; *on appeal*, 4 My. & Cr. 289, L. C.

Annotations :—**Distd.** Mason *v.* Mason (1886), 2 T. L. R. 266. **Refd.** Smith *v.* Pincombe (1852), 3 Mac. & G. 653. **Mentd.** Benn *v.* Dixon (1840), 10 Sim. 636 ; Lichfield *v.* Baker (1840), 13 Beav. 447 ; Caldecott *v.* Caldecott (1842), 1 Y. & C. Ch. Cas. 312 ; Cole *v.* Stutely (1842), 6 Jur. 314 ; Smith *v.* Pugh (1842), 6 Jur. 701 ; Daniel *v.* Warren (1843), 2 Y. & C. Ch. Cas. 290 ; Hinves *v.* Hinves (1844), 3 Hare, 609 ; Cafe *v.* Bent (1845), 5 Hare, 24 ; Chambers *v.* Chambers (1846), 15 Sim. 183 ; Pickup *v.* Atkinson (1846), 4 Hare, 624 ; Hunt *v.* Scott (1847), 1 De G. & Sm. 219 ; Simpson *v.* Earles (1847), 11 Jur. 921 ; Burton *v.* Mount (1848), 2 De G. & Sm. 383 ; Milne *v.* Parker (1848), 17 L. J. Ch. 194 ; Howe *v.* Howe (1849), 14 L. T. O. S. 290 ; Marshall *v.* Sladden (1849), 7 Hare, 428 ; Prendergast *v.* Prendergast (1850), 3 H. L. Cas. 195 ; Morgan *v.* Morgan (1851), 14 Beav. 72 ; Blann *v.* Bell (1852), 5 De G. & Sm. 658 ; Craig *v.* Wheeler (1860), 29 L. J. Ch. 374 ; Thursby *v.* Thursby (1875), L. R. 19 Eq. 395 ; Macdonald *v.* Irvine (1878), 8 Ch. D. 101 ; *Re* Game, Game *v.* Young, [1897] 1 Ch. 881 ; *Re* Bland, Miller *v.* Bland, [1899] 2 Ch. 336 ; *Re* Van Straubenzee, Boustead *v.* Cooper, [1901] 2 Ch. 779 ; Stanier *v.* Hodgkinson (1903), 73 L. J. Ch. 179 ; *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312 ; *Re* Evans' Will Trusts, Pickering *v.* Evans, [1921] 2 Ch. 309 ; *Re* Barratt, National Provincial Bank *v.* Barratt, [1925] Ch. 550.

See, further, FAMILY ARRANGEMENTS, Vol. XXIV., pp. 958, 959, Nos. 116-126.

181. Compromise — Mistake induced by misrepresentation.]—Pltf. may be entitled to relief from a contract or conveyance on the ground of ignorance & mistake, although deft. with whom he dealt, & against whom relief is sought, was also in ignorance & under mistake ; the contract or conveyance not being made upon the principle of compromising doubtful rights.

Deft. became acquainted with the fact that, under the will of a relation of pltf., an estate vested in trustees was settled, after subsisting life estate, & upon the failure of issue of the tenant for life, who had then no issue, to pltf. for life, with remainder to his issue in tail, with remainders over, & an ultimate remainder to pltf.'s brother, then deceased, & his heirs & assigns ; deft. having communicated to pltf., who was then supposed to be, & was in fact, the heir at law of his brother, the existence of such a will, in a long correspondence produced an impression on the mind of pltf., contrary to the true facts, that pltf.'s interests under the will were precarious ; that they were endangered by the conduct of the trustees & tenant for life, & could not be established without difficulty, delay & litigation ; & deft. obtained a conveyance of a moiety of the estate from pltf., deft. indemnifying pltf. against the costs of recovering the property. The ct. set aside the conveyance ; & held it was not an objection to this relief that pltf. had, throughout, the means, equally with deft., of knowing what his rights were, & of obtaining competent advice respecting them.

But if parties are ignorant of facts on which their rights depend, or erroneously assume that they know those rights, & deal with their property accordingly, not upon the principle of compromising doubts, this ct. will relieve against such a transaction (WIGRAM, V.-C.).—REYNELL *v.* SPRYE, SPRYE *v.* REYNELL (1849), 8 Hare, 222 ; 68 E. R. 340 ; *affd.* (1852), 1 De G. M. & G. 660, L. JJ.

Annotations :—**Refd.** Parr *v.* Jewell (1855), 1 K. & J. 671 ; Traill *v.* Baring (1864), 4 De G. J. & Sm. 318 ; Arkwright *v.* Newbold (1881), 17 Ch. D. 301. **Mentd.** *Re* Tratt, *Ex p.* James (1853), 3 De G. M. & G. 493 ; Parker *v.* Clarke (1861), 7 Jur. N. S. 1267 ; Hilton *v.* Woods (1867), L. R. 4 Eq. 432 ; Rees *v.* Bernhardy, [1896] 2 Ch. 437 ; Hermann *v.* Charlesworth (1905), 74 L. J. K. B. 620 ; Parkinson *v.* College of Ambulance & Harrison, [1925] 1 K. B. 1.

Sect. 1.—*When relief granted: Sub-sect.* 1, *C.; sub-sects.* 2 & 3. *Sect.* 2: *Sub-sects.* 1, 2 & 3.]

207; 25 L. J. Ch. 803; 27 L. T. O. S. 179; 2 Jur. N. S. 481; 4 W. R. 522; 52 E. R. 1087.

Annotation:—**Reld.** *Re* Turner's S. E. (1881), 28 Ch. D. 205.

203. —— ——.]—HOOD OF AVALON (LADY) *v.* MACKINNON, No. 7, *ante*.

SUB-SECT. 2.—MISTAKE AS TO EFFECT OF INSTRUMENT.

204. Whether ground for relief—General rule.]—Deed set aside upon the ground of ignorance & mistake as to its purport & effect, no fraud or undue influence in obtaining its execution being alleged, & the deed itself being inconsistent with the effect contended for by the grantee under it as against pltf. Pltf. intending to assist deft., his illegitimate son, in raising money upon mtge., & to give security for him, had executed a deed which recited a contract for sale, & in consideration of £50 conveyed the equity of redemption in the property, which had been mortgaged to deft. No consideration was ever paid; & deft., who insisted that the deed was a voluntary conveyance to himself from pltf., had not questioned a subsequent sale of a portion of the property by pltf. Deed set aside & reconveyance ordered.—COX *v.* BRUTON (1857), 5 W. R. 544.

205. —— ——.]—To a declaration against W. & H. for not loading according to the terms of a charterparty, defts. pleaded, on equitable grounds, that they entered into the charterparty solely as agents of D. & co., & that before they signed it was agreed between pltf. & defts. that defts. were only to sign as such agents so as to bind D. & co., & were not to make themselves liable as principals for the performance of the charter; that they signed the charter in the following manner: "For D. & co., W. & H., agents," defts. & pltf. *bonâ fide* believing at the time that defts. having so signed would not be personally liable as charterers, notwithstanding the charter professed to be made between pltf. as owner & defts. as merchants & freighters; that defts. had power to bind D. & co. by signing the charter as their agents, & that D. & co. are bound by the charter; & that pltf. was inequitably taking advantage of the mistake in drawing the charter so as to make the defts. personally liable, contrary to the intention of pltf. & defts.:—*Held:* a good equitable plea.

Semble: the plea raised a good defence at law. —WAKE *v.* HARROP (1862), 1 H. & C. 202; 31 L. J. Ex. 451; 7 L. T. 96; 8 Jur. N. S. 845; 10 W. R. 626; 1 Mar. L. C. 247, Ex. Ch.; *affg.* (1861), 6 H. & N. 768.

Annotations:—**Consd.** Druiff *v.* Parker (1868), L. R. 5 Eq. 131. **Folld.** Cowie *v.* Witt (1874), 23 W. R. 76. **Apld.** Nicoll *v.* Boll (1875), 32 L. T. 813. **Reld.** Bowman *v.* Rossel (1864), 3 New Rep. 471; Guardhouse *v.* Blackburn (1866), L. R. 1 P. & D. 109; Clever *v.* Kirkman (1875), 33 L. T. 672; Gadd *v.* Houghton (1876), 33 L. T. 811; Ariadne S.S. Co. *v.* McKelvie, [1922] 1 K. B. 518. **Mentd.** Reid & Glasgow *v.* Draper (1861), 4 L. T. 650; Rogers *v.* Hadley (1863), 11 W. R. 1074; Universal Steam Navigation Co. *v.* McKelvie, [1923] A. C. 492; Kimber Coal Co. *v.* Stone & Rolfe, [1926] A. C. 414.

206. —— **When operation doubtful.**]—A deed may be reformed so as to be plainly confined to the object intended, where its operation as it stands is doubtful. An appointment under a settlement limited the settled estates to such uses as a husband & wife should jointly appoint, but by mistake omitted to give them life estates. On discovering the error, they instructed a solr. to frame such a deed as would remedy it. The solr. prepared a deed which remedied the defect, but was framed by way of complete relimitation of the uses, & thus raised a question whether a testamentary appointment which the wife had made in the meantime, but of which the solr. was unaware, was not revoked:—*Held:* a proper case for reforming the deed.

The very principle of this Ct. in correcting instruments is, that the parties are to be placed in the same situation as they would have stood in if the error to be corrected had not been committed (TURNER, L.J.).—WALKER *v.* ARMSTRONG (1856), 8 De G. M. & G. 531; 25 L. J. Ch. 738; 27 L. T. O. S. 329; 2 Jur. N. S. 959; 4 W. R. 770; 44 E. R. 495, L. JJ.

Annotations:—**Apld.** A.-G. *v.* Cambridge Consumers Gas Co. (1868), L. R. 6 Eq. 282. **Folld.** *Re* Walton's Settlmt., Walton *v.* Peirson, [1922] 2 Ch. 509. **Reld.** Cowper *v.* Mantell (1856), 22 Beav. 223; Bonhote *v.* Henderson, [1895] 1 Ch. 742; Rake *v.* Hooper (1900), 83 L. T. 669. **Mentd.** *Re* Hayes, Turnbull *v.* Hayes, [1901] 2 Ch. 529.

207. —— **Mistake in means of giving effect to intention.**]—By a marriage settlement in 1779, lands were conveyed to the use of the husband, the settlor, for life; remainder to the wife for life; remainder to the children, as they, or the survivor, should appoint; & in default of appointment, to the heirs of the body of the wife by the husband; &, in default of such issue, the lands to stand charged with a sum of £2,000 to the wife's father, his heirs & assigns. In 1798 the husband & wife, by a deed reciting the first deed, that there was no issue of the marriage, & that they intended to bar all the estates & provisions in the former settlement, & to settle the lands to new uses thereby declared, covenanted to levy a fine for that purpose, to enure to such uses as they should appoint; &, in default of such appointment, to the use of the husband for life; remainder to trustees for a term of years; remainder to the wife for life; &, after the decease of both, to the use of the heirs & assigns of the husband; &, as to the term, upon trust to raise £2,000, & pay the same to the wife, or as she should appoint, &, in case of her death without appointment, to her next of kin. The fine did not bar the first charge. On a bill by the representative of the wife's father, who was also one of the next of kin of the wife, after the death of the husband & wife without issue or appointment, to procure both sums of £2,000 to be raised out of the settled lands:—*Held:* notwithstanding the recital in the deed of 1798, of the intention of the parties, that the first charge of £2,000 should be extinguished, & although such charge still remained, yet the trusts of the term for raising the second charge of £2,000 were not therefore inoperative, but the same must still be carried into execution; & both sums of £2,000 must therefore be raised.

The difficulty arises from the fact that the parties have mistaken the way of giving effect to their own intentions, correctly expressed in the deed (WIGRAM, V.-C.).—FARR *v.* SHERIFFE,

PART IV. SECT. 1, SUB-SECT. 2.

204 i. *Whether ground for relief—General rule.*]—A ct. of equity will not give relief by way of rectification of a written agreement, merely on the ground that one of the parties misunderstood its true construction & legal effect at the time of execution.—CAMPBELL *v.* EDWARDS (1876), 24 Gr. 152.—**CAN.**

204 ii. —— ——.]—If a person executes a document knowing its contents but misappreciates its legal effect, he cannot deny its execution.—DAGDU *v.* BHANA (1904), I. L. R. 28 Bom. 420. —**IND.**

DYKES *v.* FARR (1845), 4 Hare, 512; 15 L. J. Ch. 89; 10 Jur. 630; 67 E. R. 750.

Annotations:—**Refd.** Hitchcock *v.* Carew (1853), Kay App. xiv. **Mentd.** Woods *v.* Woods (1846), 5 Hare, 229.

Mistake in construction of words.]—Part V., Sect. 3, sub-sect. 1, C., *post.*

208. —— Mistake induced by party's legal adviser.]—WALKER *v.* ARMSTRONG, No. 206, *ante.*

209. —— ——.]—WAKE *v.* HARROP, No. 205, *ante.*

210. —— ——.]—By a settlement of the funds belonging to a husband & wife it was agreed that it should be lawful for the funds to be sold & the proceeds invested in the purchase of an annuity in the joint names of husband & wife, with benefit of survivorship: & if the annuity should not be purchased the whole of the funds should, in the event of the death of the husband in the lifetime of the wife, be vested in the wife & the exors. of her husband upon trust to invest the same in the purchase of a life annuity for the sole & separate use of the wife. The settlement contained a power for either party to revoke it. Upon the death of her husband his widow, who was an old lady, desired to avoid the necessity of purchasing the annuity. Upon the advice of her solr., who did not appreciate that the widow, being solely entitled to the annutiy when purchased, could call for a transfer of the capital applicable for its purchase, she executed a deed poll revoking the settlement. In an action against the exors. of her husband's will she claimed to be entitled to the funds settled by her husband, or alternatively the cancellation or rectification of the deed of revocation:—*Held:* pltf.'s solr. having gone beyond his instructions in ignorance of the true legal position of pltf., there would be a declaration that she was absolutely entitled to the investments representing her husband's fund, & an order for the cancellation of the deed poll.—*Re* WALTON'S SETTLEMENT, WALTON *v.* PEIRSON, [1922] 2 Ch. 509; 92 L. J. Ch. 32; 127 L. T. 626; 66 Sol. Jo. 666.

211. —— Contract with corporation under seal.]—HIGGINS (W.), LTD. *v.* NORTHAMPTON CORPN., No. 87, *ante.*

See, also, Part III., Sect. 2, sub-sect. 8, B., *ante.*

SUB-SECT. 3.—OMISSIONS, CLERICAL ERRORS, ETC.

See Sect. 2, sub-sect. 3, *post.*

SECT. 2.—KINDS OF RELIEF.

SUB-SECT. 1.—RESCISSION.

See Part V., Sect. 3, sub-sect. 1, *post.*

SUB-SECT. 2.—RECTIFICATION.

See Part V., Sect. 3, sub-sect. 2, *post.*

SUB-SECT. 3.—REMEDY BY CONSTRUCTION.

See, generally, DEEDS, Vol. XVII., pp. 242–389, Nos. 567–1982.

212. Restriction of meaning—General covenant in deed.]—Covenant by the assignor of certain shares in a patent right that he has good right, full power, & lawful authority to assign & convey the said shares, & that he has not by any means directly or indirectly forfeited any right or authority he ever had or might have had over the same:—*Held:* the generality of the former words of the covenant is not restrained by the latter. If the assignees of an uncertificated bkpt. in their own names execute a deed with other creditors, whereby they, & all the creditors who may sign the said deed, release the bkpt. from all actions, suits, claims, & demands against him or his estate, & such deed be not signed by all the creditors of the bkpt., the assignees are not barred from claiming as assignees the benefit of a patent right previously obtained by the bkpt. A patent right for the exclusive exercise of an invention obtained from the Crown by an uncertificated bkpt., is affected by the previous assignment of the comrs., & vests in the assignees. An Act of Parliament, empowering such bkpt. patentee, his exors., administrators, & assigns, to assign the right to a greater number of persons than allowed by the letters patent, & declared to be a public Act, does not enable either the bkpt. or his assigns to make a better title than they could before the Act.

However general the words of a covenant may be if standing alone yet if from other covenants in the same deed it is plainly & irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the ct. will limit the operation of the general words (LORD ALVANLEY, C.J.).—HESSE *v.* STEVENSON (1803), 3 Bos. & P. 565; Dav. Pat. Cas. 244; 127 E. R. 305.

Annotations:—**Refd.** Saward *v.* Anstey (1825), 2 Bing. 519; Smith *v.* Compton (1832), 3 B. & Ad. 189. **Mentd.** Nias *v.* Adamson (1819), 3 B. & Ald. 225; Bloxam *v.* Elsee (1825), 1 C. & P. 558; Line *v.* Stephenson (1838), 4 Bing. N. C. 678; *Re* Roberts, [1900] 1 Q. B. 122.

213. Words supplied.]—A submission empowered an arbitrator to make his award on or before a certain day, "or on some such ulterior day as he by a memorandum in writing, under his hand, to be indorsed hereon:—*Held:* the arbitrator had power to enlarge the time for making his award until such day as he should indorse on the submission.

By the submission, the award was "to be delivered to the parties or any of them on or before Dec. 30, next, or on such further or later day as the arbitrator, by a memorandum in writing under hand indorsed hereon," & there it stops. No one can doubt that the words "shall appoint" have by some accident been left out. The question is, whether sufficient appears on the face of the agreement to enable the ct. to supply the defect. We think there does (ALDERSON, B.).—KIRK *v.* UNWIN (1851), 6 Exch. 908; 2 L. M. & P. 519; 20 L. J. Ex. 345; 18 L. T. O. S. 64; 155 E. R. 815.

214. Words eliminated.]—It is a true canon of construction, that, where a word is found in a

208 i. —— *Mistake induced by party's legal adviser.*]—DUNLOP *v.* DUNLOP (1884), 10 A. R. 670.—**CAN.**

f. —— *Mistake as to effect of offer.*]—A party cannot be released from an offer, deliberately made to & accepted by the opposite party, on the ground that his offer turns out to have some different effect from what he supposed it would have.—COUSINEAU *v.* CITY OF LONDON FIRE INSURANCE CO. (1888), 12 P. R. 512.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 3.

g. *Restoratim of meaning — General covenant in deed.*]—*Held:* the evidence showed that the agreement of the parties was that pltf. should have a deed with covenants as distinguished from a quit claim deed, & that it was through the mistake of all the parties that the covenant, as framed, was entered into, & the deed should be accordingly reformed by limiting the covenant to the grantor's own acts in the usual form.—MCKAY *v.* MCKAY (1880), 31 C. P. 1.—**CAN.**

h. —— *Mistake due to clerical error.*]—COLLEN *v.* DUBLIN COUNTY COUNCIL, [1908] 1 I. R. 503.—**IR.**

Sect. 2.—*Kinds of relief: Sub-sect.* 3. *Part V. Sect.* 1: *Sub-sects.* 1, 2 & 3. *Sect.* 2: *Sub-sects.* 1 & 2.]

statute or in any other instrument, or document which cannot possibly have a sensible meaning, we not only may, but must, eliminate it in order that the intention may be carried out (ARCHIBALD, J.).—STONE *v.* YEOVIL CORPN. (1876), 1 C. P. D. 691; 45 L. J. Q. B. 657; 34 L. T. 874; 24 W. R. 1073; *on appeal*, 2 C. P. D. 99, C. A.

Annotations:—**Apld.** R. *v.* Vasey & Lally (1905), 22 T. L. R. 1. **Mentd.** *Re* Gough & Aspatria, Silloth & District Joint Water Board (1903), 88 L. T. 421.

Bills of sale.]—*See* BILLS OF SALE, Vol. VII., pp. 85, 87, 88, 90, Nos. 492–496, 504–506, 514.

Bonds.]—*See* BONDS, Vol. VII., pp. 184–186, 192, 235–237, Nos. 225–260, 321, 322, 770–784.

Title of corporation.]—*See* CORPORATIONS, Vol. XIII., pp. 281–284, Nos. 126–158.

Charterparty.]—*See* SHIPPING.

Leases & agreements for leases.]—*See* LANDLORD & TENANT, Vol. XXX., pp. 445, 453–456, Nos. 1060–1062, 1154–1167; Vol. XXXI., pp. 67, 231, 460–462, Nos. 2147–2150, 3698, 6077–6092.

Mortgages.] — *See* MORTGAGE; BUILDING SOCIETIES, Vol. VII., p. 513, No. 360.

Marriage licences.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 51, 52, Nos. 316–325.

Promissory notes.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 50–52, Nos. 375–387.

Separation deeds.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 230, Nos. 2011–2014.

Settlements.]—*See* SETTLEMENTS.

Wills.]—*See* WILLS; EXECUTORS, Vol. XXIII., pp. 134–137, Nos. 1333–1359.

Part V.—Relief in Cases of Mistake.

SECT. 1.—WHEN GRANTED.

SUB-SECT. 1.—MISTAKE OF LAW.

See Part II., *ante*.

SUB-SECT. 2.—MISTAKE OF FACT.

See Part III., *ante*.

SUB-SECT. 3.—MISTAKE IN EXPRESSION OF INTENTION.

See Part IV., *ante*.

SECT. 2.—CONDITIONS PRECEDENT TO RELIEF.

SUB-SECT. 1.—GENERAL RULES AS TO PROOF.

215. What must be proved — Conduct determined by mistake.]—CARPMAEL *v.* POWIS, No. 440, *post*.

216. —— Mistake affecting substance of transaction.]—In order to entitle a party to rescind a contract, it is sufficient to show that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But when there has been only an innocent misrepresentation, it is not ground for a rescission, unless it was such as that there is a complete difference in substance between the thing bargained for & that obtained, so as to constitute a failure of consideration. A co., already carrying the intercolonial mails under contracts with the govt. of New Zealand, issued a prospectus that they were "prepared to receive applications for new shares in order to enable the co. to perform the contract recently entered into with the govt. of New Zealand, for a monthly mail service between Sydney, New Zealand, & Panama, in correspondence with the West Indian Mail co.'s steamers between Southampton & Panama." K., induced by this statement in the prospectus, applied for & obtained some of the new shares. The contract alluded to in the prospectus had been made by the co. with the agent of the New Zealand govt., both parties *bonâ fide* believing that he had authority to make it; but it turned out that he had no such authority, & the govt. refused to ratify the contract:—*Held*: the prospectus by implication alleged that there was a binding contract, but being an innocent misrepresentation it did not entitle K. to rescind the contract under which he became a shareholder, as it did not affect the substance of the matter, K. having got shares in the very co. for which he had applied, & which shares were of considerable value.

The principle is well illustrated in the civil law as stated in the *Digest. lib.* 18, *tit. De Contrahenda Emptione, leges* 9, 10, 11. There—after laying down the general rule, that where the parties are not at one as to the subject of the contract there is no agreement & that this applies where the parties have misapprehended each other as to the corpus. . . . The answer given by the great jurists quoted are to the effect that if there be misapprehension as to the substance of the thing there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. . . . &, as we apprehend, the principle of our law is the same as that of the civil law; & the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration (BLACKBURN, J.).—KENNEDY *v.* PANAMA, ETC. MAIL CO. (1867), L. R. 2 Q. B. 580; 8 B. & S. 571; 36 L. J. Q. B. 260; 17 L. T. 62; 15 W. R. 1039.

Annotations:—**Consd.** Angel *v.* Jay, [1911] 1 K. B. 666. **Reld.** Corcoran *v.* Proser (1873), 22 W. R. 222; Mackay *v.* Dick (1881), 6 App. Cas. 251; *Re* Addlestone Linoleum Co. (1887), 37 Ch. D. 191; Peters *v.* Planner (1895), 11 T. L. R. 169; Seddon *v.* North Eastern Salt Co., [1905] 1 Ch. 326; Bristol Tramways, etc., Carriage Co. *v.* Fiat Motors, [1910] 2 K. B. 831. **Mentd.** Sharpley *v.* Louth & East Coast Ry. (1876), 2 Ch. D. 663; Edgington *v.* Fitzmaurice (1884), 32 W. R. 848; Newbigging *v.* Adam (1886), 34 Ch. D. 582; *Re* Murray, Dickson *v.* Murray (1887), 57 L. T. 223; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392.

217. —— ——.] — Pltf. offered to take a lease of a farm belonging to deft. at a rent of £500 *per annum* specifying in his tender the closes which he wished to take, with their acreage which

PART V. SECT. 2, SUB-SECT. 1.

216 i. *What must be proved—Mistake affecting substance of transaction.*—A man voluntarily pays a supposed debt, knowing that he does not owe it & is not liable to pay it, he cannot, in the absence of fraud, recover what he has so paid as a payment made under a mistake.—COURT *v.* GLENN (1913), 26 W. L. R. 71; 5 W. W. R. 619; 4 D. L. R. 612; 6 Sask. L. R. 140.—**CAN.**

amounted in the whole to 249 acres. Deft.'s agent desired to let only 214 acres with this farm but he accepted pltf.'s offer without looking at the acreage included in it. He had, in fact, already let one of the closes to another person. Another tender had been made by a former tenant for the same farm as comprising 235 acres & deft.'s agent admitted in examination that he thought pltf. had tendered for the same quantity of land as the former tenant. Pltf. commenced an action for specific performance against deft., & was willing to take a lease of the 214 acres at a proportionately reduced rent:—*Held:* deft. must grant pltf. a lease of 214 acres at a rent reduced from £500 in the proportion of 214 to 235.

What is the effect of that mistake? . . . It appears to me that the mistake is not one which goes to the corpus with which the contract deals; it is not a mistake as to the essential terms of the contract. The Ct. of Ch. always drew a distinction between the essential & non-essential terms of a contract & allowed the incapacity to perform it in non-essential terms to be made the subject of compensation (FRY, J.).—MCKENZIE *v.* HESKETH (1877), 7 Ch. D. 675; 47 L. J. Ch. 231; 38 L. T. 171; 26 W. R. 189.

Annotations:—**Consd.** Paget *v.* Marshall (1884), 49 J. P. 85; *Re* Aspinall & Powell's Contract (1889), 5 T. L. R. 446.

218. —— ——.]—Pltf. being entitled to a sum of £2,916 stock in reversion expectant on the death of an old lady aged eighty-two, obtained a loan of £1,650 upon mtge. The mtge. deed contained a power of sale upon three months' notice, or on interest being one month in arrear. The interest being in arrear, the stock was sold under the power for £1,950 as subject to succession duty at 3 per cent. The tenant for life was then in a precarious state of health, & died within three months. It was afterwards found that only £7 was payable for succession duty. None of the purchase-money was paid except the deposit, the remainder being left on a mtge. of the stock. There was evidence that, having regard to the age & health of the tenant for life, from £100 to £200 might have been obtained for the reversion:—*Held:* the sale could not be set aside, either on the ground of undervalue, as there was no fraud; nor the leaving of the purchase-money on mtge.; nor the mistake as to the succession duty, that being merely a matter for compensation.—BETTYES *v.* MAYNARD (1883), 49 L. T. 389; 31 W. R. 461, C. A.

Annotation:—**Mentd.** Belton *v.* Bass, Ratcliffe & Gretton, [1922] 2 Ch. 449.

219. —— ——.]—STEWART *v.* KENNEDY (No. 2), No. 33, *ante*.

220. —— ——.]—By certain heads of agreement it was agreed that 36 acres of land, to be measured, as the boundary on one side was unmarked, should be sold for £3,000, the purchase-money to bear interest at 4 per cent. from a fixed day until completion. A proviso was also inserted "subject to approval of conditions & form of agreement by purchaser's solr. The vendors, by a mistake on their part, required the purchaser to take 42 acres at £100 per acre. The purchaser refused, & brought an action for specific performance of the contract for the sale of 36 acres, which contract the vendors repudiated:—*Held:* (1) the mistake did not go to the root of the contract; (2) the proviso was not a condition precedent to a complete contract.—NORTH *v.* PERCIVAL, [1898] 2 Ch. 128; 67 L. J. Ch. 321; 78 L. T. 615; 46 W. R. 552; 42 Sol. Jo. 431.

Annotations:—*As to* (1) **Consd.** Bennett *v.* Stone, [1902] 1 Ch. 226; *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648. *As to* (2) **Dbtd.** Santa Fé Land Co. *v.* Forestal Land, Timber & Railways Co. (1910), 26 T. L. R. 534; Von Hatzfeldt-Wildenburg *v.* Alexander, [1912] 1 Ch. 284: Rossdale *v.* Denny, [1921] 1 Ch. 57. **Reld.** Chillingworth *v.* Esche (1923), 92 L. J. Ch. 461.

—— **In case of mistake of law.**]—*See* Part II., Sect. 2, sub-sect. 1, *ante*.

SUB-SECT. 2.—RESTORATION OF PARTIES TO ORIGINAL POSITION.

221. General rule — Possibility of restoration necessary.]—By agreement in writing, deft. agreed to sell, & pltf. to purchase, a piece of land, & to pay part of the purchase-money down, & the remainder on a future day; & it was agreed that pltf. should have immediate possession, & that deft. should furnish pltf. with a full & sufficient abstract of title to the land, &, upon payment of the balance of the purchase-money, a conveyance of the fee simple should be made; that all objections to, & requisitions in support of, the title, not delivered in writing in a month after the delivery of the abstract, should be deemed to be waived. Pltf. paid the deposit, & took possession of the land. Deft., in due time, delivered an abstract, containing a statement of all the deeds, etc., in his custody, power, or knowledge, but tracing the title for a period less than sixty years, & showing it to be in a trustee. No objection was made within the month. Afterwards the trustee died intestate; & it not appearing in whom the legal estate vested, pltf. gave notice that he rescinded the contract, & brought an action to recover back the deposit, &, in one count of the declaration, declared specially on the agreement, & assigned as a breach the non-delivery of a "full & sufficient abstract" of deft.'s title to the land, which was traversed by a plea. The second count was for money had & received:—*Held:* (1) no objection having been made within the month, the issue was satisfied by the abstract delivered, it having been a full & fair statement of all the muniments which deft. had in his possession, power, or knowledge, & a fair statement of the deduction of his title, though it did not go back sixty years.

(2) Pltf. could not rescind the contract & recover the deposit under the count for money had & received, inasmuch as, having taken possession of the land, the parties could not be placed *in statu quo*.—BLACKBURN *v.* SMITH (1848), 2 Exch. 783; 18 L. J. Ex. 187; 154 E. R. 707.

Annotations:—*As to* (1) **Reld.** Want *v.* Stallibrass (1873), L. R. 8 Exch. 175. *As to* (2) **Consd.** Abram S.S. Co. *v.* Westville Shipping Co., [1923] A. C. 773. **Reld.** Hellbutt *v.* Hickson (1872), L. R. 7 C. P. 438. *Generally*, **Mentd.** Green *v.* Saddington (1857), 3 Jur. N. S. 717.

PART V. SECT. 2, SUB-SECT. 2.

221 i. *General rule—Possibility of restoration necessary.*]—Where there is a substantial mistake as to the substance of the contract between contracting parties it is necessary for the party who relies upon the mistake & who seeks to rescind the contract to restore the other party to the same position in which he stood at the time the supposed contract was entered into.—PICTURESQUE ATLAS PUBLISHING CO. *v.* PHILLIPSON (1890), 16 V. L. R. 675.—**AUS.**

221 ii. —— ——.]—He who would disaffirm a contract entered into by mistake must do so within a reasonable time, & will not be allowed to do so unless both parties can be replaced in their original position.—MUHAMMAD MOHIDIN *v.* OTTAYAL UMMACHE (1863), 1 Mad. 390.—**IND.**

221 iii. —— ——.]—A mistake even not known has legal consequences, provided there can be restoration of all parties concerned to their original position.—DAODU *v.* BHANA (1904), I. L. R. 28 Bom. 420.—**IND.**

221 iv. —— ——.]—Equity cannot relieve against a mistake, unless compensation can be made for the injury sustained by it.—M'ALPINE *v.* SWIFT (1810), 1 Ball & B. 285.—**IR.**

Sect. 2.—*Conditions precedent to relief: Sub-sects.* 2 & 3.]

222. —— ——.] — WALKER *v.* ARMSTRONG, No. 206, *ante*.

223. —— ——.] — *Re* SAXON LIFE ASSURANCE SOCIETY, No. 23, *ante*.

224. —— ——.] — An award was made in 1756 by Inclosure Comrs., acting under the authority of an Act of Parliament, whereby they apportioned certain lands & a rentcharge between the rectors of B. & curates of U. Pltf., who was now curate of U., complained that this allotment was beyond the power of the Comrs., & prayed that the award might be rectified, & a fresh partition made:—*Held:* on the true construction of the Act the Comrs. had power to make the allotment; but *semble*, if they had acted *ultra vires*, this ct. would have had no power to rectify the award.

In ordinary cases, where a transaction is undone for mistake, the parties are to be restored to their original rights; but this could not be done in the present case, as the tithes are extinguished by the Act (TURNER, L.J.).—BATEMAN *v.* BOYNTON (1866), 1 Ch. App. 359; 35 L. J. Ch. 568; 14 L. T. 371; 12 Jur. N. S. 383; 14 W. R. 598, L. JJ.

Annotation: **Consd.** Micklethwait *v.* Vincent (1893), 69 L. T. 57.

225. —— ——.] — SKILBECK *v.* HILTON, No. 278, *post*.

226. —— ——.] — HARRIS *v.* PEPPERELL, No. 164, *ante*.

227. —— ——.] — BEAUCHAMP (EARL) *v.* WINN, No. 57, *ante*.

228. —— ——.] — SCOTT *v.* COULSON, No. 100, *ante*.

229. —— ——.] — Contractors brought an action against a railway co. for the rescission of a contract for the construction of a branch line, on the ground that the contract had been entered into under essential error, induced by the innocent misrepresentation of the engineer of the co. as to the nature of the strata through which the line had to pass:—*Held:* as *restitutio in integrum* had become impossible, by reason of the completion of the line by the contractor, after full knowledge of the facts, the action for rescission of the contract could not be maintained.—GLASGOW & SOUTH WESTERN RY. CO. *v.* BOYD & FORRIEST, [1915] A. C. 526; 84 L. J. P. C. 157, H. L.

230. Where third party would be prejudiced Purchaser for full value.]—Where a purchaser has given a full value for an estate the mistake or ignorance of some of the parties to a conveyance, of their claim under a marriage settlement, shall not turn to the prejudice of a fair purchaser.—MALDEN *v.* MENILL (1737), 2 Atk. 8; West *temp.* Hard. 74; 26 E. R. 402, L. C.

231. —— ——.] — Lands were devised upon trust for C. for life with remainder to her husband B. for life, with remainder to their children as tenants in common in tail, with an ultimate remainder over in fee. The will contained a power to the trustee, his heirs & assigns, at the request of C. & her husband, to sell the property, & to give valid discharges to the purchaser, & to reinvest the purchase-moneys upon the trusts therein mentioned for C. & her husband & children. The trustee died in 1806, intestate as to trust estates, leaving his sister a residuary devisee, & his brother heir at law. In the same year B., the husband of the tenant for life, contracted to sell the property, & a conveyance was executed by G. who was supposed to be the devisee of the trust estates, to the purchaser, who with her consent, subsequently paid the purchase-money to B. & it was never reinvested according to the trusts of the will. B. died in 1837, C. in 1845. None of the children became aware iuntil 1848 that the trustee had died intestate, & that G. had no authority to sell the property. In 1848 a decree was made in a suit instituted shortly after the death of B. by one of the *cestuis que trust* against his representatives for the settlement of the claims of the *cestuis que trust* under testator's will against B.'s estate in respect of the purchase-money of testator's estates received by him, declaring that an estate purchased by B. with part of the purchase-money must be considered as subject to the trusts of testator's will, & that the *cestuis que trust* were entitled to claim against B.'s estate as creditors for any deficiency. In a suit instituted by mtgees. of C.'s life interest against the extrix. of G., G.'s estate was held liable to make good the purchase-moneys received by her permission by B. Her estate is sufficient to answer the claim. In 1851 the *cestuis que trust* under testator's will filed their bill against the purchaser, disputing the validity of the sale, & seeking to restrain him from setting up an outstanding term in any action of ejectment brought against him. The purchaser filed a cross bill for an injunction to restrain the *cestuis que trust* from taking any proceedings at law:—*Held:* the sale having been made under mistake by a party not authorised, *bonâ fide*, & for the full value, & the *cestuis que trust* having a remedy against the estate of G., the supposed trustee, which is solvent, & against the estate of B. who had received the purchase-money this ct. would not, after such a lapse of time & the dealings of the *cestuis que trust* with their shares of the purchase-money, interfere to set aside the sale, but would grant a perpetual injunction against any action at law to recover the debts; if G. had had the legal estate vested in her, the ct. would not have set aside the sale on account of the character of it, or the circumstances attending being made *bonâ fide* & for full value.—HOPE *v.* LIDDELL, LIDDELL *v.* NORTON (1855), 21 Beav. 183; 25 L. J. Ch. 90; 26 L. T. O. S. 305; 2 Jur. N. S. 105; 4 W. R. 145; 52 E. R. 829.

Annotations:—**Consd.** Nawab Sidhee Nuzur Ally Khan *v.* Rajah Ojoodhyaram Khan (1866), 10 Moo. Ind. App. 540. **Refd.** *Re* Bellamy & Metropolitan Board of Works (1883), 24 Ch. D. 387. **Mentd.** *Re* Bellis's Trusts (1877), 5 Ch. D. 504.

232. —— **Incumbrancer.**] — (1) On the settlement of a ward, no clause against anticipation was attached to her separate life estate. She incumbered her interest:—*Held:* the settlement could not be rectified to the prejudice of her incumbrancers.

(2) As to the binding effect upon a ward of ct. & her husband of an order, made after she came of age, to settle her real estate.

This lady, having treated herself as possessing that estate expressed in the settlement of 1841, & having dealt with the co. upon that footing, cannot now repudiate that transaction, & say that the acts which she did in that character are not valid & binding upon her (ROMILLY, M.R.).—BLACKIE *v.* CLARK, COCK *v.* CLARK (1852), 15 Beav. 595; 51 E. R. 669; *sub nom.* BLAIKIE *v.* CLARK, COCK *v.* CLARK, 22 L. J. Ch. 377.

Annotation:—*As to* (2) **Consd.** Field *v.* Moore, Field *v.* Brown (1855), 7 De G. M. & G. 691.

233. Where restoration difficult—Relief may be granted.] — BEAUCHAMP (EARL) *v.* WINN, No. 57, *ante*.

234. Where restoration impossible.]—No doubt the general rule is that a buyer cannot rescind a

contract of sale to get back the purchase-money unless he can restore the subject matter. . . . It certainly seems to me that, in a case of rescission for a breach of the condition that the seller had a right to sell the goods, it cannot be that the buyer is deprived of his right to get back the purchase-money because he cannot restore the goods, which, from the nature of the transaction, are not the goods of the seller at all, & which the seller, therefore, has no right to under any circumstances (SCRUTTON, L.J.).—ROWLAND *v.* DIVALL, [1923] 2 K. B. 500; 92 L. J. K. B. 1041; 129 L. T. 757; 67 Sol. Jo. 703, C. A.

See, also, Part VI., Sect. 2, sub-sect. 9, A., *post*; MISREPRESENTATION & FRAUD, pp. 67, 68, 72, 76, 77, *ante*.

SUB-SECT. 3.—EFFECT OF MEANS OF KNOWLEDGE.

235. General rule—Right to relief not affected.]—A negotiable security given by a party in satisfaction of a liability from which he was discharged in law, in ignorance of the facts which constituted such discharge, cannot be enforced against him, though he may have had the means of knowing those facts.

Therefore, where a bill of exchange indorsed by A. for the accommodation of the drawer, was afterwards altered in a material point, with the consent of the drawer, & when the bill was at maturity, B., the then holder, made a demand upon A., who, ignorant of the alteration, though he had ample means of knowing it, gave B. a promissory note for the amount of the bill, & expenses:—*Held:* it was a good defence to the action on the note by B., that at the time A. gave it, he was not, in fact, aware of the alteration in the bill.

We can in fact regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances; but there is no conclusive rule of law that, because a party has the means of knowledge, he has the knowledge itself (TINDAL, C.J.).—BELL *v.* GARDINER (1842), 4 Man. & G. 11; 1 Dowl. N. S. 683; 4 Scott, N. R. 621; 11 L. J. C. P. 195; 134 E. R. 5.

Annotations:—**Consd.** Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477; Cook *v.* Wright (1861), 1 B. & S. 559. **Apprvd.** Brownlie *v.* Campbell (1880), 5 App. Cas. 925. **Consd.** Holt *v.* Markham (1922), 128 L. T. 719. **Refd.** Higgs *v.* Scott (1849), 7 C. B. 63; Pooley *v.* Brown (1862), 8 Jur. N. S. 938.

236. —— ——.]—Mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge.

The lessee of 3 acres of land agreed in Jan. 1874, to let 1 acre to pltf. for the whole of the residue of his term, & he agreed also to sell to pltf. his interest in the whole 3 acres at any time within five years from the date of the agreement. The lease contained a covenant by the lessee not to assign the property, or to part with the possession of it, or any part of it, without the written consent of the lessor. Pltf. was not, in fact, aware of this covenant. He was let into possession of the 1 acre, & he laid out money upon it, & also upon adjoining property of his own, with the view of occupying the 2 together. The lessor was aware of this expenditure. In Oct. 1877, the lessee, without pltf.'s knowledge surrendered the lease to the lessor, in exchange for a new lease for a longer term of the 3 acres, together with other property. The new lease contained a similar covenant by the lessee not to assign, etc., without licence. In Nov. 1877, pltf. gave the lessee notice of his desire to exercise his option to purchase his interest under the original lease in the 3 acres. The lessee declined to perform his agreement, on the ground that the lessor refused to give his licence to an assignment. Pltf. brought the action against the lessee & the lessor, claiming specific performance of the agreement by the lessee, & to compel the lessor to give his licence, on the ground (*inter alia*) that he had acquiesced in pltf.'s expenditure, knowing that he was acting in the mistaken belief that the lessee was able to assign the property to him. It appeared that the lessor was not, when pltf.'s expenditure was incurred, aware of the existence of the lessee's covenant not to assign without licence:—*Held:* inasmuch as the lessor was ignorant of his own rights, & there was nothing to show that he knew that pltf. had been acting in ignorance of his legal rights, the lessor could not be compelled to give his licence to assign to pltf.—WILLMOTT *v.* BARBER (1880), 15 Ch. D. 96; 49 L. J. Ch. 792; 43 L. T. 95; 28 W. R. 911.

Annotations:—**Apld.** Civil Service Musical Instrument Assocn. *v.* Whiteman (1899), 68 L. J. Ch. 481. **Refd.** Russell *v.* Watts (1883), 25 Ch. D. 559; *Re* Gorton, Dowse *v.* Gorton (1889), 60 L. T. 305; Marriott *v.* Reid (1900), 82 L. T. 369; Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1901] 2 Ch. 37; King *v.* Bird (1909), 100 L. T. 478; Hoare *v.* Kingsbury U. C., [1912] 2 Ch. 452; Morrell *v.* Studd & Millington, [1913] 2 Ch. 648; *Re* Chaplin, Milne, Grenfell & Co. (1915), 31 T. L. R. 279; Jones (Holloway) *v.* Woodhouse, [1923] 2 K. B. 117. **Mentd.** Preston Corpn. *v.* Fullwood L. B. (1885), 53 L. T. 718.

237. Means of knowledge distinguished from knowledge.]—BROWNLIE *v.* CAMPBELL, No. 249, *post*.

238. Effect of negligence — Failure to examine description—Exchange of lands.]—6 & 7 Will. 4, c. 115, extended by 3 & 4 Vict. c. 31, authorises exchanges of lands on conditions therein prescribed. One of these is the written consent of the owners of the lands intended to be exchanged. The landowners of a parish determined to carry this Act into execution, & appointed a comr. for that purpose. B., one of the landowners, authorised his agent to attend for him at the meetings held for the purpose of carrying the Act into execution, but desired him not to exchange a particular wood except for woodland. N.'s lands were to be exchanged against those of B., & this restriction was communicated to N.'s agent, who, being asked to exchange another wood against the wood in question, said that his principal had no power to do so. This answer was communicated to B., who took no further notice of the matter. The restriction on the authority of B.'s agent did not appear to have been brought to the knowledge of the comr. The comr. prepared & B. signed a written consent

PART V. SECT. 2, SUB-SECT. 3.

237 i. *Means of knowledge distinguished from knowledge.*]—*Held:* the Registry Act does not preclude inquiry as to whether there was knowledge in fact of a lien; & the ct. was not compelled as a conclusion of law to say that deft. had notice of what he was doing, & so could not mistake.—ABELL *v.* MORRISON (1890), 19 O. R. 669.—**CAN.**

K. *Effect of negligence — Failure to examine description.*]—In an action claiming rectification of a deed on the ground among others of mutual mistake, even assuming the existence of mutual mistake calling for the reformation of the instrument, the negligence of pltf. in not examining his deed to satisfy himself that it correctly described the property he intended to purchase, & his failure to discover the error relied on until about four years after the conclusion of the transaction, present serious obstacles in the way of

Sect. 2.—Conditions precedent to relief: Sub-sect. 3. Sect. 3: Sub-sect. 1, A.]

to ratify the exchange of certain closes belonging to him, & designated in the consent by numbers. Among the closes thus designated was the wood in question, but the number by which it was referred to in the consent, & in a map & plan previously submitted to B.'s inspection was not the same as that which it bore in B.'s private map of his own estate. A comparison of the two maps, or the reading of the plan sent with the comrs.' map, would have shown B. that the wood in question was included in his consent. The comr. allotted the lands to be exchanged, &, among them, included this wood, but did not give woodland for it. Possession of the exchanged lands, & of this wood, although the award of the comr. had not been formally executed, was delivered by B.'s agent to N., who immediately began to exercise acts of ownership over it. B. some time afterwards, discovered what had been done, & brought ejectment against N. for the wood. N. filed his bill in Chancery to restrain B. from proceeding with the action, & to compel him to perfect the exchange; & B. filed his bill to prevent the comr. from executing the award, alleging that the consent given to him had been signed in mistake:— *Held:* N. was entitled to an injunction, as prayed by his bill, & B. had no equity on which to ask for the interference of the ct. in his favour. —BEAUFORT (DUKE) *v.* NEELD (1845), 12 Cl. & Fin. 248; 8 E. R. 1399; *sub nom.* BEAUFORT (DUKE) *v.* TAYLOR, SAME *v.* NEELD, 9 Jur. 813, H. L.; *affg.* S. C. *sub nom.* NEELD *v.* BEAUFORT (DUKE), BEAUFORT (DUKE) *v.* TAYLOR (1841), 5 Jur. 1123, L. C.

Annotations:—**Consd.** Wood *v.* Scarth (1855), 2 K. & J. 33; Barrow *v.* Isaacs, [1891] 1 Q. B. 417. **Mentd.** Squire *v.* Whilton (1848), 1 H. L. Cas. 333; Mangles *v.* Dixon (1849), 1 H. & Tw. 542; Wing *v.* Harvey (1854), 5 De G. M. & G. 265; Wheatley *v.* Bastow (1855), 7 De G. M. & G. 261; Collen *v.* Gardner (1856), 21 Beav. 540; Towle *v.* National Guardian Assce. Soc. (1861), 30 L. J. Ch. 900; Messageries Imperiales *v.* Baines (1863), 11 W. R. 322; *Re* Scottish Universal Finance Bank, Ship's Case (1865), 12 L. T. 256; Shardlow *v.* Cotterill (1881), 50 L. J. Ch. 613.

239. —— —— Building contract.]— A builder made a tender, undertaking to sign a contract to execute for a certain sum certain works described in some rough sketches & verbal explanations of an architect. The architect subsequently sent by special messenger to the builder a contract to perform for the sum named the works delineated & described in certain plans & specifications thereto annexed. These differed materially from the works described in the rough sketches & verbal explanations on which the builder had made his tender. The builder, however signed the contract, without any examination, & completed the works according to the plans annexed to it. He then filed a bill, claiming to have an account taken of the works executed by him on the basis on which he had made his tender:—*Held:* as the mistake under which he signed the contract was due to his own negligence & he had not taken proceedings for rectifying the contract as soon as he discovered it, he was not entitled to any relief in this respect. —KIMBERLEY *v.* DICK (1871), L. R. 13 Eq. 1; 41 L. J. Ch. 38; 25 L. T. 476; 20 W. R. 49.

Annotations:—**Mentd.** Lariviere *v.* Morgan (1872), 26 L. T. 339; Sharpe *v.* San Paulo Ry. (1872), 8 Ch. App. 605, n.; Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.; Amos *v.* Herne Bay Pavilion, Promenade & Pier Co. (1886), 54 L. T. 264.

—— Recovery of money paid under mistake.]—*See* Part VI., Sect. 2, sub-sect. 5, *post.*

—— Failure to pursue inquiries—Guarantee.]—*See* GUARANTEE, Vol. XXVI., p. 211, Nos. 1663, 1664.

—— Marriage settlement.]—*See* SETTLEMENTS.

—— Sale of land.]—*See* SALE OF LAND.

Effect of forgetfulness—Breach of covenant in lease.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 381, No. 5269.

240. Mistake of party's legal adviser — Mistake in pleading.]—SPENCER *v.* HARRISON & MATHEWS (1847), 8 L. T. O. S. 316.

—— Breach of covenant in lease.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 491, Nos. 6388, 6389.

—— Sale of land by order of court.]—*See* SALE OF LAND.

—— As to effect of instrument.]—*See* Nos. 208–210, *ante.*

241. Mistake of party's agent — Valuation of business.]—*Re* EVANS, HASELDEN *v.* EVANS (1894), 38 Sol. Jo. 546.

—— Sale of land.]—*See* SALE OF LAND.

Recovery of money paid.]—*See* Part VI., Sect. 2, sub-sect. 6, *post.*

SECT. 3.—DIFFERENT KINDS OF RELIEF.

SUB-SECT. 1.—RESCISSION.

A. In General.

242. Jurisdiction of court — Where mistake plain.]—BEAUCHAMP (EARL) *v.* WINN, No. 57, *ante.*

243. —— Mistake through forgetfulness—Deed poll.]—HOOD OF AVALON (LADY) *v.* MACKINNON, No. 7, *ante.*

244. When rescission obtainable—Not on ground of formal mistake.]—BINGHAM *v.* BINGHAM (1748), 1 Ves. Sen. 126; 27 E. R. 934.

Annotations:—**Apprvd.** Cooper *v.* Phibbs (1867), L. R. 2 H. L. 149. **Consd.** Jones *v.* Clifford (1876), 3 Ch. D. 779. **Apprvd.** Huddersfield Banking Co. *v.* Lister, [1895] 2 Ch. 273. **Refd.** Clifton *v.* Cockburn (1834), 3 My. & K. 76; Stewart *v.* Stewart (1839), 6 Cl. & Fin. 911; Cochrane *v.* Willis (1865), 1 Ch. App. 58; Rogers *v.* Ingham (1876), 3 Ch. D. 351; Bettyes *v.* Maynard (1882), 46 L. T. 766; Jolliffe *v.* Baker (1883), 11 Q. B. D. 255; *Re* Tyrell, Tyrell *v.* Woodhouse (1900), 82 L. T. 675; Debenham *v.* Sawbridge, [1901] 2 Ch. 98.

245. —— ——.]—Though a formal mistake in a deed may be rectified by articles, of which it purports to be an execution, essential additions cannot be made to a conveyance from articles, of which it does not purport to be an execution: nor can the transaction be rescinded by the ct.—MOSELY *v.* VIRGIN (1796), 3 Ves. 184; 30 E. R. 959.

Annotations:—**Mentd.** Bracebridge *v.* Buckley (1816), 2 Price, 200; De Mattos *v.* Gibson (1859), 4 De G. & J. 276.

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seeking equitable relief.—HART *v.* BOUTILLIER (1917), 50 N. S. R. 211; 56 D. L. R. 620.—**CAN.**

l. —— *Failure to search for charges — Mortgage.*]— BROWN *v.* MCLEAN (1889), 18 O. R. 533.—**CAN.**

m. ——.]—The ct. will not grant relief on the ground of mistake where there has been a wilful neglect to see what lay plain to the vision.—*Re* FROST BROTHERS, [1925] 2 D. L. R. 339; [1925] 2 W. W. R. 459.—**CAN.**

n. ——.]— HOGG *v.* CAMPBELL (1864), 2 Macph. (Ct. of Sess.) 848.—**SCOT.**

o. ——.]—YOUNG *v.* CLYDESDALE BANK (1889), 17 R. (Ct. of Sess.) 231; 27 Sc. L. R. 135.—**SCOT.**

PART V. SECT. 3, SUB-SECT. 1.—A.

242 i. *Jurisdiction of court—Where mistake plain.*]—Where the govt. had appropriated & patented as a glebe a lot which had been previously occupied & improved, & upon which the patent fee had been paid by the occupier, & not returned to him by the govt., the patent was set aside as issued in error & mistake.—A.-G. *v.* HILL (1861), 8 Gr. 532.—**CAN.**

246. —— Not after conveyance.]—M'CULLOCH *v.* GREGORY, No. 445, *post.*

247. —— ——.]—After the completion of a purchase, made under an order of the ct., the purchaser discovered the existence of a culvert, not disclosed by the particulars of sale, running under the land purchased by him, & through which third parties had a right to the flow of water, who claimed to be paid compensation :—*Held :* in the absence of fraud he had no claim to compensation, although he might have been entitled to rescind the contract if he had discovered the culvert before the completion of the purchase. —MANSON *v.* THACKER (1878), 7 Ch. D. 620 ; 47 L. J. Ch. 312 ; 42 J. P. 485 ; *sub nom.* MANSON *v.* THACKER, *Ex p.* CROSHAW, 38 L. T. 209 ; *sub nom.* MANSON *v.* THACKER, THACKER *v.* MANSON, 26 W. R. 604.

Annotations :—**Reld.** Besley *v.* Besley (1878), 9 Ch. D. 103 ; Allen *v.* Richardson (1879), 13 Ch. D. 524 ; *Re* Turner & Skelton (1879), 13 Ch. D. 130 ; Brett *v.* Clowser (1880), 5 C. P. D. 376 ; Joliffe *v.* Baker (1883), 11 Q. B. D. 255 ; Palmer *v.* Johnson (1884), 13 Q. B. D. 351 ; Clayton *v.* Leech (1889), 41 Ch. D. 103. **Mentd.** Midgley *v.* Coppock (1879), 4 Ex. D. 309.

248. —— ——.]—The particulars & conditions of a contract of sale represented that the vendor held under the original lease of the property, whereas in fact he had only an underlease, there being a term of two days outstanding. One of the conditions of sale provided that "the description of the property in the particulars is believed to be correct, but if any error shall be found therein, same shall not annul the sale, nor shall any compensation be allowed the vendor or purchaser in respect thereof" :—*Held :* this condition applied to a misdescription of the physical property, but not to a mistake in the description of the vendor's title to the property ; there had been a material misdescription ; & the purchaser was entitled to have it declared that a good title had not been shown. *Qu. :* whether the purchaser was entitled to an order for rescission.—*Re* BEYFUS & MASTERS'S CONTRACT (1888), 39 Ch. D. 110 ; 59 L. T. 740 ; 53 J. P. 293 ; 37 W. R. 261 ; 4 T. L. R. 590, C. A.

Annotations :—**Reld.** Debenham *v.* Sawbridge, [1901] 2 Ch. 98 ; Lee *v.* Itayson, [1917] 1 Ch. 613.

249. —— —— Unless on ground of fraud.]—Articles of roup of certain lands expressly stipulated that the purchaser was to take the property with all risks of error in the particulars. A. agrees by missives attached to the articles of roup to buy the estate, & conveyance was executed containing a clause of warrandice in the usual general terms. Neither the disposition nor the articles of roup contained any information as to the tenure of the lands. The particulars of sale contained this statement : "The lands hold of the Crown," & in answer to an inquiry made before the sale on behalf of A. as to the nature of the holding, the sellers' agents referred A. to the note of particulars, adding : "The proprietors," B. & C., "are not entered with the Crown, but you are aware the Crown never asks for an entry." The foundation for the belief that the lands were held direct of the Crown rested on a decree of tinsel, dated 1813, directed against the heir of line of the last superior, & a decree of forfeiture of the mid-superiority, dated 1849, followed by a Crown charter. From 1813 there had been no assertion of a contrary right. Immediately before the sale the agents for D., the disponee of the last superior, wrote to B. & C.'s agents claiming the right of mid-superiority, but this claim on its being disputed & not further persevered with, B. & C.'s agents did not intimate to A. Two years later D.'s agents renewed the claim, & ultimately raised an action against A., claiming a year's rent as composition on his entry. A. was found liable, & the decree of forfeiture was reduced. A. thereupon raised this action against B. & C. for repetition of the sum paid, the expenses of the litigation, & a sum equal to one & a half times the casualty of composition, on the ground of warrandice, & misrepresentation & concealment on the part of B.'s agents :—*Held :* (1) there had been no breach of warrandice ; & the representation was perfectly true according to the knowledge & belief of those who made it, &, that being so, any error therein was covered by the express contract of the purchaser to take the property with the risks of errors in the particulars.

(2) I assume them to be errors unconnected with fraud in the particular, & when the conveyance takes place it is not, as far as I know, in either country the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived (LORD SELBORNE, C.).

(3) It is pretty clear law that the mere means of knowledge is not the same thing as knowledge (LORD BLACKBURN).—BROWNLIE *v.* CAMPBELL (1880), 5 App. Cas. 925, H. L.

Annotations :—*As to* (1) **Consd.** Barrow *v.* Isaacs, [1891] 1 Q. B. 417 ; Debenham *v.* Sawbridge, [1901] 2 Ch. 98. **Reld.** Mathias *v.* Yetts (1882), 46 L. T. 497 ; Nash *v.* Wooderson (1884), 52 L. T. 49 ; Derry *v.* Peek (1889), 14 App. Cas. 337 ; Low *v.* Bouverie, [1891] 3 Ch. 82 ; Hood of Avalon *v.* Mackinnon, [1909] 1 Ch. 476 ; Nocton *v.* Ashburton, [1914] A. C. 932. *As to* (2) **Apld.** Soper *v.* Arnold (1887), 37 Ch. D. 96. **Consd.** Seddon *v.* North Eastern Salt Co., [1905] 1 Ch. 326. **Reld.** Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392 ; May *v.* Platt, [1900] 1 Ch. 616 ; Angel *v.* Jay (1910), 80 L. J. K. B. 458. *As to* (3) **Reld.** Derry *v.* Peek (1889), 14 App. Cas. 337. *Generally,* **Reld.** *Re* Metropolitan Coal Consumers' Assocn., Karberg's Case (1892), 66 L. T. 700 ; Whittington *v.* Seale-Hayne (1900), 82 L. T. 49 ; Holt *v.* Markham (1922), 92 L. J. K. B. 406. **Mentd.** Smith *v.* Chadwick (1882), 20 Ch. D. 27 ; Cavendish-Bentinck *v.* Fenn (1887), 57 L. T. 773 ; Thisdon *v.* Tindall (1891), 40 W. R. 141 ; Pearson *v.* Dublin Corpn., [1907] A. C. 351 ; Joel *v.* Law Union & Crown Insce., [1908] 2 K. B. 863 ; Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. 452 ; Hellbut, Symons *v.* Buckleton, [1913] A. C. 30 ; Yorke *v.* Yorkshire Insce., [1918] 1 K. B. 662.

250. —— —— Unless on ground of unfair dealing.]—MAY *v.* PLATT, No. 85, *ante.*

—— —— Unless mutual mistake.] — *See* Sect. 3, sub-sect. 1, B., *post.*

—— ——.]—*See, also,* Part III., Sect. 2, *ante ;* SALE OF LAND.

—— Not when restoration to original position impossible.]—*See* Part V., Sect. 2, sub-sect. 2, *ante.*

Power to revoke distress warrant.]—*See* DISTRESS, Vol. XVIII., p. 450, No. 1862.

246 i. *When rescission obtainable—Not after conveyance.*]—DUNBAR *v.* MEEK (1881), 32 C. P. 195.—**CAN.**

249 i. **—— ——** *Unless on ground of fraud.*]—The ct. found that a mistake had been made by pltf. in inserting a clause in a lease, that deft. knew its insertion was a mistake, & that his action in requiring pltf. to pay taxes, etc., was equivalent to fraud, & gave judgment for rescission with the option to deft. to accept rectification. —BOURGEOIS *v.* SMITH (1921), 48 N. B. R. 212 ; 58 D. L. R. 515.—**CAN.**

p. **——** *Parties not ad idem.*]—SUPERIOR LOAN & SAVINGS CO. *v.* LUCAS (1879), 15 A. R. 748 ; 44 U. C. R. 106.—**CAN.**

q. **——** **——.**]—Where land has been conveyed by a description which does not apply to what either party intended, but it is not established that the parties were ever *ad idem,* the remedy is rescission & not rectification. —WATSON *v.* CULLEN (1886), 5 N. Z. L. R. 17 (S. C.).—**N.Z.**

Sect. 3.—Different kinds of relief: Sub-sect. 1, B. & C. (a) & (b).]

B. Mutual Mistake.

251. Whether ground for rescission—General rule.]—CARPMAEL *v.* POWIS, No. 440, *post.*

252. —— ——.]—CHARLESWORTH *v.* JENNINGS, No. 144, *ante.*

253. —— ——.]—COOPER *v.* PHIBBS, No. 27, *ante.*

254. —— —— **Though after conveyance.**]—Deft. contracted to buy from pltf. freeholds & leaseholds under the condition that he should assume that E. M., who died in 1871, was seised in fee of the freeholds, & should not "require the production of or investigate or make any objection in respect of the prior title" thereto. He accepted the title, & before completion contracted to sell the lands, with a farm of his own adjoining the freeholds, to a sub-purchaser, who discovered, from an inclosure award prior in date to 1841, as to the effect of which both pltf. & deft. had been under a misapprehension, that the freeholds had never belonged to E. M., but at the date of the contract belonged to deft. himself in fee, subject to a leasehold interest in pltf. Deft. then refused to complete, & pltf. filed her bill for specific performance, stating that she too had discovered that part of the lands she had contracted to sell as leaseholds belonged to her in fee simple, & offering mutual waiver or compensation: —*Held:* deft. was not precluded by the condition or the acceptance of title from taking the objection, & the ct. could not agree specific performance; but although there was no fraud, yet, there being a common mistake, deft. was entitled to an inquiry as to the title to the freeholds at the date of the contract. *Semble:* ct. will, even in the case of a completed contract, give relief against a common mistake without fraud.

Nothing can be clearer than this, that LORD CRANWORTH [in *Bingham* v. *Bingham*, No. 244, *ante*] recognised the principle that the ct. would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud (HALL, V.-C.).—JONES *v.* CLIFFORD (1876), 3 Ch. D. 779; 45 L. J. Ch. 809; 35 L. T. 937; 24 W. R. 979.

Annotations:—**Refd.** Allen *v.* Richardson (1879), 13 Ch. D. 524; Bettyes *v.* Maynard (1882), 46 L. T. 766; Soper *v.* Arnold (1887), 37 Ch. D. 96; Huddersfield Banking Co. *v.* Lister, [1895] 2 Ch. 273; *Re* Tyrell, Tyrell *v.* Woodhouse (1900), 82 L. T. 675; Debenham *v.* Sawbridge, [1901] 2 Ch. 98. **Mentd.** *Re* National Provincial Bank of England & Marsh, [1895] 1 Ch. 190; Scott *v.* Alvarez (1895), 64 L. J. Ch. 821.

255. —— —— ——.]—On a sale by the ct. of property described in the particulars as freehold stabling with dwelling rooms over, one of the conditions provided that if any error or misstatement should appear to have been made in the particulars of sale or conditions it should not annul the sale, but compensation, to be settled by the judge in chambers, should be made in respect thereof; the property was conveyed to pltf., the purchaser, in Oct. 1897, & the purchase-money was paid into ct. & the bulk of it distributed among the beneficiaries. A year after completion it was discovered that some of the dwelling rooms over & a cellar underneath a portion of the property belonged to third persons, & pltf. eventually had to pay £300 to acquire a title to these dwelling-rooms. In Feb. 1900, the present action was commenced against the vendor trustee & the beneficiaries, claiming compensation for the errors & misstatements in the particulars & conditions of sale, or, in the alternative, to set aside the sale on the ground of common mistake, & obtain repayment of the purchase-money:—*Held:* pltf. was not entitled to compensation under the above condition of sale, which did not, & was not intended to apply to the case of a defect of title, but only to error or misstatement in the subject-matter of the sale; even assuming there had been a common mistake, & assuming that there need not be a total failure of consideration to justify rescission after conveyance, the error made in the present case was not sufficient to justify rescission, & plaintiff's action therefore failed & must be dismissed.

This [rescission on the ground of mutual mistake] is relief which may undoubtedly be granted in a proper case even after conveyance although there has been nothing in the nature of fraud (BYRNE, J.).—DEBENHAM *v.* SAWBRIDGE, [1901] 2 Ch. 98; 70 L. J. Ch. 525; 84 L. T. 519; 49 W. R. 502; 17 T. L. R. 441; 45 Sol. Jo. 466.

256. —— **Not mistake in compromise—Parties on equal terms.**]—GAS LIGHT & COKE CO. *v.* METROPOLITAN RY. CO., No. 172, *ante.*

—— **Mistake of law.**]—*See* Part II., *ante.*

—— **Mistake of fact.**]—*See* Part III., *ante.*

C. Unilateral Mistake.

(a) In General.

257. Whether ground for rescission—General rule.]—A misstatement, in the particulars of sale, of the length of the term for which a tenant of the vendor holds a portion of the property, is not, in the absence of any evidence as to whether such misstatement is to the advantage of the purchaser or not, such a misrepresentation as will enable him to resist specific performance. Seven cottages, let to weekly tenants, were put up for sale, & described as "producing £73 14*s.* a year." When the particulars were issued the cottages did not produce this rental. Before the sale the vendors had entered into a contract to do certain repairs, & had given notice to the tenants that their rents would be raised, & before the day fixed for completion the repairs were done, & the rents were raised 3*d.* a week; so that, on the day of completion, the statement in the particulars was quite accurate:—*Held:* (1) this

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PART V. SECT. 3, SUB-SECT. 1.—B.

251 i. *Whether ground for rescission—General rule.*]—An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation. But where, by error of both parties & without fraud or deceit, there has been a complete failure of consideration a ct. of equity will rescind the contract & compel the vendor to return the purchase money. —COLE *v.* POPE (1898), 29 S. C. R. 291.—**CAN.**

251 ii. —— ——.]—HOPKINS *v.* FULLER (1904), 15 Man. L. R. 282; 25 C. L. T. 481.—**CAN.**

251 iii. —— ——.]—Where a lease is taken of a specific quantity of land within definite boundaries, both the lessor & the lessee being under a common mistake that such quantity exists within the boundaries, while in fact it is much less, there is no valid contract, & the parties are entitled to rescission thereof.—DURGA PRASAD SINGH *v.* RAJENDRA NARIAN BAGCHI (1909), I. L. R. 37 Calc. 293.—**IND.**

254 i. —— —— *Though after conveyance.*]—Where, on a sale of lands, there is a mutual mistake, going not necessarily to an essential, but to a material, substantial, & important element of the contract, the ct. will ordinarily order rescission, even though the contract has been completely executed, if it can do so on equitable terms.—DE CLERVAL *v.* JONES (1908), 8 W. L. R. 300; 1 Alta. L. R. 286.—**CAN.**

PART V. SECT. 3, SUB-SECT. 1.—C. (a).

257 i. *Whether ground for rescission—General rule.*]—A mistake on one side may be ground for rescinding, but not for correcting, a contract.—MORTIMER *v.* SHORTALL (1842), 2 Dr. & War. 363; 1 Con. & Law. 417.—**IR.**

257 ii. —— ——.]—Essential error alone is a good ground for reducing a

was not such a misrepresentation as would enable a purchaser to resist specific performance.

(2) Speaking generally, I understand the rule to be this: The purchaser may escape from his bargain on the ground of mistake, if it was a mistake which the vendors contributed to, that is, in other words, if he was misled by any act of the vendors; but if he was not misled by any act of the vendors, if the mistake was entirely his own, then the ct. ought not to let him off his bargain on the ground of a mistake made by himself solely, unless the case is one of considerable harshness & hardship (KAY, J.).—GODDARD *v.* JEFFREYS (1881), 51 L. J. Ch. 57; 45 L. T. 674; 30 W. R. 269.

Annotation:—As to (2) **Refd.** Van Praagh *v.* Everidge, [1902] 2 Ch. 266.

258. —— In case of hardship.]—GODDARD *v.* JEFFREYS, No. 257, *ante*.

259. —— Deed poll executed by mistake.]—HOOD OF AVALON (LADY) *v.* MACKINNON, No. 7, *ante*.

260. —— ——.]—*Re* WALTON'S SETTLEMENT, WALTON *v.* PEIRSON, No. 210, *ante*.

—— **Mistake of law.**]—*See* Part II., *ante*.

—— **Mistake of fact.**]—*See* Part III., *ante*.

261. —— Mistake induced by other party.]—GODDARD *v.* JEFFREYS, No. 257, *ante*.

262. —— —— As to construction of words—Though no fraud.]—WILDING *v.* SANDERSON, No. 34, *ante*.

263. —— —— —— ——.]—In 1914 a correspondence took place between pltf., who was a surveyor, & the clerk of the guardians of deft. union, with a view to pltf. acting as valuer for the guardians at an arbitration between them & the B. union, arising out of the dissolution of the A. Union, the transfer of its property & liabilities to the B. Union, & the inclusion in deft. union of S., a parish hitherto in the A. Union. In the opinion of the ct. pltf. throughout the correspondence believed & intended that he was to be remunerated on Ryde's scale on the basis of the value of the whole of the properties of the A. Union, while the guardians believed & intended that the scale was to be applied only to the interest of their union in those properties. The contract for employment of pltf. as valuer was originally drawn in the sense understood & intended by him; but the draft was altered to the sense understood & intended by the guardians, & in that form it was executed by pltf. & sealed with the seal of the guardians:—*Held:* on the evidence, pltf.'s mistake had been induced innocently by the guardians, & he was entitled to rescission of the agreement on the principle of *Wilding* v. *Sanderson*, No. 34, *ante*.—FARADAY *v.* TAMWORTH UNION (1916), 86 L. J. Ch. 436; 81 J. P. 81; 15 L. G. R. 258.

*Annotation:—***Refd.** Higgins *v.* Northampton County Borough (1926), 90 J. P. 82.

264. —— ——.]—Mistake may arise in two ways. There may be mistake on the part of both parties in which case the agreement would have to be modified in accordance with what the real agreement was; or it may be unilateral & in that case deft. who made the mistake would only be entitled to relief if he could show that the mistake was brought about by some act on the part of pltf. *See Wilding* v. *Sanderson*, No. 34, *ante* (STIRLING, J.).—JENNINGS *v.* JENNINGS, [1898] 1 Ch. 378; 67 L. J. Ch. 190; 77 L. T. 786; 46 W. R. 344; 14 T. L. R. 198; 42 Sol. Jo. 234.

*Annotations:—***Mentd.** *Re* David & Matthews, [1899] 1 Ch. 378; *Re* Leas Hotel Co., Salter *v.* Leas Hotel Co., [1902] 1 Ch. 332.

See, also, Sub-sect. 2, A. (*b*).

(*b*) *Parties in Unequal Position.*

See, generally, CONTRACT, Vol. XII., pp. 98–112, Nos. 611–738; FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 253–283, Nos. 802–1081.

265. Ignorance of one party—As to legal rights—Release by orphan.]—Where a daughter of a freeman of London accepts of a legacy of £10,000 left her by her father, who recommended it to her to release her right to her orphanage part, which she does release accordingly; if the orphanage part be much more than her legacy, though she were told she might elect which she pleased; yet, if she did not know she had a right first to inquire into the value of the personal estate, & the *quantum* of her orphanage part, before she made her election; this is so material, that it may avoid her release.

If a man devises lands in fee to B. who dies in the life of testator, & testator's heir taking it that the heir of B. is entitled, for a trifling consideration conveys & confirms the estate to him; equity will relieve.—PUSEY *v.* DESBOUVRIE (1734), 3 P. Wms. 315; 2 Eq. Cas. Abr. 270; 24 E. R. 1081, L. C.

*Annotations:—***Refd.** Salkeld *v.* Vernon, Salkeld *v.* Salkeld (1758), 1 Eden, 64; Clifton *v.* Cockburn (1834), 3 My. & K. 76; Lee *v.* Head (1855), 26 L. T. O. S. 12. **Mentd.** Elliot *v.* Collier (1747), 1 Ves. Sen. 15; Pym *v.* Lockyer (1841), 5 Jur. 620; Pickford *v.* Brown, Brown *v.* Brown (1856), 2 K. & J. 426; Boyd *v.* Boyd (1867), L. R. 4 Eq. 305; Pearse *v.* Dobinson (1867), 3 Ch. App. 1.

266. —— —— Delivery up of instrument.]—EAST INDIA CO. *v.* DONALD, No. 2, *ante*.

267. —— —— Release of claim to property.]—COCKING *v.* PRATT, No. 1, *ante*.

268. —— —— —— ——.]—Where a person agrees to give up his claim to property in favour of another, such renunciation will not be supported if, at the time of making it, he was ignorant of his legal rights, & of the value of the property renounced; especially if the party with whom he dealt possessed & kept back from him better information on the subject.

In *Cocking* v. *Pratt*, No. 1, *ante*, where SIR JOHN STRANGE had to deal with the case of a mother contracting with her daughter as to her share of the father's personal estate, he held the transaction to be void, on the ground that the mother plainly had better information than the daughter . . . when the evidence is narrowly scrutinised, the circumstances of the transaction relieve the case from all difficulty . . . bringing the case, therefore, directly within the principle laid down by SIR JOHN STRANGE in *Cocking* v. *Pratt*, No. 1, *ante* (LORD BROUGHAM, C.).—M'CARTHY *v.* DECAIX (1831), as reported in 2 Russ. & M. 614; 9 L. J. O. S. Ch. 180; 39 E. R. 528, L. C.

*Annotations:—***Refd.** Watkin & Bligh *v.* Brent (1836), 1 Curt. 264; Daniell *v.* Sinclair (1881), 6 App. Cas. 181. **Mentd.** Warrender *v.* Warrender (1835), 2 Cl. & Fin. 488;

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gratuitous unilateral deed.—M'CAIG *v.* GLASGOW UNIVERSITY COURT (1904), 6 F. (Ct. of Sess.) 918; 41 Sc. L. R. 700; 12 S. L. T. 174.—**SCOT.**

261 i. —— *Mistake induced by other party.*]—The ct. of equity will not rescind or rectify a written agreement on the ground that one of the parties misunderstood the real meaning & effect of the contract, unless his misapprehension has been induced by the conduct of the other party.—AUSTRALIA HOTEL CO., LTD. *v.* MOORE (1899), 20 N. S. W. Eq. 155; 16 N. S. W. W. N. 132.—**AUS.**

261 ii. —— ——.]—ZORNER *v.* BURGER (Man.) (1911), 18 W. L. R. 598.—**CAN.**

PART V. SECT. 3, SUB-SECT. 1.—C. (b).

r. Ignorance of one party—As to material facts.]—LEES *v.* MORGAN (1917), 40 O. L. R. 233; 39 D. L. R. 259.—**CAN.**

Sect. 3.—Different kinds of relief: Sub-sect. 1, C. (b), D. & E.; sub-sect. 2, A. (a).]

Ricardo *v.* Garcias (1845), 12 Cl. & Fin. 368; Geils *v.* Geils (1852), 20 L. T. O. S. 145; Shaw *v.* Gould (1868), L. R. 3 H. L. 55; Niboyet *v.* Niboyet (1878), 4 P. D. 1; Harvey *v.* Farnie (1882), 8 App. Cas. 43.

269. —— —— Contract with solicitor.]—An agreement by a widow to pay a solr.'s bill due from her late husband, out of a fund in ct. belonging to her, entered into under the erroneous impression that she was bound to pay it, was set aside.—HUTCHINGS *v.* SMITH (1838), 9 Sim. 137; 7 L. J. Ch. 128; 2 Jur. 231; 59 E. R. 310.

Annotation:—**Refd.** Michelmore *v.* Mudge (1860), 2 Giff. 183.

270. —— —— Agreement between parent & child.]—STONE *v.* GODFREY, No. 21, *ante*.

271. —— —— Promissory note obtained by bank.]—A banking firm advanced money to A., & took a promissory note for such advance, which was signed by A. & his wife, who had no separate property. A. died insolvent. Nine days after his death, one of the partners in the bank went to the house of the widow, taking with him a proper stamp, & asked her if she could pay any money on account; & on her answering that she could not, obtained her signature to a new promissory note, written by him upon the stamp. It being doubtful whether pltf. knew that she was not liable upon the original note, & nothing having been mentioned at the interview concerning her non-liability:—*Held:* the note so obtained was invalid, & the case was too plain to render it necessary to send it to be tried at law.—COWARD *v.* HUGHES (1855), 1 K. & J. 443; 69 E. R. 533.

272. —— —— Indemnity to trustees of company.]—Where the heir-at-law of a shareholder in a co., the shares in which were personal estate, being ignorant of that circumstance, & supposing himself to be liable in respect of the ancestor's shares, executed a deed of indemnity to the trustees of the co.:—*Held:* he was entitled in equity to have his execution of the deed cancelled, as having been obtained under a mistake of fact & law.—BROUGHTON *v.* HUTT (1858), 3 De G. & J. 501; 28 L. J. Ch. 167; 32 L. T. O. S. 306; 5 Jur. N. S. 231; 7 W. R. 166; 44 E. R. 1361, L. JJ.

273. —— —— —— Settlement between husband & wife.]—GILCHRIST *v.* HERBERT, No. 42, *ante*.

274. —— As to material facts—Agreement between brother & sister.]—Agreement by pltf. to accept a certain liquidated sum in lieu of a larger claim for arrears of interest due to her from her brother, under the erroneous impression that the brother's estate would be insufficient to discharge his liabilities:—*Held:* void; an account of the arrears owing to pltf. ordered to be taken.—LOVETT *v.* HANKINS (1865), 13 L. T. 580; 14 W. R. 216.

—— —— ——.]—*See* CONTRACT, Vol. XII., p. 504, No. 4140.

275. —— —— Release by cestui que trust.]—A release to a trustee set aside after the lapse of more than twenty years, & after the death of a trustee, on evidence of pltf., corroborated by the tenor of the deed, that it was executed in error. Testator bequeathed one-half of his residuary personal estate to his sister & one-quarter thereof to each of his two nieces: he appointed his sister trustee & extrix. of his will, & died in the year 1855. The residuary personal estate consisted principally of railway shares & stocks, & at the time of passing the residuary account it was valued at £42,000. The nieces lived with their aunt, who had brought them up from childhood. In 1859 the nieces executed a release of all suits & causes of action in favour of their aunt in consideration of the payment of £10,500 to each. At the time of the execution of the release, the railway shares & stocks had increased in value & the share of each of the nieces was worth much more than £10,500. The release was drawn up by the aunt's solr., & the nieces had no independent advice & executed it in error, but no fraud was imputed. In 1879, the aunt died. In 1883, an action was commenced by one of the nieces to set aside the release:—*Held:* the release was invalid & must be set aside.

It is enough to avoid a release if the ct. is satisfied that it has been made under error in a material particular, & that is certainly not the less so where the release is given by a *cestui que trust* to a trustee, & by young ladies who have been living under the care of their aunt to a person who has stood to them *in loco parentis* (FRY, L.J.).—*Re* GARNETT, GANDY *v.* MACAULAY (1885), 31 Ch. D. 1, C. A.

Annotations:—**Distd.** Mason *v.* Mason (1886), 2 T. L. R. 266. **Mentd.** *Re* Farman, Farman *v.* Smith (1887), 57 L. J. Ch. 637; Wildish *v.* Fowler (1888), 5 T. L. R. 113.

Family arrangements.]—*See* FAMILY ARRANGEMENTS, Vol. XXIV., pp. 957–959, 962–965, Nos. 110–126, 145–163.

Powers of appointment.]—*See* POWERS.

Settlements.]—*See* SETTLEMENTS.

Wills.]—*See* WILLS.

D. Releases.

See, generally, CONTRACT, Vol. XII., pp. 497–515, Nos. 4064–4272.

276. When rescission granted — Errors in account—Whether fraud or surprise must be shown.]—Accounts having been settled, & a release executed, in order to avoid the latter, & obtain an account in this ct. pltf. must establish either fraud or surprise.—DAVIES *v.* SPURLING (1829), as reported in Taml. 199; 48 E. R. 80.

Annotations:—**Mentd.** Lawless *v.* Mansfield (1841), 1 Dr. & War. 557; A.-G. *v.* Chesterfield (1854), 18 Beav. 596; Blagrave *v.* Routh (1856), 2 K. & J. 509; Gething *v.* Keighley (1878), 9 Ch. D. 547.

277. —— —— ——.]—An account was settled, & releases executed between the residuary legatees of a partner & the representatives of the surviving partner. Numerous & important errors in the account having been proved, the release was set aside, but having regard to the lapse of time, & the loss of books & documents the ct. declined opening the accounts altogether, but gave liberty only to surcharge & falsify. Partnership accounts having been directed to be taken by the master, in a case in which some of the books had been lost, the ct. directed the master, if it should appear in taking the account that any necessary books, etc., should be wanting, to report the same specially; & whether, in consequence of the want of such books, he was unable to proceed satisfactorily in taking the accounts. Where a release has been executed, & the parties have for a long space of time acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the ct. either to set it aside or to give leave to surcharge & falsify; but the nature & amount of the errors alleged & proved, may have a very considerable effect in the consideration of the question, whether the release was fairly obtained.

276 i. *When rescission granted—Errors in account—Whether fraud or surprise must be shown.*]—COULSON *v.* MCPHERSON 1863), 23 U. C. R. 129.—CAN.

—MILLAR *v.* CRAIG (1843), 6 Beav. 433; 49 E. R. 893.

Annotation :—**Refd.** Allfrey *v.* Allfrey (1849), 1 Mac. & G. 87.

278. —— Fraud of releasee.]—Where a release in terms extends to sums of money which the releasee has openly, but without justification, taken from the releasor, the latter cannot file a bill in equity to compel the releasee to pay these sums, though at the time the release was given the releasor was in fact ignorant of the fraud committed by the releasee. The remedy of the releasor in such a case is to have the release set aside *in toto*; & if, in consequence of dealings subsequent to the release, that cannot be done, the releasor can have no relief in equity.—SKILBECK *v.* HILTON (1866), L. R. 2 Eq. 587; 14 W. R. 1017.

—— **Parties in unequal position.**]—*See* Sect. 3, sub-sect. 1, C. (*b*), *ante*.

—— **Ignorance of legal rights.**]—*See* Part II., Sect. 2, sub-sect. 3, *ante*.

—— **Effect of lapse of time.**]—*See* Sect. 5, *post*.

E. Voluntary Instruments.

See, generally, GIFTS, Vol. XXV., p. 523, Nos. 159–163.

279. When rescission granted—Deed inconsistent with intention of parties.]—If a voluntary deed does not express the intentions of the parties, it cannot be rectified so as to carry out such intentions; but, if impeached, it must wholly stand or wholly fall.—PHILLIPSON *v.* KERRY (1863), 32 Beav. 628; 9 L. T. 40; 11 W. R. 1034; 55 E. R. 247.

Annotation :—**Folld.** Ellis *v.* Ellis (1909), 26 T. L. R. 166.

280. —— ——.]—Where a sum of money was without valuable consideration placed in the hands of a trustee, to be held upon certain trusts then declared; & it was agreed that the transaction should be ratified & completed by the execution of a deed, & a deed was afterwards prepared & executed, which was wholly inconsistent with the trusts declared by parol; the ct. ordered such deed to be delivered up & cancelled, & the money repaid to the settlor, who had executed the deed in ignorance of its legal effect.

No amount of evidence, however conclusive proving that he did so intend, will at all justify the ct. in compelling him to introduce a clause into the deed which he does not choose to introduce now, although he might at the time have wished to have done so. It comes to this: that the ct. will never interfere to enforce a contract between parties for the due execution of a voluntary deed (LORD ROMILLY, M.R.).—LISTER *v.* HODGSON (1867), L. R. 4 Eq. 30; 15 W. R. 547.

Annotation :—**Consd.** Weir *v.* Van Tromp (1900), 16 T. L. R. 531.

281. —— ——.]—In order to maintain a voluntary deed of gift from a son for the benefit of a father, it must be shown both that the son understood the contents of the deed & that he was not under undue parental influence.

Under a marriage settlement, the son of the marriage was entitled to the reversion expectant on the life estate of the father in two sums of money, one of which had come from the father's side, the other from the mother's side. The son had also a large income under the will of his grandfather, & would have a much larger income on attaining the age of twenty-five years. The son had lately attained the age of twenty-one years, & was residing with his father. The son, without employing a separate solr., executed a deed giving to his father's second wife & her daughter the reversion in both the sums which were included in the marriage settlement, & giving to the father power to appoint the sum which came from the mother's side to any third wife & her children. The son left the father's house five years after the execution of the deed, & employed a separate solr. two years afterwards, when the subject of setting aside the deeds was mentioned. Seven years afterwards the son filed a bill to set aside so much of the deed as related to the sum which had come from the mother's side :—*Held* : though the son understood all the contents of the deed except the power to appoint to a third wife & her children, he was not sufficiently protected from parental influence, & if the bill had been filed at an earlier time the deed must have been set aside to the extent prayed; but as the filing of the bill had been so long deferred, the deed must be rectified only by striking out the power.

There is great difficulty in reforming a voluntary deed, because if any part of it is shown to be contrary to the intention of the parties, you can only deal with it by setting the whole aside, as in *Hoghton* v. *Hoghton* (1852), 15 Beav. 278. But here the son agrees that part of the deed ought to stand, & I have therefore power as against him; & I have certainly power against the father . . . & I shall direct the settlement to be rectified by striking out of it the power in question (LORD HATHERLEY, C.).—TURNER *v.* COLLINS (1871), 7 Ch. App. 329; 41 L. J. Ch. 558; 25 L. T. 779; 20 W. R. 305, L. C.

Annotations :—**Consd.** Hoblyn *v.* Hoblyn (1889), 41 Ch. D. 200. **Refd.** Kronheim *v.* Johnson (1877), 7 Ch. D. 60; *Re* Maddever, Three Towns Banking Co. *v.* Maddever (1883), 31 W. R. 720; Lovell *v.* Wallis No. 2 (1884) 50 L. T. 681; Ogilvie *v.* Littleboy (1897), 13 T. L. R. 399

SUB-SECT. 2.—RECTIFICATION.

A. When Rectification Available.

(*a*) *Mutual Mistake.*

282. General rule—Mutual mistake necessary for rectification.]—MURRAY *v.* PARKER, No. 308, *post*.

PART V. SECT. 3, SUB-SECT. 2.—A. (a).

282 i. *General rule—Mutual mistake necessary for rectification.*]—Rectification decreed of misdescription in conveyance of land arising from mutual mistake of grantor & grantee, as against a subsequent purchaser with notice of mistake, but without costs.—KING *v.* KEITH (1898), 1 N. B. Eq. Rep. 538.—**CAN.**

282 ii. —— ——.]—HEATH *v.* MCLENEGHEN (1907), 5 W. L. R. 358.—**CAN.**

282 iii. —— ——.]—In order to obtain rectification on the ground of mistake there must be a mistake common to both parties.—O'BRIEN *v.* KNUDSON (Y. T.), [1919] 1 W. W. R. 327; 45 D. L. R. 187.—**CAN.**

282 iv. —— ——.]—*Semble* : It is necessary for a pltf. seeking rectification of an agreement on the ground of mistake to prove that the mistake was mutual or to show such knowledge in deft. as to make his availing himself of the mistake amount to fraud.—AMERICAN MERCHANT MARINE INSURANCE CO. *v.* BUCKLEY-TREMAINE LUMBER & TIMBER CO., [1920] 3 W. W. R. 878.—**CAN.**

282 v. —— ——.]—*Re* WALSH'S ESTATE (1867), 15 W. R. 1115.—**IR.**

282 vi. —— ——.]—The principle of reforming a deed is confined to cases of mutual mistake.—WILLIAMSON *v.* MORIARTY (1871), 19 W. R. 818.—**IR.**

282 vii. —— ——.]—Where at the time of the completion of his conveyance a purchaser is aware that the land is in occupation of a tenant & also of the terms of the tenancy, & completes with the intention of taking the land subject to the tenancy, but the conveyance makes no mention of the lease, a ct. of equity will, if necessary, rectify the omission on the ground of mutual mistake.—LARNACH *v.* IRVING (1893), 12 N. Z. L. R. 212.—**N.Z.**

282 viii. —— ——.]—Where there was a clear mutual mistake, a contract required to be in writing containing the words "stock-in-trade of wines & spirits," rectified by striking out the words "wines & spirits" so as to include a stock of beer.—KEILEY *v.* KAVANAGH (1898), 17 N. Z. L. R. 449.—**N.Z.**

Sect. 3.—Different kinds of relief: Sub-sect. 2, A. (a) & (b).]

283. —— ——.]—In order to enable this ct. to rectify a settlement it must be proved that it contains something which has been inserted by mistake, contrary to the intention of all the parties. . . . The other parties have a right to say, we understood the contract to be exactly as it appears by the deed & we have acted upon the faith of it; & if you come to set it aside, it can only be done by showing that we were parties to the mistake & are now improperly insisting on having the benefit of it (PAGE WOOD, V.-C.).—ROOKE *v.* KENSINGTON (LORD) (1856), 2 K. & J. 753; 25 L. J. Ch. 795; 28 L. T. O. S. 62; 2 Jur. N. S. 755; 4 W. R. 829; 69 E. R. 986.

Annotations:—**Distd.** Sells *v.* Sells (1860), 29 L. J. Ch. 500. **Refd.** Clark *v.* Girdwood (1877), 7 Ch. D. 9. **Mentd.** Jenner *v.* Jenner (1866), L. R. 1 Eq. 361; Neam *v.* Moorsom (1866), 36 L. J. Ch. 274; Cox *v.* Barker, Barker *v.* Cox (1876), 3 Ch. D. 359; Crompton *v.* Jarratt (1885), 30 Ch. D. 298; Danby *v.* Coutts (1885), 29 Ch. D. 500; Early *v.* Rathbone (1888), 57 L. J. Ch. 652; Williams *v.* Pinckney (1897), 67 L. J. Ch. 34; Barraclough *v.* Brown (1898), 62 J. P. 275; Dyson *v.* A.-G., [1911] 1 K. B. 410; Guaranty Trust Co. of New York *v.* Hannay, [1915] 2 K. B. 536.

284. —— ——.]—WRIGHT *v.* GOFF, No. 202, *ante*.

285. —— ——.]—Where a marriage settlement is prepared, pursuant to the intention of one of the parties, but under a mistake as to the other, it cannot be rectified. There must be a clear mistake common to all parties.—SELLS *v.* SELLS (1860), 1 Drew. & Sm. 42; 29 L. J. Ch. 500; 3 L. T. 229; 8 W. R. 327; 62 E. R. 294.

Annotations:—**Refd.** Clark *v.* Girdwood (1877), 7 Ch. D. 9; Rake *v.* Hooper (1900), 83 L. T. 669.

286. —— ——.]—A volunteer under a settlement declaring the trusts of property placed in the hands of trustees, is entitled to file a bill to have an error rectified, even though the effect of the error should be to carry back the fund to the original settlor. Where a clause in a marriage settlement was framed in a form which did not carry out correctly the intention of the intended wife, & the whole clause was objected to by the intended husband, but the objection ultimately waived, & it appearing that the husband's attention had not been called to the variance between the form of the clause & the intention of the wife:—*Held:* this was not a case of mutual error, & a bill for rectification dismissed.—THOMPSON *v.* WHITMORE (1860), 1 John. & H. 268; 9 W. R. 297; 70 E. R. 748; *sub nom.* THOMPSON *v.* WHITMORE, WHITMORE *v.* BAINBRIGGE, 3 L. T. 845.

Annotations:—**Refd.** Hall-Dare *v.* Hall-Dare (1885), 31 Ch. D. 251; Weir *v.* Van Tromp (1900), 16 T. L. R. 531. **Mentd.** Bayspoole *v.* Collins (1871), 25 L. T. 282.

287. —— ——.]—BRADFORD (EARL) *v.* ROMNEY (EARL), No. 345, *post*.

288. —— ——.]—A marriage settlement was drawn, as the intended husband alleged, in a manner contrary to the agreement; but before the marriage he knew its contents & executed it under protest, & reserving his right to set it aside:—*Held:* he could not, after the marriage, sustain a suit to rectify the settlement.

A husband, by his bill, alleged that his wife, under the advice & assistance of the two trustees of the settlement, secreted & withheld moneys of the wife which ought to be paid over to him, the husband. The bill sought to recover those moneys. The trustees, who were made defts., demurred, & their demurrer was allowed.

The ct., in such cases as these, only rectifies a settlement when both parties have executed it under a mistake, & have done what they neither of them intended (ROMILLY, M.R.).—EATON *v.* BENNETT (1865), 34 Beav. 196; 55 E. R. 610.

289. —— ——.]—To a claim for rent due under this lease defts. answered that part of the premises demised lay below the high water mark of the River Dee & were the property of the Crown, who had served defts. with notice of that fact, & that pltf. had no title to demise them as he well knew at the time of the demise, whereas defts. were in ignorance of his want of title; & they claimed damages for the misrepresentation, & to have the said deed rectified or set aside, & for those purposes to have the action transferred to the Ch. Div. To this statement of defence & counterclaim pltf. demurred generally:—*Held:* the deed could not be rectified, because the mistake of the parties was not mutual.—MOSTYN *v.* WEST MOSTYN COAL & IRON CO., LTD. (1876), 1 C. P. D. 145; 45 L. J. Q. B. 401; 34 L. T. 325; 40 J. P. 455; 24 W. R. 401.

Annotations:—**Refd.** Breslauer *v.* Barwick (1876), 36 L. T. 52. **Mentd.** Baynes *v.* Lloyd, [1895] 2 Q. B. 610; Budd-Scott *v.* Daniell, [1902] 2 K. B. 351; Carlish *v.* Salt [1906] 1 Ch. 335; Markham *v.* Paget, [1908] 1 Ch. 697.

290. —— ——.]—Under the Thames Navigation Act, 1866 (c. 89), the conservators of the Thames prevented the urban sanitary authority from passing their sewage into the Thames. Previously, in 1857, the local board of the district had under Public Health Act, 1848 (c. 63), s. 48, agreed with the owner of an estate adjoining the district to allow him to drain the sewage from his land, & the houses already erected or to be erected on the property, into their main sewer on condition that he should construct certain works & pay an annual sum of £10:—*Held:* there was no evidence that the deed ought to be rectified, & the deed was not *ultra vires*, as the local board had power to bind their successors, & the deed could not be altered or set aside because the discharge of sewage into the Thomes had ceased.

I could not rectify the deed except on the ground of its being shown that there was a mutual mistake (NORTH, J.).—NEW WINDSOR CORPN. *v.* STOVELL (1884), 27 Ch. D. 665; 54 L. J. Ch. 113; 51 L. T. 626; 33 W. R. 223.

Annotations:—**Mentd.** A.-G. *v.* Hastings Corpn. (1902), 67 J. P. 165; Milner's Safe Co. *v.* G. N. & City Ry., [1907] 1 Ch. 208; Municipal Mutual Insce. *v.* Pontefract Corpn. (1917), 116 L. T. 671.

291. —— ——.]—(1) Where there is mutual mistake in a deed or contract the remedy is to rectify by substituting the terms really agreed to. Where the mistake is unilateral the remedy is not rectification but rescission, but the ct. may give to deft. the option of taking what pltf. meant to give in lieu of rescission. Pltf. wrote a letter offering to deft. to make a lease to him of a portion of a block of three houses, consisting of the first, second, third, & fourth floors of all three houses, at a rent of £500 a year. Deft. wrote in answer, accepting the offer; & a lease was executed whereby all the upper floors of the block were demised by pltf. to deft. at the rent of £500. Pltf. alleged that the first floor of one of the houses was included in the offer, & in the lease, by mistake, & that he always intended to reserve such first floor for his own use. Deft. denied that he accepted the offer, or executed the lease, under any mistake. The ct. having found upon the evidence that a common mistake was not sufficiently proved, but that mistake on the part of pltf. was, gave judgment for rescission with an option to deft. to accept rectification instead.

The other class of cases is one of what is called unilateral mistake, & there, if the ct. is satisfied that the true intention of one of the parties was

to do one thing, & he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position & the agreement will be treated as if it had never been entered into (BACON, V.-C.).

(2) Then as to the costs of the action, pltf. is not entitled to costs, because he has made a mistake, & deft. ought not to have any costs, because his opposition to pltf.'s demand has been unreasonable, unjust & unlawful (BACON, V.-C.).—PAGET *v.* MARSHALL (1884), 28 Ch. D. 255; 54 L. J. Ch. 575; 51 L. T. 351; 49 J. P. 85; 33 W. R. 608.

Annotations:—As to (1) **Expld.** May *v.* Platt, [1900] 1 Ch. 616. **Refd.** North *v.* Percival (1898), 78 L. T. 615.

292. —— ——.]—G. & T., pltf.'s predecessors in title, having a general power of revocation & new appointment over lands of which they were respectively tenant for life in possession & tenant for life in remainder, by a deed of exchange in 1783 appointed & granted the lands to deft.'s predecessor in title in fee, saving & reserving nevertheless to G. & T., their heirs & assigns, full & free liberty to get the coal & minerals which should be found within the lands. The minerals were never worked under this reservation by pltf. or his predecessors in title. In 1865 the then owner of the lands demised the coal under part of them to persons whose interest became vested in defts. B. & B.; & in 1877 deft. H., who had succeeded to the ownership of the lands, demised the coal under another part to pltf. Some years after this pltf. first became aware of the reservation in the deed of 1783, & brought his action to establish his right to the minerals, to restrain defts. from working them, & to have the lease of 1877 rectified or set aside:—*Held:* the lease of 1877 could not be rectified, as there was no common mistake.—SUTHERLAND (DUKE) *v.* HEATHCOTE, [1892] 1 Ch. 475; 61 L. J. Ch. 248; 66 L. T. 210; 8 T. L. R. 272; 36 Sol. Jo. 231, C. A.

Annotation:—**Mentd.** Fitzhardinge *v.* Purcell, [1908] 2 Ch. 139.

293. —— ——.]—A policy of marine insurance can only be rectified when it is clearly shown that it has been drawn up by common mistake.—SPALDING *v.* CROCKER (1897), 13 T. L. R. 396; 2 Com. Cas. 189.

Annotations:—**Apld.** Empress Assce. Corpn. *v.* Bowring (1905), 11 Com. Cas. 107. **Mentd.** Crocker *v.* General Insce. of Trieste (1897), 3 Com. Cas. 22; Kynance Sailing Ship Co. *v.* Young (1911), 104 L. T. 397.

294. —— ——.]—MAY *v.* PLATT, No. 85, *ante*.

295. —— ——.]—BEALE *v.* KYTE, No. 433, *post*.

296. —— ——.]—The G. estate was offered in eight lots by public auction, subject to a stipulation that each lot was sold subject to all occupation ways & methods of drainage enjoyed by the vendors & their tenants. N. purchased the whole estate, & on June 1, 1910, agreed to sell lot 6, which another lot, 3, adjoined, to H. upon the conditions read at the auction. The G. estate was conveyed to N. subject to easements. N. conveyed lot 3 to pltfs. in Feb. 1911. N. had previously, in Nov. 1910, conveyed lot 6 to deft. H., who mortgaged it to C., the same solr. acting for H. on his purchase & for H. & C. as to the mtge. Rights of occupation way & drainage in fact existed over the part of the G. estate conveyed to H.:—*Held:* the conveyance to H. containing no reservation, the fact that lot 6 was sold subject to the privileges in favour of lot 3 would not, if N. had not parted with lot 3, have entitled pltfs. to rectification of H.'s conveyance without showing mutual mistake, which was not proved. At any rate, there was no such right to rectification when N. had conveyed lot 3 by deed to which H. was not a party.—SLACK *v.* HANCOCK (1912), 107 L. T. 14.

297. —— ——.]—A freehold farm in Yorkshire was mortgaged, first, to A. to secure £300 &, secondly, to pltf. Both mtges. were duly registered under the Yorkshire Registries Acts. The mtgor., who was being pressed by A. for payment, offered to sell the farm to his daughter L. for £450. L. accepted the offer conditionally on her being able to find some one to provide £300 to pay off A. She consulted W., a solr., & told him she was buying the property for £450 & wanted some one to provide the money due to A., & instructed him to carry out the transaction. W. introduced F. who agreed to advance £300 on a first mtge. of the farm, &, on receipt of the money from F. paid off A. & obtained from him the title deeds on F.'s behalf. W. acted for all the parties except A. Neither W. nor any of the parties except the mtgor. had any knowledge of pltf.'s mtge., & mtgor. did not disclose it. W. then prepared three deeds, which were duly executed & registered: (*a*) a reconveyance by A. to the mtgor.; (*b*) a conveyance by the mtgor. to L.; (*c*) a mtge. by L. to F. An interval of three weeks elapsed between the payment off of A. & the execution of the deeds, the first two of which bore the same date, the third being dated the following day. Pltf., in an action against F., L., & the mtgor., claimed that by virtue of the reconveyance to the mtgor. his mtge. had become a first charge on the property & that he was therefore entitled to priority over F.:—*Held:* pltf. was not entitled to priority, on the following ground: that owing to a common mistake induced by the misconduct of the mtgor., the deeds as framed did not express the true bargain between the parties, which was that F. should have a first mtge. on the property, & could have been rectified in the present action if defts. had counterclaimed for that relief, & in those circumstances a ct. of equity would not enforce in favour of a volunteer a title based upon deeds framed under a common mistake.—WHITELEY *v.* DELANEY, [1914] A. C. 132; 83 L. J. Ch. 349; 110 L. T. 434; 58 Sol. Jo. 218, H. L.; *revsg.* S. C. *sub nom.* MANKS *v.* WHITELEY, [1912] 1 Ch. 735, C. A.

298. —— ——.]—Both parties intended the lands & buildings to be included in the schedule. These were inadvertently omitted. Rectification must follow unless some exceptional ground for excluding this remedy is advanced (LORD BIRKENHEAD, C.).—UNITED STATES *v.* MOTOR TRUCKS, LTD., [1924] A. C. 196; 93 L. J. P. C. 46; 130 L. T. 129; 39 T. L. R. 723, P. C.

299. ——.]—CRADDOCK BROTHERS *v.* HUNT, No. 324, *post*.

How far relief available where mistake unilateral.]—*See* Sub-sect. 2, A. (*b*), *post*.

(*b*) *Unilateral Mistake.*

300. Not sufficient for rectification.]—By a deed of assignment the book debts of a co., as specified in the schedule thereto, were assigned to a purchaser by the receiver for the debenture holders of the co. One of the book debts of the

—An instrument, which agrees with the intention of one of the parties, though mistaken as to that of the other, cannot be reformed.—FALLON *v.* ROBINS (1865), 16 I. Ch. R. 422.—IR.

Sect. 3.—*Different kinds of relief: Sub-sect.* 2, *A.* (*b*), (*c*) & (*d*).]

co. was omitted from the schedule to the deed. The purchaser who had acted upon the deed brought an action against the receiver, in which he claimed to have the deed rectified by the insertion therein of this book debt. The receiver & the purchaser had prior to the deed agreed by two letters to sell & purchase "the book debts" of the co. At interviews prior to these letters the receiver owing to his misunderstanding something said by the purchaser intentionally omitted the debt in question from the list of book debts to be assigned, but the purchaser was unaware of the omission, & thought the debt was to be included :—*Held :* the deed could not be rectified. —FOWLER *v.* SUGDEN (1916) 85 L. J. K. B. 1090 ; 115 L. T. 51, C. A.

301. Option to defendant — To have agreement annulled or rectified.]—Deft. signed an agreement to take from pltf. a lease of a house at the rent of £230, & on the terms of a lease on which the agreement was written, which erroneously stated the rental to be £130. A lease was afterwards executed, in which the rent was erroneously stated to be £130. The error, on the part of the lessor, was proved, & the ct. considered that the lessee must have perceived the discrepancy between the amount of rent previously stated by pltf. & specified in the agreement & that reserved by the lease :—*Held :* pltf. was not entitled to have the lease reformed, but the proper relief was to give the lessee the option of taking the reformed lease or of rejecting it, paying, in the latter case, a rental for the past occupation & a mtge. on the lease created by such lessee.

It is argued that . . . to enable this ct. to interfere to rectify a mistake, the mistake must be mutual. But though, as a general rule, this is correct, it does not apply to every case (ROMILLY, M.R.).—GARRARD *v.* FRANKEL (1862), 30 Beav. 445 ; 31 L. J. Ch. 604 ; 26 J. P. 727 ; 8 Jur. N. S. 985 ; 54 E. R. 961.

Annotations :—**Expld.** Harris *v.* Pepperell (1867), L. R. 5 Eq. 1. **Folld.** Bloomer *v.* Spittle (1872), L. R. 13 Eq. 427. **Expld.** May *v.* Platt, [1900] 1 Ch. 616.

302. —— ——.] — PAGET *v.* MARSHALL, No. 291. *ante.*

302a. —— ——.]—CUMMINS *v.* BOYLAN (1901), 35 I. L. T. 197, H. L.

303. Where parties can be replaced in original position.]—HARRIS *v.* PEPPERELL, No. 164, *ante.*

304. —— Agreement executed on particular understanding.]—Under a tender for the performance of works, a contractor verbally stipulated that one of the provisions under which the employer proposed that the works should be done should not be insisted on, & upon that understanding he entered into a contract with the appointed officer. The bill for work exceeded the amount which the surveyor would allow, & whose judgment was the subject of the excepted provision, & the employer refused to pay more than the surveyor allowed, whereupon the contractor filed his bill for judgment of the sum demanded, & that the agreement might be rectified :—*Held :* he, having executed the agreement on a particular understanding, &, being by such execution precluded from proceeding at law for the recovery of his demands, was entitled to have it rectified.—SIMPSON *v.* METCALF (1854), 24 L. T. O. S. 139 ; 3 W. R. 88.

Rescission of agreement.]—*See* Part V., Sect. 3, sub-sect. 1, C., *ante.*

(c) Relief to Person Who Prepared Instrument.

305. Relief granted in a proper case.]—ANON. (1673), Freem. Ch. 302 ; Freem. K. B. 302 ; 22 E. R. 1223.

306. ——.] — A ct. of equity will reform an instrument which, by the mistake of the drawer, admits of a construction inconsistent with the true agreement of the parties, although the party seeking to reform it himself drew the instrument.—BALL *v.* STORIE (1823), 1 Sim. & St. 210 ; 1 L. J. O. S. Ch. 214 ; 57 E. R. 84.

Annotations :—**Distd.** Parsons *v.* Bignold (1843), 7 Jur. 591. **Mentd.** Milltown *v.* Stewart (1837), 8 Sim. 371.

307. ——.]—Pltfs. were the owners of a steamship, & defts. agreed to charter her without anything having been said by either party as to the vessel's class. After the bargain had been made defts.' agent took to pltfs.' agents a printed form of charterparty, the space for the vessel's class being left blank, & owing to a clerk of pltfs.' agents being wrongly informed as to the class the words "British Corpn." were inserted. The vessel was in fact unclassed. In an action by the owners against the charterers for rectification of the charterparty by striking out the words "British Corpn." on the ground that they had been inserted by mistake, the charterers counterclaimed for damages on the ground that they had had to pay a higher insurance than if the ship had been classed "British Corpn." :—*Held :* as the bargain was complete before anything was said about the vessel's class, & as it was left to one of the parties to fill up the blank, there was a mistake common to both parties & pltfs. were entitled to rectification & the counterclaim must be dismissed.—VERGOTTIS & Co. *v.* FORD (H.) & Co., LTD. (1918), 34 T. L. R. 233.

308. —— No costs to party occasioning error.]—(1) To justify the ct. in reforming an executed deed, it must appear that there has been a mistake common to both the contracting parties, & that the agreement has been carried into effect by the deed in a manner contrary to the intention of both.

(2) By an agreement in writing, A. agreed to take an underlease from B., at a rent of £340, A. "paying all taxes, land tax & insurance." A lease was granted, reserving the rent of £340, stated to include the land tax. It had, however, been redeemed by the superior landlord. The lessee having refused to pay the amount of the land tax redeemed, the lease was ordered to be reformed by making him liable for the land tax, though redeemed ; & parol evidence was admissible to explain the meaning of the parties by "land tax."

In all cases the real agreement must be established by evidence, whether parol or written ; if there has been no previous agreement in writing, parol evidence is admissible to show what the agreement really was ; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly ; if ambiguous, parol

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PART V. SECT. 3, SUB-SECT. 2.—A. (c).

305 i. *Relief granted in a proper case.*] —The mere fact that a party seeking relief from a mistake in a document actually drew the clause to which he takes exception is no ground for refusing relief, even if he be a legal practitioner.—JADIS *v.* PORTE (1915), 31 W. L. R. 234 ; 8 W. W. R. 768.—CAN.

305 ii. ——.]—Pltfs. having a term of ten years, commencing from June 1, 1892, in a piece of land in St. John's, sublet a portion thereof for a term of ten years from May 1, 1893. They had previously agreed to let the premises for two years & five months, with an option for an extension to six or nine years. In the year 1899 they discovered the mistake :—*Held :* pltfs. were entitled to a rectification.—WEST END CLUB *v.* HORWOOD (1900), 8 Nfld. L. R. 371.—NFLD.

evidence may be used to explain it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument (ROMILLY, M.R.).

(3) On reforming a lease, no costs were given to pltf., the lessor, because the suit had been occasioned by his error in not having the lease properly prepared.—MURRAY *v.* PARKER (1854), 19 Beav. 305; 52 E. R. 367.

Costs generally.]—*See* Sect. 6, sub-sect. 4, *post.*

(d) Necessity for Prior Contract.

309. General rule.] — A., being the holder of several policies of insurance on the life of B. & being unable to keep them up, entered into an agreement with C. for the purpose of C. keeping them up. The agreement consisted of three instruments: (*a*) a letter by which it was stated that C. was to pay the premiums, & to have his advances & interest secured by a deposit of the policies, a bond & an equitable mtge. of certain estates. No time was specified for the repayment of the advance & interest. (*b*) A bond for £6,000, referring to the letter for repaying the advances & interest at the expiration of six months from the death of B. (*c*) An agreement also referring to the letter & to the deposit of the policies to secure the payment of the advances & interest at the expiration of six calendar months from the death of B. by which agreement the advances & interest were secured to be paid at six months after the death of B., upon certain estates. A. died, living B., leaving a considerable amount of advances & interest unpaid, & having before his death, assigned the policies to trustees for his creditors. C. now filed his bill claiming to have all his advances & interest paid & that the agreement might be varied & made to conform to the letter & that, if necessary the policies might be sold:—*Held:* the agreement could not be rectified, there being nothing to rectify it by except the letter itself, the letter & agreement being incorporated in effect into one instrument & the letter not specifically pointing out the time when the security was to be available.

When a party wishes to rectify an agreement one rule is plain: he must have some draft or some evidence of the intention by which to rectify. . . . If these instruments do not express the intention of the parties, how am I to ascertain their intention? (KINDERSLEY, V.-C.).—BROUGHAM *v.* SQUIRE (1852), 1 Drew. 151; 61 E. R. 409.

310. ——.] — Pltfs., underwriters, having executed to defts., iron merchants, a policy of marine insurance on a cargo which suffered loss, filed a bill for a rectification of the policy, so as to make it conformable to that which they said was the real contract between the agents, in proof of which they produced in evidence the slip which was signed by their agent when presented at Lloyds by a clerk of defts.' insurance broker. Defts. denied that they ever entered, or intended to enter, into any contract other than expressed by the policy:—*Held:* as the slip formed no contract, & there was no binding agreement between the parties until the policy was signed & the premium paid, the bill must be dismissed with costs.

Cts. of equity do not rectify contracts; they may & do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a pltf. to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; & that such contract is inaccurately represented in the instrument (JAMES, V.-C.).—MACKENZIE *v.* COULSON (1869), L. R. 8 Eq. 368.

Annotations:—**Refd.** Cory *v.* Patton (1872), L. R. 7 Q. B. 304; Spalding *v.* Crocker (1897), 13 T. L. R. 396; Lovell & Christmas *v.* Wall (1911), 104 L. T. 85; Schofield *v.* Clough, [1913] 2 K. B. 103.

311. ——.]—Now, no one for a moment doubts that where it is shown that the actual contract & intention of the contracting parties was different from that which is expressed in the deed, the ct. has jurisdiction to alter it. But there is an enormous difference between altering a settlement under these circumstances & altering a settlement where there is no evidence whatever that there was a different intention at the time when the deed was executed, as is the case here (COTTON, L.J.).

It requires very clear & distinct evidence to show that there was some different intention at the time when the settlement was executed, & with this exception (*Wollaston* v. *Tribe*, No. 396, *post*), there is hardly a single case where many years after the settlement was executed, on mere parol evidence, uncontradicted because there was no one to contradict it, the ct. has altered a deed because one of the parties afterwards desired that it should not stand as it was executed (COTTON, L.J.).—TUCKER *v.* BENNETT (1887), 38 Ch. D. 1; 57 L. J. Ch. 507; 58 L. T. 650, C. A.

Annotation:—**Refd.** Bonhote *v.* Henderson, [1895] 2 Ch. 202.

312. ——.] — The essence of rectification is to bring the document which was expressed & intended to be in pursuance of a prior agreement into harmony with that prior agreement. . . . It presupposes a prior contract & it requires proof that by common mistake the final completed instrument as executed fails to give proper effect to the prior contract. For this purpose evidence of what took place prior to the execution of the completed document is obviously admissible & indeed essential. . . . Let me repeat that a prior agreement must be proved; mere intention will not suffice (COZENS-HARDY, M.R.).—LOVELL & CHRISTMAS, LTD. *v.* WALL (1911), 104 L. T. 85; 27 T. L. R. 236, C. A.

Annotation:—**Refd.** Slack *v.* Hancock (1912,) 107 L. T. 14.

313. Conveyance differing from articles — Conveyance not in purported execution of articles.]—MOSELY *v.* VIRGIN, No. 245, *ante.*

314. Property included by general words.] — The ct. being satisfied, upon the evidence, that a general description of property had been inserted inadvertently in a settlement, & not for the purpose of passing an estate, which the general description would in terms comprise, made a declaration that the general description had been inserted by mistake, so far as regarded the estate in question,

PART V. SECT. 3, SUB-SECT. 2.—A. (d).

309 i. *General rule.*]—In order that a deed may be reformed by the ct., there must be at least two things established, namely an agreement differing from the document, well proved by such evidence as leaves no reasonable ground for doubt as to the existence & terms of such agreement, & a mutual mistake of the parties by reason of which such agreement was not properly expressed in the deed.—MCNEILL *v.* HAINES (1889), 17 O. R. 479.—**CAN.**

309 ii. ——.]—The ct. will not rectify an alleged mistake in a written contract unless it can be shown that there was an actual concluded agreement antecedent to the instrument desired to be rectified.—WHELAN *v.* CUMMINS (1871), 5 Nfld. L. R. 405.—**NFLD.**

t. Prior verbal agreement.]—ELLERMAN *v.* CARRUTHERS (1908), 8 W. L. R. 692; 1 Sask. L. R. 157.—**CAN.**

a. ——.] — WEINERLEIN *v.* GOCH BUILDINGS, LTD., [1925] App. D. 282. — **AF.**

Sect. 3.—Different kinds of relief: Sub-sect. 2, A. (d), (e) & (f), B. & C. (a).]

& gave the parties liberty to apply as they might be advised.

It is clear that the S. Estate . . . was not intended to be included in the settlement; & that it formed no part of the proposal or of the contract, but was so included by mistake. I think therefore that the decree ought to declare that to be so & direct a reconveyance of that estate (LORD COTTENHAM, C.).—EXETER (MARQUESS) *v.* EXETER (MARCHIONESS) (1838), 3 My. & Cr. 321; 7 L. J. Ch. 240; 2 Jur. 535; 40 E. R. 949, L. C.

Annotations:—**Consd.** Rooke *v.* Kensington (1856), 2 K. & J. 753. **Refd.** Lackersteen *v.* Lackersteen (1860), 6 Jur. N. S. 1111.

315. Terms cannot be added.] — The ct. will not interfere to introduce additional terms into a settlement unless it appears on distinct evidence that such additional terms were present to the minds of the parties at the time of the agreement on which the settlement was founded.—ELWES *v.* ELWES (1861), 3 De G. F. & J. 667; 4 L. T. 593; 7 Jur. N. S. 747; 9 W. R. 820; 45 E. R. 1036, L. JJ.

Annotation:—**Refd.** Welman *v.* Welman (1880), 15 Ch. D. 570.

316. Mistake preventing parties being ad idem.] —CARPMAEL *v.* POWIS, No. 440, *post.*

317. ——.] — FARADAY *v.* TAMWORTH UNION, No. 263, *ante.*

318. ——.] — By a verbal agreement entered into between pltf. & the agent of a life insurance co. it was agreed that a policy should be granted to pltf. on the life of H. which policy should not be vitiated by reason of H. revisiting, among other places, ports on the coast of Africa; & proposals for the policy were drawn up by pltf. & forwarded through the agent to the co. In these proposals it was stated that the policy could be accepted only on the condition that "H. should be at liberty to visit Tangier or any other port within the Mediterranean, without subjecting himself to any extra premium, etc.; but it was understood that he was not to reside out of Europe at any place in the Mediterranean beyond the period of three months, or to go into the interior of Asia or Africa." No mention was made in the proposals of ports on the coast of Africa. The policy was effected, with a memorandum indorsed upon it in the terms of the above condition, & pltf. paid several premiums. H. went to a port on the coast of Africa, & died there within three months of his arrival. The co. refused to pay the assurance money, & pltf. filed a bill to have the mistake in the indorsement rectified:—*Held:* the agent had no power to bind the co., & the memorandum having been framed under a mistake, the real terms of the agreement never having been communicated to or adopted by the co., the policy was not binding upon either party.—FOWLER *v.* SCOTTISH EQUITABLE LIFE INSURANCE SOCIETY & RITCHIE (1858), 28 L. J. Ch. 225; 32 L. T. O. S. 119; 4 Jur. N. S. 1169; 7 W. R. 5.

See, also, Part III., Sect. 2, sub-sect. 8, C., *ante.*

319. Terms of prior contract doubtful.]—EWING & LAWSON *v.* HANBURY & Co. (1900), 16 T. L. R. 140.

Annotation:—**Refd.** Faraday *v.* Tamworth Union (1916), 86 L. J. Ch. 436.

320. Contract necessarily under seal.] — FARADAY *v.* TAMWORTH UNION, No. 263, *ante.*

321. ——.]—HIGGINS (W.), LTD. *v.* NORTHAMPTON CORPN., No. 87, *ante.*

(e) Conveyance after Previous Written Agreement.

322. Whether rectification ordered—Conveyance in conformity with agreement.]—MAY *v.* PLATT, No. 85, *ante.*

323. —— ——.] — Where a deed has been executed in pursuance of a previous option in writing between the same parties:—*Held:* the ct. could not rectify the deed on the ground that it did not represent the true intention of the parties.—THOMPSON *v.* HICKMAN, [1907] 1 Ch. 550; 76 L. J. Ch. 254; 96 L. T. 454; 23 T. L. R. 311.

Annotations:—**Refd.** Fowler *v.* Sugden (1916), 85 L. J. K. B. 1090; Craddock *v.* Hunt, [1923] 2 Ch. 136. **Mentd.** Glyn *v.* Howell, [1909] 1 Ch. 666.

324. —— ——.]—Where owing to a mutual mistake in reducing a verbal agreement for the sale of land into writing, the written agreement failed to express the real bargain between the parties, & the mistake was embodied in a deed of conveyance, with the result that a piece of land, which had in fact been bought & paid for by pltfs., was wrongly conveyed by the vendors to deft., who had notice of pltfs.' title:—*Held:* the ct. since Jud. Act, 1873 (c. 66), had jurisdiction to rectify the conveyance, notwithstanding that the deed conformed strictly with the written agreement, & although the effect of ordering rectification was to grant specific performance of a written agreement with a parol variation.—CRADDOCK BROTHERS *v.* HUNT, [1923] 2 Ch. 136; 92 L. J. Ch. 378; 129 L. T. 228; 67 Sol. Jo. 593, C. A.

Annotation:—**Apprvd.** United States *v.* Motor Trucks, [1924] A. C. 196.

325. —— **Conveyance differing from written agreement.**]—With regard to reforming the lease it is to be observed there was a written agreement followed by a regular lease, differing in many particulars from the agreement. The *primâ facie* conclusion from these facts is that there was a new agreement with which the lease is in conformity (TURNER, L.J.).—HILLS *v.* ROWLAND (1853), 4 De G. M. & G. 430; 22 L. J. Ch. 964; 22 L. T. O. S. 139; 1 W. R. 422; 43 E. R. 575, L. JJ.

See, also, Sub-sect. 2, A. *(f)*; Sect. 4, sub-sect. 1, B. *(b)*, *post.*

(f) Rectification of Written Agreement where Specific Performance Claimed.

326. Whether granted.]—By a building agreement in writing O. agreed to take a certain piece of land on lease & to build six houses upon it within nine months, F. agreed to build a bridge over a river adjoining the land, to give access to the houses within three months from their completion. O. built four houses & the bridge not having been erected within three months brought this action, claiming to have the agreement rectified on the ground that the number 6 had been inserted by mistake for 4 & to have damages for non-performance of the agreement to build the bridge. The objection was taken that pltf. who was in effect seeking specific performance, because unless he was entitled to specific performance he would be a mere tenant at will & have no claim to damages, could not bring parol evidence to alter

the written agreement under which he was suing: —*Held:* evidence was admissible for the purpose of obtaining rectification of the contract & there was no reason why a claim for rectification of a contract & for its specific performance as rectified should not be joined in the same action; the old cases in which pltf. in a specific performance action was not permitted to bring parol evidence turned on Stat. Frauds which was not pleaded, & did not apply the agreement having been part performed.—OLLEY *v.* FISHER (1886), 34 Ch. D. 367; 56 L. J. Ch. 208; 55 L. T. 807; 35 W. R. 301.

Annotations:—**Consd.** Craddock *v.* Hunt, [1923] 2 Ch. 136. **Refd.** Conway Bridge Comrs. *v.* Jones (1910), 102 L. T. 92; Forglone *v.* Lewis, [1920] 2 Ch. 326.

327. ——.] — SHREWSBURY & TALBOT CAB & NOISELESS TYRE CO., LTD. *v.* SHAW (1890), 89 L. T. Jo. 274.

Annotation:—**Refd.** Craddock *v.* Hunt, [1923] 2 Ch. 136.

See Sub-sect. 2, A. (*e*), *ante*.

B. Condition Precedent to Relief.

See Sect. 1, *ante*.

C. What must be Proved.

(a) The Mistake.

328. Mistake must be shown.] — BURT *v.* BARLOW (1792), 3 Bro. C. C. 451; 29 E. R. 638, L. C.

329. ——.] — Bill to rectify a conveyance, alleged to have passed by mistake more than was included in a previous agreement, dismissed; the conveyance reciting a more extended agreement, the parties being dead, the agent of the grantor having acknowledged the extended agreement, & the agent of the grantee, who could have given a personal account of the transaction, not having been examined by pltf.

There is no doubt on the one hand, that if an instrument affects by its recital to carry into execution a certain agreement & goes beyond that agreement, the ct. will rectify it; because then it has clear evidence on the face of the instrument itself; that the instrument operates beyond its intended operation; on the other hand it is quite clear that parties may enter into articles of agreement & the terms of the agreement may be extended by parol, provided the conveyance itself is written evidence that there has been such an extension by the parol agreement (LORD ELDON, C.).—BEAUMONT *v.* BRAMLEY (1822), Turn. & R. 41; 37 E. R. 1009, L. C.

Annotations:—**Distd.** Howkins *v.* Jackson (1850), 2 H. & Tw. 301. **Consd.** Rooke *v.* Kensington (1856), 2 K. & J. 753; Bentley *v.* Mackay (1862), 4 De G. F. & J. 279. **Refd.** Cox *v.* Bruton (1857), 5 W. R. 544; Wright *v.* Wilkin (1859), 4 De G. & J. 141.

330. ——.]—An erroneous statement was made to a life insurance co., by or through their agent, as to A.'s interest in his son's life; upon which the co. granted a policy to A. After the son's death the co. discovered the error & refused to pay the sum insured. A bill filed by A. to have the mistake rectified was dismissed, because the evidence did not show distinctly whether the mistake arose from the agent's inadvertence, or from his having been misinformed by A.

Pltf. had failed in making out such a mistake as the ct. could correct (SHADWELL, V.-C.).—PARSONS *v.* BIGNOLD (1843), 13 Sim. 518; 1 L. T. O. S. 358; 7 Jur. 591; 60 E. R. 201; *affd.* (1846), 15 L. J. Ch. 379, L. C.

Annotations:—**Consd.** *Re* Universal Non-Tariff Fire Insce., Forbes' Claim (1875), L. R. 19 Eq. 485. **Mentd.** Parr *v.* London Edinburgh & Glasgow Assce. (1891), 8 T. L. R. 88.

331. ——.] — BRADFORD (EARL) *v.* ROMNEY (EARL), No. 345, *post*.

332. ——.] — An action was brought to rectify a voluntary settlement, made by a deed poll or declaration of trust, & dated July 15, 1880. It was executed by pltfs., two elderly ladies & their nephew who was appointed trustee. Pltfs. had recently discovered, as they alleged, that the deed did not carry out their real intention, & they therefore desired to have it rectified in certain respects. It was decided that the ct. had jurisdiction, in a proper case, to reform or rectify a voluntary settlement, as well as a settlement for value; but that the ct. would hesitate to rectify a voluntary settlement at the instance of the settlors merely on their own evidence as to their intention, unsupported by other evidence, such as written instructions, even though the rectification sought would bring the settlement more into harmony with recognised precedents, & with what the settlors might reasonably have intended at the time. On appeal:—*Held:* under the circumstances this was not a case in which the ct. ought to order the deed to be rectified, there being no satisfactory evidence of a mistake having been made; & therefore the appeal must be dismissed.—BONHOTE *v.* HENDERSON, [1895] 2 Ch. 202; 72 L. T. 814; 43 W. R. 580, C. A.

Annotation:—**Refd.** Rake *v.* Hooper (1900), 83 L. T. 669.

333. ——.] — The ct. can only rectify a settlement, which is a matter of contract, when it is shown that both parties have been in error, that something has been put in or omitted which does not carry out the intention of either party (KEKEWICH, J.).—RAKE *v.* HOOPER (1900), 83 L. T. 669; 17 T. L. R. 118; 45 Sol. Jo. 117.

334. ——.]—Insurance co. claimed rectification of the policies as against the brokers so as to comply with their view of the effect of the open covers. The claim was made more than six years after the issue of the policies:—*Held:* apart from any question under Stat. Limitations, there was no clear evidence of common mistake, & the policies

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PART V. SECT. 3, SUB-SECT. 2.—C. (a).

328 i. *Mistake must be shown.*]—To entitle a party to rectify a document he must show distinctly the intent of all parties thereto, & that there has been a mutual mistake.—MCCLURE *v.* MARSHALL (1883), 9 V. L. R. 84.—**AUS.**

328 ii. ——.]—Although the Crown may show mistake in law or fact in respect of its grant when the individual could not, still the evidence must be conclusive.—A.-G. *v.* GARBUTT (1855), 5 Gr. 181.—**CAN.**

328 iii. ——.]—To induce the court to vary a written instrument, on the ground of alleged mistake, the evidence must be of the strongest character. — WILLIAMS *v.* FELKER (1859), 7 Gr. 345.—**CAN.**

328 iv. ——.]—WHITE *v.* HAIGHT (1865), 11 Gr. 420.—**CAN.**

328 v. ——.] — DOMINION LOAN SOCIETY *v.* DARLING (1880), 5 A. R. 576.—**CAN.**

328 vi. ——.]—SYLVESTER *v.* PORTER (1896), 11 Man. L. R. 98.—**CAN.**

328 vii. ——.]—There may be reformation of a deed based on clear & convincing evidence that a mistake was made notwithstanding the denial of deft., but not where the evidence is confined to the allegations of the grantor & grantee, & where the deed has been executed within a day or two after the parties had been on the ground locating the portion to be conveyed. —MCNEIL *v.* IONA GYPSUM PRODUCTS, LTD., [1925] 2 D. L. R. 659; 58 N. S. R. 80.—**CAN.**

328 viii. ——.]—A mtgor. alleged that a sum in excess of his debt to the mtgee. had been inserted in the instrument, but, on the facts, there being no reason to suppose that there was any fraud or deceit on the part of the mtgee., or that there was any mutual mistake of the parties as to the amount stated as that for which the security was given, a suit to have the instrument rectified was dismissed.—AMANAT BIBI *v.* LACHMAN PERSHAD (1886), I. L. R. 14 Calc. 308; L. R. 14 Ind. App. 18.—**IND.**

328 ix. ——.]—JOB BROTHERS & CO. *v.* NORMORE (1888), 7 Nfld. L. R. 371. —**NFLD.**

328 x. ——.]—In a suit to rectify a mistake in a will, positive proof that there was a mistake & the nature of the mistake must be given, & nothing must be left to conjecture.—ISAAC *v.* MILLS (1887), 5 N. Z. L. R. C. A. 122. —**N.Z.**

Sect. 3.—Different kinds of relief: Sub-sect. 2, C. (a), (b) & (c), & D. (a), (b), (c), (d) & (e).]

ought not to be rectified as against the brokers in an action to which their principals were not parties.—EMPRESS ASSURANCE CORPN., LTD. *v.* BOWRING (C. T.) & Co., LTD. (1905), 11 Com. Cas. 107.

Annotation :—**Mentd.** Glasgow Assce. Corpn. *v.* Symondson (1911), 104 L. T. 254.

See, also, Sub-sect, 2, C. (*c*), *post.*

What amounts to mistake.]—*See* Parts I. & II., *ante.*

(*b*) *Concurrent Intention of Parties up to Time of Execution.*

335. General rule.] — SHELBURNE (COUNTESS DOWAGER) *v.* INCHIQUIN (EARL), No. 356, *post.*

336. ——.] — (1) Parol evidence admissible in opposition to a specific performance of a written agreement upon the heads of mistake or surprise as well as of fraud ; & upon such evidence the bill was dismissed.

(2) LORD THURLOW in *Shelburne (Countess Dowager)* v. *Inchiquin (Earl)*, No. 356, *post*, seems to say that the proof must satisfy the ct., what was the concurrent intention of all parties ; & it must never be forgotten, to what extent deft., one of the parties, admits or denies the intention " (LORD ELDON, C.).—TOWNSHEND (MARQUIS) *v.* STANGROOM, STANGROOM *v.* TOWNSHEND (MARQUIS) (1801), 6 Ves. 328 ; 31 E. R. 1076, L. C.

Annotations :—*As to* (1) **Apld.** Beaumont *v.* Bramley (1822), Turn. & R. 41. **Consd.** Carroll *v.* Keays, Keays *v.* Carroll (1873), 22 W. R. 243. **Refd.** Squire *v.* Campbell (1836), 1 My. & Cr. 459. *As to* (2) **Consd.** Clowes *v.* Higginson (1813), 1 Ves. & B. 524 ; Wood *v.* Scarth (1855), 2 K. & J. 33 ; Fowler *v.* Fowler (1859), 4 De G. & J. 250. **Refd.** Fowler *v.* Sugden (1916), 115 L. T. 51 ; Craddock *v.* Hunt, [1923] 2 Ch. 136. *Generally*, **Refd.** Mortlock *v.* Buller (1804), 10 Ves. 292 ; London & Birmingham Ry. *v.* Winter (1840), Cr. & Ph. 57 ; Manser *v.* Back (1848), 6 Hare, 443 ; Smithson *v.* Powell, Powell *v.* Smithson (1852), 20 L. T. O. S. 105 ; Vouillon *v.* States (1856), 25 L. J. Ch. 875 ; Wharram *v.* Wharram (1864), 4 New Rep. 117. **Mentd.** Richardson *v.* Smith (1870), 39 L. J. Ch. 877 ; *Re* Marlborough, Davis *v.* Whitehead, [1894] 2 Ch. 133.

337. ——.]—A.-G. *v.* SITWELL, No. 373, *post.*

338. ——.] — The ct. will not reform a settlement, on the ground of mistake, unless the evidence, as to the mistake, & as to the real intention of the parties, is perfectly clear & satisfactory.

Now in order to justify the ct. in taking such a course, it is obvious that a clear intention must be proved ; it must be shown that the settlement does not carry into effect the intention of the parties. . . . It must be proved, not only that the contract was different from that which the settlement carried into effect, but that there was no change of intention, by which the circumstance that the settlement did not follow the terms of the original contract might be explained (LORD COTTENHAM, C.).—BREADALBANE (MARQUESS) *v.* CHANDOS (MARQUESS) (1837), 2 My. & Cr. 711 ; 7 L. J. Ch. 28 ; 40 E. R. 811, L. C.

Annotations :—**Refd.** Wood *v.* Dwarris (1856), 25 L. J. Ex. 129. **Mentd.** Henderson *v.* Henderson (1843), 3 Hare, 100 ; Boyse *v.* Colclough, Boyse *v.* Rossborough (1854), 1 K. & J. 124.

339. ——.] — ROOKE *v.* KENSINGTON (LORD), No. 283, *ante.*

340. ——.] — For the purpose of reforming an instrument, clear & unambiguous evidence must be produced, not merely showing a mistake, but showing the deed in its proposed state to be in conformity with the intention of all the parties at the very time of its execution, & a denial by one of the parties that the deed as it stands was not according to his intention at the time ought to have considerable weight. A deed of compromise between a mother & son recited a letter of the mother's, who was a widow, written before the son's marriage, stating that by her will her residuary estate would be divided equally between her four sons. The deed also recited that the mother was seised, or had power to dispose of real estate, the particulars whereof were specified in a schedule to the deed. It further recited disputes as to the effect of the ante-nuptial letter, & that to end them the arrangement was entered into effected by the deed. By the witnessing part, the mother covenanted that her exors. would at her death pay to the son such a sum as should be found to be the amount to which he would have been entitled if her real & personal estate had consisted of the particulars specified in the schedule, & she had died without altering her will as it stood when the letter was written. The descriptions in the schedule comprehended not only property of which she could dispose, but other property of which she was tenant for life only, & which was intermixed with the former, & this was noticed in the schedule :—*Held :* without conclusive evidence of an intention on the part of both parties at the execution of the deed to enter into some other contract, it could not be reformed.

It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish in the clearest & most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, & also must be able to show exactly & precisely the form to which the deed ought to be brought (LORD CHELMSFORD, C.).—FOWLER *v.* FOWLER (1859), 4 De. G. & J. 250 ; 45 E. R. 97, L. C.

Annotations :—**Consd.** Rake *v.* Hooper (1900), 83 L. T. 669 ; Fowler *v.* Sugden (1916), 115 L. T. 51 ; Vandeville Electric Cinema *v.* Muriset, [1923] 2 Ch. 74. **Refd.** Colclough *v.* Smith (1864), 10 L. T. 918 ; Clark *v.* Girdwood (1877), 7 Ch. D. 9.

341. ——.] — In a suit to rectify a settlement on the ground of mistake, the question for the ct. is, what was the intention of the parties at the time when the settlement was executed, & not what they would have done if when they executed it, the result of what they did had been present to their minds. A deed of appointment, in favour of some of the objects of a power, rectified by the insertion of a hotchpot clause, the ct. being satisfied upon the evidence that the intention of the donee of the power was to produce equality, & that the clause had been omitted by mistake.—WILKINSON *v.* NELSON (1861), 7 Jur. N. S. 480 ; 9 W. R. 393.

342. ——.] — DANIEL *v.* ARKWRIGHT, COURTHORPE *v.* DANIEL, DANIEL *v.* COURTHORPE (1864), 2 Hem. & M. 95 ; 4 New Rep. 418 ; 11 L. T. 18 ; 10 Jur. N. S. 764 ; 71 E. R. 396.

Annotations :—**Distd.** Rake *v.* Hooper (1900), 83 L. T. 669. **Refd.** Bonhote *v.* Henderson, [1895] 1 Ch. 742. **Mentd.** *Re* Turner's S. E. (1884), 28 Ch. D. 205.

PART V. SECT. 3, SUB-SECT. 2.—C. (b).

335 i. *General rule.*]—A person, who seeks to rectify a deed upon the ground of mistake, must be required to establish, in the clearest & most satisfactory manner, that the alleged intention to which he desires it to be made comformable continued concurrently in the minds of all parties down to the time of its execution.—MADHABJI *v.* RAMNATH (1906), I. L. R. 30 Bom. 457.—**IND.**

335 ii. ——.]—In order to obtain a rectification of a deed on the ground of a mistake at variance with the agreement or intention of the parties, it is necessary to give clear & incontestable evidence of the agreement or intention. —WILLIAMS *v.* PEARCE (1875), 3 C. A. 142 ; 1 J. R. N. S. 15 ; *affg.*, 2 J. R. 156. —**N.Z.**

343. Qualification of rule — Rectification to set aside deed pro tanto.]—Although in general, in order to induce the ct. to rectify an instrument on the ground of mistake, it must be shown that the mistake was the concurrent mistake of all the parties, yet *semble:* this rule ought not to be applied where the object of the rectification is to set aside the deed *pro tanto* as against the party alleging the mistake (TURNER, L.J.).

I venture to doubt whether this rule applies or ought to be applied to a case like the present in which the purpose of the rectification is to set aside the deed *pro tanto* as to the parties alleging the mistake, for in such a case no proof would be necessary of any further agreement. It would be sufficient to prove the mistake & the circumstances entitling the party to have the mistake removed. It is obvious, that unless the rule be so qualified, it would always be in the power of one of the parties to an instrument to defeat the right of another of the parties to set aside the instrument (TURNER, L.J.).—BENTLEY *v.* MACKAY (1862), 4 De G. F. & J. 279; 31 L. J. Ch. 697; 7 L. T. 143; 8 Jur. N. S. 1001; 10 W. R. 873; 45 E. R. 1191, L. JJ.

(c) Form of Proposed Alteration.

344. General rule.] — FOWLER *v.* FOWLER, No. 340, *ante.*

345. ——.]—At the time of the marriage of the daughter of A. she was contingently entitled to a portion out of certain trust funds. By the settlement made on such marriage, after reciting that she was entitled to the sum of £10,000 in possession, the same sum was vested in trustees & settled on herself, her intended husband, & the children of the marriage. The settlement also contained a covenant to settle all her after-acquired property. The £10,000 mentioned in the settlement & settled, was in fact advanced by A. out of his own moneys. After A.'s death, & when the daughter's portion out of the first-mentioned trust funds became payable, a bill was filed by the representatives of A. to have it declared that his estate was entitled to be recouped the £10,000 advanced by him on his daughter's marriage to the extent of her portion. Evidence was adduced as to the terms & circumstances under which the daughter's marriage settlement was executed, & the husband made an affidavit, in which he stated that he was utterly ignorant at the time of the marriage whence the £10,000 was derived, or that it was advanced by A. under an impression that he was to be recouped out of his daughter's fortune the money so advanced:— *Held:* (1) treating the question as one arising upon the construction of the settlement, when evidence of the intention of the parties was inadmissible, there was nothing to show that the £10,000 paid by A. was meant to be an accelerated advance of what his daughter might, & ultimately was, entitled to out of the other trust funds, or to exclude the last-mentioned property from the operation of the covenant to settle future-acquired property; (2) treating the case as one for the reformation of the settlement, when parol evidence was admissible, there was no evidence to show that its provisions were at variance with the real intention of the parties, & as no mistake common to all parties had been made, the settlement could not be rectified.

(3) In cases of reforming a deed it is essential that the extent of the proposed alteration should be clearly defined & ascertained by evidence contemporaneous with or anterior to the deed.—BRADFORD (EARL) *v.* ROMNEY (EARL) (1862), 30 Beav. 431; 31 L. J. Ch. 497; 6 L. T. 208; 8 Jur. N. S. 403; 10 W. R. 414; 54 E. R. 956.

Annotations:—As to (2) **Distd.** Harris *v.* Pepperell (1867), L. R. 5 Eq. 1; Clark *v.* Girdwood (1877), 7 Ch. D. 9.

346. ——.] — SUTHERLAND (DUKE) *v.* HEATHCOTE, No. 292, *ante.*

347. —— Mistake by testator.] — Testator's mistake not rectified because nothing to show, what would have been the intention if no mistake. —SMITH *v.* MAITLAND (1791), 1 Ves. 362; 30 E. R. 386, L. C.

Annotation:—**Consd.** Westcott *v.* Culliford (1844), 3 Hare, 265.

D. Particular Instances.

(a) Conveyances.

See SALE OF LAND.

(b) Insurance Policies.

See INSURANCE, Vol. XXIX., pp. 52, 175, 323, 397, Nos. 152–155, 1318–1324, 2648, 3157.

(c) Joint Contracts.

Bills of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 49, 50, Nos. 365–371.

Bonds drawn as joint by mistake.]—*See* BONDS, Vol. VII., pp. 192–194, Nos. 320–338.

Construction of contract in terms joint.]—*See* CONTRACT, Vol. XII., pp. 26–28, 43, 35, Nos. 46–55, 117–129.

Partners.]—*See* PARTNERSHIP.

(d) Settlements.

See, generally, SETTLEMENTS.

Voluntary settlements.]—*See* GIFTS, Vol. XXV., p. 523, Nos. 160–162; SETTLEMENTS.

Settlement enrolled under Fines & Recoveries Act, 1833 (c. 74).]—*See* REAL PROPERTY.

(e) Other Cases.

Arbitration—Order for reference.]—*See* ARBITRATION, Vol. II., pp. 625, 626, Nos. 2527–2542.

Bastardy order.]—*See* BASTARDY, Vol. III., p. 407, Nos. 404, 405.

Bankruptcy—Proof of debt due on a bond—Mistake in bond.]—*See* BANKRUPTCY, Vol. IV., p. 243, No. 2306.

—— **Proof for money advanced on security—Mistake in security.**]—*See* BANKRUPTCY, Vol. IV., p. 297, No. 2783.

—— **Proof in bankruptcy—Mistake from inadvertence.**]—*See* BANKRUPTCY, Vol. IV., p. 343, Nos. 3218–3220.

Bills of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., p. 485, No. 3078.

Bills of sale—Rectification of register.]—*See* BILLS OF SALE, Vol. VII., p. 104, Nos. 620–623.

Bonds.]—*See* BONDS, Vol. VII., p. 222, No. 646.

Building contract.]—*See* BUILDING CONTRACTS, Vol. VII., p. 349, No. 72.

Charities.]—*See* CHARITIES, Vol. VIII., p. 281, No. 554.

Companies—Removal from list of contributories.] —*See* COMPANIES, Vol. IX., p. 235, No. 1488.

—— **Mistake as to identity of company.**]—*See* COMPANIES, Vol. IX., p. 251, No. 1564.

—— **Rectification of register.**]—*See* COMPANIES, Vol. IX., p. 295, No. 1834.

—— **Under Companies Act, 1862.**]—*See* COMPANIES, Vol. IX., pp. 316, 317, Nos. 1967, 1970, 1971, 1973.

Transfer of shares.]—*See* COMPANIES, Vol. IX., p. 363, No. 2314.

—— **Liability of director.**]—*See* COMPANIES, Vol. IX., p. 451, No. 2929.

Sect. 3.—*Different kinds of relief: Sub-sect.* 2, *D.* (*e*); *sub-sects.* 3, 4 & 5. *Sect.* 4: *Sub-sect.* 1, *A.* & *B.* (*a*).]

—— **Articles of association.**]—*See* COMPANIES, Vol. IX., p. 557, No. 3691.

—— **Winding up of company.**]—*See* COMPANIES, Vol. X., pp. 949, 950, Nos. 6499–6503.

Deeds—Transposition of terms.]—*See* DEEDS, Vol. XVII., p. 355, No. 1665.

Amendment of affidavits.]—*See* EVIDENCE, Vol. XXII., pp. 534, 535, Nos. 5732–5741.

Writs of execution.]—*See* EXECUTION, Vol. XXI., p. 430, No. 119; pp. 431–434, Nos. 132–166.

Correction of wills.] — *See* EXECUTORS, Vol. XXIII., pp. 135–137, Nos. 1339–1359; WILLS.

Payment under order of court—Order contravening Income Tax Acts.]—*See* INCOME TAX, Vol. XXVIII., p. 68, No. 358.

Settlement on marriage of infant—Mistake by person acting on infant's behalf.]—*See* INFANTS, Vol. XXVIII., p. 215, No. 754.

Leases.]—*See* LANDLORD & TENANT, Vol. XXX., p. 480, 481, Nos. 1417–1420.

Register under Workmen's Compensation Act, 1906.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 446, 447, Nos. 3653–3656.

Patents.]—*See* PATENTS.

Order to pay compensation made by Lords of the Treasury.]—*See* PUBLIC AUTHORITIES.

Valuation list for rate assessment.]—*See* RATES & RATING.

Fines.]—*See* REAL PROPERTY.

Land Register.]—*See* REAL PROPERTY.

Register of trade marks.]—*See* TRADE MARKS.

Bought & sold notes.]—*See* SALE OF GOODS.

Agreement to purchase business—Error in valuation of goods.]—*See* SALE OF GOODS.

SUB-SECT. 3.—CANCELLATION OF INSTRUMENT.

348. Bond—Purchase of reversionary interest.] —HITCHCOCK *v.* GIDDINGS, No. 90, *ante*.

——.]—*See* BONDS, Vol. VII., p. 234, No. 765.

SUB-SECT. 4.—DEFENCE TO ACTION.

349. When available—Contract not such as equity would reform—Action at law restrained by injunction.]—In an action on a dissolution of partnership deed, in which one of the parties covenanted with the other not to practise in a certain district, the action being for the penalty incurred by practising in a certain part of that district, a plea was allowed to be pleaded, by way of equitable defence, to the effect that the part in question had been treated between the parties in their partnership arrangements as not part of that district, that it was not intended to include it in the prohibition to practise, & that the deed in that respect was executed under a mistake in fact, the ground of the defence being, not that a ct. of equity would reform the deed, for, *semble*, it could not be reformed, but would decree a perpetual & absolute injunction against suing upon the covenant for practising in the place in question.—LUCE *v.* IZOD (1856), 1 H. & N. 245; 25 L. J. Ex. 307; 2 Jur. N. S. 573; 156 E. R. 1194.

Annotations:—**Distd.** Reis *v.* Scottish Equitable Life Assce. Soc. (1857), 2 H. & N. 19. **Refd.** Wake *v.* Harrop (1861), 6 H. & N. 768.

350. —— —— Performance impossible—By default of plaintiffs.]—To a count for not accepting petroleum pursuant to contract by bought & sold notes, defts. pleaded, by way of equitable defence, that the real contract was not that which was contained in the bought & sold notes, but was a contract for 150 cases of refined petroleum to agree with a sample shown by the brokers at the time of making the contract, & that the brokers, who were acting as agents for both parties, in drawing up the contract, by mistake omitted to state therein that the sale was by sample; that the mistake was not discovered until after defts. had received a portion of the petroleum; that pltfs. were never ready & willing to deliver to defts. any cases of petroleum as the petroleum they so agreed to sell, except a certain lot of 150 cases; that the petroleum which pltfs. were so ready & willing to sell in fact did not agree with the sample, but were greatly inferior thereto, of less value; & that, as soon as defts. discovered that fact, they refused to receive any more of it, & gave notice of such refusal to pltfs.:—*Held*: this plea afforded a good equitable defence, inasmuch as, the full performance of the agreement having become impracticable by reason of the default of pltfs., the case was not one in which a ct. of equity could reform the contract, or impose conditions upon defts.—BORROWMAN *v.* ROSSELL, (1864), 16 C. B. N. S. 58; 33 L. J. C. P. 111; 10 L. T. 236; 10 Jur. N. S. 679; 12 W. R. 426; 143 E. R. 1045; *sub nom.* BOWMAN *v.* ROSSEL, 3 New Rep. 471.

Annotation:—**Apld.** Nicoll *v.* Bell (1875), 32 L. T. 815.

351. —— Contract reformable in equity.]—(1) By the conditions attached to a contract of indemnity against losses in trade, the guarantee became void on the death or retirement from trade of the person guaranteed:—*Held*: this condition applied to the death or retirement of one of two partners guaranteed; & therefore that a plea alleging such death of the partner was an answer to an action against the co-partner by the guarantors for the subscription or annual payments agreed to be paid by the assured.

(2) Deft. pleaded on equitable grounds to an action for such payments, & also for a certain increased premium, that by certain printed rules & regulations delivered to him as the rules & regulations under & subject to which the agreement for guarantee was to be made, the amount of subscription payable by the assured was to be increased at a certain specified percentage rate, according to the amount of admitted claims in the previous year, & that deft. entered into the contract upon the basis & faith of such rules & regulations; but that the contract did not contain them, & other & much less advantageous rules, with other rates were substituted, of which deft. had no notice:—*Held*: the plea was bad, as the facts stated would not relieve deft. from the performance of the contract, but would only entitle him to have it reformed.—SOLVENCY MUTUAL GUARANTEE CO. *v.* FREEMAN (1861), 7 H. & N. 17; 31 L. J. Ex. 197; 158 E. R. 374.

Annotation:—*Generally*, **Refd.** Harvey *v.* Municipal Permanent Investment Bldg. Soc. (1884), 26 Ch. D. 273.

352. —— Mistake as to other contract between other parties.]—Sea Fire Life Assurance Co. took an assignment, valid, as they supposed, from Port of London co., of their business & obligations, & drew a bill in favour of pltf., to whom Port of

PART V. SECT. 3, SUB-SECT. 3.

b. Deed of conveyance — Land sold for taxes by mistake.]—CHARLTON *v.* WATSON (1883), 4 O. R. 489.—**CAN.**

PART V. SECT. 3, SUB-SECT. 4.

c When available — Covenant in lease incomplete.]—To an action of covenant in a lease, deft. pleaded in substance on equitable grounds, that by mutual mistake the covenant declared on was inserted in the lease in different terms from what both

London co. owed £500, on deft., their cashier, who accepted it for that amount payable at sixty days. Pltf., as well as the assurance co., were under the same mistaken apprehensions that the assignment was valid. It turned out to be invalid. To an action upon the bill, deft. proposed to plead by way of equitable defence that the bill was drawn & accepted under a mistaken supposition on the part of pltf., as well as of deft., that the assignment was valid:—*Held:* the mistake was not a mistake as to the contract in the bill itself, but was a mistake as to another contract between other parties, & such a plea was no defence either at law or in equity.—BALFOUR *v.* SEA FIRE LIFE ASSURANCE CO. (1857), 3 C. B. N. S. 300; 27 L. J. C. P. 17; 30 L. T. O. S. 122; 3 Jur. N. S. 1304; 6 W. R. 19; 140 E. R. 756.

Annotation:—**Apld.** Pope & Pearson *v.* Buenos Ayres New Gas Co. (1892), 8 T. L. R. 758.

353. —— Plaintiff deceived by reasonable reading of contract.]—Pltfs.' agent entered into a contract to supply bricks to a builder at certain prices "to be taken within four months from the date thereof. Month's account, & bill at five months from the date thereof. The due performance of this contract by" the builder being guaranteed by deft. This was signed by deft., but he & pltf.'s agent both understood & agreed that he was thereby guaranteeing only the acceptance of bills by the builder. Pltf. always believed deft. had guaranteed the payment of the bills, & heard nothing of the agreement of their agent with deft. The agent had received no authority from pltfs. to assent to such a guarantee as deft. intended, & pltfs. supplied the bricks on the faith of the guarantee, as they interpreted it:—*Held:* the contract was a guarantee for the payment of these bills, & this was not such a mutual mistake between the parties as to constitute an equitable ground of defence to an action upon the guarantee.

Pltfs. having been deceived by the reasonable reading of the guarantee as to what had been deft.'s meaning, deft. is not entitled to relief in equity, nor is he, according to my opinion, in common justice (COCKBURN, C.J.).—HAYMEN *v.* GOVER (1872), 25 L. T. 903.

354. —— Agreement contrary to intention of parties.]—Equitable plea to a declaration for allowing the business of a cheesemonger or pork butcher to be carried on on deft.'s premises near to certain premises let by deft. to pltf. contrary to agreement that at the time of making the agreement deft. possessed a shop near the premises let, where such business was, & had long been carried on, as pltf. knew; that it never was intended that such business should not be carried on there; that the agreement was by mistake so framed as to include the carrying on of such business there in the general words; that the real & true agreement was fulfilled, & was always understood & acted upon as not intended to prevent the carrying on of such business there:—*Held:* a good plea.—NICOLL *v.* BELL (1875), 32 L. T. 815.

Whether agent or principal liable upon contract.]—*See* AGENCY, Vol. I., p. 639, Nos. 2603, 2604.

Defence to action for specific performance.]—*See* LANDLORD & TENANT, Vol. XXX., pp. 415, 416, Nos. 774–781; SPECIFIC PERFORMANCE.

Particular instances.]—*See* titles *passim*.

SUB-SECT. 5.—COMPENSATION.

Leases.]—*See* LANDLORD & TENANT, Vol. XXX., p. 486, Nos. 1465–1466; Vol. XXXI., p. 260, No. 4018.

On partition.]—*See* PARTITION.

On sale of land.]—*See* SALE OF LAND.

SECT. 4.—EVIDENCE ON WHICH RELIEF GRANTED.

SUB-SECT. 1.—ADMISSION OF PAROL EVIDENCE.

A. In General.

See DEEDS, Vol. XVII., pp. 302–348, Nos. 1144–1588.

B. Equitable Rule.

(a) In General.

355. Evidence admissible—To make case for rectification or rescission.]—Arts. of agreement rectified by the minutes. Admission of parol evidence where fraud or surprise.

How can a mistake in an agreement be proved but by parol evidence? It is not read to contradict the face of the agreement which the ct. would not allow, but to prove a mistake therein, which cannot otherwise be proved; it may therefore be read (LORD HARDWICKE, C.).—BAKER *v.* PAINE (1750), 1 Ves. Sen. 456; 27 E. R. 1140, L. C.

Annotation:—**Consd.** Rich *v.* Jackson (1794), 4 Bro. C. C. 514.

356. —— ——.]—I think it is impossible to refuse as incompetent, parol evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties. It is the only way of explaining latent ambiguities (LORD THURLOW, C.).—SHELBURNE (COUNTESS DOWAGER) *v.* INCHIQUIN (EARL) (1784), 1 Bro. C. C. 338; 28 E. R. 1166, L. C.; *on appeal* parties had agreed upon, intended & supposed when the lease was executed, & that reading the covenant as it should have been, there was no breach thereof:—*Held:* plea bad.—SHIER *v.* SHIER (1872), 22 C. P. 147. —**CAN.**

PART V. SECT. 4, SUB-SECT. 1.—A.

d. *Evidence must be conclusive.*]—In order to correct an error in the descriptive part of a grant by parol evidence, the evidence must be such as to leave no doubt of the intention of the grantor.—BRENNOCK *v.* FRASER (1853), 2 N. S. R. (James) 178.—**CAN.**

e. *Conflict of parol evidence.*]—Reformation of agreement for renewal lease by inserting a provision for reference to arbitration as to the terms. The evidence as to mistake in omitting such provision being chiefly the verbal testimony of deft., which pltf. denied:—*Held:* the agreement clearly could not be reformed.—DAWSON *v.* GRAHAM (1877), 41 U. C. R. 532.—**CAN.**

PART V. SECT. 4, SUB-SECT. 1.—B. (a).

355 i. *Evidence admissible—To make case for rectification or rescission.*]—The ct. will receive parol evidence to rectify a written instrument, notwithstanding that the language used was that intended by the parties, where the legal effect of such language is different from what was their intention & agreement.—MERRITT *v.* IVES (1844), 2 O. S. 25.—**CAN.**

355 ii. —— ——.]—A mtge. may be reformed by inserting additional parcels, on clear parol evidence that the omission was by mutual mistake.—FORRESTER *v.* CAMPBELL (1870), 17 Gr. 379.—**CAN.**

355 iii. —— ——.]—Parol evidence is admissible to reform a mtge. which omitted land shown by the mtgor. to the mtgee. as part of the property to be mortgaged.—MERCHANTS BANK OF CANADA *v.* MORRISON (1872), 19 Gr. 1. —**CAN.**

355 iv. —— ——.]—Where a widow & child filed a bill against the husband's father to rectify a marriage settlement wrong by mistake, the mistake was allowed to be shown by parol evidence.—NOBLE *v.* NOBLE (1817), 2 Mol. 403.—**IR.**

355 v. —— ——.]—M'CORMACK *v.* M'CORMACK (1877), 1 L. R. Ir. 119.—**IR.**

355 vi. —— ——.]—Where it is sought to cancel a lease or executed conveyance upon equitable grounds, parol evidence is admissible, even where there has been an antecedent agreement in writing for the lease or conveyance.—GUN *v.* M'CARTHY (1883), 13 L. R. Ir. 304.—**IR.**

Sect. 4.—Evidence on which relief granted: Sub-sect. 1, B. (a) & (b).]

sub nom. INCHIQUIN (EARL) *v.* FITZMAURICE (1785), 5 Bro. Parl. Cas. 166, H. L.

Annotations:—**Consd.** Townshend *v.* Stangroom (1801), 6 Ves. 328; Fowler *v.* Fowler (1859), 4 De G. & J. 250. **Refd.** Wharram *v.* Wharram (1864), 3 Sw. & Tr. 301; Fowler *v.* Sugden (1916), 115 L. T. 51; Craddock *v.* Hunt (1923), 92 L. J. Ch. 378. **Mentd.** Richardson *v.* Smith (1870), 39 L. J. Ch. 877.

357. —— ——.]—Parol evidence is admissible to make out a case for the rectification of a settlement, but the jurisdiction in such cases is to be cautiously exercised.—BARROW *v.* BARROW (1854), 18 Beav. 529; 52 E. R. 208; *on appeal*, 5 De G. M. & G. 782, L. JJ.

Annotations:—**Mentd.** *Re* Ford (1863), 2 New Rep. 349; Spirett *v.* Willows (1865), 3 De G. J. & Sm. 293; *Re* Cooke's Trusts (1887), 56 L. T. 737.

358. —— ——.]—Trust funds were limited, after the death of the husband & wife, to the children of the marriage, to be vested interests at their respective ages of twenty-five or day of marriage if daughters, which should first happen, with benefit of survivorship in the event of any dying under that age or before marriage if daughters. The settlement contained powers of maintenance & advancement:—*Held:* the language of the settlement being unambiguous, its legal effect could not be controlled, & the limitations were void for remoteness, but leave was given to the children to adduce evidence that the settlement was not in accordance with the intention of the parties, with a view to its being rectified.—*Re* MORSE'S SETTLEMENT (1855), 21 Beav. 174; 25 L. J. Ch. 192; 26 L. T. O. S. 163; 2 Jur. N. S. 6; 4 W. R. 148; 52 E. R. 825.

Annotation:—**Refd.** *Re* Malet (1862), 30 Beav. 407.

359. —— ——.]—BRADFORD (EARL) *v.* ROMNEY (EARL), No. 345, *ante*.

360. —— ——.]—PRICE *v.* LEY, No. 163, *ante*.

361. —— ——.]—Trustees for sale put certain property, including two freehold houses, into the hands of an auctioneer to be sold. The property for sale comprised a scullery so situated that it might have belonged to either of the two houses. The auctioneer prepared a plan which clearly showed the scullery as part of Lot 2, but, by some inadvertence, it was in the particulars of sale clearly included in Lot 3. The person who subsequently became the purchaser of Lot 2, having before the sale called the auctioneer's attention to the discrepancy, was informed by the latter that the plan was correct, & that the scullery was included in Lot 2. He also orally pointed out the mistake at the sale, & informed those present that the scullery formed part of Lot 2. Lot 2 was sold, but Lot 3 was not sold. The conveyance of Lot 2 was made, after an interview on the subject between the solrs. of the vendors & of the purchaser, so as expressly to comprise the scullery. The purchaser, immediately after the execution of the conveyance, mortgaged Lot 2. The vendors brought an action against the purchaser & his mtgees. for rectification of the conveyance, alleging that the scullery was included in the conveyance by mistake, as they had never authorised their agents to include it in Lot 2, their attention never having been called to what had passed between their agents & the purchaser with reference to it, & that they had executed the conveyance without reading it. Pltfs. contended that, there being a written contract to sell Lot 2 without the scullery, & that contract being free from ambiguity, parol evidence to vary it was not admissible:—*Held:* (1) even apart from the difficulty arising from the position of the mtgees., who like the purchaser himself, had no notice at the time they took their mtge., of the facts on which the equities claimed by pltf. were based, there was certainly no mistake on the part of deft. the purchaser, & none was satisfactorily proved even on the part of pltfs., as they simply left the matter to their agents, who accordingly had authority to include the scullery in Lot 2 in the way they did, & there was therefore no case for rectification; (2) the conveyance, having been executed, *primâ facie* governed the relations between the parties & evidenced their contract, but if for the purpose of showing a mistake in the conveyance the prior written contract was to be looked at, then all the prior relevant transactions ought to be looked at also, & not the contract alone.—ELLIS *v.* HILLS & BRIGHTON & PRESTON A. B. C. PERMANENT BENEFIT BUILDING SOCIETY (1892), 67 L. T. 287.

362. —— ——.]—LOVELL & CHRISTMAS, LTD. *v.* WALL, No. 312, *ante*.

363. —— **To prove mistake.**] — BAKER *v.* PAINE, No. 355, *ante*.

364. —— ——.]—OLLEY *v.* FISHER, No. 326, *ante*.

365. —— —— **As defence to action.**]—If an agreement purport, by the words attached to the signature of a particular person, to have been signed by that person on the behalf of another having an interest but not being a party, such person may be examined to prove that he signed in reality for a different person named as a party & whose signature was not to the agreement, & that the statement of his having signed for the first-mentioned person was written by mistake.—RUMBALL *v.* WRIGHT (1824), 1 C. & P. 589, N. P.

366. —— —— ——.]—Where testator, being seised in fee of several estates, in the parish of C., partly paternal, & the remainder purchased at different times, devised the whole [consisting of nineteen messuages & eighteen acres of land] to his wife in fee, & afterwards levied a fine "of twelve messuages, twelve gardens, twenty acres of land, twenty acres of meadow, twenty acres of pasture, five acres of wood, & five acres of land covered with water," & died suddenly without re-executing his will. In ejectment by the heir-at-law for the paternal estate, on the ground that the fine operated as a revocation of the will:—*Held:* parol evidence was admissible to restrain the operation of the fine to one of the purchased estates on which were twelve messuages, so as not to pass the estate in question.—DENN d. BULKLEY *v.* WILFORD (1826), 8 Dow. & Ry. K. B. 549; 4 L. J. O. S. K. B. 295.

367. —— —— ——.]—In an action of trespass, the question being as to a right of way over the *locus in quo*, an equitable plea, stating that deft. had contracted to purchase from C. a close, to which was attached the right of way in question, & that pltf. had contracted with C. to purchase the *locus in quo* subject to such right, but that by their mutual mistake it had been omitted in the conveyance; evidence admitted on the part of pltf. as to what C. said at the sale as to the close conveyed to deft., in order to negative the alleged

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363 i. —— *To prove mistake.*]—EDMONTON SECURITIES, LTD. *v.* LEPAGE (1913), 25 W. L. R. 532; 5 W. W. R. 188; 14 D. L. R. 66; 6 Alta. L. R. 282.—**CAN.**

363 ii. —— ——.]—KANE *v.* DUBLIN & WICKLOW RY. CO. (1857), 10 Ir. Jur. 160.—**IR.**

1. Evidence inadmissible—Where mistake denied.]—If mistake is positively denied by any party to an instrument, parol evidence is inadmissible to prove it.—BALFOUR *v.* DRUMMOND, 9 C. L. T. Occ. N. 201.—**CAN.**

agreement with him.—SCOTT *v.* SYKES (1860), 2 F. & F. 191, N. P.

368. —— —— ——.]—In an action on a promissory note made by defts. as directors of an insurance co., where it was sought to make them personally liable, evidence was received, under an equitable plea of mutual mistake as to the form of the note, of the intention with which the note was given on the one side & taken on the other.—CORTAULD *v.* SAUNDERS (1867), 16 L. T. 469, N. P.; *subsequent proceedings, sub nom.* COURTAULD *v.* SAUNDERS, 16 L. T. 562.

369. —— —— ——.]—BEALE *v.* KYTE, No. 433, *post.*

To show contract executory.]—*See* DEEDS, Vol. XVII., pp. 334, 335, Nos. 1455–1466.

—— **Estoppel.**]—*See* ESTOPPEL, Vol. XXI., p. 278, No. 948.

—— **Settlements.**]—*See* SETTLEMENTS.

—— **To establish claim to specific performance with parol variation.**]—*See* Sect. 3, sub-sect. 2, A. (*e*) & (*f*), *ante*; SPECIFIC PERFORMANCE.

(*b*) *Effect of Statute of Frauds.*

370. Evidence admissible.]—YOUNG *v.* YOUNG (1750), cited in 1 Dick. at p. 295; 21 E. R. 282.

Annotations :—**Folld.** Rogers *v.* Earl (1757), 1 Dick. 295. **Consd.** Thomas *v.* Davis (1757), 1 Dick. 301. **Apprvd.** Bold *v.* Hutchinson (1855), 5 De G. M. & G. 558.

371. ——.]—Parol evidence read to prove a mistake of a solr. in taking instructions for a settlement.—ROGERS *v.* EARL (1757), 1 Dick. 294; 21 E. R. 282.

Annotations :—**Apprvd.** Bold *v.* Hutchinson (1855), 5 De G. M. & G. 558. **Reid.** Thomas *v.* Davis (1757), 1 Dick. 301; Johnson *v.* Bragge, [1901] 1 Ch. 28.

372. ——.]—Evidence circumstantial is entitled to be read provided any parol evidence be admissible. The objection is, that it is a direct contradiction to Stat. Frauds; but I am clear it may be read (CLARKE, M.R.).—THOMAS *v.* DAVIS (1757), 1 Dick. 301; 21 E. R. 284.

Annotations :—**Consd.** Johnson *v.* Bragge, [1901] 1 Ch. 28. **Reid.** Craddock *v.* Hunt, [1923] 2 Ch. 136.

373. ——.]—Where, under the general words of a contract for the sale of an estate, property passes which the vendor insists he did not mean to sell, but the purchaser by his answer denies, or does not admit that it was not in his contemplation at the time of the purchase. *Semble*: the vendor, on the ground of mistake, cannot sustain a bill against the purchaser to have the contract rectified & carried into execution.

Qu.: whether, consistently with the Stat. Frauds, the Ct. can entertain a bill for rectifying an executory contract for the sale of lands, & carrying it, when rectified, into execution, even where the mistake is admitted by the answer.—A.-G. *v.* SITWELL (1835), 1 Y. & C. Ex. 559; 5 L. J. Ex. Eq. 86; 160 E. R. 228.

Annotations :—**Reid.** Steele *v.* Haddock (1855), 10 Exch. 643; Wharram *v.* Wharram (1864), 3 Sw. & Tr. 301.

374. ——.]—Pltf. under a mistaken apprehension that he was indictable for bigamy, conveyed & assigned certain real estate & other property, to deft. absolutely, for a mere nominal consideration, which was never paid. The evidence showed that when the conveyance & assignment was executed there was a verbal understanding that deft. was to hold the property for pltf. till the termination of the affair. Pltf. continued in possession of the property. It subsequently appeared that he was not liable to be indicted; & he then requested deft. to reconvey the property. Deft. refused. Pltf. then filed a bill for relief accordingly. Deft. demurred to the bill, but the demurrer was overruled. By his answer he denied the alleged verbal agreement, claimed the property as his own, relied on Stat. Frauds as a bar to pltf.'s suit, & contended that he was in fact only an agent of deft.:—*Held*: as the evidence clearly showed the real nature of the transaction between the parties, deft. could not be allowed to set up Stat. Frauds, & must reconvey the property to pltf.—DAVIES *v.* OTTY (1865), 35 Beav. 208; 5 New. Rep. 391; 34 L. J. Ch. 252; 12 L. T. 789; 10 Jur. N. S. 506; 13 W. R. 484; 55 E. R. 875.

Annotations :—**Reid.** Haigh *v.* Kaye (1872), 7 Ch. App. 469; Booth *v.* Turle (1873), L. R. 16 Eq. 182; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196; Gascoigne *v.* Gascoigne, [1918] 1 K. B. 223.

375. ——.]—By an instrument under seal dated Nov. 2, a customer gave to his bankers a charge on the premises mentioned in the schedule as a security for all moneys then due or hereafter to become due from him to them subject to a prior mtge. of Oct. 3 to a building society, & he covenanted to execute a legal mtge. when required. The schedule described the property as "three leasehold houses in Coity held by the mtgor. under a lease of Sept. 25." The lease of Sept. 25 in fact comprised only one house. There was evidence that on Nov. 2 the bankers agreed to make further advances to the customer, upon his giving them satisfactory security: that he then offered to give them a charge upon three leasehold houses, which he pointed out to the manager; that the manager agreed to accept those three houses as security; & that the deed of charge was then drawn up at the bank, the description in the schedule being inserted from the customer's instructions. One only of the three houses thus pointed out was comprised in the lease of Sept. 25, & the two others were comprised in a lease of Dec. 31, which, as well as the lease of Sept. 25, was subject to a prior mtge. to the building society:—*Held*: this evidence was admissible.—*Re* BOULTER, *Ex p.* NATIONAL PROVINCIAL BANK OF ENGLAND (1876), 4 Ch. D. 241; 46 L. J. Bcy. 11; 35 L. T. 673; 25 W. R. 100.

Annotation :—**Reid.** Craddock *v.* Hunt, [1923] 2 Ch. 136.

376. ——.]—In an action to rectify a settlement after the death of the husband, on the ground that it did not exercise a certain power of appointment in favour of the wife in accordance with the arrangement alleged to have been entered into prior to the marriage, defts. pleaded Stat. Frauds, s. 4, they also contended that relief could not be given against a non-execution, as distinct from an imperfect execution, of a power.

PART V. SECT. 4, SUB-SECT. 1.—B. (b).

370 i. *Evidence admissible.*]—Parol evidence is not admissible to show that by mistake the written bond did not express the true agreement, unless mistake is expressly charged.—MCDONALD *v.* ROSE (1870), 17 Gr. 657.—**CAN.**

370 ii. ——.]—Where there is no previous agreement in writing, parol evidence is admissible to show what the agreement really was in an action to rectify a mistake in a written instrument. It is no defence to an action for rectification to plead that the antecedent contract was one which Statute of Frauds requires to be in writing & that it was made by word of mouth only.—FORDHAM *v.* HALL (1914), 20 B. C. R. 562.—**CAN.**

370 iii. ——.]—Where there has been part performance of a contract by parol for the sale of land sufficient to take the case out of Statute of Frauds, parol evidence is admissible, in an action for rectification of a subsequent written agreement entered into in furtherance of the verbal contract, to show that such written agreement, owing to a mutual mistake, does not include all the land the subject matter of the prior parol contract.—STANSELL *v.* EASTON & AUSTIN (1910), 30 N. Z. L. R. 975.—**N.Z.**

g. Evidence inadmissible — Instrument in accordance with prior agreement —Agreement unambiguous.]—D. & F. made a written agreement for a lease; a lease is executed according to the expressed terms of the agreement. In a

Sect. 4.—Evidence on which relief granted: Sub-sect. 1, B. (b) & (c); sub-sects. 2 & 3.]

& particularly after the death of the donee thereof:—*Held:* parol evidence was admissible in an action to rectify a mistake in a settlement, notwithstanding Stat. Frauds, an action, of that kind not being one seeking "to charge any person upon any agreement made upon consideration of marriage" within s. 4; relief could be given, & rectification in the present case did not amount to aiding the non-execution or defective execution of a power; when once the settlement was made to accord with what the ct. found to have been the real bargain & intention of the parties to it, no further deed or relief was necessary.

I shall order a copy of the declaration to be indorsed on the settlement (COZENS-HARDY, J.).—JOHNSON *v.* BRAGGE, [1901] 1 Ch. 28; 70 L. J. Ch. 41; 83 L. T. 621; 49 W. R. 198.

Annotations:—**Consd.** Craddock *v.* Hunt, [1923] 2 Ch. 136. **Refd.** Meeking *v.* Meeking, [1917] 1 Ch. 77.

377. ——.]—HIGGINS (W.), LTD. *v.* NORTHAMPTON CORPN., No. 87, *ante*.

378. —— **Ambiguity in document.**]—MURRAY *v.* PARKER, No. 308, *ante*.

Rectification of conveyance after previous written agreement.]—*See* Sect. 3, sub-sect. 2, A. (*e*), *ante*.

Rectification of written agreement when specific performance claimed.]—*See* Sect. 3, sub-sect. 2, A. (*f*), *ante*.

(c) *To Establish Defence to Claim for Specific Performance.*

See, generally, SPECIFIC PERFORMANCE.

379. Evidence admissible—To show mistake.]—A bill brought to carry an agreement into execution for a lease of a house which was signed by deft. the lessor only, who by his answer insisted it ought to be inserted in the agreement that the tenant should pay the rent clear of taxes, pltf. who wrote the agreement having omitted to make it so, & offered to read evidence to show this was a part of the agreement. The evidence ought to be admitted, for if there has been any omission, deft. ought to have the benefit of it by way of objection to a specific performance.—JOYNES *v.* STATHAM (1746), 3 Atk. 388; 26 E. R. 1023, L. C.

Annotations:—**Consd.** Rich *v.* Jackson (1794), 4 Bro. C. C. 514; Townshend *v.* Stangroom (1801), 6 Ves. 328; Ramsbottom *v.* Gosden (1812), 1 Ves. & B. 165. **Refd.** Rogers *v.* Earl (1757), 1 Dick. 295; Woollam *v.* Hearn (1802), 7 Ves. 211; Mason *v.* Armitage (1806), 13 Ves. 25; London & Birmingham Ry. *v.* Winter (1840), Cr. & Ph. 57. **Mentd.** Smith *v.* Wheatcroft (1878), 9 Ch. D. 223.

380. ——.]—TOWNSHEND (MARQUIS) *v.* STANGROOM, STANGROOM *v.* TOWNSHEND (MARQUIS), No. 336, *ante*.

381. ——.]—An omission in an agreement by mistake stands on the same ground as an omission by fraud.

Construction of a contract; that a reference of the expenses was confined to the expense of the conveyance; but the evidence of the attorney was admitted for deft. to prove the intention of both parties, according to verbal instructions, that pltf., the purchaser, should also pay the expense of making out deft.'s title.—RAMSBOTTOM *v.* GOSDEN (1812), 1 Ves. & B. 165; 35 E. R. 65.

Annotations:—**Consd.** Clowes *v.* Higginson (1813), 1 Ves. & B. 524; Gordon *v.* Hertford (1817), 2 Madd. 106. **Refd.** London & Birmingham Ry. *v.* Winter & Ph. 57. **Mentd.** Stratford *v.* Bosworth (1813), 2 Ves. & B. 341.

382. —— ——.]—CLOWES *v.* HIGGINSON, No. 76, *ante*.

383. —— ——.]—On a bill for a specific performance of an agreement by several persons to enter into several bonds for £1,500, parol evidence permitted to be read to show that the agreement was to give a joint bond for £1,500 & not separate bonds to that amount.—GORDON (LORD) *v.* HERTFORD (MARQUIS) (1817), 2 Madd. 106; 56 E. R. 274.

384. —— ——.]—The principle is that it is against conscience for a man to take advantage of the plain mistake of another or, at least, that a ct. of equity will not assist him in so doing. . . . As the principle however is general, where the fraud, mistake or surprise cannot be established without evidence, equity will allow a deft. to a bill for specific performance, to support a defence founded upon any of these grounds by evidence dehors the agreement (WIGRAM, V.-C.).—MANSER *v.* BACK (1848), 6 Hare, 443; 67 E. R. 1239.

Annotations:—**Consd.** Tamplin *v.* James (1880), 15 Ch. D. 215. **Refd.** *Re* Hare & O'More's Contract, [1901] 1 Ch. 93; Douglas *v.* Baynes, [1908] A. C. 477 **Mentd.** Rainbow *v.* Howkins, [1904] 2 K. B. 322.

385. —— ——.]—(1) Deft. S., being the owner of a newly built public-house called "The Q." sent to pltfs. W., who were brewers, a letter, in which he stated the terms for a twenty-five years' lease to be £30 the first year & £63 from the time of obtaining the licence. Pltfs. thereupon sent an agent to view the premises, who saw deft. there, & accepted those terms. Pltfs. were thereupon let into possession, & commenced alterations & additions. The ingrossed lease contained a covenant on the part of the lessees to pay, in addition to the above rent, a premium of £500 on obtaining a licence, which deft. insisted had been mentioned *viva voce* at the interview with pltfs.' agent, & taken down by him in writing in deft.'s presence. This turned out to be an entire misapprehension, although positively sworn to by deft., but in deft.'s letter, containing the first offer of terms to pltfs., there was the following passage: "I am giving to all the brewers who have left cards the offer in rotation"; & it was proved, that immediately before the offer to pltfs., deft. had offered the premises to another brewer on the same terms as those in the ingrossed lease to pltfs., viz. the same as in the letter, with the additional term of the £500 premium:—*Held:* this was sufficient evidence of a mistake by deft. in accidentally omitting the premium in the terms first mentioned to pltfs.

(2) Deft. was not prevented from setting up the defence of mistake in his original proposition because he had also set up the defence, which failed, that pltfs. had agreed to vary the terms of that original proposition.—WOOD *v.* SCARTH (1855), 2 K. & J. 33; 3 Eq. Rep. 485; 26 L. T. O. S. 87; 1 Jur. N. S. 1107; 4 W. R. 31; 69 E. R. 682.

Annotations:—*Generally,* **Refd.** Onions *v.* Cohen (1865), 2 Hem. & M. 354; Shardlow *v.* Cotterell (1881), 18 Ch. D. 280. **Mentd.** Sheers *v.* Thimbleby (1897), 76 L. T. 709; Slack *v.* Leeds Industrial Co-op. Soc., [1923] 1 Ch. 431.

386. —— **Evidence must be strong.**] — The proof must be very clear which should induce a ct. of equity to refuse to enforce a written agreement, upon the ground that a term of the real agreement between the parties has been omitted by mistake.—CLAY *v.* RUFFORD (1850), 8 Hare, 281; 19 L. J. Ch. 295; 14 Jur. 803; 68 E. R.

suit, instituted by D., to reform the lease, by introducing a new term:—*Held:* parol evidence was not admissible to show, that the lease, though in strict conformity with the terms of the written agreement, was contrary to its spirit, as there was something *dehors* the contract agreed upon between the parties, yet omitted in the lease.—DAVIES *v.* FITTON (1842), 4 I. Eq. R. 612; 2 Dr. & War. 225.—IR.

367; *subsequent proceedings* (1852), 5 De G. & Sm. 768.

Claim to specific performance with parol variation.]—*See* Sect. 3, sub-sect. 2, A. (*e*) & (*f*), *ante*; SPECIFIC PERFORMANCE.

SUB-SECT. 2.—RECTIFICATION ON PAROL EVIDENCE ONLY.

387. Court generally requires written evidence—But will act upon clear parol evidence.]—A ct. of equity will interfere to correct a formal instrument in which a mistake has occurred; but it is upon very clear evidence, generally written evidence; as where a marriage settlement executed in pursuance of previous arts., does not follow the terms of the arts.—HODGSON *v.* HANCOCK (1827), 1 Y. & J. 317; 148 E. R. 692.

388. —— ——.] — BARROW *v.* BARROW, No. 357, *ante*.

389. —— ——.]—In a suit for the rectification of a settlement on the ground that the instructions have been exceeded, the ct. will give relief upon parol evidence of the intention of the parties, on being satisfied that no written instructions are in existence.—LACKERSTEEN *v.* LACKERSTEEN (1860), 30 L. J. Ch. 5; 3 L. T. 581; 6 Jur. N. S. 1111.

390. —— ——.] — By a marriage settlement personalty of the wife was settled on trust for herself for life, for her separate use, without power of anticipation, & after her death, as she should by will or codicil notwithstanding coverture appoint, & in default of appointment on trust for the statutory next of kin then living. The husband died in the wife's lifetime. On her uncontradicted evidence that the settlement was not in accordance with the intentions of the parties:—*Held:* she was entitled to have it rectified, so that in the events which had happened the trust funds might be held in trust for herself absolutely.—COOK *v.* FEARN (1878), 48 L. J. Ch. 63; 39 L. T. 348; 27 W. R. 212.

391. —— ——.] — BONHOTE *v.* HENDERSON, No. 332, *ante*.

392. Plaintiff's case denied by defendant.] — TOWNSHEND (MARQUIS) *v.* STANGROOM, STANGROOM *v.* TOWNSHEND (MARQUIS), No. 336, *ante*.

393. ——.] — FOWLER *v.* FOWLER, No. 340, *ante*.

394. ——.] — BENTLEY *v.* MACKAY, No. 343, *ante*.

395. ——.] — BLOOMER *v.* SPITTLE, No. 165, *ante*.

Evidence from instrument itself.]—*See* Part IV., Sect. 1, *ante*.

SUB-SECT. 3.—EVIDENCE OF PLAINTIFF ONLY.

396. No further evidence obtainable — Clear evidence necessary.]—Trusts in a marriage settlement in favour of the children of a future marriage & of collaterals are purely voluntary. A person taking a benefit under a voluntary gift which is not subject to a power of revocation has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable. A voluntary gift not subject to a power of revocation, but not meant to be irrevocable, may be set aside by the donor.—WOLLASTON *v.* TRIBE (1869), L. R. 9 Eq. 44; 21 L. T. 449; *sub nom.* WOOLLASTON *v.* TRIBE, 18 W. R. 83.

Annotations:—**Consd.** Phillips *v.* Mullings (1871), 7 Ch. App. 244; James *v.* Couchman (1885), 29 Ch. D. 212. **Dbtd.** Tucker *v.* Bennett (1887), 38 Ch. D. 1. **Reld.** Paul *v.* Paul (1880), 15 Ch. D. 580; Welman *v.* Welman (1880), 15 Ch. D. 570.

397. —— ——.] — TUCKER *v.* BENNETT, No. 311, *ante*.

398. —— ——.] — BONHOTE *v.* HENDERSON, No. 332, *ante*.

399. —— **Rectification granted.**] — By a marriage settlement executed in pursuance of arts. made under the order of the ct. on the marriage of a lady, an infant & a ward of ct., personalty of the wife was limited on the death of the husband & in default of children, both of which events happened, to the wife, as she should by will appoint, & in default to her next of kin. Upon her uncontradicted evidence that this was not in accordance with her intention:—*Held:* she was entitled to have the settlement rectified by limiting the property in the events which had happened, to herself, her exors., & administrators, absolutely; & declaration to that effect ordered to be indorsed on the settlement.—SMITH *v.* ILIFFE (1875), L. R. 20 Eq. 666; 44 L. J. Ch. 755; 33 L. T. 200; 23 W. R. 851.

Annotations:—**Consd.** Cogan *v.* Duffield (1876), 34 L. T. 593. **N.F.** Tucker *v.* Bennett (1887), 38 Ch. D. 1. **Reld.** Hanley *v.* Pearson (1879), 13 Ch. D. 545; Welman *v.* Welman (1880), 15 Ch. D. 570.

400. —— ——.] — COOK *v.* FEARN, No. 390, *ante*.

401. —— ——.] — The ct. will order rectification of a deed on the ground of mistake upon the evidence of pltf. alone, where no further evidence can be obtained. By a post-nuptial settlement, real estate belonging to the wife was conveyed unto A. & his heirs "to the use of" A., his exors. & administrators, during the life of the wife, "upon trust" to pay the rents & profits to her for her separate use; & from & after her decease, in case of the death of her husband in her lifetime, "to the use of the heirs & assigns" of the wife for ever; but in case of the wife predeceasing the husband, then to the use of the husband, his heirs, & assigns for ever. The wife having survived her husband, she brought an action against A.'s legal personal representative to have the settlement rectified, on the ground that by a technical mistake in the form of the settlement her equitable life estate & the legal estate in remainder did not coalesce within the rule in *Shelley's Case*, so as to give her, as was intended in the events that had happened, an absolute estate in fee. Pltf.'s case was supported by an affidavit by herself alone:—*Held:* (1) her uncontradicted affidavit was sufficient, & ordered that the settlement be rectified so as to vest the legal estate in fee simple to pltf.; (2) also, a conveyance of the outstanding legal estate was unnecessary; (3) form of order for rectification.—HANLEY *v.* PEARSON (1879), 13 Ch. D. 545; 41 L. T. 673.

Annotations:—*As to* (1) **Reld.** Craddock *v.* Hunt, [1923] 2 Ch. 136. *Generally*, **Reld.** Welman *v.* Welman (1880), 15 Ch. D. 570.

402. —— ——.] — By a marriage settlement made in 1850, the property of the intended wife was settled in trust, as to £600, as the wife should by deed appoint & subject thereto, as to the whole property, in trust for the wife for life, & after her

PART V. SECT. 4, SUB-SECT. 2.

387. *Court generally requires written evidence—But will act upon clear parol evidence.*]—*Semble:* the ct. will reform a settlement where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach.—ALEXANDER *v.* CROSBIE (1835), L. & G. *temp.* Sugd. 145.—**IR.**

Sect. 4.—Evidence on which relief granted: Sub-sect. 3. Sect. 5: Sub-sect. 1.]

decease as she should by will appoint, & in default of appointment in trust for her children by any marriage, & if there should be no children of the then intended marriage & the husband should predecease the wife, then in trust as to two thirds for such persons as, under the Statutes of Distribution, would have become entitled thereto at the death of the wife if she had died possessed thereof intestate & without having been married. There were no children of the marriage, & in 1879, after the death of the husband the wife, not having married again, brought an action claiming the rectification of the settlement. The only evidence was an affidavit of the wife that it had not been her intention to limit & she had not for some time discovered that she had by the settlement limited for her disposing power in the event of her surviving her husband:—*Held:* the settlement ought to be rectified by inserting a power of appointment by deed as well as by will.—EDWARDS *v.* BINGHAM (1879), 28 W. R. 89.

Annotation:—**Mentd.** Paul *v.* Paul (1880), 43 L. T. 239.

403. ——— ———.]—Rectification of a marriage settlement decreed at the instance of the wife after the death of the husband upon her uncorroborated parol testimony.

Upon the marriage of a widow with a retired solr., who had formerly acted as her solr., the whole of her property, amounting to more than £20,000, was vested in trustees, upon trust to pay the income to the wife for her life, & after her death to the husband for his life; &, as to the capital, upon trust, after the death of the wife, to pay one moiety thereof to the husband, his exors., administrators, or assigns, & to hold the other moiety upon such trusts as the wife should by deed or will appoint. By another deed, executed contemporaneously, the husband, in exercise of a power given to him by the will of his father, charged some estates of which he was tenant for life, with remainder to his issue in tail male, with the payment of an annuity of £100 to the wife for her life. The settlement was prepared by the husband himself the night before the marriage, & was brought by him to the wife for execution on the morning of the marriage day. She had no independent professional advice. After the husband's death she brought an action for the rectification of the settlement by omitting the trust of a moiety of the capital for the husband. The trustees & one of the next of kin of the husband were made defts. Pltf. deposed that her husband had told her that he wished every farthing of her property to be settled upon her, & that she said she was willing to allow him a life interest; that he said he would employ counsel; that the settlement did not carry out her intentions, & that she did not know what its provisions were until after the husband's death:—*Held:* it was the duty of the husband to have explained to the wife in the most unmistakable terms, & with due opportunity for deliberation, the provision in his favour, & as the settlement on the face of it was not such as the ct. would have sanctioned in the absence of agreement, the burden of proof was on the representatives of the husband, & pltf. was entitled to the rectification which she claimed; also, the fact that pltf. claimed to retain the benefit of the settlement made on her by the husband was no bar to the rectification.—LOVESY *v.* SMITH (1880), 15 Ch. D. 655; 49 L. J. Ch. 809; 43 L. T. 240; 28 W. R. 979.

404. ——— **Rescission granted — Corroboration from instrument itself.**]—*Re* GARNETT, GANDY *v.* MACAULAY, No. 275, *ante*.

405. Deed poll — Rectification granted.]—BONHOTE *v.* HENDERSON, No. 332, *ante*.

406. ——— **Rescission granted.**]—HOOD OF AVALON (LADY) *v.* MACKINNON, No. 7, *ante*.

407. Other parties raising no objection.]—CORDEAUX *v.* FULLERTON (1879), 41 L. T. 651; 28 W. R. 320.

SECT. 5.—EFFECT OF LAPSE OF TIME.

SUB-SECT. 1.—ON RECTIFICATION AND RESCISSION.

See, generally, LIMITATION OF ACTIONS, Vol. XXXII., pp. 509 *et seq.*

408. General rule.]—SCOTT *v.* COULSON, No. 100, *ante*.

409. Rectification—Ground for refusing decree.]—In 1792 husband & wife, in consideration of a sum of money, executed a conveyance, with a fine, of the wife's estates of M. & F. to O. in fee. In Aug. 1798, they conveyed the M. estate alone to O. in fee, with a declaration, that the fine already levied should enure to the uses of that deed. In Nov. 1798, by a deed reciting that the original transaction was only a mtge., & that it had been lately discovered that the wife had only a life interest in the F. estate, the husband & wife, in consideration of a further advance of money from O., conveyed to him the wife's life interest in that estate. O. never executed the last-mentioned deed, but he entered into possession of both estates at the time of its execution. Upon a bill filed in 1836, by the heir of the wife, to redeem the F. estate. The ct. refused, after a long lapse of time, to rectify the deed, by altering it from an absolute conveyance to a mtge.—TULL *v.* OWEN (1840), 4 Y. & C. Ex. 192; 9 L. J. Ex. Eq. 33; 4 Jur. 503; 160 E. R. 975.

410. ——— ———.]—BLOOMER *v.* SPITTLE, No. 165, *ante*.

411. ——— ———.]—C., a domiciled Englishman, in 1834 married A., an Italian lady. On Jan. 11, 1834, prior to the marriage, a contract in Italian was executed in the terms of the Sicilian law, the father of the bride having been domiciled in Sicily at the time of his death. On July 17, 1847, C. & his wife, to avoid certain doubts as to the true construction of the deed of 1834, resettled the real estate in England belonging to C., & released it from the contract of 1834. On June 9, 1886, C. & his wife executed a deed confirming the contract of 1834, & declaring the deed of 1847, so far as it purported to vary that contract, void. C. died in 1877, & by his will confirmed the marriage contract of 1834 & the deed of 1886. An action was then commenced by C.'s grandson, the tenant in tail in possession under the deed of 1847, asking the ct. to declare the deed of 1886 void, & to have the trusts of the deed of 1847 carried into effect. A., the widow of C., commenced a cross action to enforce the marriage contract of 1834, & for a declaration that the deed of 1847, so far as it purported to vary that contract, was

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PART V. SECT. 5, SUB-SECT. 1.

409 i. *Rectification—Ground for refusing decree.*]—DOE d. BELDING *v.* HALLETT (1847), 5 N. B. R. (3 Kerr) 359.—**CAN.**

409 ii. ——— ———.]—HART *v.* BOUTILIER (1917), 50 N. S. R. 211; 56 D. L. R. 620.—**CAN.**

409 iii. ——— ———.]—CANADIAN BANK OF COMMERCE *v.* STEWART, [1925] 1 D. L. R. 840; [1925] 1 W. W. R. 433; 19 Sask. L. R. 240.—**CAN.**

void:—*Held:* there was a reasonable doubt in 1847 as to the true construction of the deed of 1834; therefore, the deed of 1847 was a family arrangement made for the purpose of settling that doubt, with which the ct. would not interfere.

In equity you cannot come for equitable relief, like setting aside or rectifying a deed, unless you come with the utmost possible diligence (KAY, J.).—CASE *v.* CASE (1889), 61 L. T. 789; 38 W. R. 183.

412. —— —— Mistake clearly proved.] — A marriage settlement, dated in 1823, reformed in 1857, & after the death of the husband, upon proof of the written instructions, so as to give the property to the wife absolutely in the event of her surviving her husband & there being no issue, which events had happened.

It is very true, that the ct. pays great attention to the lapse of time in cases of this description on account of the loss of evidence & the doubt thence arising; but here there is none, for the instructions which were given in writing are preserved & the intention is established (ROMILLY, M.R.).—WOLTERBEEK *v.* BARROW (1857), 23 Beav. 423; 29 L. T. O. S. 119; 3 Jur. N. S. 804; 53 E. R. 167.

Annotations:—**Consd.** Tucker *v.* Bennett (1887), 38 Ch. D. 1. **Reld.** Smith *v.* Iliffe (1875), L. R. 20 Eq. 666.

413. —— Change in position of parties — Fund distributed.]—After money has been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement on the ground that such construction was contrary to the intention of all parties is barred.

C. & Co. built a ship for B., & a considerable sum remained due to them, for which they had a lien on the ship. M. had made advances to B. An agreement was made between the three parties for sale of the ship by C., & for the distribution of the proceeds. The agreement was very obscure, & left it doubtful in what order the claims of C. & of M. were to be paid. After the sale M. sued C. for an account of the proceeds, & judgment was given in the ct. of the County Palatine for carrying into execution the trusts of the agreement, & for the requisite account. On taking the account before the registrar, C. claimed to be allowed his debt, but the registrar held that M. had priority. The proceeds were amply sufficient to pay M.'s claim, but not C.'s also. The Vice-Chancellor affirmed the view of the registrar, & made an order for C. to pay M.'s claim. C. appealed, but the appeal was dismissed & the money was paid to M. After this C. brought an action to rectify the agreement by making it provide that C.'s claim should have priority over that of M. M. pleaded that the agreement having been executed & the money paid under the order of the Palatine Ct., C. was not entitled to any relief:—*Held:* that the action must be dismissed, for that although, the question of rectification not having been before the Palatine Ct., there was no *res judicata*, C. could not come to have the agreement rectified after it had been worked out, & the fund distributed, under the order of the ct. in the Palatine action.—CAIRD *v.* Moss (1886), 33 Ch. D. 22; 55 L. J. Ch. 854; 55 L. T. 453; 35 W. R. 52; 5 Asp. M. L. C. 565, C. A.

Annotation:—**Reld.** Moore *v.* Fulham Vestry, [1895] 1 Q. B. 399.

414. Rescission—Ground for refusing decree.]—Husband & wife, under the erroneous impression that the after-acquired property of the wife was bound by their marriage settlement, directed a sum of money to which the wife became entitled to be paid to the trustees upon the trusts of the settlement. The husband lived for six years afterwards, but took no steps to correct the mistake. Upon the death of the husband & subsequent marriage of the wife, fourteen years after the date of the transaction it was held to be too late to set it aside.—SPICER *v.* SPICER, SPICER *v.* DAWSON, LAWFORD *v.* SPICER (1857), 24 Beav. 365; 26 L. J. Ch. 704; 29 L. T. O. S. 136; 3 Jur. N. S. 1161; 5 W. R. 431; 53 E. R. 398.

Annotation:—**Mentd.** Giacometti *v.* Prodgers (1873), 8 Ch. App. 338.

415. —— ——.] — A., a tenant in tail, immediately upon attaining the age of twenty-one, in 1857, executed a disentailing deed, & resettled the estate to the use of himself for life, with remainder to the use of his first & other sons in tail male, with remainder to his brothers, & sisters & their children in like manner, with remainder over & with power for himself to jointure & charge portions. A. executed this settlement under the advice of a friend of the family, & in ignorance of its real effect, though it was read over to him by the family solicitor, who prepared it. A. married in 1859, & then executed a settlement, in which he recited the deed of 1857, & exercised the power of jointure & charge portions. In 1868 he filed a bill to set aside the deed of 1857 without prejudice to the jointure & portions charged by him on the occasion of his marriage:—*Held:* the settlement of 1859 in which A. confirmed a portion of the deed of 1857, operated as a confirmation of the whole deed. *Semble:* independently of the confirmation the mere lapse of time would have barred A.'s title to relief.—JARRATT *v.* ALDAM (1870), L. R. 9 Eq. 463; 39 L. J. Ch. 349; 22 L. T. 192; 18 W. R. 511.

Annotation:—**Reld.** Hoblyn *v.* Hoblyn (1889), 60 L. T. 499.

416. —— ——.] — The sale took place on Feb. 8, & two days later a copy of the conditions of sale was furnished to pltf.'s solrs. On Feb. 26 pltf.'s solr. wrote to the vendor's solr., stating that, as pltf. had entered into the contract under a mistake, he was desirous of having it rescinded & his deposit returned, in which case he would pay all expenses. This proposal having been refused, pltf.'s solr. sent in requisitions on the title without prejudice to his right to rescind the contract. On May 10, pltf. gave the vendor notice that he declined to complete, & on May 30, he filed his bill for rescission of the contract:—*Held:* there had not been such delay as to deprive pltf. of his right to relief.—TORRANCE *v.* BOLTON (1872), 8 Ch. App. 118; 42 L. J. Ch. 177; 27 L. T. 738; 37 J. P. 164; 21 W. R. 134, L. JJ.

Annotations:—**Reld.** Blaiberg *v.* Keeves, [1906] 2 Ch. 175. **Mentd.** Carlish *v.* Salt, [1906] 1 Ch. 335; Nocton *v.* Ashburton, [1914] A. C. 932.

417. —— ——.] — Neither ignorance of the contents of the settlement nor ignorance of the legal right to repudiate can be pleaded by the settlor as an excuse if the delay in repudiation appears, apart from such ignorance, to have been unreasonable.—CARNELL *v.* HARRISON, [1916] 1 Ch. 328; 85 L. J. Ch. 321; 114 L. T. 478; 60 Sol. Jo. 290, C. A.

414 i. *Rescission — Ground for refusing decree.*]—He who would disaffirm a contract entered into by mistake must do so within a reasonable time, & will not be allowed to do so unless both parties can be replaced in their original position.—MUHAMMAD MOHIDIN *v.* OTTAYAL UMMACHE (1863), 1 Mad. 390.—IND.

414 ii. —— ——.] — MORLING *v.* WARD & Co. (1890), 8 N. Z. L. R. 427. —N.Z.

414 iii. —— ——.]—VAN DER BYL *v.* VAN DER BYL & Co. (1899), 16 S. C. 338; 9 C. T. R. 343.—S. AF.

Sect. 5.—*Effect of lapse of time: Sub-sects.* 1, 2 & 3. *Sect.* 6: *Sub-sects.* 1, 2, 3 & 4.]

418. —— —— **Mistake clearly proved.**]—MILLAR *v.* CRAIG, No. 277, *ante.*

419. —— —— ——.]—*Re* GARNETT, GANDY *v.* MACAULAY, No. 275, *ante.*

See, also, EQUITY, Vol. XX., pp. 524 *et seq.*

SUB-SECT. 2.—RECOVERY OF MONEY.

See Part VI., Sect. 2, sub-sect. 8, *post.*

SUB-SECT. 3.—WHEN TIME BEGINS TO RUN.

See, generally, LIMITATION OF ACTIONS, Vol. XXXII., pp. 327 *et seq.*; pp. 509 *et seq.*

420. Time of notice of the error.]—The time of limitation in cases of mistake, which, by analogy to that prescribed by Stat. Limitations, is held to bar the remedy in cts. of equity, begins to run from the period of the discovery of the mistake.—BROOKSBANK *v.* SMITH (1836), 2 Y. & C. Ex. 58; Donnelly, 11; 6 L. J. Ex. Eq. 34; 160 E. R. 311.

Annotations:—**Expld.** Baker *v.* Courage, [1910] 1 K. B. 56; *Re* Robinson, Mc Laren *v.* Public Trustee, [1911] 1 Ch. 502. **Reld.** Denys *v.* Shuckburgh (1840), 4 Y. & C. Ex. 42; Eccl. Comrs. for England *v.* N. E. Ry. (1877), 4 Ch. D. 845.

421. ——.]—KIMBERLEY *v.* DICK, No. 239, *ante.*

422. ——.]—BEALE *v.* KYTE, No. 433, *post.*

SECT. 6.—PRACTICE.

SUB-SECT. 1.—ACTION FOR RECTIFICATION.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 56 (1) (*b*).

423. Whether rectification ordered on petition.]—A fund in ct., which has, contrary to the intention of the parties, clearly proved, been included in a settlement, will only be paid out to the parties entitled under that settlement until it has been reformed; & this ct. has no jurisdiction, upon petition, to reform an instrument.—*Re* MALET (1862), 30 Beav. 407; 31 L. J. Ch. 455; 8 Jur. N. S. 226; 10 W. R. 332; 54 E. R. 947.

424. —— **Fund in court under Act of Parliament.**]—*Re* HOFFE'S ESTATE ACT, 1855 (1900), 82 L. T. 556; 48 W. R. 507; 44 Sol. Jo. 484.

Annotations:—**Reld.** *Re* Bridgwater's Settlmt., Partridge *v.* Ward, [1910] 2 Ch. 342; Grosham Life Assce. Soc. *v.* Crowther, [1914] 2 Ch. 219; *Re* Harper's Settlmt., Williams *v.* Harper, [1919] 1 Ch. 270.

425. Action by trustees to carry out trusts—Claim for rectification by settlor—Cross bill necessary.]—(1) A married woman invested a fund arising from the savings of her separate estate in the names of trustees, & executed a deed declaring the trusts for herself & her husband during their respective lives, & after their decease, for her children, absolutely; & the deed contained a proviso, that the dividends arising from the fund might be added to the same fund, & should be then held upon the same trusts. She afterwards made considerable additions to the fund, partly arising from the accumulations of the dividends, & partly from other parts of her separate estate. Her sons lived to attain vested interests, subject to her life interest, & then died: —*Held:* on a bill by the trustees to carry into effect the trusts of the deed, that not only the accumulations, but the other additional moneys, followed the trusts of the original fund.

(2) The settlor having set up a case that the ultimate limitations in the deed were inserted under a mistake, & that it was intended that, on the death of her children without issue, the fund should revert to her:—*Held:* she could not set up that case without a cross bill; &, under the circumstances, the ct. refused to give her leave to file one.—MUGGERIDGE *v.* STANTON (1859), 1 De G. F. & J. 107; 1 L. T. 144; 8 W. R. 69; 45 E. R. 300, L. C. & L. JJ.

426. Summons as to construction of separation deed—Claim for rectification—Suit for rectification necessary.]—*Re* CLENCH, DRAPER *v.* CLENCH (1894), 38 Sol. Jo. 546.

SUB-SECT. 2.—FORM OF RECTIFICATION.

427. Declaration indorsed on instrument — New instrument unnecessary.]—(1) In a suit to rectify a settlement, there being no blame imputable to any of the parties, the costs are payable out of the fund.

(2) Mode of rectifying a settlement by striking out the erroneous words & indorsing the decree.—STOCK *v.* VINING (1858), 25 Beav. 235; 53 E. R. 626.

Annotation:—**Reld.** White *v.* White (1872), L. R. 15 Eq. 247.

428. —— ——.]—A deed was executed purporting, by mistake, to convey a moiety only of real estate, the intention of the parties having been to pass the whole. Infants were interested. Upon bill for rectification:—*Held:* a conveyance of the other moiety by another deed was not necessary, & order made declaring the deed was in the particulars after specified executed by mistake; it was intended to pass the entirety & the deed ought to be rectified, ordering rectification by words & figures accordingly, & directing a copy of the order to be indorsed on the deed.—WHITE *v.* WHITE (1872), L. R. 15 Eq. 247; 42 L. J. Ch. 288; 27 L. T. 752.

Annotation:—**Reld.** Hanley *v.* Pearson (1879), 13 Ch. D. 545.

429. —— ——.]—SMITH *v.* ILIFFE, No. 399, *ante.*

430. —— ——.]—HANLEY *v.* PEARSON, No. 401, *ante.*

431. —— ——.]—GIFFORD (LORD) *v.* FITZHARDINGE (LORD), [1899] 2 Ch. 32; 68 L. J. Ch. 529; 81 L. T. 106; 47 W. R. 618.

432. —— ——.]—JOHNSON *v.* BRAGGE, No. 376, *ante.*

433. —— ——.]—In 1900 A. sold & conveyed land to B. In 1906 A. brought an action against B. for rectification of the conveyance, alleging that by common mistake the parcels in the conveyance included more land than was comprised in the written contract in pursuance of which the conveyance was executed. A. commenced the action as soon as he became aware of the error. B. denied any mistake, & further contended that A. came too late for rectification:—*Held:* (1) on the evidence, there had been a common mistake, & A. was entitled to rectification, for he had not been guilty of any laches.

I think therefore that the conveyance ought to be rectified & the only rectification necessary is the rectification of the plan on it so as to show

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PART V. SECT. 6, SUB-SECT. 1.

423 i. *Whether rectification ordered on petition.*]—STEWART *v.* WARNER (1895), 4 B. C. R. 298.—**CAN.**

h. *Necessity for pleading every fact supporting claim.*]—KENNY *v.* SHOLL (1905), 7 W. A. L. R. 197.—**AUS.**

k. *Joinder of parties — Necessity or.*]—SMITH *v.* SMITH (1887), 6 N. Z. L. R. 15.—**N.Z.**

that the measurement referred to in the body of the deed is a measurement from a particular point as indicated in the plan annexed to the written contract (NEVILLE, J.).

(2) *Semble:* in such a case it is open to deft. to adduce parol evidence to show that the parties were not *ad idem* when the written agreement was signed, & if this were shown rectification of the conveyance would not be granted by the ct.

(3) Where the question of laches arises in an action for rectification time is to be reckoned, not from the date of the execution of the document in which the mistake occurs, but from the date when the party seeking rectification discovers the mistake.—BEALE *v.* KYTE, [1907] 1 Ch. 564; 76 L. J. Ch. 294; 96 L. T. 390.

434. —— ——.]—HOOD OF AVALON (LADY) *v.* MACKINNON, No. 7, *ante*.

435. Conveyance ordered.]—EXETER (MARQUESS) *v.* EXETER (MARCHIONESS), No. 314, *ante*.

436. ——.] —A power of sale & exchange was given to the trustees of a settlement, at the request of the person for the time being "seised of the freehold & inheritance of the manors," etc.:—*Held:* reading the word "&" conjunctively, the power could not be exercised at the request of a tenant for life who, subject to intervening limitations, had the ultimate remainder in fee; also, the word "&" could not be read disjunctively as "or."

Power of sale in a settlement rectified, on proof that it was not conformable with the contract.

As to the necessity of a reconveyance in cases of rectification of a settlement, & as to its retrospective operation. Form of decree in such a case.—MALMESBURY *v.* MALMESBURY, PHILLIPSON *v.* TURNER (1862), 31 Beav. 407; 54 E. R. 1196.

437. ——.] —A purchase from an illiterate man, who was ill at the time, set aside, the price being inadequate, the vendor having no professional advice, & the transaction being completed in great haste & on terms unduly disadvantageous to him:—*Held:* the proper form of decree in such cases is not to declare the deed void, but to direct it to be set aside & order a reconveyance.—CLARK *v.* MALPAS (1862), 4 De G. F. & J. 401; 31 L. J. Ch. 696; 6 L. T. 596; 10 W. R. 677; 45 E. R. 1238, L. JJ.

Annotations:—**Refd.** Baker *v.* Monk (1864), 33 Beav. 419; O'Rorke *v.* Bolingbroke (1877), 2 App. Cas. 814; Fry *v.* Lane, *Re* Fry, Whittet *v.* Bush (1888), 40 Ch. D. 312; Rees *v.* De Bernardy, [1896] 2 Ch. 437; Grindell *v.* Bass (1920), 124 L. T. 211.

SUB-SECT. 3.—INCIDENTAL RELIEF.

438. Conveyance set aside — Order to account for profits.]—LONG *v.* FLETCHER (1708), 2 Eq. Cas. Abr. 5; 22 E. R. 4.

439. —— **Order to account for rents & profits.**]—NEESOM *v.* CLARKSON (1842), 2 Hare, 163; 12 L. J. Ch. 99; 6 Jur. 1055; 67 E. R. 68; *subsequent proceedings* (1845), 4 Hare, 97.

Annotation:—**Consd.** Parkinson *v.* Hanbury (1867), L. R. 2 H. L. 1.

440. Deed granting annuity declared void — Order to account for principal & interest.]—In 1839 a treaty was entered into between C. & P. for the purchase from the former of an annuity by the latter for her own life. An agent of P. in an interview with C. agreed, subject to P.'s approval, to give £1 per cent. more on the purchase than the Govt. would grant for the same amount of purchase-money; & on same day the agent stated to P.'s solr. that he would obtain from a friend in the Govt. Annuity Office the amount of annuity which the Govt. would grant on P.'s life, for the sum proposed to be invested, which was £1,800. He accordingly did so, & C. expressed himself satisfied. Four years afterwards C. happened to discover that the amount of the annuity was much too large, the computation having been made on a male, & not a female, life, as it ought to have been. It was in evidence that P. had been informed by her agent of the principle of calculation previously to the grant being made; but P. distinctly denied by her answer that she had been informed of the mode, or would have taken a less annuity than she did:—*Held:* the ct. could not rectify the deed granting the annuity; the grant of the annuity, & the agreement for granting it, ought to be declared to be void, but on C.'s waiving any account of the payments made in respect of the annuity previously to the filing of the bill to set aside the deed, it was ordered to be delivered up to C. to be cancelled, & the proper accounts of principal & interest due to P. were ordered to be taken, & the balance thereof, after deducting the costs of the suit, was ordered to be paid to P.—CARPMAEL *v.* POWIS (1846), 10 Beav. 36; 16 L. J. Ch. 31; 9 L. T. O. S. 390; 11 Jur. 158; 50 E. R. 495.

441. Conveyance rectified — Order to pay occupation rent & sums expended on repairs & improvements — Interest on purchase money.] — BLOOMER *v.* SPITTLE, No. 165, *ante*.

Cancellation of bond—Repayment of interest.]—*See* BONDS, Vol. VII., p. 234, No. 766.

SUB-SECT. 4.—COSTS.

442. Dependent on conduct of parties—No costs for party to blame.]—HARRIS *v.* PEPPERELL, No. 164, *ante*.

443. —— ——.] —MURRAY *v.* PARKER, No. 308, *ante*.

444. —— ——.] —(1) A marriage settlement secured all the wife's fortune for her separate use, except a sum of £10,000 Consols. This sum had been settled, on her former marriage, upon a trust for her separate use, which was supposed by the lady to extend, but did not extend, to future covertures. The husband & wife were divorced, on account of adultery of the husband. In a suit instituted by the wife to rectify the settlement by including the £10,000, therein, or, in the alternative, to enforce her equity to a settlement out of the same fund; although the husband had had no portion of the wife's property, & the wife had other means sufficient for her support:—*Held:* without determining the question of the rectification of the settlement, she was entitled to have the whole income secured for her separate use upon her equity to a settlement. The husband's conduct is taken into account in considering the wife's equity to a settlement.

(2 The solr. who had prepared the marriage settlement, being also a trustee of it, & as such a party to the suit, had severed in his defence for his co-trustee. The ct. considering that the litigation had been caused by his negligence in preparing the settlement, refused to allow him his costs in the suit.—BARROW *v.* BARROW (1854), 5 De G. M. & G. 782; 3 Eq. Rep. 149; 24 L. J. Ch. 267; 3 W. R.

PART V. SECT. 6, SUB-SECT. 4.

1. *Motion to correct error—Whether applicant pays costs.*] —When in equity any error occurs in drawing up any of the papers in a cause, & it is necessary to have the mistake rectified, the party applying for that purpose must pay the costs of the motion.—EMMONS *v.* CROOKS (1850), 1 Gr. 558.—**CAN.**

Sect. 6.—*Practice: Sub-sect.* 4. *Part VI. Sects.* 1 & 2: *Sub-sect.* 1.]

122; 43 E. R. 1073; *sub nom.* BARROW *v.* WILLIAMS, BARROW *v.* BARROW, 24 L. T. O. S. 198, L. JJ.

Annotations:—*As to* (1) **Reld.** *Re* Ford (1863), 2 New Rep. 349. *Generally*, **Mentd.** Spirett *v.* Willows (1864), 3 De G. J. & Sm. 293; *Re* Cooke's Trusts (1887), 56 L. T. 737.

445. —— ——.] — In an abstract of title of an estate directed to be sold under an order of the ct., a will was erroneously set out; the word "them" having been inserted for "their children" so as to make it appear that the estate to be sold was a fee simple absolute; but in the deed next abstracted the will was recited correctly. The counsel for the purchaser did not discover the discrepancy between the two statements of the will in the abstract, though he required the will to be examined for other purposes, which, however, was not done. After the purchaser had accepted the title & paid his purchase-money into ct., but before a conveyance was executed, the error was discovered:—*Held:* he was entitled to be discharged from his purchase, & to be repaid the purchase money, but without interest; & he should pay the costs of all parties appearing upon the petition, except those of the person by whose negligence the error had been committed.

If the conveyance had been executed the purchaser must have taken all the conveyances (PAGE-WOOD, V.-C.).—M'CULLOCH *v.* GREGORY (1855), 1 K. & J. 286; 3 Eq. Rep. 495; 24 L. J. Ch. 246; 24 L. T. O. S. 307; 3 W. R. 231; 69 E. R. 466.

Annotations:—*Generally*, **Mentd.** Shoreditch Vestry *v.* Hughes (1864), 10 L. T. 723; Allen *v.* Richardson (1879), 13 Ch. D. 524.

446. —— —— .] — BLOOMER *v.* SPITTLE, No. 165, *ante*.

447. —— —— —— —.] — SHORT *v.* RIDGE, [1876] W. N. 47.

448. —— —— —.] — PAGET *v.* MARSHALL, No. 201, *ante*.

449. Rectification of settlement — No party to blame—Costs paid out of funds.]—STOCK *v.* VINING, No. 427, *ante*.

450. —— —— —— —.] — Evidence upon which a settlement was ordered to be rectified. A marriage settlement gave the income of the trust funds to the husband, in the event of his surviving the wife, until death or bkptcy. There was a maintenance clause only applicable after the death of the husband. The wife was dead, & the husband had become bkpt. The settlement was ordered to be rectified by making the maintenance clause applicable upon the bkpcy. of the husband, upon the oath of the husband & of the solr. who prepared the settlement, that such had been the intention of the parties at the time of the marriage.

The costs must come out of the dividends, not the corpus of the fund (ROMILLY, M.R.).—TOMLINSON *v.* LEIGH (1865), 13 L. T. 516; 11 Jur. N. S. 962; 14 W. R. 121.

451. —— —— ——.] — The ct., upon the application of the testamentary guardians of an infant child of the marriage of petitioner & resp., directed, after various references to the registrar, that an order, made upon the consent of petitioner, resp., & trustees of the marriage settlement, be amended by extinguishing resp.'s interest in a portion of the settled funds; & further directed that the costs of all parties be paid out of the said portion of the trust funds or the income thereof.—ARKWRIGHT *v.* ARKWRIGHT (1895), 73 L. T. 287.

452. —— **Party to blame must pay costs.**] — MEADOWS *v.* MEADOWS (1853), 16 Beav. 401; 51 E. R. 833.

453. —— **Negligence not amounting to fraud on part of solicitor—Solicitor not ordered to pay costs.**]—Pltf., a widow with children, being possessed of property left by her first husband, married, & marriage arts. were prepared upon instructions given by the intended husband the night before the marriage, by which the wife's property was limited in the first instance to him for life. The bill was filed by the wife to rectify the settlement against the husband & the solr. who prepared the settlement:—*Held:* upon the evidence, the limitations were contrary to the intention of pltf., & the husband having undertaken as agent for the wife to have a settlement prepared, was bound to have such a contract prepared as the ct. would sanction, & such contract would give the wife the first life estate in her own property. A decree was therefore made to rectify the settlement.

The husband, & the solr. who prepared the settlement, who in the view of the V.-C. had failed in his professional duty, & had by his neglect & misconduct caused the litigation, were ordered to pay the costs of the suit:—*Held:* on appeal by the solr., as he had not been guilty of participation in a fraud, but at most only of a blunder for which the remedy was an action for professional negligence, there was no jurisdiction to order him to pay the costs of the suit.—CLARK *v.* GIRDWOOD (1877), 7 Ch. D. 9; 47 L. J. Ch. 116; 37 L. T. 614; 26 W. R. 90, C. A.

Annotation:—**Reld.** Lovesy *v.* Smith (1880), 15 Ch. D. 655.

454. Information to administer charities — Mistake in report—No costs ordered as no fund applicable.]—A.-G. *v.* NEWARK CORPN. (1843), 1 L. T. O. S. 227.

455. Cancellation of bond — Bond executed in ignorance—No costs.]—HITCHCOCK *v.* GIDDINGS, No. 90, *ante*.

Part VI.—Recovery of Money Paid under Mistake.

SECT. 1.—IN GENERAL.

What amounts to mistake of law.]—*See* Part II., *ante*.

What amounts to mistake of fact.]—*See* Part III., *ante*.

Availability of & general defences to action for money had & received.]—*See* CONTRACT, Vol. XII., pp. 539, 540, Nos. 4478-4487.

SECT. 2.—MONEY PAID UNDER MISTAKE OF FACT.

SUB-SECT. 1.—MISTAKE MUST BE OF MATERIAL FACT.

See, generally, CONTRACT, Vol. XII., p. 570.

What amounts to mistake of fact.]—*See* Part III., *ante*.

456. Mistake as to fact creating liability to pay.]—KELLY *v.* SOLARI, No. 487, *post*.

457. ——.]—If you are claiming to have money repaid on the ground of mistake you must show that the mistake is one which led you to suppose you were legally liable to pay (FARWELL, J.).—*Re* BODEGA CO., LTD., [1904] 1 Ch. 276; 73 L. J. Ch. 198; 89 L. T. 694; 52 W. R. 249; 11 Mans. 95.

Annotation:—**Refd.** Admiralty Comrs. *v.* National Provincial & Union Bank of England (1922), 38 T. L. R. 492.

458. ——.]—In 1917 pltfs., under licence from the Russian Imperial Govt., exported timber to this country, &, in accordance with the conditions of the licence, paid the purchase-money received by them for the timber to deft. bankers for the credit of the Russian Govt. They then became entitled to receive from the Govt. in Russia an equivalent amount in roubles at a fixed rate of exchange. In Mar. 1917, the Imperial Govt. was overthrown by a revolution, & was succeeded by a Provisional Govt., which in its turn, was, on Nov. 7, 1917, displaced by the Bolshevists, who, on Dec. 13, forcibly dissolved the Constitutent Assembly & established a Soviet Republic. Pltfs., having received no roubles in Russia, brought actions against the bankers to recover two sums of money, one of which was paid to them by pltfs. in the second action before Nov. 7, & the other by pltfs. in the first action on Nov. 9, at which date they did not know of the Bolshevist revolution. Pltfs. in both actions alleged that the bankers & the Russian Govt. were merely trustees for them, & the money having been paid under a contract, the consideration for which had entirely failed, they were entitled to recover. Pltfs. in the first action further contended that they had paid the money under a mistake of fact, & on that ground also they were entitled to recover it:—*Held*: this money had been paid to the bank as agents for the Russian Govt., & the ct. would not order payment of it in the absence of that Govt. or its representatives. As to mistake of fact, the fact of which pltfs. were ignorant was not one which, if they had known it, would necessarily have discharged them from the liability to make the payments in question. The bank were entitled to keep the money in their hands, but must undertake not to part with it without notice to pltfs. & an order of the ct.—STEAM SAW MILLS CO., LTD. *v.* BARING BROTHERS & CO., ARCHANGEL SAW MILLS CO. *v.* BARING BROTHERS & CO., [1922] 1 Ch. 244; 91 L. J. Ch. 325; 126 L. T. 403; 38 T. L. R. 200; 66 Sol. Jo. 170, C. A.

459. ——.] — Pltfs. in London sold to a New York co. a quantity of Belgian francs to be delivered to defts. as the purchasers' agents in Brussels on Dec. 31, at a price to be paid in dollars on the same day in New York, & the purchasers instructed defts. to pay the francs when received to the C. Bank. On Dec. 30, bkpcy. proceedings were commenced against the purchasers in New York & a receiver was appointed, & on the same day the purchasers cabled to pltfs. not to pay the francs to defts., as they, the purchasers, were unable to complete their contract. Before that cable arrived pltfs. had already paid the francs to defts., & defts. had paid them to the C. Bank. Pltfs. then requested the C. Bank to return them, & the C. Bank returned them to defts., with an explanation that they did so for the purpose of cancelling defts.' payment to them. Under these circumstances defts. claimed that, the money having been returned to them they were entitled to hold it on behalf of their principals, & refused to pay it over to pltfs. Pltfs. brought their action to recover the francs as being money had & received by defts. to their use:—*Held*: (1) at the time pltfs. paid the francs to defts. the purchasers had already repudiated their contract, although pltfs. did not know that fact & consequently had not accepted the repudiation, pltfs. were under no legal obligation to pay, & having paid under a mistaken belief of legal liability, they would have been entitled to recover the money back if they had discovered their mistake before defts. had paid it to the bank; (2) the effect of the money being returned by the C. Bank was to restore pltfs. to the same position as that which they occupied before defts. paid it away, & that position was unaffected by the fact that before redemand of the money by pltfs. the trustee in bkpcy. of the purchasers had directed defts. not to part with it, & defts. in compliance with that direction had credited the purchasers with it in their books; (3) consequently defts. were bound to repay it to pltfs.—BRITISH AMERICAN CONTINENTAL BANK *v.* BRITISH BANK FOR FOREIGN TRADE, [1926] 1 K. B. 328; 95 L. J. K. B. 326; 134 L. T. 472; 42 T. L. R. 202, C. A.

460. —— **Whether mistake as to fact making payment desirable sufficient.**]—Where a bkpt. has underwritten a policy to a broker acting under a commission *del credere* & a loss upon the policy happens before, but is not adjusted till after the bkpcy. the broker may deduct the amount of the loss from the debt which he owes to the estate of the bkpt.; & if by mistake, he pay all that is due to the assignees without deducting such money, he may recover it from the assignees as money had & received to his use.

The rule has always been that if a man has actually paid what the law would not have compelled him to pay, but what in equity & conscience

PART VI. SECT. 2, SUB-SECT. 1.

456 i. *Mistake as to fact creating liability to pay.*]—GRANTHAM *v.* TORONTO CITY (1846), 3 U. C. R. 212.—**CAN.**

456 ii. ——.]—STREET *v.* LAMPTON COUNTY (1862), 12 C. P. 294.—**CAN.**

456 iii. ——.]—FIDELITY & GUARANTY CO. *v.* UNION BANK (1917), 12 O. W. N. 141; 39 O. L. R. 338; 36 D. L. R. 724.—**CAN.**

456 iv. ——.] — LISTOWEL URBAN DISTRICT COUNCIL *v.* GIBSON (1913), 47 I. L. T. 261.—**IR.**

Sect. 2.—Money paid under mistake of fact: Subsects. 1 & 2.]

he ought, he cannot receive it back again in an action for money had & received. So where a man has paid a debt which would otherwise have been barred by Stat. Limitation; or a debt contracted during his infancy which in justice he ought to discharge though the law would not have compelled the payment, yet the money being paid it will not oblige the payee to refund it. But where money is paid under a mistake which there was no ground to claim in conscience, the party may recover it back again by this kind of action (LORD MANSFIELD, C.J.).—BIZE *v.* DICKASON (1786), 1 Term Rep. 285; 99 E. R. 1097.

Annotations:—**Consd.** Brisbane *v.* Dacres (1813), 5 Taunt. 143. **Refd.** *Re* Bentley, Dear & Richardson, *Ex p.* Wilson, *Re* Bentley, *Ex p.* Wyman (1841), 1 Mont. D. & De G. 586. **Mentd.** Stevens *v.* Lynch (1810), 12 East, 38; Koster *v.* Eason (1813), 2 M. & S. 112; Gall *v.* Comber (1817), 7 Taunt. 558; Peele *v.* Northcote (1817), 1 Moore, C. P. 178.

461. ——— ———.] — Deft. an extrix., being entitled to £200 lent by testator in his lifetime, & secured to him by bond & an equitable mtge., applied to C., the debtor, for payment. C. referred her to a bank which had purchased of him the mortgaged property, subject to the charges thereon. The bank paid the £200. It turned out that by a will prepared & attested by testator, & made subsequently to that under which C. had claimed, but which had been suppressed by the family of C., C. had no title to the property so charged:—*Held:* the bank could not recover back the money as having been paid under a mistake of facts.

In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money: not where, if true, it would merely make it desirable that he should pay the money. Here if the fact was true, the bankers were at liberty to pay or not as they pleased (BRAMWELL, B.).—AIKEN *v.* SHORT (1856), 1 H. & N. 210; 25 L. J. Ex. 321; 27 L. T. O. S. 188; 4 W. R. 645; 156 E. R. 1180.

Annotations:—**Expld.** *Re* Bodega Co., [1904] 1 Ch. 276. **Distd.** Gasson *v.* Cole (1910), 26 T. L. R. 468. **Consd.** Archangel Saw Mills *v.* Baring & A.-G., Steam Saw Mills *v.* Baring & A.-G. (1921), 37 T. L. R. 857. **Distd.** Jones *v.* Waring & Gillow, [1925] 2 K. B. 612. **Refd.** Deutsche Bank (London Agency) *v.* Beriro (1895), 1 Com. Cas. 255; Maskell *v.* Horner, [1915] 3 K. B. 106; *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735.

462. ——— ———.] — GASSON *v.* COLE (1910), 26 T. L. R. 468.

463. ——— ———.] — *Re* THELLUSSON, *Ex p.* ABDY, [1919] 2 K. B. 735; 88 L. J. K. B. 1210; 122 L. T. 35; 35 T. L. R. 732; 63 Sol. Jo. 788; [1918–19] B. & C. R. 249.

Annotations:—**Consd.** *Re* Wignell, *Ex p.* Hart, [1921] 2 K. B. 835. **Refd.** Scranton's Trustee *v.* Pearse, [1922] 2 Ch. 87. **Mentd.** *Re* Wilson, *Ex p.* Salaman, [1926] Ch. 21.

464. ——— **Innocently induced by other party.**]— RAMSDEN *v.* MUSICAL EXCHANGE (1887), 3 T. L. R. 409.

465. Payment to avoid litigation — Doubt as to liability.]—From Sept. 1900, to June, 1912, pltf. carried on business as a dealer in produce in the vicinity of Spitalfields Market. As soon as he commenced business deft. who was the owner of the market, demanded tolls from him under threat of seizure of his goods if he refused to pay, & on the first occasion pltf. objected to pay & actual seizure took place. Pltf. then consulted a solr. & upon learning that other dealers outside the market paid tolls he, acting upon his solr.'s advice, paid the tolls under protest, & thereafter, he, or his agents acting upon his instructions, always paid the tolls under protest. Subsequently, whenever pltf. challenged deft.'s right, or disputed the amount of tolls, in particular cases there was a seizure or threat of seizure followed by payment under protest. From the decision in *A.-G.* v. *Horner*, [1913] 2 Ch. 140, it appeared that the tolls had been unlawfully demanded, & in consequence, pltf. brought this action for money had & received to recover the tolls so paid, claiming that he paid them under a mistake of fact & not voluntarily but under the pressure of seizure of his goods:—*Held:* pltf. did not pay under a mistake either of law or fact, but because he found that other sellers were paying tolls & he did not wish to be involved in litigation with deft., & pltf. could not recover under this head of claim.—MASKELL *v.* HORNER, [1915] 3 K. B. 106; 84 L. J. K. B. 1752; 113 L. T. 126; 79 J. P. 406; 31 T. L. R. 332; 59 Sol. Jo. 429; 13 L. G. R. 808, C. A.

Annotation:—**Consd.** Brocklebank *v.* R., [1924] 1 K. B. 647.

SUB-SECT. 2.—MISTAKE MUST BE BETWEEN PAYER AND PAYEE.

466. General rule.]—A. pays a sum of money into a banker's for a specific purpose; the banker's clerk, by mistake, pays this money to B. who has no right to it:—*Held:* A. cannot maintain an action against B. to recover it back.

There is no privity between the parties to this suit. Pltf.'s claim is on the bankers, & they must seek their remedy against deft. the best way they can. Pltf.'s money must still be considered as in the hands of the bankers (LORD ELLENBOROUGH, C.). —ROGERS *v.* KELLY (1809), 2 Camp. 123; 170 E. R. 1102, N. P.

See, generally, CONTRACT, Vol. XII., pp. 542 *et seq.*

467. ———.] — Pltf. presented a cheque at a bank, which the cashier of defts., the bankers, took, & gave pltf. in return notes & gold. Whilst pltf. was counting the notes one of defts., having discovered that the drawer of the cheque had no assets, demanded the money back. Pltf. refused to give it up, & defts. thereupon took it by force; in an action by A. of assault & trespass for taking the money from him by force:—*Held:* he was entitled to recover; the transfer of the money was complete; as between pltf. & defts. there was no mistake at all, the mistake being between defts. & their customer; & defts., therefore, could not have recovered back the money from pltf. in an action for money had & received.—CHAMBERS *v.* MILLER (1862), 13 C. B. N. S. 125; 1 New Rep. 95; 32 L. J. C. P. 30; 7 L. T. 856; 9 Jur. N. S. 626; 11 W. R. 236; 143 E. R. 50.

Annotations:—**Apld.** Deutsche Bank (London Agency) *v.* Beriro (1895), 73 L. T. 669; Barclay *v.* Malcolm (1925), 133 L. T. 512; Jones *v.* Waring & Gillow, [1925] 2 K. B. 612. **Refd.** Pollard *v.* Bank of England (1871), L. R. 6 Q. B. 623. **Mentd.** R. *v.* Prince (1868), 19 L. T. 364; Soc. des Hôtels Le Touquet Paris-Plage *v.* Cummings, [1922] 1 K. B. 451.

468. ———.] — Deft. as trustee of a certain marriage settlement, invested money on a mtge. of pltf.'s land. The mtge. deed provided for interest at the rate of 5 per cent., but contained a proviso for the reduction of the rate to 4 per cent.

punctual payments. All the payments of interest except the first had been punctual, but, through pltf.'s ignorance of the proviso for reduction of the interest, they had been made at the rate of 5 per cent. In an action by pltf. to recover from deft., the trustee, the extra 1 per cent. paid under this mistake:—*Held:* the action was rightly brought against the trustee; the only contract was between pltf. as mtgor. & deft. as

mtgee.; money had been received under that contract by the mtgee.; & he alone could be asked or required to repay it.—KING *v.* STEWART (1892) 66 L. T. 339.

469. ——.]—Pltfs. claimed to recover from defts., who were merchants carrying on business in the City of London, the sum of £1,000 as money paid under a mistake of fact. Defts. had among their customers in Poland two associated cos. namely, the W. co & the S. co. In 1920 the W. co. owed defts. a large sum of money for goods sold & delivered. The W. co. instructed their local bank, the Bank of Warsaw, to pay defts. £2,000. The Bank of Warsaw thereupon telegraphed to pltfs., whom they employed as their London agents, to pay defts. £2,000. On the receipt of the telegram pltfs. immediately paid that amount to defts. in London. The Bank of Warsaw wrote to pltfs. a letter confirming the telegram, but pltfs., on receipt of the letter of confirmation, treated it as a direction to pay defts. a further sum of £2,000 & did not notice that it was merely confirming the telegraphed instructions. Pltfs. thereupon paid to defts. a second sum of £2,000 making a total of £4,000. Even with the total of £4,000 thus paid to defts., the W. co. still remained indebted to them. Afterwards the W. co., believing that they had paid off only £2,000 of their debt, instructed the Bank of Warsaw to arrange to pay another £1,000 to defts. Instructions to that effect were sent by the Bank of Warsaw to pltfs., but were never received by pltfs., being lost in transmission. Subsequently pltfs. discovered all the facts & informed defts. that the £2,000 was paid by mistake of fact. They offered to credit defts. with £1,000 which they then knew the W. co. wished to pay to defts., but they claimed to recover the balance of £1,000, as money paid under a mistake of fact:—*Held:* there was no such mistake of fact in this case as would entitled pltfs. to maintain that the money had been received by defts. to pltfs.' use; & even if, in the first instance, there had been such mistake, defts. must still succeed on the ground of ratification of the payment by pltfs., who, after the facts were all discovered, were willing to allow the payment to hold good with regard to the £1,000, but claimed that it was bad as to the remainder. There must, therefore, be judgment for defts.—BARCLAY & CO., LTD. *v.* MALCOLM & CO. (1925), 133 L. T. 512; 41 T. L. R. 518; 69 Sol. Jo. 675.

470. ——.]—B., being indebted to defts. under a hire-purchase agreement in a sum of £5,000, which he had no means of paying, represented to pltfs. that he was the agent of a firm of motor manufacturers, who were putting on the market a new car, & persuaded pltfs. to sign a form of agreement appointing them on behalf of the firm agents for the sale of the car on the terms that pltfs. should purchase five hundred cars & pay £5,000 as a deposit. On pltfs. objecting to pay this sum to B. or to the firm, B. told them that defts. were financing the firm & were his principals, & suggested that the £5,000 might be paid to them. Pltfs. then drew two cheques to the order of defts., one for £2,000 & one post-dated for £3,000 & handed them to B. who handed them on to defts. in payment of his debt. Defts. objected to the cheques as being irregular in form, & as the result of a conversation through the telephone between defts. & pltfs., no mention being made of the purpose of the payment, pltfs. took back the irregular cheques & posted to defts. a new cheque for £5,000 duly signed. Defts. cashed the cheque & returned to B. goods which they had seized under the hire-purchase agreement. No such motor firm of car as alleged existed. On discovery of the fraud pltfs. sued defts. for the recovery of the £5,000 as money paid under a mistake of fact:—*Held:* pltfs. were entitled to recover on the principle of *Kelly* v. *Solari*, No. 487, *post*.

In the language of LORD LINDLEY, in *Imperial Bank of Canada* v. *Bank of Hamilton*, No. 494, *post*, "Means of knowledge & actual knowledge" are not the same; & it was long ago decided in *Kelly* v. *Solari*, No. 487, *post*, that money honestly paid under a mistake in facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. [This is] the general principle of the law as to payments made under mistake in fact (LORD SHAW OF DUNFERMLINE).—JONES (R. E.), LTD. *v.* WARING & GILLOW, LTD., [1926] A. C. 670; 95 L. J. K. B. 913; 135 L. T. 548; 42 T. L. R. 644; 70 Sol. Jo. 756; 32 Com. Cas. 8, H. L.

471. Money retained by payee against express directions.]—A., who was the London agent of S. & J., attornies in the country, by their directions issued a *fi. fa.* & warrant to levy on the goods of a debtor in Wilts., at the suit of one of their clients, referring the officer to S. & J. for instructions. The officer not being able to meet with S. & J. paid the amount of the levy to the under-sheriff, who without any instructions from S. & J. remitted the money to A. in London, whose name was indorsed on the warrant. A. refused to pay the money over to the client, claiming to apply it in reduction of the general balance due from S. & J. for agency business:—*Held:* on these facts there was no privity of contract to support an action by the client against A. for money had & received to his use. But it appearing that the money had been paid in the first instance to the town agent under a mistake, & retained by him against the express directions of S. & J., the ct. made absolute a rule obtained by the client to compel the town agent to refund the money.—ROBBINS *v.* FENNELL (1847), 11 Q. B. 248; 2 New Pract. Cas. 420; 17 L. J. Q. B. 77; 12 Jur. 157; 116 E. R. 468; *sub nom.* ROBINS *v.* FENNELL, 10 L. T. O. S. 246.

Annotations:—**Refd.** Robbins *v.* Heath (1848), 2 New Pract. Cas. 433. **Mentd.** Hobart *v.* Butler (1859), 33 L. T. O. S. 62; Collins *v.* Brook (1860), 5 H. & N. 700; New Zealand Land Co. *v.* Ruston (1880), 5 Q. B. D. 474; *Ex p.* Edwards (1881), 8 Q. B. D. 262.

472. Money coming accidentally to payee's hands.]—A country attorney was employed to obtain judgment & execution upon a warrant of attorney. The London agents of that country attorney issued writs of execution, & sent them to the under-sheriff in the country, with a direction to call upon the country attorney for instructions. The levy was made, & £166 3*s.*, the proceeds thereof, was paid by the under-sheriff to the bankers of the London agents, he having first sent to the country attorney & not found him at home. The London agents then wrote to the country attorney informing him that the money had been remitted to them, & inquiring what they should do with it. The answer to that letter was not produced; but a second letter from the London agents to the country agents to the country attorney was produced, in which they expressed their surprise at being required to refund that money, & their intention of retaining it to satisfy a general balance due from the country attorney to the London agents. The country attorney expressly stated that the London agents held the money without his authority, & against his consent. Upon a summary application to compel the London agents to repay the money to pltf.:—*Held:* although under ordinary circumstances there is no privity between the London agent & the client in the country, so as to make the former

Sect. 2.—Money paid under mistake of fact: Subsects. 2, 3, 4 & 5.]

responsible to the latter, either in an action for money had & received or upon a summary application, for money of the client received by him in his character as London agent merely, & in the ordinary course of his business as London agent, still, under the circumstances above stated, he was bound to refund the money which he had received, because it came into his hands accidentally, & not merely in his character of London agent.

This money did not come into the hands of the town agents merely as such town agents; it came directly from the under-sheriff to them, & out of the ordinary course; indeed, so much out of the ordinary course that they immediately wrote to the country attorney to know what they are to do with it. . . . The money was not received by the town agents at all in the course of their engagement & connection with the country attorney; but by some accident it got into their hands, as it might into the hands of a stranger (LORD DENMAN, C.J.).—ROBBINS *v.* HEATH (1848), 11 Q. B. 257, n.; 2 New Pract. Cas. 433; 10 L. T. O. S. 371; 12 Jur. 158; 116 E. R. 472.

Annotation:—**Mentd.** *Ex p.* Edwards (1881), 7 Q. B. D. 155.

473. Payer acting on mistake of third party.]—Pltfs. paid to defts. dock dues estimated by pltfs. according to an erroneous scale of measurement promulgated by the Comrs. of Customs:—*Held:* the excess could not be recovered back.—MOSS *v.* MERSEY DOCKS & HARBOUR BOARD (1872), 26 L. T. 425; 20 W. R. 700; 1 Asp. M. L. C. 274.

474. Payee one of class authorising payment.]—The doctrine that money paid under a mistake cannot be recovered back unless the mistake be one of fact, applies even though the person receiving the payment be one of the persons authorising it to be made.—MILES *v.* SCOTTING (1885), Cab. & El. 491.

Actions on bills of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 357–359, Nos. 2361–2370.

SUB-SECT. 3.—MISTAKE DUE TO IGNORANCE.

475. Money paid recoverable.]—A. having a navy bill which purports to be for £1,800, pays it to B. for that sum; B. passes it to C., who presents it at the navy office for payment, when it appearing that it was originally drawn for £800 only, & that the sum had been fraudulently altered to £1,800, the navy office detained the bill, issuing a fresh one for £800; C. demands & receives of B. the remaining £1,000:—*Held:* B. was entitled to recover the £1,000 from A., though all the parties were equally ignorant of the fraud.—JONES *v.* RYDE (1814), 5 Taunt. 488; 1 Marsh. 157; 128 E. R. 779.

Annotations:—**Folld.** Bruce *v.* Bruce (1814), 5 Taunt. 495, n. **Apld** Gompertz *v.* Bartlett (1853), 2 E. & B. 849. **Consd.** Leeds Bank *v.* Walker (1883), 11 Q. B. D. 84. **Refd.** Smith *v.* Mercer (1815), 6 Taunt. 76; Wilkinson *v.* Johnson (1824), 3 B. & C. 428; Cocks *v.* Masterman (1829), 9 B. & C. 902; Westropp *v.* Solomon (1849), 19 L. J. C. P. 1; Gurney *v.* Womersley (1854), 4 E. & B. 133; Hall *v.* Condor (1857), 2 C. B. N. S. 22.

476. ——.]—Where defts. presented for payment a post-dated cheque, knowing it to be post-dated, & that the maker of it was insolvent, & pltfs., in ignorance of these circumstances, paid the cheque for the honour of the maker, expecting funds from him in a short time, though they had none at the moment, a verdict having been taken for defts., with leave for pltfs. to move for a new trial, the ct. granted a new trial.—MARTIN *v.* MORGAN (1819), 1 Brod. & Bing. 289; Gow, 128, n.; 3 Moore, C. P. 635; 129 E. R. 734.

Annotations:—**Refd.** Chambers *v.* Miller (1862), 13 C. B. N. S. 125. **Mentd.** Sinclair *v.* Brougham, [1914] A. C. 398.

477. ——.]—Although, in general, the sheriff must bear the consequence brought upon him by his own officer's misconduct, yet where that misconduct has been caused by another party, the sheriff may have his remedy over against that party. Where, in such a case, the sheriff had paid money to the party, in ignorance of the facts:—*Held:* he was entitled to recover it back, although the facts were all known to his officer.—CROWDER *v.* LONG (1828), 8 B. & C. 598; 3 Man. & Ry. K. B. 17; 7 L. J. O. S. K. B. 86; 108 E. R. 1164.

Annotation:—**Refd.** Raphael *v.* Goodman (1838), 8 Ad. & El. 565. **Mentd.** Brown *v.* Copley (1844), 7 Man. & G. 558.

478. ——.]—WORCESTER & BIRMINGHAM CANAL CO. OF PROPRIETORS *v.* SOUTHAM (1843), 2 L. T. O. S. 151.

479. ——.]—Pltf. was co-surety with K. in a bond given by B. to the guardians of a Union, conditioned for the due accounting to them of moneys received by him as treasurer. At the time the bond was entered into, B. was a member of a banking firm into which the moneys of the Union were afterwards paid & drawn out by the guardians by cheques in their name. The firm became bkpt., & B. having ceased to be treasurer, the guardians demanded of pltf., as such surety, the balance due from B., the late treasurer. Pltf., in ignorance of the facts, paid the money:—*Held:* the sureties were not liable on the bond, & pltf., having paid the money in ignorance of the facts, was entitled to recover it back.—MILLS *v.* ALDERBURY GUARDIANS (1849), 3 Exch. 590; 18 L. J. Ex. 252; 12 L. T. O. S. 454; 13 J. P. 621; 154 E. R. 980.

Annotation:—**Refd.** Monteflore *v.* Lloyd (1863), 15 C. B. N. S. 203.

480. ——.]—By a local Act a rate or duty was imposed upon coal imported & landed at the town of Harwich, or otherwise brought or delivered

PART VI. SECT. 2, SUB-SECT. 2.

473 i. *Payer acting on mistake of third party.*]—*Re* AN ARRANGING DEBTOR (1909), 43 I. L. T. 21.—**IR.**

PART VI. SECT. 2, SUB-SECT. 3.

475 i. *Money paid recoverable.*]—HARPER *v.* GAYNOR (1893), 19 V. L. R. 675.—**AUS.**

475 ii. ——.]—COMMONWEALTH OF AUSTRALIA *v.* KERR, [1919] S. A. L. R. 201.—**AUS.**

475 iii. ——.]—LEEDON *v.* SKINNER, [1923] V. L. R. 401.—**AUS.**

475 iv. ——.]—MINGAYE *v.* WHITE (1873), 34 U. C. R. 82.—**CAN.**

475 v. ——.]—CLARK *v.* WHITE (1879), 3 S. C. R. 309.—**CAN.**

475 vi. ——.]—CULBERT *v.* MCKEEN (1887), 20 N. S. R. (8 R. & G.) 1.—**CAN.**

475 vii. ——.]—BLACK *v.* BANK OF NOVA SCOTIA (1889), 21 N. S. R. (9 R. & G.) 448.—**CAN.**

475 viii. ——.]—JOHNSTON *v.* MILLER (1898), 31 N. S. R. (19 R. & G.) 83.—**CAN.**

475 ix. ——.]—TRUSTS CORPN. OF ONTARIO *v.* TORONTO CORPN. (1899), 30 O. R. 209.—**CAN.**

475 x. ——.]—ALBERTA PACIFIC GRAIN CO. *v.* DOMINION BANK (Alta.) (1922), 66 D. L. R. 735.—**CAN.**

475 xi. ——.]—CARSE *v.* TAYLOR (1858), 10 Ir. Jur. 158; 7 I. C. L. R. 451.—**IR.**

475 xii. ——.]—*Re* CASEY'S DROGHEDA BREWERY CO., LTD. (1911), 45 I. L. T. 280.—**IR.**

475 xiii. ——.]—*Re* JONES'S ESTATE, [1914] 1 I. R. 188.—**IR.**

475 xiv. ——.]—NORTH QUEENSLAND INSURANCE CO., LTD. *v.* ROYAL EXCHANGE ASSURANCE CORPN. OF LONDON (1900), 19 N. Z. L. R. 252.—**N.Z.**

475 xv. ——.]—ASSETS CO., LTD. *v.* R. (1902), 22 N. Z. L. R. 459.—**N.Z.**

475 xvi. ——.]—DUNDEE MASTERS & SEAMEN *v.* COCKERILL (1869), 8 Macph. (Ct. of Sess.) 278; 42 Sc. Jur. 130.—**SCOT.**

475 xvii. ——.]—BAIRD'S TRUSTEES *v.* BAIRD & CO. (1877), 4 R. (Ct. of Sess.) 1005; 14 Sc. L. R. 623.—**SCOT.**

475 xviii. ——.]—ALIWAL NORTH DIVISIONAL COUNCIL *v.* DE WET (1890), 7 S. C. 232.—**S. AF.**

within the limits of the town: Provided that in every case where any coals shall have been landed or unloaded within the town, & which shall have paid the rate or duty hereby imposed, & which shall have been so landed or unloaded for the purpose of being forwarded to any other place or places, & not to be consumed within the town, a drawback of the whole rate or duty is to be paid to the coal owners for coals so landed or unloaded, which shall have been forwarded to any other place for sale or consumption:—*Held:* this provision for the payment of a drawback did not relate to coal sold by retail in the town, although set apart from its arrival for the consumption only of persons living out of the town; & the drawback actually allowed under these circumstances through a mistake could be recovered back.—VAUX *v.* CHAPMAN, HARWICH CORPN. *v.* VAUX (1873), 27 L. T. 758.

481. ——.]—A ward of ct. on coming of age paid her guardian a sum in respect of maintenance during her minority. The guardian had charged in his account for maintenance for a period of eighteen months during which time the ward had been living with her brother & of which charge the ward was unaware when she paid the guardian's account. An action was now brought to recover the sum so paid under a mistake of fact. Verdict for pltf.—GARRARD *v.* ROGULSKI (1884), 1 T. L. R. 25.

482. ——.]—The corpn. of E. exacted harbour dues from pltf. in respect of exempted articles. Pltf. paid in ignorance of the exemption:—*Held:* pltf. was entitled to recover back the money so paid.—HOOPER *v.* EXETER CORPN. (1887), 56 L. J. Q. B. 457, D. C.

483. ——.]—Applt. was served with a notice to repair a certain drain in order to abate a nuisance &, believing it to be a drain, he repaired it in accordance with the notice. It was afterwards discovered that the drain was, in fact, a sewer & repairable as such by the sanitary authority:—*Held:* applt. could recover from the sanitary authority the expenses incurred by him under a mistake of fact.—ANDREW *v.* ST. OLAVE'S BOARD OF WORKS, [1898] 1 Q. B. 775; 67 L. J. Q. B. 592; 78 L. T. 504; 62 J. P. 328; 46 W. R. 424; 42 Sol. Jo. 381, D. C.

Annotations:—**Consd.** North *v.* Walthamstow U. C. (1898), 67 L. J. Q. B. 972; Cree *v.* St. Pancras Vestry, [1899] 1 Q. B. 693. **Refd.** Ellis *v.* Bromley R. D. C. (1899), 81 L. T. 224; Haedicke *v.* Friern Barnet U. C., [1904] 2 K. B. 807; Harris *v.* Hickman, [1904] 1 K. B. 13. **Mentd.** Rhymney Iron Co. *v.* Gelligaer District Council, [1917] 1 K. B. 589.

484. ——.] — The owners or occupiers of houses on a certain estate were entitled to a reduction of 15 per cent. on the ordinary water rate. Pltf. held a house on this estate by an assignment of a sub-lease, but there was nothing in the assignment to show that the house was on the estate. Pltf. & defts. who supplied the house with water, were both unware that the house was on the estate, & pltf. paid the full water rate. On a claim by pltf. to recover excess payments of water rate for six years before action brought:—*Held:* the mistake was one of fact, & the money could be recovered.—MEADOWS *v.* GRAND JUNCTION WATERWORKS CO. (1905), 69 J. P. 255; 21 T. L. R. 538; 3 L. G. R. 910, D. C.

485. —— Where no means of obtaining knowledge.]—MILNES *v.* DUNCAN, No. 515, *post.*

Money paid on forged bill of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 322, 323, 357, 358, Nos. 2143, 2146–2148, 2361–2366.

SUB-SECT. 4.—MISTAKE DUE TO FORGETFULNESS.

486. Money recoverable.]—*Assumpsit* for money had & received, lies to recover money paid by pltf. under a forgetfulness of facts which were within his knowledge.—LUCAS *v.* WORSWICK (1833), 1 Mood. & R. 293, N. P.

Annotations:—**Consd.** Kelly *v.* Solari (1841), 9 M. & W. 54. **Refd.** Pooley *v.* Brown (1862), 11 C. B. N. S. 566. **Mentd.** Cave *v.* Mills (1862), 7 H. & N. 913.

487. ——.] — (1) Money paid by pltf. to deft. under a *bonâ fide* forgetfulness of facts which disentitled deft. to receive it, may be recovered back in an action for money had & received.

(2) It is not sufficient to preclude a party from recovering money paid by him under a mistake of fact, that he had the means of knowledge of the fact; unless he paid it intentionally, not choosing to investigate the fact.

I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, & the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, & it is against conscience to retain it, though a demand may be necessary in those cases in which a party receiving may have been ignorant of the mistake.

If indeed money is intentionally paid, without reference to the truth or falsehood of the fact, pltf. meaning to waive all inquiry into it & that the person receiving shall have the money in all events, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact (PARKE, B.).—KELLY *v.* SOLARI (1841), 9 M. & W. 54; 11 L. J. Ex. 10; 6 Jur. 107; 152 E. R. 24.

Annotations:—*As to* (2) **Apld.** Bell *v.* Gardiner (1842), 4 Man. & G. 11; Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477. **Distd.** Chambers *v.* Miller (1862), 13 C. B. N. S. 125. **Consd.** Barrow *v.* Isaacs, [1891] 1 Q. B. 417. **Apld.** Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A. C. 49. **Consd.** Hood of Avalon *v.* Mackinnon, [1909] 1 Ch. 476; Baker *v.* Courage, [1910] 1 K. B. 56; Holt *v.* Markham, [1923] 1 K. B. 504. **Apld.** Jones *v.* Waring & Gillow, [1926] A. C. 670. I am not aware that in the whole course of the decisions such an assault upon *Solari's Case* has ever been successful, & since its date in 1841 it has, I believe, remained of paramount authority as part of the law of England (LORD SHAW OF DUNFERMLINE). *Generally,* **Refd.** Higgs *v.* Scott (1849), 7 C. B. 63; Aiken *v.* Short (1856), 1 H. & N. 210; Pooley *v.* Brown (1862), 11 C. B. N. S. 566; Brownlie *v.* Campbell (1880), 5 App. Cas. 925; Deutsche Bank (London Agency) *v.* Beriro (1895), 1 Com. Cas. 255; Baylis *v.* London (Bp.), [1913] 1 Ch. 127; Maskell *v.* Horner, [1915] 3 K. B. 106. **Mentd.** Mersey Docks & Harbour Board *v.* Penhallow (1861), 8 Jur. N. S. 486.

SUB-SECT. 5.—FAILURE TO USE MEANS OF KNOWLEDGE.

488. Whether precluding recovery of money paid.]—Money paid by mistake cannot be recovered

PART VI. SECT. 2, SUB-SECT. 4.

486 i. *Money recoverable.*]—A party may recover back money paid in forgetfulness of certain facts, which had without doubt been known to him.—PERRY *v.* NEWCASTLE DISTRICT MUTUAL FIRE INSURANCE CO. (1852), 8 U. C. R. 363.—**CAN.**

486 ii. ——.]—CONFEDERATION LIFE ASSOCN. *v.* MERCHANTS BANK OF CANADA (1894), 10 Man. L. R. 67.—**CAN.**

PART VI. SECT. 2, SUB-SECT. 5.

488 i. *Whether precluding recovery of money paid.*]—The money having been paid under a mistake of fact, pltfs. were entitled to succeed. The fact that they could, after proper investigation, have ascertained the true state

Sect. 2.—Money paid under mistake of fact: Sub-sects. 5 & 6.]

back, if the party paying had the means of knowing all the facts; & no fraud has been practised upon him.

Accordingly, a creditor drew upon his debtor, &, by anticipation, wrote the acceptance across, leaving a blank for the name of the debtor, making the bill payable at the house of a friend of the debtor, but without any previous authority from that friend. The bill was accepted by the debtor, negotiated by the creditor, & on its becoming due, was presented by the holder at the friend's house; he mistaking it for another bill, paid it:—*Held:* he could not recover the amount back from the drawer.—DAVIS *v.* WATSON (1833), 2 Nev. & M. K. B. 709; 2 L. J. K. B. 175.

489. ——.] — Defts., who were sharebrokers, on Aug. 30, 1845, bought for pltf., also a share-broker, thirty-eight T. shares at £2 8*s.* 6*d.* per share for the next account day, Sept. 15, & sent him an advice note to that effect. The £2 8*s.* 6*d.* was premium, & did not include the deposit, none being then paid, the scrip not having then issued. By the custom of brokers, if the deposit is paid, before the account day, it is added to the price. Defts. subsequently paid the deposits to the vendors. On Sept. 19, defts. sent in their account to pltf. but, by mistake, omitted to charge him with the amount of the deposits; pltf. sold the shares at £2 8*s.* 6*d.* per share, & at that rate was paid. On Sept. 18, defts. bought for pltf. eighty S. shares, at £4 10*s.* 0*d.* per share, which did not include the deposit, & sent him an advice note with that sum as the price. Defts. subsequently paid the vendors the amount of deposit, £200. On Sept. 26, defts. sold the shares for pltf. at £7 per share, which included the deposit; & in the accounts rendered to pltf. by defts. he was credited with the amount, but was only debited with the premium. Pltf. acted as broker for other parties, & settled with them upon the footing of the advice notes, & of the prices charged in those notes, being the full price of the shares:—*Held:* defts. were entitled to set off the amounts paid by them for deposits, & were not concluded by their omission, by mistake, to charge him with those payments.—DAILS *v.* LLOYD (1848), 12 Q. B. 531; 5 Ry. & Can. Cas. 572; 17 L. J. Q. B. 247; 11 L. T. O. S. 327; 12 Jur. 827; 116 E. R. 967.

Annotations:—**Folld.** Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477. **Refd.** Bayley *v.* Wilkins (1849), 7 C. B. 886. **Mentd.** Camillo Tank S.S. Co. *v.* Alexandria Engineering Works (1921), 38 T. L. R. 134.

490. ——.] — TOWNSEND *v.* CROWDY, No. 506, *post.*

491. ——.] — Cotton was shipped at Madras, consigned to London for pltfs., merchants residing at Liverpool. The bills of lading expressed the freight to be "at the rate of £2 5*s.* per ton of 50 cubic feet as per margin." The margin contained a note of the measurement of the cotton, & of the amount of freight calculated accordingly. On the arrival of the ship the cotton was bonded at a wharf in London, & pltfs.' brokers sent copies of the bills of lading to the wharfinger, & also to pltfs. at Liverpool. The wharfinger in the ordinary course of business measured the cotton & sent a note of the measurement to defts., who were the ship's brokers, one of them being the sole owner of the ship. Defts. thereupon made out a freight note, calculating the freight according to the London measurement, which was larger than the Madras measurement, & forwarded it to pltfs.' brokers, who paid the amount & were credited therewith by pltfs., their principals, the latter having the bills of lading in their possession at the time. After the lapse of nearly two years pltfs. settled their accounts with their agents at Madras, & the mistake was discovered. Pltfs. then sued defts. for the amount of freight overpaid. Defts. had in the meantime settled the ship's account for the voyage with the owner. There was perfect *bona fides* on both sides:—*Held:* the money having been paid by pltfs. under a mistake, they were entitled to recover it back from the owner of the ship, but not from defts. the ship's brokers.—SHAND *v.* GRANT (1863), 15 C. B. N. S. 324; 9 L. T. 390; 1 Mar. L. C. 396; 143 E. R. 809.

Annotation:—**Distd.** Newall *v.* Tomlinson (1871), L. R. 6 C. P. 405.

492. ——.]—Applt. had been in the habit of personally ordering goods from resps., & he had an employee C., who had no authority to order goods. Applt. dismissed C. & the latter subsequently obtained goods from resps. on the representation that applt. had sent him for them. When applt. was paying resps.' account he did not notice the items for these articles & he paid the account in full. A second account containing charges for further articles fraudulently obtained by C. in the name of applt. was looked over by applt.'s clerk, but was not properly checked, & applt. paid it in full. Applt. claimed to recover back from resps. the sum overpaid:—*Held:* applt. was entitled to recover the sum, as he had not held out C. as his agent & there was no estoppel.—BAILEY & WHITES, LTD. *v.* HOUSE (1915), 31 T. L. R. 583.

Annotation:—**Refd.** Bradford *v.* Price (1923), 92 L. J. K. B. 871.

493. —— **Failure to inquire amounting to waiver.**]—KELLY *v.* SOLARI, No. 487, *ante.*

See Sub-sect. 6, *post.*

494. —— **Where mistake bonâ fide.**] — Means of knowledge & actual knowledge are not the same; & it was long ago decided in *Kelly* v. *Solari*, No. 487, *ante*, that money honestly paid by mistake of facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since, & their lordships consider it applicable to the present case (LORD LINDLEY).—IMPERIAL BANK OF CANADA *v.* BANK OF HAMILTON, [1903] A. C. 49; 72 L. J. P. C. 1; 87 L. T. 457; 51 W. R. 289; 19 T. L. R. 56, P. C.

Annotations:—**Consd.** Jones *v.* Waring & Gillow, [1926] A. C. 670. **Refd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356.

495. —— ——.] — JONES (R. E.), LTD. *v.* WARING & GILLOW, LTD., No. 470, *ante.*

496. —— **Non-fulfilment of condition precedent.**]—In 1900 a co. entered into an agreement with the borough corpn. as the water authority, that in the event of their being unable to obtain sufficient water for the purposes of their brick & tile works from their own sources of supply the corpn. would supply them with water at a cost price not exceeding 2*d.* per 1,000 gallons. Previous to this agreement they had taken water from the corpn., & had paid the ordinary rate charged

of affairs, did not preclude pltfs. from recovering, as they had not paid the money intentionally not choosing to ascertain the facts.—WHITE, ETC. *v.* COPELAND (1894), 15 N. S. W. L. R. 281; 11 N. S. W. W. N. 26.—**AUS.**

488 ii. ——.]—CLARK *v.* ECKROYD (1886), 12 A. R. 425.—**CAN.**

488 iii. ——.]—A party who has had the means of knowing the facts before making a payment, & seeks reparation on an allegation that he paid under a mistake in point of fact, may be barred from claiming repetition.—WILSON & M'LELLAN *v.* SINCLAIR (1830), 4 Wils. & S. 398.—**SCOT.**

to customers of 8*d.* per 1,000 gallons, & they continued to do so down to 1910. They then claimed that they were entitled to have had the water supplied to them at 2*d.* per 1,000 gallons, & demanded a return of 6*d.* per 1,000 gallons overpaid during the preceding ten years, as money paid under a mistake of fact. The arbitrator found, as a fact, that if claimants were so entitled to be supplied with water under the covenant they were, during the whole of the ten years in question, *bonâ fide* ignorant of their legal rights in this respect, & one of the questions stated by him for the opinion of the ct. was whether, in the circumstances, claimant had paid the money they sought to recover under a mistake of law or under a mistake of fact:—*Held:* the money had been paid under a mistake of law, but whether it was paid under a mistake of law or fact it could not be recovered, as, in the opinion of the ct., the condition precedent to the right to demand a supply at the lower rate, namely, a notice that their own supplies had become exhausted, had not been complied with.—STANLEY BROTHERS, LTD. *v.* NUNEATON CORPN. (1913), 108 L. T. 986; 77 J. P. 349; 57 Sol. Jo. 592; 11 L. G. R. 902, C. A.

——.] *See* ECCLESIASTICAL LAW, Vol. XIX., p. 489, Nos. 3468, 3469.

497. Possession of means of knowledge — Not conclusive as to actual knowledge.] —BROWNLIE *v.* CAMPBELL, No. 249, *ante*.

498. —— ——.]—IMPERIAL BANK OF CANADA *v.* BANK OF HAMILTON, No. 494, *ante*.

499. —— ——.] — JONES (R. E.), LTD. *v.* WARING & GILLOW, LTD., No. 470, *ante*.

500. Possession of full knowledge—Money paid not recoverable.]—A., tenant to B., received notice from C., a mtgee. of B.'s term, that the interest was in arrear, & requiring payment to her, C., of the rent then due. A., notwithstanding this notice, paid the rent to B., under an indemnity which turned out to be unauthorised, & was afterwards compelled, by distress to pay the amount over again to C.:—*Held:* the payment to B. was a voluntary payment, with full knowledge of the circumstances, & therefore not recoverable back in an action for money had & received.—HIGGS *v.* SCOTT (1849), 7 C. B. 63; 137 E. R. 26.

501. —— ——.] — The lessee of premises deposited his lease by way of charge to secure the repayment of a sum of money advanced by the equitable mtgee. & interest thereon. The payment under the mtge. being in arrear, the equitable mtgee. served a notice on the tenant of the mtgor. to pay all rent due or thereafter to become due, to the mtgee. as mtgee. under & by virtue of the charge; & in pursuance of this notice the tenant paid the rent to the mtgee. Subsequently a distress for rent due by the lessee to the head landlord was put in & the tenant satisfied this distress. The tenant then brought an action to recover back from the equitable mtgee. the rent paid to him, as being money paid without consideration:—*Held:* the money paid to the equitable mtgee. could not be recovered back, as it was paid by the tenant under no mistake of fact, but with full knowledge that the person to whom he paid it was claiming it in his capacity as equitable mtgee. under & by virtue of the charge.—FINCK *v.* TRANTER, [1905] 1 K. B. 427; 74 L. J. K. B. 345; 92 L. T. 297, D. C.

Annotation:—**Refd.** Vacuum Oil Co. *v.* Ellis, [1914] 1 K. B. 693.

502. —— ——.] — Certain parcels of hay of which pltf. was consignee were respectively delivered to railway cos. at certain places in the United States of America to be carried to New York, & thence by defts. to London under through bills of lading signed by an agent "on behalf of carriers severally but not jointly." By the terms of the through bills of lading, with respect to the service until delivery at New York all liability under the contract terminated on delivery of the property to the steamship at New York, & the inland freight was a first lien, due & payable by defts., &, with respect to the service after delivery at New York, & until delivery at London, payment of freight was to be made on the gross weight landed from ocean steamship unless otherwise agreed or so provided in the bill of lading, or unless the carriers elected to take the freight on the bill of lading weight. The through freight was made up by the railway cos. in America after the transport rates of defts. had been ascertained:—*Held:* upon the facts as pltf. although he objected, had paid the bill of lading through freight & had accepted a rebate of the ocean freight only, in all cases where the bill of lading freight was greater than the quantity delivered, he was not entitled to recover the overpayment for inland freight as having been made under a mistake of fact.—KITTS *v.* ATLANTIC TRANSPORT CO., LTD. (1902), 18 T. L. R. 739; 7 Com. Cas. 227.

Annotation:—**Mentd.** The Hibernian (1906), 95 L. T. 395.

SUB-SECT. 6.—WAIVER OF INQUIRY.

503. General rule — Money not recoverable.] — C., a trader, on June 5, 1838, assigned his effects in trust for the benefit of creditors. On the same day, but before the execution of the assignment, a *fi. fa.* against C. was delivered to the sheriff's agent in London, under which a sheriff's officer levied upon his goods on June 6. The trustees under the assignment paid him the amount of the levy under protest, & he withdrew from possession. It afterwards appeared that C. had committed an act of bkpcy. on June 2, upon which a *fiat* issued on June 18:—*Held:* the trustees could not recover back from the sheriff the money so paid by them to the officer, as having been paid under a mistake of fact.

The short answer, however, to the action is, that the money was not paid under a mistake of fact, but upon a speculation, the failure of which cannot entitle pltfs. to recover it back (LORD ABINGER, C.B.).—HARRIS *v.* LOYD (1839), 5 M. & W. 432; 9 L. J. Ex. 95; 151 E. R. 182.

Annotation:—**Refd.** Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477.

504. —— ——.] — KELLY *v.* SOLARI, No. 487, *ante*.

505. —— ——.]—The doctrine that a person could recover money voluntarily paid over without full knowledge of the facts was subject to an exception that a person who had waived all inquiry into the facts could not on subsequently ascertaining fresh facts recover the money (WRIGHT, J.).—BEEVOR *v.* MARLER (1898), 14 T. L. R. 289, D. C.

506. Waiver must be absolute.] — Money paid under a mistake of fact, arising from an error in taking accounts, may be recovered back in an

PART VI. SECT. 2, SUB-SECT. 6.

503 i. *General rule—Money not recoverable.*]—A person seeking to recover money paid under mistake of fact is not now bound to show that he has been guilty of no laches; the only limitation is, that he must not waive all inquiry.—LAW SOCIETY OF UPPER CANADA *v.* CITY OF TORONTO CORPN. (1866), 25 U. C. R. 199.—**CAN.**

Sect. 2.—Money paid under mistake of fact: Subsects. 6 & 7.]

action for money had & received, although pltf. had been guilty of laches in making the miscalculation. Where a party pays money under a mistake of fact, he is entitled to recover it back, although he may at the time of the payment have had means of knowledge of which he has neglected to avail himself.

T. purchased from C. his share in the business of an attorney, & covenanted to pay him by six half-yearly instalments the sum of £300 & the further sum of £450 at the end of six calendar months after the expiration of three years, subject to a proviso that if one moiety of the whole of the net profits of the business for the period of three years should not amount to £1,800, T. should be entitled to deduct from the £450 such a sum as should be equal to the difference between £1,800 & the amount of one moiety of the net profits. T. had access to all the accounts & examined them, & having come to the conclusion that the profits in the three years amounted to £1,800, paid the £450 to C. He afterwards ascertained that he had made an error in his calculation, & that the net profits were less than £1,800, & then brought an action to recover back the amount overpaid :—*Held :* such action could be maintained.

This does not fall within that class of cases where a man chooses to waive going into the accounts. He paid it because he believed the fact existed. If the agreement had been that the facts should be taken to have been conclusively ascertained at a certain time, then, even if that were impliedly stipulated, I think the party paying the money would not afterwards have been entitled to recover it (ERLE, C.J.).—TOWNSEND *v.* CROWDY (1860), 8 C. B. N. S. 477 ; 29 L. J. C. P. 300 ; 2 L. T. 537 ; 7 Jur. N. S. 71 ; 141 E. R. 1251.

Annotations :—**Refd.** Chambers *v.* Miller (1862), 13 C. B. N. S. 125 ; Pooley *v.* Brown (1862), 11 C. B. N. S. 566 ; Jones *v.* Waring & Gillow, [1925] 2 K. B. 612.

507. Payment under blind suspicion of facts — Money unjustly paid.] — CHATFIELD *v.* PAXTON (1799), cited 2 East, at p. 471, n. ; 102 E. R. 449.

Annotations :—**Expld.** Brisbane *v.* Dacres (1813), 5 Taunt. 143. **Refd.** Bilbie *v.* Lumley (1802), 2 East, 469 ; Stevens *v.* Lynch (1810), 12 East, 38 ; Martin *v.* Morgan (1819), 1 Brod. & Bing. 289.

SUB-SECT. 7.—FORM OF ACTION.

See, generally, CONTRACT, Vol. XII., pp. 539 *et seq.*

Availability of & defences to action for money had & received.]—*See* CONTRACT, Vol. XII., pp. 539, 540, Nos. 4478–4487.

508. Action for money had & received.] — An action of *assumpsit* will lie for money paid by mistake, which deft. *ex æquo et bono* ought to refund.—CAVENDISH (LADY) *v.* MIDDLETON (1628), Cro. Car. 141 ; W. Jo. 196 ; 79 E. R. 725.

Annotation :—**Mentd.** Asser *v.* Wilks (1707), Holt, K. B. 36.

509. ——.] — BONNEL *v.* FOULKE (1657), 2 Sid. 4 ; 82 E. R. 1224.

Annotation :—**Mentd.** Asser *v.* Wilks (1707), Holt, K. B. 36.

510. ——.] — *Indebitatus assumpsit* lies for money paid by mistake or deceit.—TOMKINS *v.* BERNET (1694), 1 Salk. 22 ; Skin. 411 ; 91 E. R. 21.

Annotations :—**Consd.** Smith *v.* Bromley (1760), 2 Doug. K. B. 696, n. **Refd.** Bosanquet *v.* Dashwood (1734), Cas. *temp.* Talb. 38 ; Clarke *v.* Shee & Johnson (1774), 1 Cowp. 197. **Mentd.** A.-G. *v.* Perry (1734), 2 Com. 481 ; Bosanquet *v.* Westmoreland (1738), West *temp.* Hard. 598 ; Stackpole *v.* Earle (1761), 2 Wils. 133 ; Neville *v.* Wilkinson (1782), 1 Bro. C. C. 543.

511. ——.] — This kind of equitable action, to recover money back, which ought not in justice to be kept, is very beneficial & therefore much encouraged. It lies only for money which, *ex æquo et bono*, deft. ought to refund. . . . It lies for money paid by mistake (LORD MANSFIELD, C.J.).—MOSES *v.* MACFERLAN (1760), 2 Burr. 1005 ; 1 Wm. Bl. 219 ; 97 E. R. 676.

Annotations :—**Consd.** Marriott *v.* Hampton (1797), 2 Esp. 546 ; Johnson *v.* Johnson (1802), 3 Bos. & P. 162 ; Brisbane *v.* Dacres (1813), 5 Taunt. 143 ; Persian Investment Corpn. *v.* Prince Malcolm Khan (1893), 37 Sol. Jo. 340 ; Jacobs *v.* Morris, [1901] 1 Ch. 261 ; *Re* Bodega Co., [1904] 1 Ch. 276 ; Lodge *v.* National Union Investment Co., [1907] 1 Ch. 300 ; Baylis *v.* London (Bp.), [1913] 1 Ch. 127 ; Sinclair *v.* Brougham, [1914] A. C. 398. **Refd.** Phillips *v.* Hunter (1795), 2 Hy. Bl. 402 ; Hennings *v.* Rothschild (1827), 4 Bing. 315 ; Colonial Bank *v.* Exchange Bank of Yarmouth (1885), 54 L. T. 256 ; Phillips *v.* London School Board, Cockerton *v.* Same, [1898] 2 Q. B. 447 ; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655 ; Leslie *v.* Sheill, [1914] 3 K. B. 607 ; Sharp & Knight *v.* Chant, [1917] 1 K. B. 771 ; John *v.* Dodwell, [1918] A. C. 563. **Mentd.** Neville *v.* Wilkinson (1782), 1 Bro. C. C. 543 ; Galbraith *v.* Neville (1789), 1 Doug. K. B. 6, n. ; Utterson *v.* Vernon (1792), 4 Term Rep. 570 ; Walker *v.* Constable (1798), 1 Bos. & P. 306 ; Evans *v.* George & Rowe (1825), 12 Price, 76.

512. ——.]—Deft. supposing himself the legal representative of lessee for years sold the term, & delivered the lease to pltf. but without any assignment or formal conveyance, saying the premises were his & if anything happened he would see pltf. righted :—*Held :* pltf. might maintain an action against him for money had & received, the rightful administrator or tenant for years having ousted pltf. by ejectment.—CRIPPS *v.* READE (1796), 6 Term Rep. 606 ; 101 E. R. 728.

Annotations :—**Apld.** Jones *v.* Ryde (1814), 1 Marsh. 157. **Refd.** Smith *v.* Mercer (1815), 6 Taunt. 76 ; Hall *v.* Conder (1857), 2 C. B. N. S. 22 ; Clare *v.* Lamb (1875), L. R. 10 C. P. 334. **Mentd.** Allen *v.* Richardson (1879), 13 Ch. D. 524.

513. ——.] — Pltf. never has had any title conveyed to him & therefore we are of opinion, notwithstanding the party sued is a legatee, that pltf. has paid his money under a mistake, consequently the rule adopted in cts. of law in such cases applies to him, & entitles him to recover that money from the party to whom it has been paid in an action for money had & received (LORD ALVANLEY, C.J.).—JOHNSON *v.* JOHNSON (1802), 3 Bos. & P. 162 ; 127 E. R. 89.

Annotations :—**Refd.** Walker *v.* Moore (1829), 10 B. & C. 416 ; Sikes *v.* Wild (1861), 1 B. & S. 587 ; Lock *v.* Furze (1866), L. R. 1 C. P. 441 ; Bain *v.* Fothergill (1874), L. R. 7 H. L. 158 ; Clare *v.* Lamb (1875), L. R. 10 C. P. 334 ; Allen *v.* Richardson (1879), 13 Ch. D. 524 ; Sinclair *v.* Brougham, [1914] A. C. 398. **Mentd.** *Re* West, West *v.* Roberts, [1909] 2 Ch. 180.

514. ——.] — BARKER *v.* MACRAE (1811), 3 Camp. 144 ; 170 E. R. 1335, N. P.

515. ——.] — (1) A bill of exchange was drawn in Ireland upon the stamp required by law, which was less in amount than the stamp required for such a bill drawn in England ; but there was nothing on the face of the bill to show that it had been drawn in Ireland. The holder in England neglected to present it for payment, & held it a month after it was due. The acceptor having become bkpt., the holder applied for payment to the indorser who had paid it to him. The latter refused to pay it, alleging that the holder had made it his own by his laches. The holder then threatened to sue him, alleging that the bill was

508 i. *Action for money had & received.]*—SCOTT *v.* KELLY (1858), 17 U. C. R. 306.—**CAN.**

508 ii. ——.]—SESSIONS *v.* STRACHAN (1864), 23 U. C. R. 492.—**CAN.**

508 iii. ——.]—BOULTON *v.* UNITED COUNTIES OF YORK & PEEL CORPN. (1865), 25 U. C. R. 21.—**CAN.**

508 iv. ——.]—OWSTON *v.* GRAND TRUNK RY. CO. (1881), 28 Gr. 431.—**CAN.**

void, on the ground that it was drawn on an improper stamp. The indorser inspected the bill, & finding that the stamp was not that required for a bill of the same amount drawn in England, but ignorant of the fact that it had been drawn in Ireland, paid the amount to the holder:—*Held:* this was money paid in ignorance of the fact, & there being no laches imputable to the party who paid the money, he might recover it back in an action for money had & received.

(2) Money paid with a knowledge of the facts, but in ignorance of the law, cannot be recovered back, unless it be against good conscience to retain it. A party who has the means of knowledge of the facts, but neglects to avail himself of them, will be concluded as though he had actual knowledge.

(3) If a fact is *bonâ fide*, but incorrectly, stated by one party to another, who therefore pays money under a belief of the accuracy of that fact, & the means of knowledge as to its correctness are as much within the reach of one party as the other, the party who has paid the money may recover it back on a discovery of the mistake, provided it would be against good conscience that it should be retained.—MILNES *v.* DUNCAN (1827), 6 B. & C. 671; 9 Dow. & Ry. K. B. 731; 5 L. J. O. S. K. B. 239; 108 E. R. 598.

Annotations:—As to (1) **Refd.** Pooley *v.* Brown (1862), 11 C. B. N. S. 566. *As to* (2) **Dbtd.** Kelly *v.* Solari (1841), 9 M. & W. 54. **Overd.** Jones *v.* Waring & Gillow, [1926] A. C. 670. **Refd.** Bell *v.* Gardiner (1842), 4 Man. & G. 11; Mather *v.* Maidstone (1856), 18 C. B. 273; Holt *v.* Markham (1922), 128 L. T. 719. *Generally,* **Refd.** Hamlet *v.* Richardson (1833), 9 Bing. 644; Moore *v.* Fulham Vestry, [1895] 1 Q. B. 399.

516. ——.]—Rent paid by A. to B., claiming as a devisee, the amount of which A. is afterwards compelled to pay to the heir, may be recovered back by A. as money had & received to his use, B. setting up no title to the lands when the action is brought, or at the trial, since money paid under a mistake as to the facts, may be recovered back as money had & received.—NEWSOME *v.* GRAHAM (1829), 10 B. & C. 234; 5 Man. & Ry. K. B. 64; 8 L. J. O. S. K. B. 100; 109 E. R. 437.

Annotations:—**Refd.** Clare *v.* Lamb (1875), L. R. 10 C. P. 334; Finck *v.* Tranter, [1905] 1 K. B. 427.

517. ——.] — LUCAS *v.* WORSWICK, No. 486, *ante.*

518. ——.] — KELLY *v.* SOLARI, No. 487, *ante.*

519. ——.] — Pltf. received a letter of allotment, allotting him one hundred shares in a projected railway, upon which he paid a deposit of £2 2*s.* per share. With the letter of allotment, the board of directors, one of whom was deft., caused to be sent to pltf. a circular containing, amongst others, the following provision: "In the event of the Act not being obtained, the directors undertake to return the whole of the deposits, without deduction." There was no evidence of any application by pltf. for shares, or that his allotted shares had been exchanged for scrip; & it appeared that he had never signed the Parliamentary contract or subscribers' agreement. The project proving abortive:—*Held:* money had & received lay, to recover back the deposit paid.—WARD *v.* LONDESBOROUGH (LORD) (1852), 12 C. B. 252; 18 L. T. O. S. 209; 138 E. R. 900.

Annotation:—**Mentd.** Londesborough *v.* Mowatt (1854), 18 Jur. 1094.

520. ——.] — In 1811, L., being possessed of certain premises under leases which would expire at Midsummer, 1854, granted to T. & E. respectively, an annuity of £222 4*s.* 5*d.* for three lives, to secure which he granted to each of them an underlease of the same premises for forty-three years, if the lives, or the survivor of them, should so long endure. In 1827, the premises in the annuity deeds mentioned were assigned to pltf. for the residue of the terms granted to W. L., subject to the annuities to T. & E., & to the underleases for securing the same. In 1825, T. & E. were let into possession of the premises so underlet to them: &, in 1830, pltf. became tenant to them of part of the premises at the rent of £550, payable to them in equal moieties. T., the last survivor of the *cestuis que vie* in his annuity deed, died in 1851; &, from the time of his death, down to the time of the expiration of the leases granted to L., W. E., as their agent, applied for & received the rent of £550 from pltf. for them & the representative of E., & accounted for a moiety to each of them, deducting certain payments thereout in respect of ground rent, rates, taxes, insurance, repairs, & commission:—*Held:* pltf. was entitled, in an action for money had & received, to recover back the sums so paid by him under the mistaken impression that the right to receive them still continued, deducting only the sums paid by the agent in respect of ground rent, rates, & taxes.—BARBER *v.* BROWN (1856), 1 C. B. N. S. 121; 26 L. J. C. P. 41; 28 L. T. O. S. 318; 21 J. P. 294; 3 Jur. N. S. 18; 5 W. R. 79; 140 E. R. 50.

Annotation:—**Mentd.** Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n.

521. ——.] — TOWNSEND *v.* CROWDY, No. 506, *ante.*

522. ——.] — By agreement between the outgoing tenant of a farm, deft., & the incoming tenant, pltf., the amount to be paid by pltf. to deft. was referred to two valuers, who made their valuation. A promissory note for the amount of the valuation, after deducting £2,000 paid on account, was given by pltf. to deft.; & pltf. entered into possession. On the occasion of his selling his interest in the farm to a third person, pltf. discovered that errors had been made in the former valuation, by including items that ought not by the custom of the country to have been valued to him, & items that did not exist. He nevertheless paid the promissory note at maturity without objection. Afterwards, without having given deft. any information as to the nature of his complaint of the valuation, & without having made any demand, he brought this action for money had & received:—*Held:* pltf. could not recover.

(1) (KELLY, C.B., & MARTIN, B.), the conduct of pltf. had made it impossible to restore the parties to their original condition or to do justice between them, & therefore pltf. could not maintain an action for money had & received.

(2) (MARTIN & BRAMWELL, BB.), to enable a pltf. to maintain an action for money paid by mistake, as money had & received by deft., notice of the mistake must have been given to the deft. & a demand made.

It appears to me, therefore, that this case does not come within the principle upon which the action for money had & received, to recover money paid by mistake, is maintainable. That principle is clear & simple in the extreme. No man should by law be deprived of his money, which he has parted with under a mistake, & where it is against justice & conscience that the receiver should retain it (KELLY, C.B.).—FREEMAN *v.* JEFFRIES (1869), L. R. 4 Exch. 189; 38 L. J. Ex. 116; 20 L. T. 533.

Annotations:—As to (2) **Distd.** Baker *v.* Courage, [1910] 1 K. B. 56. *Generally,* **Refd.** Colonial Bank *v.* Exchange Bank of Yarmouth (1885), 54 L. T. 256; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655. **Mentd.** Tendring Hundred Waterworks Co. *v.* Jones, [1903] 2 Ch. 615.

523. ——.] — The firm of W. & K. being indebted to G., to whom W. was also privately

Sect. 2.—Money paid under mistake of fact: Subsects. 7, 8 & 9. A. & B.; sub-sects. 10 & 11.]

indebted individually, G. gave a receipt in the name of the firm for £1,000, paid by W. out of the partnership moneys, & subsequently, at the request of W., credited his private account with the amount instead of the account of the firm. W. had no authority to appropriate the partnership moneys in this manner, but G. believed that he had. On the dissolution of the firm, K. paid to G., partly in cash & partly in bills, the amount which appeared by G.'s books to be due from the firm. Before the last bill became due, which was for an amount over £1,000, K. discovered how W. had appropriated the £1,000; but he paid the bill under protest notwithstanding:—*Held:* K. was entitled to recover £1,000 from G. as money had & received to his use, seeing that he was not bound by the act of W., done without his authority; & it was for G. to show that K. had so conducted himself as to induce the belief that he had given W. authority.—KENDAL *v.* WOOD (1870), L. R. 6 Exch. 243; 39 L. J. Ex. 167; 23 L. T. 309, Exch.

524. ——.]—Pltf. bank being under instructions from R. to remit his moneys to a bank at Halifax, through the mistake of its agents paid them to a New York bank for transmission to defts., who on being advised thereof debited the New York bank, & credited R. in account with the amount thereof, & being afterwards advised of the mistake claimed to retain & use the moneys in reduction of R.'s account with them:—*Held:* on being advised of the mistake defts. were bound to repair it, & pltf. bank had a sufficient interest in the moneys to recover them as moneys received to their use.—COLONIAL BANK *v.* EXCHANGE BANK OF YARMOUTH, NOVA SCOTIA (1885), 11 App. Cas. 84; 54 L. T. 256; 34 W. R. 417; *sub nom.* COLONIAL BANK *v.* BANK OF NOVA SCOTIA, 55 L. J. P. C. 14, P. C.

Annotations:—**Refd.** Holt *v.* Markham (1922), 128 L. T. 719; Jones *v.* Waring & Gillow, [1926] A. C. 670.

525. ——.] — CLOUGH *v.* HENRY (1894), 10 T. L. R. 603.

526. ——.]—In *Moses* v. *Macferlan*, No. 511, *ante*, LORD MANSFIELD says that an action for money had & received lies only for money which, *ex æquo et bono*, deft. ought to refund. But the wide language thus used by that great judge has not been followed. For example, money paid under a mistake of law cannot be recovered, although its retention would seem to be equally against good conscience (COZENS-HARDY, M.R.).—BAYLIS *v.* LONDON (BP.), [1913] 1 Ch. 127; 82 L. J. Ch. 61; 107 L. T. 730; 29 T. L. R. 59; 57 Sol. Jo. 96, C. A.

Annotations:—**Refd.** Sinclair *v.* Brougham, [1914] A. C. 398; Holt *v.* Markham, [1923] 1 K. B. 504; Chillingworth *v.* Esche, [1924] 1 Ch. 97; Jones *v.* Waring & Gillow, [1926] A. C. 670.

527. —— **Court will not interfere summarily.**]—NATHAN *v.* COLLINS (1843), 1 L. T. O. S. 317.

——.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 489, Nos. 3468, 3469.

528. Remedy at law & not in equity.] — A. purchases from B. a share in a concern, & gives for it a price which he understands to be four times the amount of the yearly profits, but which, in consequence of a mistake made by B. in the estimate of the profits, turns out to be more than that; the deed of assignment purports to be for an absolute sum; there is evidence that B. never intended to sell for less that that absolute sum, & no evidence to the contrary:—*Held:* a ct. of equity will not decree the sum, which A. alleges he has overpaid, to be refunded to him.—STEWART *v.* STUART, STUART & STREET *v.* STEWART (1823), as reported in 1 L. J. O. S. Ch. 61.

529. ——.]—Where money has been voluntarily paid under a mistake the remedy is at law & not in equity.—LAMB *v.* CRANFIELD (1874), 43 L. J. Ch. 408.

Annotation:—**Refd.** Baylis *v.* London (Bp.), [1913] 1 Ch. 127.

SUB-SECT. 8.—TIME LIMIT FOR RELIEF.

See LIMITATION OF ACTIONS, Vol. XXXII., pp. 337, 518, 519, Nos. 206, 207, 1758–1761.

SUB-SECT. 9.—LOSS OF RIGHT TO RECOVER.

A. Alteration of Position of Parties.

See CONTRACT, Vol. XII., pp. 553, 554, Nos. 4596–4601.

530. No alteration of position.] — Applts., & B. & co., who were both bankers, financed K., a merchant, making advances against goods. K. sold a parcel of goods to resps. & directed them to remit the price to B. & co. who had an equitable mtge. on these goods. Resps. by mistake, but acting in good faith, paid the money to applts., who received it in good faith, believing it to represent the price of goods on which they had made advances to K. A jury found, in answer to a specific question, that they had not been led to alter their position for the worse as regarded K.:—*Held:* resps. were entitled to recover the money from applts. as being money paid under a mistake of fact.

It is indisputable that, if money is paid under a mistake of fact & is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received (LORD LOREBURN, C.).—KLEINWORT, SONS & CO. *v.* DUNLOP RUBBER CO. (1907), 97 L. T. 263; 23 T. L. R. 696; 51 Sol. Jo. 672, H. L.

Annotations:—**Folld.** Kerrison *v.* Glyn Mills, Currie (1911), 81 L. J. K. B. 465; Jones *v.* Waring & Gillow, [1926] A. C. 670. **Refd.** Baylis *v.* London (Bp.), [1913] 1 Ch. 127; British American Continental Bank *v.* British Bank for Foreign Trade, [1926] 1 K. B. 328.

531. ——.] — BRITISH AMERICAN CONTINENTAL BANK *v.* BRITISH BANK FOR FOREIGN TRADE, No. 459, *ante*.

532. Effect of alteration of position — Plaintiff's conduct making restitution impossible.] — Pltf. bought of deft.'s agent by a verbal agreement twenty-five sacks of flour "of the same quality as certain flour which deft. had lately sold to Mr. Mackness." The next day a sold note in the following form, signed by deft., was delivered to pltf.: "Sold Mr. Harnor per Mr. Howard, twenty-five sacks, Whites X.S. at 68*s.* per sack, net 280 lbs. Net cash. J. T. Groves." It was proved at the trial that Mackness's flour was of superior quality to that delivered to pltf., & bore the mark X.S.S. The flour was delivered two days after the sold note. Pltf. used two sacks, with which he was dissatisfied, but he subsequently paid for the whole under protest:—*Held:* he could not recover, under a count for money had & received, as for money paid on a mistake of facts, he having

532 i. *Effect of alteration of position—Plaintiff's conduct making restitution impossible.*]—MISENER *v.* GASTON (1873), R. E. D. 125.—CAN.

converted & appropriated to his own use a portion of the flour.—HARNOR *v.* GROVES (1855), 15 C. B. 667; 3 C. L. R. 406; 24 L. J. C. P. 52; 24 L. T. O. S. 215; 3 W. R. 168; 139 E. R. 587.

Annotation :—**Mentd.** Rye *v.* Purcell, [1926] 1 K. B. 446.

533. ——.] —By certain military regulations officers in the Royal Air Force were on demobilisation entitled to a gratuity varying in amount according to circumstances. If their names were on a certain list, called the Emergency List, they were only entitled to a gratuity at a lower rate than if they were not on that list. Deft. was a demobilised officer of the Royal Air Force. Pltfs., who acted as Govt.'s agents for the payment (*inter alia*) of gratuities to demobilised officers of that force, in ignorance of the fact that deft. was on the Emergency List, but also in forgetfulness of the regulation which provided that the gratuities of officers on the Emergency List should be paid at the lower rate, & not appreciating the materiality of an officer being on that list, paid deft. his gratuity at the higher rate to which he would have been entitled if he had not been on that list. More than a year afterwards, & before notice of the mistake, deft. spent the money. In an action to recover back the excess payment as money paid under a mistake of fact :—*Held :* (1) pltfs.' mistake was not a mistake of fact causing the payment; (2) as deft. had been led by pltfs.' conduct to believe that he might treat the money as his own, & in that belief had altered his position by spending it, pltfs. were estopped from alleging that it was paid under a mistake.

The provisions of Order 263 of 1919 appear to have been altogether overlooked. Pltfs.' mistake, if any, is one of law; it resulted from a failure to apply what is now said to be the true construction of the Orders relating to gratuities to deft.'s case. Pltfs. consequently cannot recover (BANKES, L.J.).—HOLT *v.* MARKHAM, [1923] 1 K. B. 504; 92 L. J. K. B. 406; 128 L. T. 719 67 Sol. Jo. 314, C. A.

Annotations :—*As to* (2) **Refd.** Jones *v.* Waring & Gillow, [1926] A. C. 670. *Generally,* **Mentd.** Ord *v.* Ord, [1923] 2 K. B. 432.

Money received or paid by agents.]—*See* AGENCY, Vol. I., pp. 669–673, 678, Nos. 2818–2841, 2888.

Money received or paid by bankers.] —*See* BANKERS, Vol. III., pp. 170, 179, 233, 234, Nos. 282, 330–333, 646.

Payments on bills of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 126, 357–359, Nos. 842, 2361–2370.

B. Breach of Duty.

Delay in communicating mistake.]—*See* CONTRACT, Vol. XII., p. 546, No. 4534; ECCLESIASTICAL LAW, Vol. XIX., p. 489, No. 3468.

Payment on bills of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 357–359, Nos. 2361–2370.

SUB-SECT. 10.—NECESSITY FOR DEMAND.

See, generally, ACTION, Vol. I., pp. 52 *et seq.*

534. Whether demand necessary — Mistake not known to payer.]—KELLY *v.* SOLARI, No. 487, *ante.*

535. —— ——.] —FREEMAN *v.* JEFFRIES, No. 522, *ante.*

536. —— **Mistake common to both parties.**]—Where both parties were under the mistake when the payment was made, the cause of action is complete on such payment, & no demand for repayment is necessary.—BAKER *v.* COURAGE & Co., [1910] 1 K. B. 56; 79 L. J. K. B. 313; 101 L. T. 854.

Annotations :—**Refd.** Jones *v.* Waring & Gillow, [1925] 2 K. B. 612. **Mentd.** *Re* Robinson, McLaren *v.* Public Trustee (1911), 104 L. T. 331.

SUB-SECT. 11.—ACTUAL PAYMENT UNNECESSARY.

537. Whether actual payment essential — Sum credited in account.]—The paymaster of a military corps had given credit in account to an officer in that corps from Jan. 1, 1817, to Nov. 5, 1820, for certain increased pay, erroneously supposed to be granted by a general order of Aug. 27, 1806, to an officer of his situation, & a statement of that account was delivered to the officer in 1821. In Dec. 1816, the paymasters were informed by the board of ordnance that the increased pay granted by the order of 1806 would not be allowed to persons in the situation of the officer in question. The paymasters did not communicate this information to the officer until 1821, & subsequently to that time they continued to receive his pay. In an action brought by his personal representative to recover such pay :—*Held :* it was not competent to the paymaster to retain any of such sums of money on account of the sums which they had credited him for by way of increased pay, & which they had allowed him to consider his own for so long a period of time.

I think they cannot now be permitted to say, that the money which they allowed him in account as money received by them to his use, was not money received to his use (BAYLEY, J.).—SKYRING *v.* GREENWOOD (1825), 4 B. & C. 281; 6 Dow. & Ry. K. B. 401; 107 E. R. 1064.

Annotations :—**Distd.** R. *v.* Blenkinsop, [1892] 1 Q. B. 43. **Expld.** Baker *v.* Courage (1909), 101 L. T. 854. **Apld.** Holt *v.* Markham, [1923] 1 K. B. 504. **Refd.** Higgs *v.* Scott (1849), 7 C. B. 63; Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477; Cave *v.* Mills (1862), 7 H. & N. 913; Swan *v.* North British Australasian Co. (1862), 7 H. & N. 603; De Cordova *v.* De Cordova (1879), 4 App. Cas. 692; Daniell *v.* Sinclair (1881), 6 App. Cas. 181; Deutsche Bank (London Agency) *v.* Beriro (1895), 73 L. T. 669. **Mentd.** Bate *v.* Laurence (1844), 2 Dow. & L. 83; Parrott *v.* Anderson (1851), 7 Exch. 93; R. *v.* Treasury Lords, *Re* Queen Dowager's Annuity (1851), 20 L. J. Q. B. 305; Miles *v.* Scotting (1885), Cab. & El. 491; Vagliano *v.* Bank of England (1889), 5 T. L. R. 489; Jones *v.* Waring & Gillow, [1926] A. C. 670.

538. —— ——.]—A sum of money allowed in account by mistake on a settlement between pltf. & deft., when deft. paid the balance after deduction of that sum, cannot be recovered back in an action for money had & received, the sum allowed never having passed between the parties otherwise than by such allowance.—LEE *v.* MERRETT (1846), 8 Q. B. 820; 15 L. J. Q. B. 289; 7 L. T. O. S. 83; 10 Jur. 916; 115 E. R. 1083.

Annotation :—**Dbtd.** Gingell *v.* Purkins (1850), 4 Exch. 720.

539. —— ——.]—Pltfs. sued deft. for work & labour done. In the writ they by mistake credited deft. with the payment of a sum on account & claimed the balance. Deft. knowing that they had made a mistake paid the balance & obtained from them a receipt for the whole sum due from him to them. Subsequently, having

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m. *Whether demand necessary — Mistake not known to payee.*]—Where deft. takes money in good faith unaware of its bring paid under mistake of fact he is entitled to a demand for its return before action is brought.—PACIFIC COAST INSURANCE CO. *v.* HICKS (1913), 13 E. L. R. 194.—**CAN.**

n. —— *Mistake known to payer.*]—PECK *v.* HAWTHORN CORPN. (1892), 18 V. L. R. 24.—**AUS.**

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discovered their mistake, pltfs. brought an action to recover from deft. the sum wrongfully credited to him, as money had & received to their use :—*Held :* although the receipt had been given under compulsion of legal process, deft. could not rely upon it as a defence to the action since he had not acted *bonâ fide*, & pltfs. were therefore entitled to recover the sum claimed.—WARD & Co. *v.* WALLIS, [1900] 1 Q. B. 675 ; 69 L. J. Q. B. 423 ; 82 L. T. 261 ; 16 T. L. R. 193.

Annotation :—**Mentd.** L. C. C. *v.* Dundas, [1904] P. 1.

540. —— —— Necessity for previous authority to pay—Or communication of making of entry.]—In every case where it is sought to treat a mere book entry as a payment some other circumstance must be present & relied upon to enable the customer in whose favour it was made to succeed, either some express previous authority to pay, or some communication of the making of the entry to the customer & some acting upon it by him (SANKEY, J.).—BRITISH & NORTH EUROPEAN BANK *v.* ZALZSTEIN, [1927] W. N. 95.

541. —— Money treated as paid.] — Deft., having recovered judgment against H., on Apr. 25, lodged with pltf., who was the sheriff, a writ of *fi. fa.* Pltf. neglected to execute the writ until May 11, when he seized the goods of H. & assigned them to deft. by bill of sale, which stated the consideration to be £256 paid by deft. to him. He then returned *fieri feci*. Before the seizure deft. had notice of an act of bkpcy. committed by H. before Apr. 25, upon which a *fiat* issued in Aug., & assignees were appointed, who sued & recovered from pltf. the value of the goods seized, whereupon he brought the present action to recover back the money so paid :—*Held :* (1) though no money in fact passed, pltf. & deft. were, as between themselves, in the same situation as if pltf. had sold the goods to deft. & received the money ; (2) though the money was not pltf.'s, still he was entitled to recover, since it was money which he ought to have received as soon as he had been compelled by the owner to pay for the goods seized ; (3) the money having been paid by pltf. in ignorance of the facts, he was entitled to recover it back, although deft. could not in every respect be placed in *statu quo*.—STANDISH *v.* ROSS (1849), 3 Exch. 527 ; 19 L. J. Ex. 185 ; 12 L. T. O. S. 495 ; 13 J. P. 269.

Annotations :—*As to* (1) **Refd.** Hobson *v.* Holt (1850), 16 L. T. O. S. 263. *As to* (3) **Refd.** Jones *v.* Waring & Gillow, [1926] A. C. 670. *Generally*, **Mentd.** Gingell *v.* Purkins (1850), 4 Exch. 720 ; Colonial Bank *v.* Exchange Bank of Yarmouth (1885), 54 L. T. 256 ; Baylis *v.* London (Bp.), [1913] 1 Ch. 127 ; Holt *v.* Markham, [1923] 1 K. B. 504 ; British American Continental Bank *v.* British Bank for Foreign Trade, [1926] 1 K. B. 328.

542. —— Set-off.]—Pltf. granted a lease to deft., in consideration of a premium of £40, &, being i[illegible] done, [illegible] them, when deft. was allowed the £40 in account, but no moneys in fact passed. Pltf. having afterwards sued deft. for £37 4*s.* for rent, & goods sold, deft. claimed to set off the £40 as money received for his use, on the ground that it was not expressed in the lease, & therefore he was entitled, under the Probate & Legacies Duties Act, 1808 (c. 149), s. 24, & Stamp Act, 1815 (c. 184), to recover it :—*Held :* (1) the settlement of accounts amounted to payment ; (2) as deft. might recover back the premium as money received for his use, he was entitled to set it off as a debt.—GINGELL *v.* PURKINS (1850), 4 Exch. 720 ; 19 L. J. Ex. 129 ; 154 E. R. 1405.

See, also, AGENCY, Vol. I., pp. 441–443, Nos. 1310–1320.

SUB-SECT. 12.—RE-OPENING ACCOUNTS.

See, generally, AGENCY, Vol. I., p. 445, Nos. 1351 *et seq.* ; CONTRACT, Vol. XII., pp. 587, 588, Nos. 4895–4901 ; EQUITY, Vol. XX., pp. 273, 274–276, Nos. 329, 333–353 *et seq.*

Mistake in calculation of interest—Re-opening account in bank books.]—*See* BANKERS, Vol. III., p. 247, No. 721.

Mortgage accounts.]—*See* MORTGAGE, Part XVI., Sect 1, sub-sect. 7, *post*.

SUB-SECT. 13.—PARTICULAR INSTANCES.

Payments on bills of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 76, 357–359, Nos. 596, 2361–2370.

Director's fees paid in ignorance of disqualification.]—*See* COMPANIES, Vol. IX., p. 461, No. 2994.

Mistake amounting to failure of subject-matter.]—*See* CONTRACT, Vol. XII., pp. 368, 369, 370, Nos. 3076–3080, 3085.

Recovery of legacy wrongfully paid.]—*See* EXECUTORS, Vol. XXIII., p. 393, No. 4643.

Money paid in betting transaction.] — *See* GAMING & WAGERING, Vol. XXV., p. 411, Nos. 146, 148.

Money paid on guarantee.]—*See* GUARANTEE, Vol. XXVI., p. 112, No. 781.

Recovery of premium on insurance policy.]—*See* INSURANCE, Vol. XXIX., pp. 59, 304, Nos. 195, 196, 2521.

Recovery of losses paid by insurer.] — *See* INSURANCE, Vol. XXIX., pp. 300, 301, Nos. 2469–2472.

SECT. 3.—MONEY PAID UNDER MISTAKE OF LAW.

SUB-SECT. 1.—GENERAL RULE.

What amounts to mistake of law.]—*See* Part II., *ante*.

543. Whether remedy available.]—When money is paid by one man to another on a mistake either of fact or of law or by deceit this action [money had & received] will certainly lie (DE GREY, C.J.).—FARMER *v.* ARUNDEL (1772), 2 Wm. Bl. 824 ; 96 E. R. 485.

[illegible]. Dacres (1813), 5 Taunt. 143.

544. ——.]—Money paid by one with full knowledge, or the means of such knowledge in his hands, of all the circumstances cannot be recovered back again on account of such payment having been made under an ignorance of the law.—BILBIE *v.* LUMLEY (1802), 2 East, 469 ; 102 E. R. 448.

Annotations :—**Consd.** Brisbane *v.* Dacres (1813), 5 Taunt. 143. **Apld.** Currie *v.* Goold (1817), 2 Madd. 163 ; Martin [1926] 3 D. L. R. 891.—**CAN.**

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o. *No right to recover.*]—When a person has paid money with a full knowledge of facts, he cannot recover it back on the ground that he paid it in ignorance of the law resulting from those facts.—PERRY *v.* NEWCASTLE DISTRICT MUTUAL FIRE INSURANCE CO. (1852), 8 U. C. R. 363.—**CAN.**

p. ——.]—PAGET *v.* R. (1901), 7 Exch. C. R. 50 ; 21 C. L. T. 280.—**CAN.**

q. ——.]—SLETTO *v.* ADAMS (Alta.),

r. ——.]—CLUTHA COUNTY COUNCIL *v.* MCDONALD (1883), 2 N. Z. L. R. 257 (S. C.).—**N.Z.**

t. ——.]—DELPONTE'S ESTATE *v.* BARNES, [1910] C. P. D. 118.—**S. AF.**

v. Morgan (1819), 1 Brod. & Bing. 289. **Folld.** East India Co. *v.* Tritton (1824), 3 B. & C. 280. **Apld.** Bramston *v.* Robins (1826), 12 Moore, C. P. 68. **Refd.** Lothian *v.* Henderson (1803), 3 Bos. & P. 499; Forrester *v.* Pigou (1813), 1 M. & S. 9; Andrew *v.* Hancock (1819), 1 Brod. & Bing. 37; Hales *v.* Freeman (1819), 1 Brod. & Bing. 391; Morgan *v.* Palmer (1824), 2 B. & C. 729; Smith *v.* Alsop (1824), M'Cle. 622; Young *v.* Timmins (1831), 1 Tyr. 226; Stewart *v.* Stewart (1839), 6 Cl. & Fin. 911; Kelly *v.* Solari (1841), 9 M. & W. 54; Bell *v.* Gardiner (1842), 4 Man. & G. 11; Parker *v.* G. W. Ry. (1844), 7 Man. & G. 253; *Re* Alexander, *Ex p.* Sanderson (1856), 28 L. T. O. S. 133; Urquhart *v.* Butterfield (1887), 57 L. J. Ch. 521.

545. ——.]—If a person with knowledge of the facts, but under a mistake as to the law, pays over to another claiming it as a right money which he was not compellable to pay, he cannot upon discovering what his legal right was, recover it back, there being nothing against conscience in the other party's retaining it.

The captain of a King's ship brought home in her public treasure upon the public service, & treasure of individuals for his own emolument; he received freight for both & paid over one-third of it, according to an usage heretofore established in the navy, to the admiral under whose command he sailed. Discovering that the law does not compel captains to pay to admirals one-third of the freight; the captain brought an action for money had & received to recover it back from the admiral's extrix.:—*Held:* he could not recover back the private freight because the whole of that transaction was illegal, nor the public freight, because he had paid it with full knowledge of the facts although in ignorance of the law & because it was not against conscience for the extrix. to retain it.—BRISBANE *v.* DACRES (1813), 5 Taunt. 143; 128 E. R. 641.

Annotations:—**Apld.** Andrew *v.* Hancock (1819), 1 Brod. & Bing. 37. **Refd.** Dew *v.* Parsons (1819), 2 B. & Ald. 562; Hales *v.* Freeman (1819), 1 Brod. & Bing. 391; Goodman *v.* Sayers (1820), 2 Jac. & W. 249; Morgan *v.* Palmer (1824), 2 B. & C. 729; Smith *v.* Alsop (1824), M'Cle. 622; Bramston *v.* Robins (1826), 4 Bing. 11; Wilson *v.* Way (1837), 1 Jur. 637; Parker *v.* G. W. Ry. (1844), 7 Man. & G. 253; R. *v.* Treasury Lords Comrs., *Re* Queen Dowager's Annuity (1851), 15 Jur. 767; Miles *v.* Scotting (1885), Cab. & El. 491; Maskell *v.* Horner, [1915] 3 K. B. 106. **Mentd.** Hatchwell *v.* Cooke (1816), 2 Marsh. 293; Bayley *v.* Wilkins (1849), 7 C. B. 886; Baylis *v.* London (Bp.), [1913] 1 Ch. 127; King-Hall & Heuenge *v.* Standard Bank of South Africa (1919), 88 L. J. K. B. 1058.

546. ——.]—Where the agent of an exor. paid interest on a legacy for seventeen years, without deducting the property tax:—*Held:* he could not afterwards deduct out of future interest due, the amount of the property tax on such precedent payments.—CURRIE *v.* GOOLD (1817), 2 Madd. 163; 56 E. R. 295.

Annotation:—**Folld.** *Re* Hatch, Hatch *v.* Hatch (1919), 88 L. J. Ch. 147.

547. ——.]—It is admitted that at law it is impossible to recover after a voluntary payment with a knowledge of all the facts though under a mistake in point of law. That principle applies equally to suits here (PLUMER, M.R.).—GOODMAN *v.* SAYERS (1820), 2 Jac. & W. 249; 37 E. R. 622.

Annotations:—**Mentd.** Little *v.* Newton (1841), 9 Dowl. 437; Moseley *v.* Simpson (1873), L. R. 16 Eq. 226.

548. ——.]—MILNES *v.* DUNCAN, No. 515, *ante*.

549. ——.]—Where a party, to secure advances made to him, assigned to his creditor his present & also his after-acquired property, & the former being insufficient to pay the debt, the creditor sold the present & also the after-acquired property, with the assent of the debtor, who probably thought that the after-acquired property passed by the assignment:—*Held:* the proceeds of the after-acquired property which had been sold under a mistake as to the law, but without fraud, could not be recovered back.—PLATT *v.* BROMAGE (1854), 24 L. J. Ex. 63.

550. ——.]—A married woman entitled to the income of a legacy for her separate use, continued for fifteen years, with full notice of the circumstances affecting her rights, to receive income on the footing that the legacy was liable to contribute in favour of the residuary legatees to a loss occurring on the reinvestment of part of the estate. It was afterwards decided that the legacy was not liable so to contribute, but must be paid in full:—*Held:* she was not entitled to recover from the residuary legatees the difference between the income of the full amount of the legacy & the reduced income she had actually received.—STAFFORD *v.* STAFFORD (1857), 1 De G. & J. 193; 29 L. T. O. S. 368; 4 Jur. N. S. 149; 44 E. R. 697, L. JJ.

Annotations:—**Refd.** *Re* Ashwell's Will (1859), John. 112 Upton *v.* Vanner (1861), 5 L. T. 480.

551. ——.]—ROGERS *v.* INGHAM, No. 25, *ante*.

552. ——.]—No doubt when money paid under an error in law had been extorted or obtained by duress or any kind of compulsion it could be recovered back. . . . There was no authority to show that it could be recovered back on account of a judicial decision reversing the former understanding of the law. . . . The law, however, does not allow money voluntarily paid under a mistake in law to be recovered back (COLERIDGE, C.J.).—HENDERSON *v.* FOLKESTONE WATERWORKS CO. (1885), 1 T. L. R. 329, D. C.

Annotation:—**Refd.** Meadows *v.* Grand Junction Waterworks Co. (1905), 69 J. P. 255.

553. ——.]—S. was rated for water rate on a scale which the water authority afterwards reduced on discovery that they had misconstrued their local Act. S. had not been proceeded against, but the rate so paid was £1 11*s.* 6*d.* above the succeeding rate:—*Held:* S. could not recover back this excess, as it was a voluntary & not a compulsory payment.—SLATER *v.* BURNLEY CORPN. (1888), 59 L. T. 636; 53 J. P. 70; 36 W. R. 831; 4 T. L. R. 642, D. C.

Annotations:—**Folld.** Slater *v.* Burnley Corpn. (No. 2) (1889), 53 J. P. 535. **Distd.** Meadows *v.* Grand Junction Waterworks Co. (1905), 69 J. P. 255.

554. ——.]—Defts. in consequence of a misconstruction of their local Act, charged pltfs. for water rent on the basis of the gross annual value instead of on the basis of the net annual value. Pltfs. paid the water rent on that basis, in ignorance of the fact that it was a wrong basis. In an action by pltfs. for a return of the sum of £35 6*s.* 3*d.*, the amount overcharged by defts. in excess of their powers:—*Held:* inasmuch as the payment of the water rent on the basis of the gross annual value was voluntary, no action lay against defts. for the return of any overcharge.—SLATER *v.* BURNLEY CORPN. (NO. 2) (1889), 53 J. P. 535.

555. ——.]—Where the lessee has without protest paid money to the lessor for obtaining his consent to an assignment, no action lies by the lessee to recover it back. *Qu.*: whether such an action would lie if the money were paid under protest.—ANDREW *v.* BRIDGMAN, [1908] 1 K. B. 596; 77 L. J. K. B. 272; 98 L. T. 656; 52 Sol. Jo. 148, C. A.; *affg.*, [1907] 2 K. B. 494; *sub nom.* BRIDGMAN *v.* ANDREW, 23 T. L. R. 548.

Annotation:—**Mentd.** West *v.* Gwynne, [1911] 2 Ch. 1.

556. ——.]—Suppliants carried on a large business in which they employed a large number of assistants who had all their meals on the premises, & for the service of these meals supplicants employed a number of men as cooks & waiters. The Inland Revenue authorities said that these waiters were "male servants" in respect of whom duties were payable, & in an interview in 1900 the supervisor of taxes told the

Sect. 3.—Money paid under mistake of law: Subsects. 1, 2 & 3, A. & B.]

secretary of suppliant co. that in his opinion the waiters were "male servants" & that the duties were payable, & that if they were not paid suppliants would incur penalties, & upon that the duties were then paid by suppliants in each year in the belief that they had no option except to do so. From 1903 onwards the duties were paid with a protest that the waiters were not "male servants" within Revenue Act, 1869 (c. 14), & that the duties were not payable, but the Comrs. of Inland Revenue gave their opinion that the waiters were "male servants" & the duties were payable. In 1906 suppliants refused to pay, & upon proceedings being taken for penalties, the Div. Ct. held that the waiters were not "male servants" & that the duties were not payable. On a petition of right to recover back the moneys so paid:—*Held:* the moneys having been paid under a mistake, not of fact, but of law, could not be recovered back, either on the ground that they were paid under duress or compulsion, or on the ground that they were paid in discharge of a demand illegally made under colour of an office.—WILLIAM WHITELEY, LTD. *v.* R. (1909), 101 L. T. 741; 26 T. L. R. 19.

Annotation:—**Refd.** Brocklebank *v.* R., [1924] 1 K. B. 647.

557. ——.]—STANLEY BROTHERS, LTD. *v.* NUNEATON CORPN., No. 496, *ante*.

558. ——.]—The landlord of a dwelling-house, to which Increase of Rent & Mortgage (War Restriction) Act, 1915 (c. 97), applied, in Mar. 1915, increased the tenant's rent by 6*d.* a week. The tenant paid the increased rent &, in ignorance of the Act, continued to do so until Jan. 31, 1916. Having then become aware of the Act, he deducted from his subsequent payment of rent the total amount of the increase over the standard rent which he had paid between Nov. 25, 1915, & Jan. 31, 1916. In an action by the landlord to recover the amount so deducted:—*Held:* although the Act provided that the increase beyond the standard rent was not recoverable by the landlord if the tenant had not paid it, yet the tenant, having paid it under mistake of law, was not entitled to recover it from the landlord in any shape or form.

On the facts I have stated the money was paid under a perfectly legal contract, & while it is true that it was continued to be paid at a time when the sum had become irrecoverable by law, neither party knew of this, & neither party put any pressure on the other to continue to pay. Under these circumstances it seems to me the right to repayment does not come within any of the common law doctrines; & it is not conferred by the express words of the Act; & for these reasons I think that the sum cannot be recovered (SCRUTTON, L.J.).—SHARP BROTHERS & KNIGHT *v.* CHANT, [1917] 1 K. B. 771; 86 L. J. K. B. 608; 116 L. T. 185; 33 T. L. R. 235; 61 Sol. Jo. 352, C. A.

Annotations:—**Refd.** Rawlinson *v.* Alger (1921), 90 L. J. K. B. 497; Lewis *v.* McKay, Algate *v.* Vugler, Clark *v.* Potter, [1924] 2 K. B. 136.

559. ——.]—When a payment has been made under a mistake of law, it leaves the parties where they are without any resultant rights (SARGANT, J.).—*Re* HATCH, HATCH *v.* HATCH, [1919] 1 Ch. 351; 88 L. J. Ch. 147; 120 L. T. 694; 63 Sol. Jo. 389.

Annotations:—**Mentd.** *Re* Kennedy, Corbould *v.* Kennedy, [1916] 2 Ch. 379; *Re* Stoddart, Bird *v.* Grainger, [1916] 2 Ch. 444; *Re* Eve, Hall *v.* Eve, [1917] 1 Ch. 562; *Re* Tinkler, Loyd *v.* Allen, [1917] 1 Ch. 242; *Re* Wooldridge, Wooldridge *v.* Coe, [1920] W. N. 78; *Re* Sarson, Public Trustee *v.* Sarson, [1925] 1 Ch. 31.

560. ——.]—HOLT *v.* MARKHAM, No. 533, *ante*.

561. Effect of change in understanding of law.]—HENDERSON *v.* FOLKESTONE WATERWORKS CO., No. 552, *ante*.

562. —— **Subsequent declaration of law by court.**]—Pltfs., as owners, chartered a steamer to defts. to bring to West Hartlepool a cargo of pit props, to be "taken from alongside at the charterers' risk & expense as customary." The custom at West Hartlepool varied according as the discharge was to be into railway wagons or on to the quay. In this case the discharge was into railway wagons, & the props, after being swung over the wagons by a crane, had to be stowed in the wagons. Pltfs. & defts. settled accounts on the basis that pltfs. were liable for the whole cost of discharge, but afterwards it was held in *The Rensfjell* (1924), 40 T. L. R. 458, that by the custom at West Hartlepool from the moment when the cargo was released from the sling the cost of handling it & stowing it in the wagons fell on the charterers. The shipowners, therefore, in this action sought to recover from the charterers such share of the cost of discharge as ought to have been borne by the latter, the claim being for breach of contract in not providing the men to stow the cargo, & alternatively for money paid to defts.' use:—*Held:* as both parties believed it to be the duty of pltfs. to provide the men for stowage & therefore, defts. had not committed a breach of contract, & as pltfs. had made a voluntary payment under the mistaken belief that they were liable to make it, the action failed.—AKT. DAMPSKIBS STEINSTAD *v.* PEARSON (W.) & CO. (1927), 43 T. L. R. 531.

SUB-SECT. 2.—APPLICATION OF RULE.

563. Payment out of court under order—Claim of person entitled on Consolidated Fund—Default of Paymaster-General.]—JONES *v.* JONES (1879), [1901] 1 Ch. 464, n.; 70 L. J. Ch. 272, n.; 84 L. T. 109, n.; 49 W. R. 342, n., L. C.

Annotations:—**Folld.** Bath *v.* Bath (1901), 70 L. J. Ch. 270. **Consd.** *Re* Williams' S. E., [1910] 2 Ch. 481.

564. —— —— ——.]—If a person becoming interested in a fund in ct. standing to an account in the name of another does not obtain any stop order against the fund, & the fund is subsequently paid out in disregard of his interest to a person apparently; but not in fact, entitled to it, the Paymaster-General is not guilty of default within Court of Chancery Funds Act, 1872 (c. 44), s. 5, so as to make the Treasury liable to make good the fund out of the Consolidated Fund.—BATH *v.* BATH, [1901] 1 Ch. 460; 70 L. J. Ch. 270; 84 L. T. 107; 49 W. R. 341; 17 T. L. R. 196; 45 Sol. Jo. 239; *affd.* on other grounds (1902), 71 L. J. Ch. 500, C. A.

Annotation:—**Refd.** *Re* Williams' S. E., [1910] 2 Ch. 481.

565. —— —— **Order obtained by fraud or forgery.**]—Where money is ordered to be paid out

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PART VI. SECT. 3, SUB-SECT. 2.

a. *Money paid in excess of interest.*]—KAINES *v.* STACEY (1860), 9 C. P. 355.—**CAN.**

b. ——.]—JARVIS *v.* CLARK (1861), 10 C. P. 480.—**CAN.**

c. ——.]—STEWART *v.* FERGUSON (1899), 31 O. R. 112.—**CAN.**

d. *Fee illegally charged for licence.*]—HANCOCK *v.* TOWN OF DARTMOUTH (1881), 2 R. & G. 129.—**CAN.**

e. ——.]—LOWE *v.* R. (Y. T.) (1918), 17 Exch. C. R. 126; 40 D. L. R. 686.—**CAN.**

f. *Money paid by administrator—On competent advice—Whether recoverable.*]—If an administrator, on competent advice, pays a claim *bonâ fide* made against the estate, the money paid is

of ct. to a person apparently but not really entitled, & 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 ct. when the order was made, has no claim upon the Consolidated Fund.—*Re* WILLIAMS' SETTLED ESTATES, [1910] 2 Ch. 481; 80 L. J. Ch. 8; 103 L. T. 390; 26 T. L. R. 688; 54 Sol. Jo. 736.

566. —— —— Form of order for repayment.]—MARSH *v.* JOSEPH, [1897] 1 Ch. 213; 66 L. J. Ch. 128; 75 L. T. 558; 45 W. R. 209; 13 T. L. R. 136; 41 Sol. Jo. 171, C. A.

Annotations :—**Consd.** *Re* Williams' S. E., [1910] 2 Ch. 481 **Mentd.** Hambro *v.* Burnand, [1903] 2 K. B. 399.

567. —— Liability of negligent solicitor.]—In an administration action a fund belonging to the children of R. who should attain twenty-one or marry was carried over to "the account of the issue or children of R. deceased." The fund in Jan. 1884, consisted of £4,387 10*s.* 3*d.* Consols & £195 19*s.* 4*d.* cash. B., managing clerk of the firm of solrs. conducting the action, knew that R. died leaving one daughter, who would attain twenty-one in Dec. 1886. He retained L. as solr. on behalf of the daughter to get the fund out, saying he had authority. A summons was taken out in chambers, & B. having produced an affidavit that the daughter was of age, an order was made by the chief clerk on Jan. 28, 1884, for transfer & payment to the daughter. B. got the usual form of power of attorney from the Paymaster-General, & it was apparently executed by the daughter of R. in favour of L., but in reality it was forged. L. obtained payment, & after deducting one-half of one-sixth of the fund & other expenses, pursuant to an agreement between him & B., paid the remainder to B. on an authority apparently signed by the daughter of R., but really forged. L. never saw the daughter of R., & had no communication with her. The daughter of R. never saw B., & never gave any authority to B. B. absconded. In Dec. 1886, when the daughter of R. attained twenty-one, she presented a petition to the Lord Chancellor under Court of Chancery Funds Act, 1872 (c. 44), s. 5, for a certificate under that sect. in order that the fund might be replaced out of the Consolidated Fund. Upon the hearing of this petition on Dec. 14, 1887, counsel for the Treasury contended that the application should not go until petitioner had herself obtained a proper order from the ct. for payment out of the fund to her, & the Paymaster-General had failed to comply with such order. This was a petition to discharge the order of Jan. 28, 1884, & for payment out of the sums above-mentioned, & the interest & dividends. The petition was served on the Comrs. of Her Majesty's Treasury, & the Paymaster-General, & upon L. :—*Held :* the order of Jan. 28, 1884, must be discharged, & an order now be made that the sums of £4,387 10*s.* 3*d.* Consols & £195 19*s.* 4*d.* cash, & such further sums as would have been standing to the credit of the account, if the order of Jan. 28, 1884, had not been made, should be respectively transferred & paid to petitioner, & L. should within two months from the date of the present order pay into ct. to the account of the Paymaster-General the sum of £4,387 10*s.* 3*d.* Consols & £195 19*s.* 4*d.* cash, & such other sums as should be payable to the petitioner under the present order.—SLATER *v.* SLATER (1888), [1897] 1 Ch. 222, n.; 58 L. T. 149.

Annotations :—**Consd.** *Re* Williams' S. E., [1910] 2 Ch. 481. **Refd.** Marsh *v.* Joseph, [1897] 1 Ch. 213. **Mentd.** *Re* Dangar's Trusts (1889), 41 Ch. D. 178.

568. —— ——.]—MARSH *v.* JOSEPH, [1897] 1 Ch. 213; 66 L. J. Ch. 128; 75 L. T. 558; 45 W. R. 209; 13 T. L. R. 136; 41 Sol. Jo. 171, C. A.

Annotations :—**Refd.** *Re* Williams' S. E., [1910] 2 Ch. 481. **Mentd.** Hambro *v.* Burnand, [1903] 2 K. B. 399.

569. —— —— Primary liability of payee's estate.]—A legacy of £500 bequeathed to M., an infant, & a legacy of £7,000 settled upon trust for L. & her children, were paid into ct. by the trustees, on separate occasions, but to one & the same account. A petition was afterwards presented on behalf of L. for the purpose of getting her legacy transferred to a separate account & of obtaining payment of the dividends to her. The petition did not state that the fund in ct. represented the two legacies, & in consequence of this omission, & of the amount of the fund proposed to be dealt with being stated in blank, an order was erroneously made upon the petition, under which the whole fund was transferred to the account of L.'s legacy & the dividends paid to her during her life. The solr. who acted for the trustees on the occasion of the payment into ct. also acted for petitioners, & had the carriage of the whole proceedings. After L.'s death M. attained twenty-one, & presented a petition for payment out of ct. of her legacy, with the accumulated dividends thereon :—*Held :* the estate of L. was primarily liable for the amount of the dividends erroneously paid to her; but, failing her estate, the solr. was personally liable to make good to M. any deficiency there might be, & to pay all the costs occasioned by the mistake as between solr. & client.—*Re* DANGAR'S TRUSTS (1889), 41 Ch. D. 178; 58 L. J. Ch. 315; 60 L. T. 491; 37 W. R. 651; 5 T. L. R. 266; *previous proceedings* (1888), 60 L. T. 402, C. A.

Annotations :—**Consd.** *Re* Williams' S. E., [1910] 2 Ch. 481. **Refd.** Marsh *v.* Joseph, [1897] 1 Ch. 213.

SUB-SECT. 3.—EXCEPTIONS TO RULE.

A. Where Retention by Payee Inequitable.

570. Money paid recoverable.]—BRISBANE *v.* DACRES, No. 545, *ante*.

571. ——.]—MILNES *v.* DUNCAN, No. 515, *ante*.

572. ——.]—STONE *v.* GODFREY, No. 21, *ante*.

573. ——.]—ROGERS *v.* INGHAM, No. 25, *ante*.

574. —— Money obtained by duress or compulsion.]—HENDERSON *v.* FOLKESTONE WATERWORKS CO., No. 552, *ante*.

Overpayments of dividends by building society.]—*See* BUILDING SOCIETIES, Vol. VII., p. 516, No. 371.

Overpayments by executor.]—*See* EXECUTORS, Vol. XXIII., pp. 427 *et seq.*

B. Payment to Officer of Court.

575. Money paid recoverable.]—Deft., on being arrested, placed in the officer's hands in *lieu* of bail,

not on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator *de bonis non* a right of action to recover it back.—MAYHEW *v.* STONE (1896), 26 S. C. R. 58.—**CAN.**

PART VI. SECT. 3, SUB-SECT. 3.—A.

570 i. *Money paid recoverable.*]—The Supreme Ct. may grant relief against a mistake in law if there is any equitable ground which makes it inequitable that the party who receives the money should retain it.—KELLY *v.* R. (1902), 27 V. L. R. 522.—**AUS.**

570 ii. ——.]—ROWNTREE *v.* SYDNEY LAND & LOAN CO. (1907), 39 S. C. R. 614.—**CAN.**

570 iii. ——.]—CONNICK *v.* CARMICHAEL RURAL MUNICIPALITY No. 109 (Sask.), [1923] 4 D. L. R. 994; [1923] 3 W. W. R. 1244.—**CAN.**

570 iv. ——.]—R. *v.* BANNATYNE & CO. (1901), 20 N. Z. L. R. 232.—**N.Z.**

570 v. ——.]—DIXON *v.* MONKLAND CANAL CO. (1831), 5 Wils. & S. 445.—**SCOT.**

Sect. 3.—*Money paid under mistake of law: Sub-sect.* 3, *B. & C.; sub-sect.* 4. *Sect.* 4.]

a quantity of linen drapery goods; eight days after the process was returnable, deft. surrendered himself to prison; & ten days after the process was returnable, the officer who arrested deft. paid into the hands of the prothonotaries £30 for the debt, in the cause, & £10 for the costs, those being sums which deft. was supposed on his arrest, to have deposited with the officer in *lieu* of bail, under 43 Geo. 3, c. 46. Defendant was afterwards, notwithstanding resistance on the part of pltf., allowed to take this money out of ct. on the ground that it had been paid in by mistake.—HILL *v.* CHINN (1822), 1 Bing. 103; 7 Moore, C. P. 432; 130 E. R. 43.

576. ——.]—If the assets in the hands of an officer of the ct. on behalf of creditors or others have been increased by a transaction occasioned by an honest mistake of law, then, notwithstanding such mistake is not capable of rectification as between ordinary adverse litigants, the ct. will compel its officer to recognise the rules of honesty as between man & man, & to act accordingly.

Previously to the presentation of a petition for the winding up of a co., the sheriff was in possession of goods of the co. which he had seized under writs of *fi. fa.* Subsequently to the presentation of the petition, the sheriff, in the honest belief that he was justified in so doing, seized the money paid at the doors of the co.'s theatre, & thereout paid the execution creditors, & his own costs, & handed a small sum to the provisional liquidator, who accepted the same. The sheriff afterwards gave up possession of the goods. A winding-up order was made, & on the application of the official liquidator the sheriff was ordered to refund the money seized by him less the sum paid to the provisional liquidator, on the ground that the seizure was wrongful. The goods having been sold by the official liquidator:—*Held:* the official liquidator must be ordered to pay out of the moneys received by him for the sale of the goods the amounts due to the sheriff for levy & charges on the writs, & the sheriff's costs of the application for such order.—*Re* OPERA, LTD., [1891] 2 Ch. 154; 60 L. J. Ch. 464; 64 L. T. 313; 39 W. R. 398; *revsd.* on other grounds, [1891] 3 Ch. 260, C. A.

Annotations:—**Mentd.** Robson *v.* Smith, [1895] 2 Ch. 118; Taunton *v.* Warwickshire Sheriff, [1895] 2 Ch. 319; Richards *v.* Kidderminster Overseers, Richards *v.* Kidderminster Corpn., [1896] 2 Ch. 212; *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373; Davey *v.* Williamson, [1898] 2 Q. B. 194; Duck *v.* Tower Galvanizing Co., [1901] 2 K. B. 314; *Re* London Pressed Hinge Co., Campbell *v.* London Pressed Hinge Co., [1905] 1 Ch. 576; Evans *v.* Rival Granite Quarries, [1910] 2 K. B. 979.

577. Retention of funds in payer's hands—As against official receiver.]—Bkpt. having mortgaged two fishing boats to some fish salesmen to secure his current account with them, & having subsequently failed in his business, the mtgees. offered to pay his creditors a composition which nearly all the creditors agreed to accept, &, after having notice that the debtor had committed an act of bkpcy. they paid this composition in good faith to the assenting creditors, believing that they were entitled under their mtge. to add the money so paid to their security. They then sold the fishing boats, & claimed to retain the balance of the proceeds of sale, after paying themselves the amount due on their mtge. at the date of the act of bkpcy. on account of the composition paid to the creditors. The official receiver applied that the balance might be paid over to him:—*Held:* the mere fact that the mtgees. were not familiar with the working of the bkpcy. law was not a ground for precluding the official receiver from insisting on his right to treat this balance as part of the debtor's estate, & the money ought to be paid over to him.

In this case the officer of the ct. has neither done or omitted anything which could give rise to the suggestion that he has committed the ct. to a course of conduct which is in any way unworthy of its dignity (FARWELL, L.J.).—*Re* HALL, *Ex p.* OFFICIAL RECEIVER, [1907] 1 K. B. 875; 76 L. J. K. B. 546; 97 L. T. 33; 23 T. L. R. 327; 51 Sol. Jo. 292; 14 Mans. 82, C. A.

Annotations:—**Mentd.** Tapster *v.* Ward (1909), 101 L. T. 503; *Re* Phillips, [1914] 2 K. B. 689; *Re* Stokes, *Ex p.* Mellish, [1919] 2 K. B. 256; *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735; *Re* Wigzell, *Ex p.* Hart, [1921] 2 K. B. 835; Scranton's Trustee *v.* Pearse, [1922] 2 Ch. 87.

In bankruptcy cases.]—*See* BANKRUPTCY, Vol. IV., pp. 205, 206, 505, Nos. 1889–1894, 1895, 4549; Vol. V., pp. 820, 821, No. 6968.

C. Re-Opening of Settled Accounts.

See AGENCY, Vol. I., pp. 445, 447, Nos. 1351–1360; CONTRACT, Vol. XII., pp. 587, 588, Nos. 4895–4901; EQUITY, Vol. XX., pp. 274–276, Nos. 333–353.

Mortgage accounts.]—*See* MORTGAGE, Part XVI., *post.*

578. General rule.]—Under a plea of *non assumpsit* to a count on an account stated, deft. may show that accounts between pltf. & himself, the correctness of which he has admitted, were in fact incorrect.—THOMAS *v.* HAWKES (1841), 8 M. & W. 140; 9 Dowl. 801; 10 L. J. Ex. 240; 151 E. R. 983.

Annotations:—**Apld.** *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648. **Refd.** Wilson *v.* Wilson (1854), 14 C. B. 616; Daniell *v.* Sinclair (1881), 6 App. Cas. 181; Camillo Tank S.S. Co. *v.* Alexandria Engineering Works (1921), 38 T. L. R. 134.

579. ——.]—DANIELL *v.* SINCLAIR, No. 10, *ante.*

580. ——.]—Further, even when an account is stated & the balance paid, it can be opened on the ground of a mistake . . . unless, of course, it be stated as the result of a compromise of disputed cross-claims (PARKE, J.).—*Re* BAYLEY-WORTHINGTON & COHEN'S CONTRACT, [1909] 1 Ch. 648; 78 L. J. Ch. 351; 100 L. T. 650.

Annotation:—**Mentd.** British & Beningtons *v.* N. W. Cachar Tea Co., [1923] A. C. 48.

SUB-SECT. 4.—PARTICULAR INSTANCES.

581. Payment into court.]—A submission to arbn. of all matters in difference between the parties in the cause is not confined to the subject-matter in the particular action then depending, but will extend to cross demands between the parties, though not pleaded by way of set-off; & the costs being to abide the event makes no difference. But a reference of all matters in dispute in the cause between the parties is confined solely to the matters in dispute in that trial. Assignees of a bkpt. having received £1,500 from a debtor to bkpt. as a debt due to his estate, & having commenced an action against him for a

PART VI. SECT. 3, SUB-SECT. 4.

581 i. *Payment into court.*]—ANDREW *v.* CANADIAN MUTUAL LOAN & INVESTMENT CO. (1898), 29 O. R. 365.—**CAN.**

g. *Money paid by officer of court.*]—Money paid over by an officer of the ct. under mistake of law may be recovered.—LONDON GUARANTEE & ACCIDENT CO., LTD. *v.* HENDERSON, MCWILLIAMS (1915), 32 W. L. R. 61; 25 Man. L. R. 617, 726.—**CAN.**

h. *Deduction of poor rate from annuity—Recovery of arrears.*]—CORCORAN *v.* WADE, [1913] 1 I. R. 25.—**IR.**

further demand on the same account, to which he had only pleaded the general issue, agreed with him to refer their differences to arbn. & the submission is in this form, that all matters in difference between the parties in the cause be referred; the arbitrator has power to award that the assignees shall repay a part of the sum already received, if it appear to have been paid by mistake. The only case where a party shall be bound by the payment of money, though by mistake, is where it is paid into ct. under a rule.—MALCOLM *v.* FULLARTON (1788), 2 Term Rep. 645; 100 E. R. 347.

582. ——.]—The ct. refused an injunction to restrain pltfs. in an action at law from taking out of ct. money which defts. at law had paid into ct. in an action, in ignorance that upon such payment, pltfs. at law were entitled to stay their action, & take the sum so paid. Such ignorance or inadvertences does not amount to that kind of mistake against the consequences of which equity will interpose to relieve.

If the payment of the money into ct. by the co. gives pltfs. at law the right of taking the money out of ct., I do not see there is any equity to restrain them. The facts of the case were well known to the co.; & although they may have made the payment in ignorance of the legal consequences, it does not appear to me to amount to such a mistake as calls for the interference of a ct. of equity (WIGRAM, V.-C.).—GREAT WESTERN RY. Co. *v.* CRIPPS (1846), 5 Hare, 91; 4 Ry. & Can. Cas. 473; 67 E. R. 840.

583. ——.]—The ct. will not order money paid into ct. by deft. through a mistake to be restored to him. Though perhaps in case of fraud they may.—VAUGHAN *v.* BARNES (1801), 2 Bos. & P. 392; 126 E. R. 1346.

584. Sums allowed in account.]—SKYRING *v.* GREENWOOD, No. 537, *ante*.

585. ——.]—(1) By a marriage settlement, a sum of £30,000 Irish currency was vested in trustees, upon trust, out of the interest & dividends of two equal third parts of it, together with the interest & dividends of the remaining third part, to make up the annual sum of £500, & pay such annual sum to the husband & wife during the life of A.:—*Held:* the husband & wife were entitled during the life of A. to the income of the remaining third part, whether it did or did not exceed £500 *per annum*.

(2) A person, who by mistake had received for some years a less income than he was entitled to under his marriage settlement, held, under the circumstances of the case, to be entitled to have the difference made up to him out of the estate of deceased settlor.—DAVIS *v.* MORIER (1845), 2 Coll. 303; 63 E. R. 745.

Annotation:—*As to* (2) **Distd.** Rogers *v.* Ingham (1876), 3 Ch. D. 351.

586. —— Mere non-demand of full amount—Not allowance on account.]—A rate having been made in pursuance of 18 & 19 Vict. c. 70, s. 13, a railway co. occupying land in the parish were correctly rated in the rate book at their full net annual value, but owing to a mistaken belief on the part of the overseers that the co. had been incorrectly so rated, & that the land in question was within the exemptions in 18 & 19 Vict. c. 70, a demand note for one-third only of their full share of the rate was sent to the co., who paid no more than such third accordingly. In each of the three succeeding years, similar demand notes for one-third only were sent to & paid by the co., notwithstanding that they continued to be correctly rated in the rate book at the full net annual value. In the fifth year the overseers discovered the mistake, & sought to recover from the co. the unpaid two-thirds for each of the four preceding years, as arrears under 17 Geo. 2, c. 38, s. 11:—*Held:* the money sought to be recovered was arrears within 17 Geo. 2, c. 38, s. 11, & the overseers were not estopped from recovering it by reason of the delivery of the incorrect demand notes by their predecessors.

It was said that the case came within the rule of *Skyring* v. *Greenwood*, No. 537, *ante*, that money allowed in account under a mistake of law cannot be recovered back, & that the non demand of the two-thirds was equivalent to an allowance in account. But I do not think that this could in any sense be treated as an allowance in account. The money was not allowed; it was merely not claimed. I can see no reason why the money should not be paid (SMITH, J.).—R. *v.* BLENKINSOP, [1892] 1 Q. B. 43; 61 L. J. M. C. 45; 66 L. T. 187; 56 J. P. 246; 40 W. R. 272, D. C.

Annotation:—**Refd.** Gill *v.* Mellor, Gill *v.* Monday, [1924] 1 K. B. 97.

—— Acceptance of composition by creditor.]—*See* BANKRUPTCY, Vol. V., p. 1128, No. 9171.

Money paid in discharge of ultra vires loan.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 491, 492, No. 227.

Money paid under void & illegal contracts.]—*See* CONTRACT, Vol. XII., pp. 281 *et seq.*

Money paid by infant.]—*See* INFANTS, Vol. XXVIII., pp. 163, 164, Nos. 202–208.

Premiums paid by persons having no insurable interest.]—*See* INSURANCE, Vol. XXIX., p. 62, No. 212.

Omission to deduct taxes.]—*See* INCOME TAX, Vol. XXVIII., pp. 72, 73, Nos. 381–391; LAND TAX, Vol. XXX., p. 302, Nos. 33, 34.

Payment of rent.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 291, 300, 573, Nos. 4366–4369, 4456–4457, 7207.

SECT. 4.—MONEY PAID UNDER COMPULSION.

See CONTRACT, Vol. XII., pp. 528–532, 555–561, Nos. 4396–4427, 4611–4665.

MONEY AND MONEY-LENDING.

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Independent Advice	,, FRAUDULENT AND VOIDABLE CONVEYANCES; SOLICITORS.		*Time Limit of Actions*	,, LIMITATION OF ACTIONS.	
			Work Done	,, WORK AND LABOUR.	

Part I.—Money.

SECT. 1.—IN GENERAL.

1. What constitutes money — Exchequer bills.]—Exchequer bills, if received as cash, may be treated as money, under a count for money had & received.—DOUGAN *v.* BOLLAND (1826), 5 B. & C. 622; 8 Dow. & Ry. K. B. 435; 4 L. J. O. S. K. B. 278; 108 E. R. 232.

——.]—*See* CONTRACT, Vol. XII., pp. 520, 521, 546, 547, Nos. 4327–4332, 4537–4549; WILLS.

—— **Bank of England notes.**]—*See* BANKERS, Vol. III., pp. 129–130, Nos. 52–55; Bank of England Act, 1833 (c. 98), s. 6.

Tender.]—*See* CONTRACT, Vol. XII., p. 319, Nos. 2634–2639.

Legal tender.]—*See* Part II., Sect. 1, *post.*

Payment.]—*See* CONTRACT, Vol. XII., pp. 447 *et seq.*

Appropriation of payments.]—*See* CONTRACT, Vol. XII., pp. 474 *et seq.*

Coinage—The Royal Prerogative.]—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 502, 557, Nos. 46, 569–571.

Coinage offences.]—*See* CRIMINAL LAW, Vol. XV., pp. 718–723, Nos. 7759–7823.

Theft of coin.]—*See* CRIMINAL LAW, Vol. XV., pp. 620, 621, Nos. 6492, 6506–6509.

SECT. 2.—"MONEY HAS NO EARMARK."

2. Extent of doctrine — How far money can be followed.]—WHITECOMB *v.* JACOB (1710), 1 Salk. 160; 91 E. R. 149.

Annotations :—**Folld.** Taylor *v.* Plumer (1815), 3 M. & S. 562. **Consd.** *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696. **Apld.** Patten *v.* Bond (1889), 60 L. T. 583. **Refd.** Scott *v.* Surman (1742), Willes, 400; Banque Belge Pour L'Etranger *v.* Hambrouck, [1921] 1 K. B. 321. **Mentd.** Ryall *v.* Rolle (1749), 1 Atk. 165.

3. —— ——.] — THOMAS *v.* WHIP (1715), cited 1 Burr. at p. 458.

Annotation :—**Refd.** Miller *v.* Race (1758), 1 Burr. 452.

4. —— ——.]—Money has no earmark, & if invested in land or other things it cannot be pursued; therefore if a receiver of rents, or if an exor. in trust lays out the rents or the assets in a purchase of lands in fee, & dies insolvent, the purchase will not be liable; but where A. receives a sum of money, which he covenants to lay out in land to be settled to certain uses, & afterwards purchases an estate which he does not settle, but does by writing own that this purchase was made with the trust money, this binds the estate, & is a declaration of trust.—DEG *v.* DEG (1727), 2 P. Wms. 412; 24 E. R. 791.

Annotations :—**Mentd.** Bally *v.* Ploughman (1729), Mos. 95; Hall *v.* Kendall (1730), Mos. 328.

5. —— ——.] — It has been quaintly said, "that the reason why money cannot be followed is, because it has no earmark": but this is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it, after it has been paid away fairly & honestly upon a valuable & *bonâ fide* consideration: but before money has passed in currency, an action may be brought for the money itself (LORD MANSFIELD, C.).—MILLER *v.* RACE (1758), 1 Burr. 452; 2 Keny. 189; 96 E. R. 1151.

Annotations :—**Apld.** Grant *v.* Vaughan (1764), 3 Burr. 1516; Peacock *v.* Rhodes (1781), 2 Doug. K. B. 633. **Consd.** Snow *v.* Peacock (1826), 3 Bing. 406; Glyn *v.* Soares (1835), 1 Y. & C. Ex. 644; Litchfield Union Grdns. *v.* Greene (1857), 1 H. & N. 884. **Apld.** Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337; London & County Banking Co. *v.* London & River Plate Bank (1888), 21 Q. B. D. 535. **Consd.** Moss *v.* Hancock, [1899] 2 Q. B. 111; Banque Belge Pour L'Etranger *v.* Hambrouck, [1921] 1 K. B. 321. **Refd.** Clarke *v.* Shee (1774), 1 Cowp. 197; Wright *v.* Reed (1790), 3 Term Rep. 554; Lawson *v.* Weston (1801), 4 Esp. 56; Glyn *v.* Baker (1811), 13 East, 509; Wookey *v.* Pole (1820), 4 B. & Ald. 1; Gill *v.* Cubitt (1824), 3 B. & C. 466; Camidge *v.* Allenby (1827), 6 B. & C. 373; Lang *v.* Smyth (1831), 7 Bing. 284; Easley *v.* Crockford (1833), 10 Bing. 243; Keene *v.* Beard (1860), 8 C. B. N. S. 372. **Mentd.** R. *v.* Sadi & Morris (1787), 1 Leach, 468; Mead *v.* Young (1790), 4 Term Rep. 28; Stuart *v.* Bute (1806), 11 Ves. 657; Robinson *v.* Reynolds (1841), 2 Q. B. 196; *Re* Craven, Crowdson *v.* Craven (1908), 99 L. T. 390.

6. —— ——.] — The dictum that money has no earmark must be understood in the same way; *i.e.* as predicated only of an undivided & undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked, if the fact were so, for the purpose of being distinguished, are so far earmarked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains, as the property in question did, in the hands of the factor, or his general legal representatives (LORD ELLENBOROUGH, C.J.).—TAYLOR *v.* PLUMER (1815), 3 M. & S. 562; 2 Rose, 457; 105 E. R. 721.

Annotations :—**Folld.** Twiss *v.* White (1826), 3 Bing. 486. **Apld.** *Re* Hammond, *Ex p.* Brook (1869), 20 L. T. 547; *Re* Strachan, *Ex p.* Cooke (1876), 4 Ch. D. 123. **Folld.** Birt *v.* Burt (1877), 36 L. T. 943. **Expld.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696. **Folld.** Collins *v.* Stimson & France (1883), 52 L. J. Q. B. 440. **Apld.** Patten *v.* Bond (1889), 60 L. T. 583. **Distd.** Lister *v.* Stubbs (1890), 62 L. T. 654. **Consd.** Sinclair *v.* Brougham, [1914] A. C. 398; Banque Belge Pour L'Etranger *v.* Hambrouck, [1921] 1 K. B. 321. **Refd.** Neate *v.* Harding (1851), 6 Exch. 349; Muttyboll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328; Ashmall *v.* Wood (1856), 28 L. T. O. S. 30; *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; Harris *v.* Truman (1881), 7 Q. B. D. 340; Crowther *v.* Elgood (1887), 56 L. J. Ch. 416; King *v.* Hutton, [1899] 2 Q. B. 555; Moss *v.* Hancock, [1899] 2 Q. B. 111. **Mentd.** Sheppard *v.* Shoolbred (1841), Car. & M. 61; Walshe *v.* Provan (1853), 1 C. L. R. 823; R. *v.* Bunkall (1864), 3 New Rep. 492.

7. —— ——.] — It may be that the true meaning of the saying that money has no earmark is that when current coins of the realm have passed *bonâ fide* from hand to hand as currency & as money they are considered, for all purposes of property in them, not to be identifiable. They become merely so much money in the possession of the person to whom they have passed. If it is a sovereign, then for all purposes of the property twenty shillings or eight half-crowns are the legal equivalent of the sovereign. If the payment to the man has been made in error the right against him is, as a rule, merely to recover so much money, & not the identical coins. . . . The point only arises upon the passing of the coins from one person to another as money. The doctrine that money has no earmark, whatever it means, is undoubtedly a doctrine of our law (CHANNELL, J.).—MOSS *v.* HANCOCK, [1899] 2 Q. B. 111; 68 L. J. Q. B. 657; 80 L. T. 693; 63 J. P. 517; 47 W. R. 698; 15 T. L. R. 353; 43 Sol. Jo. 479; 19 Cox, C. C. 324.

Annotations :—**Consd.** R. *v.* Dickinson, [1920] 3 K. B. 552. **Refd.** Banque Belge Pour L'Etranger *v.* Hambrouck, [1921] 1 K. B. 321.

8. —— ——.] — A building society, formed under the Building Societies Act, 1836 (c. 32), with powers of borrowing, in addition to the

Sect. 2.—"Money has no earmark." Part II. Sects. 1 & 2: Sub-sect. 1.]

legitimate business of a building society, established & developed a banking business on a large scale, which was admitted to be *ultra vires*. A winding-up order was made, & the assets of the society, after payment of the outside creditors & the costs, were more than sufficient to pay the members in full, but were not sufficient to pay them & also the depositors in the bank in full:—*Held:* the depositors could not maintain an action for money had & received in respect of the money borrowed by the society *ultra vires*, but they could recover money which they could trace into the hands of the society as actually existing assets, & on this footing the members of the society & the depositors were entitled to rank *pari passu* in the distribution of the assets, in proportion to the amounts properly credited to them in respect of their advances.

The difficulty of establishing a title *in rem* in this case arises from the apparent difficulty of following money. In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease *ipso facto* to be the subjects of specific title as chattels. If a sovereign or bank note be offered in payment it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such a kind form part of what the law recognises as currency, & treats as passing from hand to hand in point not merely of possession, but of property. It would cause great inconvenience to commence if in this class of chattel an exception were not made to the general requirement of the law as to title. But the exception is not extended beyond the limits which necessity imposes. If money in a bag is stolen, & can be identified in the form in which it was stolen, it can be recovered *in specie*. Even if it has been expended by the person who has wrongfully taken it in purchasing some particular asset, that asset, if capable of being earmarked as purchased with the money, can be claimed by the true owner of the money. This is a principle not merely of equity, but of the common law (LORD HALDANE, C.).—SINCLAIR *v.* BROUGHAM, [1914] A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315; 58 Sol. Jo. 302, H. L.; *varying* S. C. *sub nom. Re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY, [1912] 2 Ch. 183, C. A.

Annotations:—**Consd.** Banque Belge *v.* Hambrouck, [1921] 1 K. B. 321. **Refd.** James Roscoe (Bolton) *v.* Winder, [1915] 1 Ch. 62; Hammerton *v.* Dysart, [1916] 1 A. C. 57; John *v.* Dodwell, [1918] A. C. 563; Dominion Coal Co. *v.* Maskinonge S.S. Co., [1922] 2 K. B. 132; Holt *v.* Markham, [1923] 1 K. B. 504; Cantiare San Rocco, S. A. *v.* Clyde Shipbuilding & Engineering Co., [1924] A. C. 226. **Mentd.** Brougham *v.* Dwyer (1913), 108 L. T. 504; Leslie *v.* Sheill, [1914] 3 K. B. 607; Kensington & Knightsbridge Electric Lighting Co. *v.* Notting Hill Electric Lighting Co. (1918), 87 L. J. K. B. 565; Boston Corpn. *v.* Fenwick (1923), 129 L. T. 766; Bowling *v.* Cox, [1926] A. C. 751.

9. —— ——.] — Deft. H., having possessed himself of crossed cheques which were drawn on pltf. bank in his favour & which purported to be drawn by his employer's authority defrauded his employer by paying them into a bank, which collected them & credited H. with the amounts. H. drew out these amounts & paid some of the money without valuable consideration to deft. S., who in turn paid into her account with deft. bank a portion of what she so received. S. had no notice of any defect in H.'s title, & she never paid into her account with deft. bank any money except money which was part of the proceeds of H.'s frauds. In an action for a declaration that the money standing to the credit of S. with deft. bank was the property of pltf. bank:—*Held:* on the assumption that H. obtained a voidable title to the proceeds of the cheques, yet pltf. bank had established their right to the money claimed, as it was capable of being traced.—BANQUE BELGE POUR L'ETRANGER *v.* HAMBROUCK, [1921] 1 K. B. 321; 90 L. J. K. B. 322; 37 T. L. R. 76; 65 Sol. Jo. 74; 26 Com. Cas. 72, C. A.

Annotation:—**Refd.** Jones *v.* Waring & Gillow, [1925] 2 K. B. 612.

10. —— —— **Money held in fiduciary capacity.**]—If money held by a person in a fiduciary capacity, though not as a trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, & has a charge on the balance in the bankers' hands.—*Re* HALLETT'S ESTATE, KNATCHBULL *v.* HALLETT (1880), 13 Ch. D. 696; *sub nom. Re* HALLETT'S ESTATE, KNATCHBULL *v.* HALLETT, COTTERELL *v.* HALLETT, 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732, C. A.

Annotations:—**Consd.** *Re* Mawson, *Ex p.* Hardcastle (1881), 44 L. T. 523. **Distd.** New Zealand & Australian Land Co. *v.* Watson (1881), 7 Q. B. D. 374. **Consd.** Collins *v.* Stimson (1883), 11 Q. B. D. 142. **Apld.** *Re* Murray, Dickson *v.* Murray (1887), 57 L. T. 223. **Consd.** Hancock *v.* Smith (1889), 41 Ch. D. 456. **Distd.** Ellis *v.* Goulton, [1893] 1 Q. B. 350. **Consd.** *Re* Hallett, *Ex p.* Blane, [1894] 2 Q. B. 237. **Distd.** Wilsons & Furness-Leyland Line *v.* British & Continental Shipping Co. (1907), 23 T. L. R. 397. **Consd.** Sinclair *v.* Brougham, [1914] A. C. 398. **Apld.** *Re* Dacre, Whitaker *v.* Dacre (1915), 85 L. J. Ch. 274. **Consd.** James Roscoe (Bolton) *v.* Winder, [1915] 1 Ch. 62; Banque Belge Pour L'Etranger *v.* Hambrouck, [1921] 1 K. B. 321. **Refd.** Kirkham *v.* Peel (1880), 43 L. T. 171; Marten *v.* Rocke, Eyton (1885), 53 L. T. 946; *Re* Miller, *Ex p.* Official Receiver, [1893] 1 Q. B. 327; *Re* Stenning, Wood *v.* Stenning, [1895] 2 Ch. 433; *Re* Wreford, Carmichael *v.* Rudkin (1897), 13 T. L. R. 153; Moss *v.* Hancock (1899), 2 Q. B. 111; Mutton *v.* Peat (1900), 82 L. T. 440; *Re* Oatway, Hertslet *v.* Oatway, [1903] 2 Ch. 356; Davis *v.* Petrie, [1906] 2 K. B. 786. **Mentd.** Harris *v.* Truman (1881), 7 Q. B. D. 340; Lyell *v.* Kennedy (1887), 18 Q. B. D. 796; Cory *v.* Turkish Steamship Mecca, The Mecca, [1897] A. C. 286; Grunnell *v.* Welch, [1905] 2 K. B. 650; *Re* St. Mark's, Wimbledon, Wimbledon *v.* Eden, [1908] P. 167; Burdett *v.* Horne & Horne (1911), 27 T. L. R. 402; Galula *v.* Pintus (1911), 104 L. T. 574; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25; *Re* Hodgson's Trusts, Public Trustee *v.* Milne, [1919] 2 Ch. 189.

Trust funds.]—*See* TRUSTS.

—— ——.]—*See, also,* AGENCY, Vol. I., pp. 562–566, Nos. 2094–2119; BANKERS, Vol. III., pp. 185, 186, Nos. 359–365; BANKRUPTCY, Vol. V., pp. 719–722, Nos. 6261–6281; BUILDING SOCIETIES, Vol. VII., p. 493, No. 236; EXECUTORS, Vol. XXIII., pp. 427–434.

Part II.—Currency and Rate of Exchange.

SECT. 1.—WHAT IS CURRENCY.

In England.]—*See, generally,* Coinage Act, 1870 (c. 10), Coinage Act, 1891 (c. 72); CONTRACT, Vol. XII., pp. 328, 329, Nos. 2733–2739.

—— **Bank notes.**]—*See* Bank of England Act, 1833 (c. 98), s. 6; BANKERS, Vol. III., pp. 129, 130, Nos. 52–55.

—— **Treasury notes.**]—*See* Currency & Bank Notes Act, 1914 (c. 14).

11. Abroad—Notes issued by recognised government.]—The only question in the case was what at the present time was Russian currency. It was really a question rather for the Foreign Office than for a judge, but he must give the best opinion that he could on it. In his view metal coinage was excluded. The Imperial rouble notes were currency; & as the Kerensky Govt. was a successor of the Tsar's Govt., &, while it was in existence, was recognised throughout Russia & by our own Govt., he thought that Kerensky notes also must be considered currency. Bolshevist notes were on a different footing; the Bolshevist Govt. had never exercised authority over the whole country & had never been recognised by England; he thought, therefore, that Bolshevist notes must be ruled out. The result was that defts. must pay in London such a sum in English currency as was represented by the number of roubles held by them, treating both Imperial notes & Kerensky notes, at the respective values, as Russian currency (BAILHACHE, J.).—LINDSAY, GRACIE & Co. *v.* RUSSIAN BANK FOR FOREIGN TRADE (1918), 34 T. L. R. 443.

12. —— Treasury notes made legal tender by foreign government.]—In an action brought to administer the trusts of a fund settled by an indenture dated Mar. 23, 1887, an inquiry was ordered whether the persons who had become entitled on the death of the tenant for life, who died on Jan. 19, 1920, to shares of the trust fund, which was represented by a fund in ct., had encumbered their shares. The master by his certificate, dated Nov. 24, 1922, found that F. had not encumbered her share, that Edwin von B. had absolutely assigned his share to M., who, on Nov. 23, 1911, had assigned it by way of mtge. to a Dutch bank to secure the repayment of a sum of German reichsmarks, & that Egon von B. had, on Feb. 12, 1906, also assigned by way of mtge. his share to another Dutch bank to secure the repayment of a sum of German reichsmarks. The master further found that there were due to the Dutch banks certain sums in German reichsmarks. On further consideration the ct. was asked to apportion the mtge. security in the proper proportions between the mtgors. & mtgees., & it was therefore necessary to convert the sums found due in reichsmarks into English currency. At the date of the execution of the mtges. the creditors could under German law have insisted on payment in gold, but by a German Imperial Statute of Aug. 4, 1924, it was provided that Imperial Treasury notes should be legal tender & that any agreement made before July 31, 1914, for the payment of any debt in gold should, until further order, not be binding on the debtor, & no further order had been made:—*Held:* (1) the loans were loans of foreign money, involving on the one side an obligation to pay, & on the other side an obligation to accept payment in whatever at the date of repayment was legal tender & legal currency in the foreign country whose money was lent, & the covenants to pay specified sums in reichsmarks were satisfied under the German law now in force, by the payment in Treasury notes of sums so specified. (2) The date for the conversion of the sums of money found due in marks into English currency was the date of the master's certificate.—*Re* CHESTERMAN'S TRUSTS, MOTT *v.* BROWNING, [1923] 2 Ch. 466; 93 L. J. Ch. 263; 130 L. T. 109, C. A.

Annotations:—As to (1) **Apld.** Anderson *v.* Equitable Assoc. Soc. of United States (1926), 134 L. T. 557. *As to* (2) **Reid.** Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451.

SECT. 2.—CURRENCY IN WHICH DEBT PAYABLE.

SUB-SECT. 1.—IN GENERAL.

13. Document drawn in Ireland — Sum in sterling.]—A bill drawn in Ireland for £256 18*s.* sterling payable in England will be taken to mean English money.—TAYLOR *v.* BOOTH (1824), 1 C. & P. 286, N. P.

14. —— ——.] — R. became a partner in a mercantile house in Ireland, in the year 1801, & having no ready money to bring into the firm, & being in London, he obtained from N. & co., London bankers', a credit for £10,000, by giving them his bonds, with warrants of attorney to confess judgments to secure the payment of the loan. Four bonds, drawn on Irish stamps by the London bankers' law agent in Ireland, were executed there by R., who resided in Ireland, & had large estates there, & none elsewhere. Each of the bonds was expressed to be for the sum of £5,000, conditioned for the payment of £2,500 "sterling, good & lawful money of Great Britain, with legal interest." The last of them was payable in Mar. 1804. The warrant of attorney to each bond was expressed to be to confess a judgment upon a bond for £5,000 "sterling, good & lawful money of Great Britain, with legal interest of like lawful money of Great Britain." The judgments were entered up in the Ct. of K. B., in Dublin, in the usual form, & had the word sterling only. The £10,000 put to R.'s credit, in the London bank, was applied in paying, in London,

PART II. SECT. 1.

a. *Whether dollars & cents—Within* 2 *Geo.* 4, *c.* 13.]—Dollars & cents are not New York currency within 2 Geo. 4, c. 13.—PHINNY *v.* STEVENSON (1841), 1 U. C. R. 428.—**CAN.**

PART II. SECT. 2, SUB-SECT. 1.

13 i. *Document drawn in Ireland—Sum in sterling.*]—In the case of a lease made before the assimilation of the currency:—*Held:* notwithstanding the words "sterling currency of Great Britain," the rent was payable in Irish currency only.—WHELAN *v.* ANNESLEY (1841), 1 Leg. Rep. 309.—**IR.**

b. *Covenant made in Toronto—Debt in dollars.*]—Defts. in Toronto covenanted to pay $516 in New York, on Aug. 20, 1858, which they failed to do, & when sued here in 1865, they claimed to pay in American currency at par, though in the meantime it had become very much depreciated:—*Held:* pltfs. were entitled to the equivalent of the $516 in New York on the day of payment, with interest.—MASSACHUSETTS HOSPITAL *v.* PROVINCIAL INSURANCE CO. (1866), 25 U. C. R. 613.—**CAN.**

c. *Tender in Spanish dollars—Covenant to pay in English currency.*] — A tender of payment in Spanish dollars at five shillings each is not sufficient, where the party has covenanted for payment in lawful money of

Sect. 2.—Currency in which debt payable: Sub-sects.

by R.'s direction, bills drawn by his partners in Ireland. Payments on account were made by R. & his agents to N. & co.'s law agent in Dublin, in Irish currency, & he acknowledged these payments. The assignee of the securities, several years after, filed a bill in Ireland, against R.'s heir-at-law & exor., claiming full principal & interest; & thereupon a question was raised, whether the debt was to be repaid in English or Irish currency, & with English or Irish interest :—*Held:* the sums secured by the bonds should be treated as principal money of English currency, bearing English interest, payable in London, with exchanges on the payments made by R. on foot of the bonds at the rate of the day on which such payments were made.—NOEL *v.* ROCHFORT (1836), 4 Cl. & Fin. 158; 10 Bli. N. S. 483; 7 E. R. 59, H. L.

15. Salary payable at such place & in such manner as directed—Unpaid bills drawn in foreign currency—Claim in liquidation in English currency.]—By an agreement entered into in England between the manager of a co. carrying on business in Chile & the co. it was provided that he should be paid an annual salary, at the rate of £1,000 sterling, by monthly payments, "at such place or places & in such manner as he may direct." The manager, while the co. was carrying on business, drew bills upon them from time to time for the monthly payments of his salary payable in Chile in Chilian dollars, in an amount of dollars that would at those dates, at the then rate of exchange, be equivalent to the amount of his sterling claim. These drafts were not paid by the co.; & on the co. subsequently going into liquidation the manager claimed to prove in the liquidation for the amounts of the unpaid instalments calculated in pounds sterling, the rate of exchange having fallen since the dates when the bills were drawn :—*Held:* the co. not having paid the manager in the manner in which he "directed" by drawing the bills, his position was that of a person whose salary, at the rate of £1,000 *per annum*, was unpaid; & he was entitled to prove for his unpaid salary at the sterling rate.—*Re* TALTAL CHILE NITRATE CO., LTD. (1895), 73 L. T. 422; 12 T. L. R. 47, C. A.

16. Mortgage debt — Money of same kind as that lent.]—An English bank obtained a loan from a Russian bank on the security of certain bonds. A question having arisen upon the construction of the contract whether the loan was repayable in roubles or in sterling, the borrowers commenced an action against the lenders in the K. B. Div., which was transferred to the Commercial Ct., claiming a declaration that they were entitled to the possession of the bonds upon payment of the amount of the loan in roubles, & an injunction restraining the lenders from parting with the bonds save by delivery of the same to the borrowers against such payment. The judge held, upon the construction of the correspondence as pleaded, that the loan was repayable in sterling & dismissed the action. The Ct. of Appeal, after allowing an amendment which let in some further correspondence, declared that the loan was repayable in roubles, & gave liberty to the borrowers to take proceedings in the Ch. Div. to redeem their securities, but granted no further relief in the action :—*Held:* the loan was repayable in roubles, &, notwithstanding that the action, being an action for relief which was incidental to a redemption action, was brought in the wrong ct., there was in the circumstances no ground for interfering with the discretion of the Ct. of Appeal in making the declaration or in allowing the amendment.—RUSSIAN COMMERCIAL & INDUSTRIAL BANK *v.* BRITISH BANK FOR FOREIGN TRADE, LTD., [1921] 2 A. C. 438; 90 L. J. K. B. 1089; 126 L. T. 35; 37 T. L. R. 919; 65 Sol. Jo. 733, H. L.

Annotations:—**Mentd.** Prosperity *v.* Lloyds Bank (1923), 39 T. L. R. 372; Public Trustee *v.* Elder, [1926] Ch. 776.

17. —— ——.]— Pltfs., a British bank, obtained from defts., a Russian bank, on the security of certain bonds, a loan of 750,000 Russian roubles, in June, 1914, when the currency was based on the gold rouble. At that time 750,000 Russian roubles represented £78,206, but subsequently they became almost valueless owing to the issue of paper currency uncovered by gold. In an action for redemption :—*Held:* the loan was repayable in paper roubles issued by the authority of the Russian Govt. & in use at the material date, & upon payment of the principal & interest in roubles & of the costs in English money pltfs. were entitled to redemption.

If he [the mtgor.] made repayment in full in the kind of money actually advanced to him—paper roubles issued by the authority of the Russian Govt.—it did not matter whether that paper money was legal tender in or out of Russia. . . . A further defence was that the debt was repayable at expiration of nine months from the date of the loan, & that from that date pltfs. were in default & could only redeem by payment of a sum equivalent to the value of 750,000 roubles at the rate of exchange current at that date. . . . Pltf. could not have been called upon to repay except in exchange for their securities, which being in Belgium could not be forthcoming. . . . The authorities as to the date when rate of exchange has to be taken, which had been cited, did not apply. . . . Defts. said pltfs. in a redemption action sought equitable relief & must act equitably . . . & in my opinion in the case of a loan of paper roubles the risk of depreciation or the benefit of appreciation lies with the lender (RUSSELL, J.). —BRITISH BANK FOR FOREIGN TRADE, LTD. *v.* RUSSIAN COMMERCIAL & INDUSTRIAL BANK (1921), 38 T. L. R. 65.

Annotations:—**Consd.** Anderson *v.* Equitable Life Assce. Soc. of United States (1926), 134 L. T. 557. **Reid.** *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466.

SUB-SECT. 2.—MONEY CHARGED ON LAND.

18. Instrument made in England—Portions out of land in Ireland.]—PHIPPS *v.* ANGLESEA (EARL) (1721), 1 P. Wms. 696; 2 Eq. Cas. Abr. 220; 24 E. R. 576, L. C.

Annotations:—**Reid.** Lansdowne *v.* Lansdowne (1820), 2 Bli. 60; Noel *v.* Rochfort (1836), 10 Bli. N. S. 483.

19. —— Annuity out of land in Ireland.]—One by will made in England devises an annuity

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Great Britain.—BLADESTON *v.* THOMAS (1823), 1 Nfld. L. R. 334.—**NFLD.**

d. —— ——.]—HANY *v.* GADEN (1823), 1 Nfld. L. R. 298.—**NFLD.**

e. *Sterling.*] — Under the law of tender sterling money cannot be tendered in discharge of demands in currency until their value in respect of one another is fixed & determined by law.—BROOKING *v.* THOMAS (1854), 4 Nfld. L. R. 1.—**NFLD.**

f. *Payment in local currency — Price of goods fixed in foreign currency.*] —When the price of goods sold is given in a foreign currency, in the absence of any term in the contract to the contrary, payment may be made in local currency of the place of payment of a value equivalent to the price agreed upon at the rate of exchange ruling at the date when payment falls due.—BARRY, CALNE & CO. (TRANSVAAL), LTD. *v.* JACKSON'S, LTD., [1922] C. P. D. 372.—**S. AF.**

in trust for his wife out of lands in Ireland, testator & his wife & the trustee residing in England, the annuity shall be paid in England & the estate bear the charge of the return. So if one in England gives by will a legacy out of lands in Ireland the legacy shall be paid in England & in English money. —WALLIS *v.* BRIGHTWELL (1722), 2 P. Wms. 88; 2 Eq. Cas. Abr. 62; 24 E. R. 652, L. C.

Annotation:—**Consd.** Lansdowne *v.* Lansdowne (1820), 2 Bli. 60.

20. —— Rentcharge on land in Ireland.]—Prior to 6 Geo. 4, c. 79, an English lady married an Irish gentleman. By their settlement, which was executed at Bath where the marriage was solemnised, it was recited that the gentleman had agreed to charge certain of his estates in Ireland with the payment of a rentcharge of £1,000 a year to the lady for life in case she should survive him, but the sum secured to her by the deed was expressed to be £1,000 a year sterling lawful money of Ireland:—*Held:* she was entitled to £1,000 a year sterling.—COPE *v.* COPE (1846), 15 Sim. 118; 15 L. J. Ch. 274; 60 E. R. 562.

Annotation:—**Refd.** Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910.

21. Instrument made out of England — Annuity charged on land in Ireland.]—Testator by his will made in Ireland prior to 6 Geo. 4, c. 79, bequeaths an annuity & dies domiciled in England after that Act was passed. The annuity is to be paid according to the rate of Irish currency.—HOLMES *v.* HOLMES (1830), 1 Russ. & M. 660; 8 L. J. O. S. Ch. 157; 39 E. R. 253.

22. —— ——.] — Lands in Ireland were charged with a sum of £5,000 "lawful money of Ireland." 6 Geo 4, c. 79, was passed subsequently & afterwards the money became raisable:—*Held:* the money must be paid in Irish currency, according to the direction of 6 Geo. 4, c. 79. In this case before the parties must have had some meaning & some intention when they say "lawful money of Ireland." I apprehend that they could mean nothing but this, that the £5,000 was to be paid according to the value of the Irish currency (WOOD, V.-C.).—BOURNE *v.* HARTLEY, BOURNE *v.* MAHON (1854), 2 Eq. Rep. 910; 23 L. T. O. S. 219; 18 Jur. 532.

23. —— Portions partly payable out of land in Ireland.]—A settlement was made in Ireland of estates some of which were situate there & the rest in England by which the estates were limited to trustees for a term of years for raising at a future time £10,000 for portions; & interest at £5 per cent. was to be raised out of the rents for the children's maintenance in the meantime; but the settlement was silent as to the rate of interest or the portions after they became payable:—*Held:* the £10,000 must be raised in Irish currency; but not with Irish interest but 4 per cent. according to the usual course of the ct.—YOUNG *v.* WATERPARK (LORD) (1842), 13 Sim. 199; 11 L. J. Ch. 367; 6 Jur. 656; 60 E. R. 77; *on appeal* (1845), 15 L. J. Ch. 63.

Annotations:—**Distd.** Balfour *v.* Cooper (1883), 23 Ch. D. 472. **Mentd.** Cox *v.* Dolman (1852), 2 De G. M. & G. 592; Hughes *v.* Williams, Chappell *v.* Rees (1852), 16 Jur. 415; Petre *v.* Petre (1853), 1 Drew. 371; Mansfield *v.* Ogle (1855), 1 Jur. N. S. 414; Snow *v.* Booth (1856), 2 Jur. N. S. 244, n.; Blower *v.* Blower (1858), 5 Jur. N. S. 33; Burrowes *v.* Gore (1858), 6 H. L. Cas. 907; Knight *v.* Bowyer (1858), 2 De G. & J. 421; Lewis *v.* Duncombe (No. 2) (1861), 29 Beav. 175; Round *v.* Bell (1861), 31 L. J. Ch. 127; Bulteel *v.* Plummer (1870), 6 Ch. App. 160; *Re* Jordison, Raine *v.* Jordison, [1922] 1 Ch. 440.

24. —— Portions payable out of land in Ireland.]—By a deed of settlement B. was empowered to charge certain lands in Ireland with any sum not to exceed £400 a year as jointure for his wife & with any sum not to exceed £2,000 sterling for his younger children. In exercise of the power B. charged the lands with £2,000 late Irish currency to be vested in & paid to his younger children in equal shares on their attaining twenty-one or marriage & he directed in the event of his dying before the shares became vested that his said children should be entitled to interest on their presumptive portions at 5 per cent. by way of maintenance from the time of his death until such portions should be payable:—*Held:* the £2,000 carried interest at 5 per cent. Irish currency from the death of B. until the shares of the younger children became payable.—DENNY *v.* DENNY (1866), 14 L. T. 854.

25. Currency indicated in instrument — Rentcharge on land in Ireland.]—Power in a marriage settlement to grant to a wife any annual sum of money, or yearly rentcharge to be tax free, & without any deduction, & to be issuing out of any chargeable upon lands in Ireland, so that such rentcharge do not exceed, in the whole, the yearly sum of £3,000 of lawful money of Great Britain:—*Held:* a rentcharge appointed under this power was payable in Ireland in the currency of England, but the appointee was not entitled to have the sum transmitted to England free of the charge of conveyance & exchange properly so called. The *lex loci contractus* & the law applicable to cases of money charged as a rent payable out of land, where no provision as to the place of payment was made by the instrument, were inapplicable to a case where the instrument itself furnished the means of interpretation.—LANSDOWNE (MARCHIONESS) *v.* LANSDOWNE (MARQUIS) (1820), 2 Bli. 60; 4 E. R. 250.

Annotations:—**Apld.** Noel *v.* Rochfort (1836), 10 Bli. N. S. 483. **Refd.** Cope *v.* Cope (1846), 15 Sim. 118; Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910. **Mentd.** Powys *v.* Blagrave (1854), Kay, 495; Sawyer *v.* Goodwin (1867), 36 L. J. Ch. 578; Peek *v.* Gurney (1873), L. R. 6 H. L. 377; Phillips *v.* Homfray (1883), 24 Ch. D. 439.

26. —— Mortgage on colonial land.] — A., resident at Amsterdam, being possessed of property in Essequibo, in British Guiana, sold it to B., & took, as part of the consideration money, a first mtge. for 100,000 guilders "Holland currency," with interest at the rate of 5 per cent. The terms of the mtge. were, that the 100,000 guilders were not to be paid during the life of A., but, upon her death, to her descendants, if she had any, &, if not, to the nephews & nieces of J.; but there was a special condition that, if at any time the interest should not be punctually paid every year in Amsterdam, & A. should be obliged to appoint an attorney to demand the same in the colony, the interest in that case should be at the rate of 6 per cent., instead of 5. The interest was allowed to fall in arrear, & A. appointed an attorney to recover it in the colony. A. married, & died in the year 1828, without leaving any descendants, at which time the interest was in arrear more than two years. In 1836 appcts. purchased this first mtge. together with all interest due thereon, from persons, who, by a decree of the ducal tribunal of Overgonne, the proper ct. for that purpose, were declared to be the attorneys of the persons described as the nephews & nieces of J. The consideration money paid by appcts. was not within several thousand pounds of the amount then due upon the mtge., including interest. In 1837 appcts. received from the slave comrs., in respect of the first mtge., a sum more than sufficient to repay them what they gave for the mtge., but much less than what was then actually due upon the mtge. In 1838 the mtged. estate was sold, at the suit of a second mtgee., &, in the proceedings

Sect. 2.—Currency in which debt payable: Sub-sects. 2 & 3. Sect. 3: Sub-sects. 1 & 2, A.]

arising out of that suit, it was decided by the Supreme Ct. of Civil Justice in the colony that the second mtgee. was preferent over the first, & rejected the claims of appcts. The decision of the ct. below was founded upon the supposition that the *Lex Anastasiana*, by which an assignee for valuable consideration of a debt cannot recover more than the consideration which he actually paid to the assignor, with legal interest from the time of payment, & that the debt was settled by the money received from the slave comrs.:—*Held:* (1) in the absence of any fraud by appcts. in the purchase of the mtge., & in the absence of any authority to show that the *Lex Anastasiana* prevails in the colony, the amount of consideration-money given by appcts. was not to enter into the question.

(2) The operation of the condition for increasing the interest from 5 to 6 per cent. was not limited to the lifetime of A., but circumstances might make it inequitable to increase the rate of interest after the death of A., or during some portion of time after A.'s death.

(3) By the term "Holland currency" coupled with the fact that it was to be paid in Amsterdam, meant Dutch currency, & not colonial currency.—MACRAE *v.* GOODMAN (1846), 5 Moo. P. C. C. 315; 10 Jur. 555; 13 E. R. 512, P. C.

Legacy charged on lands.]—*See* Sect. 2, *post.*

SUB-SECT. 3.—LEGACY.

27. Legacy charged on land out of England—Will in England.]—WALLIS *v.* BRIGHTWELL, No. 19, *ante.*

28. No currency specified—Other legacies in specified currency.]—Testator who lived in Jamaica gave legacies to be paid in sterling money in the first place, & the two legacies immediately following, generally, without saying in sterling money, & at the end of his will several more to be paid in sterling money:—*Held:* pltf. must take his legacy in Jamaican money, for his expressing himself differently showed a different intention.—SAUNDERS *v.* DRAKE (1742), 2 Atk. 465; 26 E. R. 681, L. C.

Annotations:—**Folld.** Malcolm *v.* Martin (1790), 3 Bro. C. C. 50. **Distd.** Lansdowne *v.* Lansdowne (1820), 2 Bli. 60. **Refd.** Bourke *v.* Ricketts (1804), 10 Ves. 330.

29. —— ——.]—Legacies, no fund being described, to be paid in the currency of the country where the will is made.—PIERSON *v.* GARNET (1786), 2 Bro. C. C. 38; 29 E. R. 20; *on appeal* (1787), 2 Bro. C. C. 226, L. C.

Annotations:—**Apld.** Lansdowne *v.* Lansdowne (1820), 2 Bli. 60. **Refd.** Malcolm *v.* Martin (1790), 3 Bro. C. C. 50; Bourke *v.* Ricketts (1804), 10 Ves. 330. **Mentd.** Clarke *v.* Blake (1788), 2 Bro. C. C. 320; Sprange *v.* Barnard (1789), 2 Bro. C. C. 585; Malin *v.* Keighley (1795), 2 Ves. 529; Pushman *v.* Filliter (1795), 3 Ves. 7; Brown *v.* Higgs (1803), 8 Ves. 561; Morice *v.* Durham (Bp.) (1805), 10 Ves. 522; Kirkbank *v.* Hudson (1819), Dan. 259; Heneage *v.* Andover (1822), 10 Price, 230; Wright *v.* Atkyns (1823), Turn. & R. 143; Foley *v.* Parry (1833), 2 My. & K. 138.

30. —— ——.]—Testator living in Antigua gave legacies described to be sterling; then another without that description, the interest to be paid to the children of J. G. & L. for life, then the principal to be divided among the grandchildren:—*Held:* the legacy was only a legacy of current money of Antigua.—MALCOLM *v.* MARTIN (1790), 3 Bro. C. C. 50; 29 E. R. 402.

Annotations:—**Refd.** Bourke *v.* Ricketts (1804), 10 Ves. 330. **Mentd.** Taniere *v.* Pearkes (1825), 2 Sim. & St. 383; Pearce *v.* Edmeades (1838), 3 Y. & C. Ex. 246; Arrow *v.* Mellish (1847), 1 De G. & Sm. 355; Doe d. Patrick *v.* Royle (1849), 13 Q. B. 100; Abrey *v.* Newman (1853), 16 Beav. 431; Penny *v.* Allen (1857), 3 Jur. N. S. 273; Wills *v.* Wills (1875), L. R. 20 Eq. 342.

SECT. 3.—RATE OF EXCHANGE.

SUB-SECT. 1.—IN GENERAL.

31. Value of foreign money lessened by act of government—Whether binding on British subject.]—DU COSTA *v.* COLE (1688), Skin. 272; 90 E. R. 123.

32. Rate fixed by foreign government—Whether binding where commercial rates also quoted.]—Upon the construction of a charterparty made in London between parties in London, whereby a steamship was chartered for a voyage from Buenos Aires to Antwerp, dispatch money & commission payable on loading the ship were payable in sterling:—*Held:* the place of payment for both dispatch money & commission on freight was English, the rate of exchange at which the amount of dispatch money & commission should be inserted on a ship's account made out in Buenos Aires was the commercial rate of exchange of the day for converting English money into Argentine money, & the legal unit established by the Argentine Monetary Law, fixing the rate of exchange for the English sovereign at $5.04 gold did not compel owners in England to pay charterers also in England a higher rate for moneys payable on loading at Buenos Aires than the current commercial rate.—ATLANTIC SHIPPING & TRADING CO. *v.* DREYFUS (LOUIS) & CO. (NO. 2), STATHATOS & CO. *v.* DREYFUS (LOUIS) & CO. (1922), 91 L. J. K. B. 518; 127 L. T. 415; 38 T. L. R. 556; 15 Asp. M. L. C. 570, H. L.

33. Legacy—Expressed in foreign currency—In foreign country.]—Legacy in a foreign country & coin as sicca rupees by a will in India; if paid by remittance to this country the payment must be according to the current value of the rupee in India without regard to the exchange or the expense of remittance. So as to other countries.—COCKERELL *v.* BARBER (1810), 16 Ves. 461; 33 E. R. 1059, L. C.

Annotations:—**Refd.** Sluysken *v.* Hunter (1815), 1 Mer. 40; Manners *v.* Pearson, [1898] 1 Ch. 581.

34. —— —— **Payable out of assets in England.**]—Testator, domiciled in Jamaica, gave legacies in Jamaica currency to J., H., & M., persons also domiciled in that island, & desired them to be paid out of money due to him on certain bonds which the will specified. At his death, which happened in Scotland in 1790, no such bonds were to be found; but J. was then indebted to his estate upon other bonds, in a sum which exceeded the value of his legacy, & which, a year after testator's death, including interest, was equal to the amount of the penalties. In 1794, actions were brought in Jamaica upon those

PART II. SECT. 3, SUB-SECT. 1.

g. Debt—Date on which rate of exchange is fixed—Whether date of payment.]—Where a payment originating in one country is to be made in another country, & the currency denomination specified is the same in both countries, *e.g.*, United States & Canada, the rule is that the payment must be made in the currency of the country where the money is payable unless by express terms or necessary implication payment in some other currency is required, & the rate of exchange must be taken as that of the date on which payment should have been made.—SIMMS *v.* CHERNENKOFF, [1922] 1 W. W. R. 967; 62 D. L. R. 703; 15 Sask. L. R. 185.—**CAN.**

h. —— *Contracted & payable in Germany.*]—FERGUSON (N. G.) & CO. LTD. *v.* BROWN & TAWSE, [1917] 2 S. L. T. 2.—**SCOT.**

j. Execution decree—Rate of exchange fixed by Secretary of State for

bonds, by testator's personal representative there, & judgments recovered against J. for the full penalties & costs; but no attempt was made to levy execution upon the judgments, & they remained unsatisfied. About the time of testator's death the legatees came to England, & never returned to Jamaica, nor did any of them set up a claim to their legacies prior to the year 1817. In the year 1818 H. & M. assigned their respective legacies to pltf., who was the personal representative of J., the other legatee; & he, in the year 1821, when administration was for the first time taken out to testator's estate in England, filed the bill for the purpose of enforcing payment:—*Held:* as they were payable out of assets in this country, their value was to be computed according to the standard par of exchange between Jamaica & British currency, & not according to the actual rate, at the time of payment.—CAMPBELL *v.* GRAHAM (1831), 1 Russ. & M. 453; 9 L. J. O. S. Ch. 234; 39 E. R. 175, L. C.; *on appeal, sub nom.* CAMPBELL *v.* SANDFORD (1834), 2 Cl. & Fin. 429, H. L.

Annotations:—**Mentd.** Baldwin *v.* Peach (1835), 1 Y. & C. Ex. 453; Grenfell *v.* Girdlestone (1837), 2 Y. & C. Ex. 662; Courtenay *v.* Williams (1844), 3 Hare, 539; Freeman *v.* Dowding (1856), 2 Jur. N. S. 1014; Williams *v.* Hughes (1857), 4 Jur. N. S. 42; Pitt *v.* Dacre (1876), 3 Ch. D. 295; Dingle *v.* Coppen, Coppen *v.* Dingle, [1899] 1 Ch. 726.

-.]—*See, also,* Sect. 2, sub-sect. 3, *ante.*

35. Debt — Contracted in Jamaica — Payable in England.]—Debt contracted in Jamaica, made payable in London. The expense of commission to the agent, remitting the money, falls upon the debtor.—CASH *v.* KENNION (1805), 11 Ves. 314; 32 E. R. 1109, L. C.

Annotations:—**Consd.** Manners *v.* Pearson, [1898] 1 Ch. 581; Lebeaupin *v.* Crispin, [1920] 2 K. B. 714. **Refd.** Bertram *v.* Duhamel (1838), 2 Moo. P. C. C. 212; S.S. Celia *v.* S.S. Volturno, [1921] 2 A. C. 544; Soc. des Hotels du Touquet-Paris-Plage *v.* Cumming, [1921] 3 K. B. 459.

36. —— Contracted & payable in France — Sued for in England—Payment in France in French currency pending action.]—Deft., an English lady, having in 1914 contracted in France a debt to pltfs. of 18,035 francs, undertook to pay that sum to them in France in French money before the end of that year. Deft. did not pay the money within the time specified, & in Nov. 1919, by which date the value of the French franc as expressed in English currency had heavily fallen, pltfs. commenced an action against her in England on a specially indorsed writ claiming the amount of sterling which would have been the equivalent of 18,035 francs at the end of the year 1914. While the action was pending deft. went to France & paid in French money to the then hotel manager of pltfs. the sum of 18,035 francs. The manager, who did not know the amount of deft.'s debt, nor that an action had been begun, did not when taking the money intend to accept it in full satisfaction, & gave deft. a receipt as for money deposited with him. By French law interest is not payable on money due in the absence of an express agreement to pay it. Deft. then pleaded that after action brought she had satisfied pltfs.' claim by payment. On the question whether upon the facts above stated that plea had been established:—*Held:* the debt, being payable in France, in French currency, did not cease to be a French debt by reason of its being sued for in England, & as, if the action had been brought in France, the payment made would have been a good discharge of the debt notwithstanding the depreciation of the French franc as expressed in English currency since the date when the money became due, that payment must equally be a good discharge of the debt for the purposes of the English action; & pltfs. were entitled to recover no more than nominal damages for the non-payment at the due date, & the costs of action down to plea pleaded.—SOCIÉTÉ DES HÔTELS LE TOUQUET-PARIS-PLAGE *v.* CUMMINGS, [1922] 1 K. B. 451; 91 L. J. K. B. 288; 126 L. T. 513; 38 T. L. R. 221; 66 Sol. Jo. 269, C. A.

Annotations:—**Consd.** *Re* British American Continental Bank, Credit General Liegeois' Claim, [1922] 2 Ch. 589; *Re* British American Continental Bank, Lisser & Rosenkraz's Claim, [1923] 1 Ch. 276. **Refd.** Pocahontas Fuel Co., Incorporated *v.* Ambatielos (1922), 27 Com. Cas. 148; *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466; Peyrae *v.* Wilkinson, [1924] 2 K. B. 166.

37. Bill drawn in England—Payable abroad—Dishonoured abroad.]—Where a bill, drawn & endorsed in England, & payable abroad, is dishonoured by the acceptor's non-payment, the holder is entitled, as against the drawer, to the amount of the re-exchange, that is, the value at the rate of exchange on the day of the dishonour, of the sum expressed on the face of the bill in the currency of the place where it is payable, with interest & expenses.

In an action against the drawer on a bill so drawn, accepted & dishonoured:—*Held:* evidence is not admissible to prove a usage among merchants here to entitle the holder, at his option, to demand from the drawer the amount of the re-exchange, or the sum which he gave him for the purchase of the bill, this being a usage which in terms contradict the written instrument.—SUSE *v.* POMPE (1860), 8 C. B. N. S. 538; 30 L. J. C. P. 75; 3 L. T. 17; 7 Jur. N. S. 166; 9 W. R. 15; 141 E. R. 1276.

Annotations:—**Refd.** Willans *v.* Ayers (1877), 3 App. Cas. 133; Manners *v.* Pearson, [1898] 1 Ch. 581; Di Ferdinando *v.* Simon, Smith (1920), 36 T. L. R. 797. **Mentd.** *Re* Commercial Bank of South Australia (1887), 36 Ch. D. 522; *Re* Francke & Rasch (1918), 87 L. J. Ch. 273.

SUB-SECT. 2.—CLAIM OR DAMAGES IN FOREIGN CURRENCY.

A. In General.

38. Whether principle differs for liquidated or unliquidated amounts.]—In an action by a German subject for the balance of an account due for goods sold & delivered to defts. in England the question arose, the original price being in marks, as to the date on which the rate of exchange at which the goods should be paid for should be fixed:—*Held:* the rate of exchange to be taken must be that prevailing on the date on which the debt became due & payable, & not that prevailing on the date of judgment in the action.

In practice, the theory that the rate to be taken should be that prevailing at the date of the judgment would lead to great inconvenience, & it would not be in accordance with the principle adopted in cases of tort or breach of contract (ROWLATT, J.). —ULIENDAHL *v.* PANKHURST, WRIGHT & CO. (1923), 39 T. L. R. 628; *sub nom.* UELLENDAHL *v.* PANKHURST, WRIGHT & Co., 67 Sol. Jo. 791.

Annotations:—**Apld.** Peyrae *v.* Wilkinson, [1924] 2 K. B. 166. **Refd.** *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466.

India.]—PARAM SUKH *v.* RAM DAYAL (1886), I. L. R. 8 All. 650.—**IND.**

k. *Costs in sterling — Conversion into Indian currency—When rate of exchange fixed.*]—In converting into Indian currency the amount of costs expressed in sterling in an order of Her Majesty in Council, the rate of exchange is the rate which prevailed at the time when the order was made.—MAHOMAD ABDUL HYE *v.* GAJRAJ SAHAI (1897), I. L. R. 25 Calc. 283; 2 C. W. N. 89.—**IND.**

Sect. 3.—Rate of exchange: Sub-sect. 2, A., B., C. & D.]

39. Whether principle differs where damages for breach of contract or for tort.]—In an action arising out of a collision between an English ship & an Italian ship both ships were held to blame & the cross-claims for damages were agreed, subject to a question raised by the owners of the Italian ship as to the rate of exchange in respect of a claim calculated in Italian lire for detention during the period that the ship was undergoing repairs :—*Held :* the proper date for ascertaining the rate of exchange for the purpose of converting the amount payable into English currency was the date at which the detention occurred.

A judgment, whether for breach of contract or for tort, where, as in this case, the damage is not continuing, does not proceed by determining what is the sum which, without regarding other circumstances, would at the time of the hearing afford compensation for the loss, but what was the loss actually proved to have been incurred either at the time of the breach or in consequence of the wrong (LORD BUCKMASTER).

In the case of contract no doubt the parties may agree to make an alteration of exchange subsequent to the breach of contract an element in the assessment of damages, but in the absence of any such agreement, the same considerations would be applicable whether the action is based on tort or on contract (LORD PARMOOR).—S.S. CELIA *v.* S.S. VOLTURNO, [1921] 2 A. C. 544 ; 90 L. J. P. 385 ; 126 L. T. 1 ; 37 T. L. R. 969 ; 15 Asp. M. L. C. 374, H. L.

Annotations :—**Apld.** *Re* British American Continental Bank, Credit General Liegeois' Claim, [1922] 2 Ch. 589 ; *Re* British American Continental Bank, Goldzieher & Penso's Claim, [1922] 2 Ch. 575. **Distd.** *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466. **Refd.** *Re* British American Continental Bank, Lisser & Rosenkranz's Claim, [1923] 1 Ch. 276. **Mentd.** Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451.

40. —— Damages continuing.]—S.S. CELIA *v.* S.S. VOLTURNO, No. 39, *ante*.

41. Whether principle applicable to redemption of mortgage.] — BRITISH BANK FOR FOREIGN TRADE, LTD. *v* RUSSIAN COMMERCIAL & INDUSTRIAL BANK, No. 17, *ante*.

42. Special agreement between parties.] — S.S. CELIA *v.* S.S. VOLTURNO, No. 39, *ante*.

B. Liquidated Demand.

43. Whether at time amount due or at date of judgment or trial.]—In trover for billettes paid to pltfs. by the Peruvian Govt. & purporting to be of the value of $16,000 the cause was referred to arbn. & an award having been made in favour of pltf. the ct. ordered the billettes to be valued by the prothonotary at the rate at which they were current at the time of the award :—*Held :* such value was to be estimated as the value of a bill of exchange for the amount of the dollars specified in the billettes upon a solvent house in the country where they were issued although they were at a considerable discount at the time of making the award.—DELEGAL *v.* NAYLOR (1831), 7 Bing. 460 ; 5 Moo. & P. 443 ; 9 L. J. O. S. C. P. 167 ; 131 E. R. 178.

Annotations :—**Consd.** S.S. Celia *v.* S.S. Volturno, [1921] 2 A. C. 544. **Refd.** Manners *v.* Pearson (1898), 46 W. R. 498.

44. ——.]—In an action brought in England to recover the value of a given sum Jamaica currency, upon a judgment obtained in that island ; the value is that sum in sterling money, which the currency would have produced according to the actual rate of exchange between Jamaica & England at the date of the judgment.—SCOTT *v.* BEVAN (1831), 2 B. & Ad. 78 ; 9 L. J. O. S. K. B. 152 ; 109 E. R. 1073.

Annotations :—**Expld. & Apld.** Di Ferdinando *v.* Simon, Smits, [1920] 3 K. B. 409. **Consd.** S.S. Celia *v.* S.S. Volturno, [1921] 2 A. C. 544. **Refd.** Bertram *v.* Duhamel (1838), 2 Moo. P. C. C. 212 ; Manners *v.* Pearson, [1898] 1 Ch. 581 ; Lebeaupin *v.* Crispin, [1920] 2 K. B. 714 ; Soc. des Hôtels du Touquet-Paris-Plage *v.* Cumming, [1921] 3 K. B. 459 ; *Re* British American Continental Bank, Credit General Liegeois' Claim, [1922] 2 Ch. 589 ; Ullendahl *v.* Pankhurst Wright (1923), 39 T. L. R. 628.

45. ——.]—A cheque for 7,680 francs (Paris) is a bill of exchange, being for a sum of money certain or which can be made certain within Bills of Exchange Act, 1882 (c. 61), s. 9 (1) (*d*). The drawer cannot as between himself & an indorsee of the cheque set up an oral agreement between himself & the original payee that the rate of exchange shall be that ruling at the date of the cheque. In an action on such a cheque the rate of exchange at which the amount of the judgment is to be calculated is that ruling at the date of the trial.—COHN *v.* BOULKEN (1920), 36 T. L. R. 767 ; 64 Sol. Jo. 636.

Annotations :—**Expld.** Ullendahl *v.* Pankhurst Wright (1923), 39 T. L. R. 628. **N.F.** Peyrae *v.* Wilkinson, [1924] 2 K. B. 166. **Refd.** *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466.

46. ——.]—Upon a claim in the winding up of a co., a bank, in England for a debt, by way of overdraft, due from the bank to claimants, Belgian co., in Belgium in Belgian currency, the correct date on which that debt ought to be converted into English money for the purpose of ascertaining the amount for which claimants ought to be admitted as creditors is the date when the debt became due in Belgium.—*Re* BRITISH AMERICAN CONTINENTAL BANK, LTD., CREDIT GENERAL LIEGEOIS' CLAIM, [1922] 2 Ch. 589 ; 91 L. J. Ch. 765 ; 127 L. T. 284 ; 38 T. L. R. 464 ; 66 Sol. Jo. 388.

Annotations :—**Refd.** *Re* British American Continental Bank, Lisser & Rosenkranz's Claim, [1923] 1 Ch. 276 ; *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466.

47. ——.]—ULIENDAHL *v.* PANKHURST, WRIGHT & Co., No. 38, *ante*.

48. ——.]—In an action in this country for a debt payable in a foreign currency the debt must be converted into English currency at the rate of exchange prevailing at the date when the debt became due & payable & not at the rate of exchange prevailing at the date of judgment.—PEYRAE *v.* WILKINSON, [1924] 2 K. B. 166 ; 93 L. J. K. B. 121 ; 130 L. T. 511.

See, also, No. 36, *ante*.

Claim in account.]—*See* Sub-sect. 2, E., *post*.

Legacy.]—*See* Sub-sect. 1, *ante*.

C. Damages for Breach of Contract.

49. Whether at date of breach of contract or date of judgment.]—Pltfs., a co. incorporated in the United States of America, carried on business in New York as merchants & exporters of condensed milk. They sold to defts., who carried on business in England, a quantity of condensed milk to be delivered during 1918, payment for which was to be made in dollars. Defts., in alleged breach of the contract, refused to accept & pay for a certain number of cases of milk.

PART II. SECT. 3, SUB-SECT. 2.—B.

43 i. *Whether at time amount due or at date of judgment or trial.*]—QUARTIER *v.* FARAH (1921), 64 D. L. R. 37 ; 49 O. L. R. 186.—CAN.

PART II. SECT. 3, SUB-SECT. 2.—C.

49 i. *Whether at date of breach of contract or date of judgment.*]—MADHAVJI VISRAM THACKER *v.* RAMNIKEL VADILAL (1921), I. L. R. 47 Bom. 487.—IND.

49 ii. ——.]—In cases of breach of

The rate of exchange between England & America had varied considerably between the date of the alleged breach of contract & the date of the judgment in the action :—*Held :* there had been no breach of contract, & therefore, no question of damages arose.—KIRSCH & Co. *v.* ALLEN, HARDING & Co., LTD. (1920), 89 L. J. K. B. 265 ; 123 L. T. 105 ; 36 T. L. R. 245 ; 25 Com. Cas. 174, C. A.

Annotations :—**N.F.** Di Ferdinando *v.* Simon, Smits, [1920] 3 K. B. 409 ; Lebeaupin *v.* Crispin, [1920] 2 K. B. 714. **Dbtd.** *Re* British American Continental Bank, Lisser & Rosenkranz's Claim, [1923] 1 Ch. 276. **Refd.** Barry *v.* Van den Hurk, [1920] 2 K. B. 709 ; S.S. Celia *v.* S.S. Volturno, [1921] 2 A. C. 544.

50. ——.] — Where, upon the breach of a contract the person in default, whether seller or buyer, becomes liable for the payment of a sum of money in a foreign currency, the damages, for the purposes of an English judgment, must be assessed as at the date of the default, & the sum payable must be converted into English currency according to the rate of exchange prevailing at that date.—BARRY *v.* VAN DEN HURK, [1920] 2 K. B. 709 ; 89 L. J. K. B. 899 ; 123 L. T. 719 ; 36 T. L. R. 663 ; 64 Sol. Jo. 602.

Annotations :—**Apprvd.** Di Ferdinando *v.* Simon, Smits, [1920] 3 K. B. 409. **Foll.** Lebeaupin *v.* Crispin, [1920] 2 K. B. 714. **Refd.** S.S. Celia *v.* S.S. Volturno, [1921] 2 A. C. 544 ; *Re* British American Continental Bank, Goldzieher & Penso's Claim, [1922] 2 Ch. 575.

51. ——.] — By each of two contracts, each dated May 16, 1917, C. & Co. sold to L. 2,500 cases of "British Columbia Fraser river salmon." No deliveries having been made under the contracts, the buyer claimed damages, & the umpire awarded him 12,500 dollars, to be paid in London at the rate of exchange ruling at the date of the award, namely, Feb. 24, 1920 :—*Held :* the damages, assessed at 12,500 dollars, were payable in London at the rate of exchange ruling upon the date of the breach of contract, namely, Sept. 30, 1917, & not at the rate ruling at the date of the award.—LEBEAUPIN *v.* CRISPIN (R.) & Co., [1920] 2 K. B. 714 ; 89 L. J. K. B. 1024 ; 124 L. T. 124 ; 36 T. L. R. 739 ; 64 Sol. Jo. 652 ; 25 Com. Cas. 335.

Annotations :—**Apprvd.** Di Ferdinando *v.* Simon, Smits, [1920] 3 K. B. 409. **Refd.** S.S. Celia *v.* S.S. Volturno, [1921] 2 A. C. 544 ; *Re* British American Continental Bank, Goldzieher & Penso's Claim, [1922] 2 Ch. 575.

52. ——.] — Defts. contracted to carry goods for pltf. from this country to Italy & deliver them there on Feb. 10, 1919, but in breach of their contract failed to do so, & converted the goods. In an action by pltf. the ct. fixed the damages as the value of the goods in Italy on Feb. 10, namely, 190 lire per 100 lbs. :—*Held :* in arriving at the proper equivalent in British currency for the purposes of assessing these damages, the rate of exchange prevailing between the two countries on Feb. 10, 1919, when the breach was committed, & not that prevailing at the date of the judgment, should be adopted.—DI FERDINANDO *v.* SIMON, SMITS & Co., LTD., [1920] 3 K. B. 409 ; 89 L. J. K. B. 1039 ; 124 L. T. 117 ; 36 T. L. R. 797 ; 25 Com. Cas. 37, C. A.

Annotations :—**Apld.** Soc. des Hôtels du Touquet-Paris-Plage *v.* Cumming, [1921] 3 K. B. 459. **Consd.** S.S. Celia *v.* S.S. Volturno, [1921] 2 A. C. 544. **Refd.** Barry *v.* Van Den Hurk, [1920] 2 K. B. 709 ; Lebeaupin *v.* Crispin, [1920] 2 K. B. 714 ; *Re* British American Continental Bank, Credit General Liegeois' Claim, [1922] 2 Ch. 589 ; *Re* British American Continental Bank, Goldzieher & Penso's Claim, [1922] 2 Ch. 575 ; *Re* British American Continental Bank, Lisser & Rosenkranz's Claim, [1923] 1 Ch. 276 ; *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466. **Mentd.** Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451.

53. —— **Winding up order.**] — Upon a claim in the winding up of a co., a bank, for damages for breach of contract to deliver foreign currency, the correct date when the claim ought to be converted into English currency for the purpose of ascertaining the amount for which the claimants were entitled to be admitted as creditors is the date of the breach & not the date of the winding-up order.—*Re* BRITISH AMERICAN CONTINENTAL BANK, LTD., GOLDZIEHER & PENSO'S CLAIM, [1922] 2 Ch. 575 ; 91 L. J. Ch. 760 ; 38 T. L. R. 785 ; 66 Sol. Jo. 647, C. A.

Annotations :—**Foll.** *Re* British American Continental Bank, Lisser & Rosenkranz's Claim, [1923] 1 Ch. 276. **Refd.** *Re* British American Continental Bank, Credit General Liegeois' Claim, [1922] 2 Ch. 589 ; *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466.

54. —— ——.] — A bank in England, hereinafter called the bank, contracted with appcts., a German bank, to deliver to appcts. on Dec. 31, 1920, specific amounts of American dollars & English pounds sterling against the delivery to the bank of specific amounts of Swiss francs & German marks. Appcts. performed their part of the contract, but the bank failed to deliver either the dollars or the sterling. On Jan. 6, 1921, the bank suspended payment, & on Jan. 25, 1921, a compulsory winding-up order was made & a liquidator was appointed. Appcts. in the meantime, namely, on Jan. 15, 1921, to put themselves in a position to fulfil their obligations to customers & to minimise their loss, purchased, as it was not disputed they were entitled to do, the American dollars & English sterling against the bank & paid therefor German marks at the market price ruling on that day. On May 19, 1921, appcts. at the invitation of the liquidator lodged their proof for a sum of English pounds sterling which represented the German marks converted into English currency at the rate of exchange ruling on Jan. 25, 1921, the date of the winding-up order. In Dec. 1921, the liquidator, in pursuance of Companies (Consolidation) Act, 1908 (c. 69), s. 214, purchased the same number of marks as appcts. had expended in acquiring the undelivered currencies, & on Jan. 5, 1922, in spite of appcts.' proof tendered that sum of marks to appcts. in full satisfaction of their claim, which tender was refused. Owing to the rapid depreciation of the mark from & after Jan. 1921, the value of the marks converted into English currency at the date of the purchase & tender by the liquidator as compared with their value on Dec. 31, 1920, was approximately in the *ratio* of £5,000 to £20,000. Upon the application of appcts. that the liquidator be directed to admit their proof :—*Held :* the claim was for damages for breach of contract to deliver American dollars & English sterling & not for a debt in German marks, & on the authority of *Re British American Continental Bank, Ltd., Goldzieher & Penso's Claim*, No. 53, *ante*, appcts. were entitled to be admitted as creditors in the winding up for the value of the marks in English sterling at the rate of exchange ruling on Dec. 31, 1920, the date of the breach, & were not bound to accept the tender of the marks made on Jan. 5, 1922.—*Re* BRITISH AMERICAN CONTINENTAL BANK, LTD., LISSER & ROSENKRANZ'S CLAIM, [1923] 1 Ch. 276 ; 92 L. J. Ch. 241 ; 128 L. T. 727.

Annotation :—**Refd.** *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466.

D. Damages for Tort.

55. At time damage sustained, not at date of judgment.]—S.S. CELIA *v.* S.S. VOLTURNO, No. 39, *ante*.

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contract, the date on which the rate of exchange is to be taken for the purpose of converting one set of currency into another is the date on which under the agreement the money was to be paid & on which a breach occurred by its not being so paid.—SHAKOOL *v.* FINLAY (1923), I. L. R. 1 Ran. 339.—**IND.**

Sect. 3.—*Rate of exchange: Sub-sect.* 2, *E.; sub-sects.* 3 & 4. *Sect.* 4. *Part III. Sect.* 1.]

E. Account.

56. Whether at date of judgment—Or at time of default.]—The rate of exchange at which a creditor is entitled to recover on account of money received under a specific authority, to be applied in a particular manner, is according to the rate at the time & place specified, where the default in payment was made & not at the time the judgment for the recovery of the sum is recorded.—BERTRAM *v.* DUHAMEL (1838), 2 Moo. P. C. C. 212; 12 E. R 984, P. C.

Annotations:—**Refd.** Manners *v.* Pearson, [1898] 1 Ch. 581 S.S. Celia *v.* S.S. Volturno, [1921] 2 A. C. 544.

57. —— Or at time account completed.]—An action for an account in equity is an action for the balance found due on taking the account it is not a series of actions for the various items included in the account, nor a series of actions for damages for breaches of covenants to make particular payments.

When a pltf. sues a deft. in England on a contract made abroad, under which periodical payments in foreign currency ought to have been made to him in a foreign country, & the ct. orders an account, he is not entitled to have each periodical sum treated as converted into English money at the rate of exchange which prevailed at the date when the payment ought to have been made under the contract.

The date of conversion cannot be fixed before the balance is found on the account.—MANNERS *v.* PEARSON & SON, [1898] 1 Ch. 581; 67 L. J. Ch. 304; 78 L. T. 432; 46 W. R. 498; 14 T. L. R. 312; 42 Sol. Jo. 413, C. A.

Annotations:—**Distd.** Lebeaupin *v.* Crispin, [1920] 2 K. B. 714. **Consd.** Di Ferdinando *v.* Simon, Smits, [1920] 3 K. B. 409; Soc des Hotels du Touquet-Paris-Plage *v.* Cumming, [1921] 3 K. B. 459. **Expld.** S.S. Celia *v.* S.S. Volturno, [1921] 2 A. C. 544. **Distd.** *Re* British American Continental Bank, Credit General Liegeois' Claim, [1922] 2 Ch. 589; *Re* British American Continental Bank, Goldzieher & Penso's Claim, [1922] 2 Ch. 575. **Refd.** *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466.

58. Administration of trust—Date of master's certificate.]—*Re* CHESTERMAN'S TRUSTS, MOTT *v.* BROWNING, No. 12, *ante*.

59. Whether conversion to be made during course of account.]—MANNERS *v.* PEARSON & SON, No. 57, *ante*.

SUB-SECT. 3.—REDEMPTION OF MORTGAGE.

60. Redemption granted on payment in kind of money actually advanced.]—BRITISH BANK FOR FOREIGN TRADE, LTD. *v.* RUSSIAN COMMERCIAL & INDUSTRIAL BANK, No. 17, *ante*.

61. Risk of depreciation & benefit of appreciation lies with lender.]—BRITISH BANK FOR FOREIGN TRADE, LTD. *v.* RUSSIAN COMMERCIAL & INDUSTRIAL BANK, No. 17, *ante*.

SUB-SECT. 4.—INSURANCE POLICIES.

62. Conversion at date of payment—"Profits" added at other rates of exchange.]—Pltf., Mrs. A., a widow, brought an action on a semi-tontine policy of insurance on the life of her husband, who died in Mar. 1922. Pltf. claimed a declaration that on the true construction of the policy she was entitled to payment of the sum insured, together with the surplus & profits, at the pre-war rate of exchange, or in gold marks. The policy was issued by deft. society on Feb. 18, 1887. Under the policy pltf. agreed to pay in London an initial premium of 2,149.80 reichsmarks, & thereafter quarterly payments of 570 reichsmarks for twenty years. Deft. society undertook to pay 60,000 reichsmarks on the death of the assured, Mr. A. The policy became fully paid in 1907. There were profit sharing rights when the policy became fully paid. Throughout the period of the policy deft. society had continued to keep their accounts as if there had been no violent fluctuations in the rate of exchange, &, in computing their contingent liabilities, they had treated the reichsmark as being at its pre-war value. After the death of her husband in 1922 pltf. brought the action. Defts. contended that they were liable to pay the amount of reichsmarks due under the policy only at the rate of exchange ruling on the day of payment, one billion reichsmarks being equivalent to one English shilling:—*Held:* on the true construction of the contract contained in the policy, the amount due under the policy must be paid by defts. in this country in sterling, & the amount of sterling to be paid was to be calculated on the basis of the rate of exchange between Germany & this country, prevailing on the day of payment & not at the pre-war rate.—ANDERSON *v.* EQUITABLE ASSURANCE SOCIETY OF UNITED STATES (1926), 134 L. T. 557; 42 T. L. R. 302, C. A.

63. ——.]—Between 1903 & 1909, pltfs., who were Russian subjects, affected with defts., an American insurance co. then having a branch in Russia, certain insurances in the form of four endowment life policies & paid the premiums in Russia in roubles down to 1918. The amounts secured by two of the policies were now payable if the policies were still existent & enforceable, & it was admitted by both parties that the contracts were to be governed by Russian law. In an action claiming the amount due on the policies or the return of the premiums defts. contended that by the laws of Russia the policies had become void, as the Russian Govt. had in 1919 by decree cancelled all kinds of life insurance & transferred all premiums to the Govt. Treasury. Uncontradicted evidence was given for pltfs. that by a Russian law made in 1923 the People's Commissariat of Justice was charged with the "interpretation" of existing laws & that the Commissariat had interpreted the decree of 1919 as having no application to contracts of life assurance made by Russian subjects with companies having assets which were in the United States & which were not liable to confiscation in Russia:—*Held:* as the ct. could not, by putting its own construction on the term "interpretation," make for Russia a law which the Russian judicial system did not recognise, pltfs. were entitled to recover on the two policies above referred to, & judgment should be entered for the sterling equivalent of the amounts due in chervonetz roubles at the date when those amounts became due.—BUERGER *v.* NEW YORK LIFE ASSURANCE CO. (1927), 43 T. L. R. 601, C. A.

SECT. 4.—RATE OF INTEREST ON DEBT CONTRACTED ABROAD.

See Part III., Sect. 5, sub-sect. 4, *post*.

Part III.—Interest.

SECT. 1.—IN GENERAL.

64. Definition of interest—Damages for detention of principal.]—SWEATLAND *v.* SQUIRE (1699), 2 Salk. 623 ; 91 E. R. 527.

65. —— ——.]—Interest upon a promissory note is damage for the detention of the principal money. Where a promissory note was made abroad & the payee did not sue upon it till thirty years afterwards & the jury refused to give interest: —*Held :* the ct. could not increase the amount of the verdict by adding the interest.

Interest upon such securities is no part of the debt, & where it is given, it is upon the ground of the injury which the party has sustained by the detention of his debt after it may be lawfully demanded, & juries give it as damages (ABBOTT, C.J.).—DU BELLOIX *v.* WATERPARK (LORD) (1822), 1 Dow. & Ry. K. B. 16.

Annotations :—**Refd.** Laing *v.* Stone (1828), 2 Man. & Ry. K. B. 561 ; Brooke *v.* Coleman (1833), 1 Cr. & M. 621 ; Petre *v.* Duncombe (1851), 2 L. M. & P. 107 ; Rodway *v.* Lucas (1855), 24 L. J. Ex. 155 ; Stevenson *v.* Akt. für Cartonnagen Industrie, [1918] A. C. 239.

66. —— ——.]—Where, after creditor has endeavoured to obtain payment, there has been a wrongful withholding of a debt arising out of a contract, which does not carry interest, the jury may allow interest in the shape of damages for the unjust detention of the money.—ARNOTT *v.* REDFERN (1826), 3 Bing. 353 ; 11 Moore, C. P. 209 ; 4 L. J. O. S. C. P. 88 ; 130 E. R. 549.

Annotations :—**Consd.** Page *v.* Newman (1829), 9 B. & C. 378. **Distd.** Hare *v.* Rickards (1831), 7 Bing. 254. **Consd.** Frühling *v.* Schroeder (1835), 2 Bing. N. C. 77 ; L. C. & D. Ry. *v.* S. E. Ry., [1893] A. C. 429. **Refd.** Juggomohun Ghose *v.* Manickchund (1859), 7 Moo. Ind. App. 263.

67. —— ——.]—Where a person borrows money for a certain period, with interest at a certain rate down to the day named, a contract for payment of interest at that rate after the day named is not to be implied. The principal & interest, if not then paid, become a debt, & any allowance for detention of non-payment made by any tribunal before which the payment may be sought, is in the nature of damages, not of interest. Although the rate of interest agreed on for the time certain is usually adopted as the proper measure of the damages for the subsequent delay, the tribunal may look at all the circumstances of the case, & award such a rate of interest as shall appear fair & reasonable. Where the holder of a warrant of attorney to enter judgment for a fixed sum on a day named, with interest at the rate of 5 per cent. per month & costs, did not enter up judgment, & did not, the maker of the instrument having died, make any definite claim against his debtor's estate for the space of four years & upwards :—*Held :* the tribunal before whom the claim at last came, was justified in awarding by way of damages such a rate of interest as the holder of the warrant of attorney would have been entitled to, according to the ordinary rule of the Ct. of Ch., had he entered up judgment on the day named in the defeasance to the warrant of attorney, namely, at the rate of 4 per cent.—COOK *v.* FOWLER (1874), L. R. 7 H. L. 27 ; 43 L. J. Ch. 855, H. L.

Annotations :—**Distd.** *Re* Dixon, Heynes *v.* Dixon, [1900] 2 Ch. 561. **Refd.** Wallington *v.* Cook (1878), 47 L. J. Ch. 508 ; Goldstrom *v.* Tallerman (1886), 18 Q. B. D. 1 ; Di Ferdinando *v.* Simon, Smits, [1920] 3 K. B. 409.

68. —— ——.]—Deft. agreed with pltf., his tenant of a mill, to purchase at a proper valuation at the expiration of the tenancy some machinery which pltf. was setting up in the mill, nothing being said about interest on the purchase-money. The tenancy expired at Michaelmas, 1885. Deft. refused to purchase the machinery, & in Feb. 1887, pltf. commenced an action for specific performance, not specifically mentioning in his statement of claim either interest or damages. The action was dismissed, but in Nov. 1888, the Ct. of Appeal reversed this decision & gave a judgment directing a reference to an official referee to ascertain the value & ordering deft. to pay it when ascertained. The question as to interest was not raised. Pltf. applied to vary the minutes by directing deft. to pay the value with interest from Michaelmas, 1885. The ct. made the order for payment of interest only from the referee's report & declined to decide anything further on that application but gave leave to pltf. if so advised to apply after the report for payment of prior interest. The report was made in Feb. 1889, & pltf. then applied to the ct. to order interest from Michaelmas, 1885 :—*Held :* pltf. was entitled by way of damages for delay, to interest at 4 per cent. on the amount of the valuation from Lady Day, 1886, on which day deft. had taken possession, pltf. having up to that time remained in possession rent free as caretaker.—MARSH *v.* JONES (1889), 40 Ch. D. 563 ; 60 L. T. 610, C. A.

—— ——.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 187, Nos. 670, 671.

69. —— ——.]—Interest is compensation for delay in payment & is not accurately applied to the share of profits of trading, although it may be used as an inaccurate mode of expressing the measure of the share of those profits (FARWELL, J.).—BOND *v.* BARROW HÆMATITE STEEL CO., [1902] 1 Ch. 353 ; 71 L. J. Ch. 246 ; 86 L. T. 10 ; 50 W. R. 295 ; 18 T. L. R. 249 ; 46 Sol. Jo. 280 ; 9 Mans. 69.

Annotations :—**Mentd.** *Re* Accrington Corpn. Steam Tram. Co., [1909] 2 Ch. 40 ; *Re* Spanish Prospecting Co., [1911] 1 Ch. 92 ; Ammonia Soda Co. *v.* Chamberlain, [1918] 1 Ch. 266 ; Evling *v.* Israel & Oppenheimer, [1918] 1 Ch. 101.

70. —— **Yearly interest.**]—"Interest" means "yearly interest" although it may be payable in a lump sum at an uncertain date.—*Re* COOPER, COOPER *v.* COOPER (1917), 88 L. J. Ch. 105 ; 119 L. T. 303 ; 62 Sol. Jo. 230.

Annotations :—**Mentd.** *Re* Janes' Settlmt., Wasmuth *v.* Janes, [1918] 2 Ch. 54 ; Bayley *v.* Bayley, [1922] 2 K. B. 227 ; Smith *v.* Smith, [1923] P. 191.

Distinguished from dividend.]—*See* COMPANIES, Vol. IX., p. 587, No. 3934.

71. Whether part of debt.]—A principal sum secured by deed, & the interest stipulated to be payable thereon, are two distinct sums, & not one

PART III. SECT. 1.

l. *Definition of interest.*]—Where in consideration of a present advance of money the borrower agrees to pay the lender a certain larger amount at a future date, the difference between the amount lent & the amount to be paid by the borrower is interest.—CUMMINGS *v.* SILVERWOOD (Sask.), [1918] 3 W. W. R. 629.—**CAN.**

m. *Interest or debt in arrear—Lender's default—Whether interest payable.*]—Where delay in the payment of the principal debt is caused by some improper act or omission of the creditor, the accrual of interest will be suspended during such period as the debtor is so prevented.—GOPESHWAV TAHA *v.* JADAV CHANDRA CHANDA (1915), I. L. R. 43 Calc. 632.—**IND.**

n. —— —— ——.]—DURIE'S TRUSTEES *v.* AYTOUN (1894), 22 R. (Ct. of Sess.) 34 ; 32 Sc. L. R. 28 ; 2 S. L. T. 276.—**SCOT.**

o. *Stipulation to pay interest—Reason for.*]—A stipulation to pay interest does not postpone the demand ;

Sect. 1.—*In general. Sect.* 2: *Sub-sect.* 1, *A.*]

entire sum, & either may be sued for, independently of the other. Interest is not a part of the debt secured by mtge., but rather sounds in damages, although, *semble*, it may be sued for in debt.—DICKENSON *v.* HARRISON (1817), 4 Price, 282; 146 E. R. 465.

Annotations:—**Consd.** Trix *v.* Thorne (1846), 9 Q. B. 282. **Refd.** Price *v.* G. W. Ry. (1847), 16 M. & W. 244.

72. ——.]—Interest accruing before the act of bkpcy. cannot be added to the principal sum due on a bill of exchange, so as to constitute a good petitioning creditor's debt, unless interest be specially made payable on the face of the bill.

Interest is in the nature of damages, & is no part of the debt (BAYLEY, J.).—CAMERON *v.* SMITH (1819), 2 B. & Ald. 305; 106 E. R. 378.

Annotations:—**Expld.** Laing *v.* Stone (1828), 2 Man. & Ry. K. B. 561. **Distd.** Montgomery *v.* Bridge (1831), 2 Dow. & Cl. 297. **Apprvd.** Cook *v.* Fowler (1874), L. R. 7 H. L. 27. **Consd.** Webster *v.* British Empire Mutual Life Assce. (1880), 15 Ch. D. 169. **Refd.** *Re* Dixon, Heynes *v.* Dixon, [1900] 2 Ch. 561; Stearns *v.* Village Main Reef Gold Mining Co. (1904), 48 Sol. Jo. 700.

73. ——.]—Where an action is brought for a sum not exceeding £20 but the judgment, by the addition of interest, is signed for more, deft. is not entitled to his discharge under the 48 Geo. 3, c. 123.

It is clear that the debt exceeds £20; the interest forms a part of the debt itself (COLERIDGE, J.).—ADAMS *v.* JAMES (1844), 3 L. T. O. S. 79.

-.]—*See, also*, No. 65, *ante*.

74. Interest allowed to supply want of prompt payment.]—Where excessive prices are charged for work on account of slow & precarious payment, no interest ought to be allowed; for interest is only allowed to supply the want of prompt payment.—MARLBOROUGH (DUCHESS) *v.* STRONG (1723), 4 Bro. Parl. Cas. 539; 2 Eq. Cas. Abr. 531; 2 E. R. 367, H. L.

Annotation:—**Consd.** Mackintosh *v.* G. W. Ry. (1865), 4 Giff. 683.

Payment of interest as acknowledgment of debt.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 379, 394, 473, 474, Nos. 620–752, 1370–1384.

SECT. 2.—WHEN PAYABLE.

SUB-SECT. 1.—AT COMMON LAW.

A. In General.

75. Liquidated sums generally.] — Interest is not allowable by law upon money lent generally, without a contract for it expressed or to be implied from the usage of trade, or from special circumstances, or from written securities for the payment of principal money at a given time.

It was said, indeed, in *Blaney* v. *Hendrick*, No. 90, *post*, that interest is due upon all liquidated sums from the instant the principal becomes due & payable. But those words must be taken in a restricted sense, & I must understand by them something more than an account stated. If an account be stated, & the nature of the transaction be such as to afford evidence of an agreement for interest, as if it be shown to have been allowed before upon a prior settlement of accounts, then it may be warranted (LORD ELLENBOROUGH, C.J.).—CALTON *v.* BRAGG (1812), 15 East, 223; 104 E. R. 829.

Annotations:—**Distd.** Farquhar *v.* Farley (1817), 1 Moore, C. P. 322. **Apld.** Higgins *v.* Sargent (1823), 2 B. & C. 348; Curling *v.* Shuttleworth (1829), 6 Bing. 121. **Consd.** Page *v.* Newman (1829), 9 B. & C. 378. **Refd.** Arnott *v.* Redfern (1826), 3 Bing. 353; Juggomohun Ghose *v.* Kaisreechund (1862), 9 Moo. Ind. App. 256; Mackintosh *v.* G. W. Ry. (1865), 4 Giff. 683; *Re* Edwards, Williams *v.* Trench (1891), 61 L. J. Ch. 22.

76. Debt vexatiously withheld — By husband from executor of wife.]—Interest at 4 per cent. ordered to be paid upon a debt, not in its nature bearing interest, vexatiously withheld by a husband from the exor. of his deceased wife.—MEREDITH *v.* BOWEN (1836), 1 Keen, 270; 5 L. J. Ch. 350; 48 E. R. 310.

Annotations:—**Distd.** Phillips *v.* Homfray, [1892] 1 Ch. 465. **Refd.** Pearce *v.* Slocombe (1838) 3 Y. & C. Ex. 84.

77. Money had & received.] — The net sum only, without interest, can be recovered in an action for money had & received.—WALKER *v.* CONSTABLE (1798), 1 Bos. & P. 306; 2 Esp. 659; 126 E. R. 919.

Annotations:—**Apld.** Frühling *v.* Schroeder (1835), 2 Bing. N. C. 77. **Mentd.** Coles *v.* Trecothick (1804), 9 Ves. 234; Buckmaster *v.* Harrop (1807), 13 Ves. 456; Kenworthy *v.* Schofield (1824), 2 B. & C. 945; Glengal *v.* Barnard (1836), 1 Keen, 769.

78. ——.] — On an inquiry to ascertain damages in an action for money had & received, before an official referee, a certain sum was claimed & allowed for interest, not *eo nomine*, but as an item of loss:—*Held*: it was rightly allowed.—GAS LIGHT & COKE CO. *v.* SOUTH METROPOLITAN GAS CO. (1890), 7 T. L. R. 105.

.]—*See* CONTRACT, Vol. XII., p. 571, Nos. 4753–4760.

79. Trust term to pay debts—Simple contract debts.]—(1) Under a trust term, by deed, to pay debts, & legacies, held, that simple contract debts did not carry interest. So likewise as to a will. *Contra*, however, if by any deed in the nature of a specialty, from whence an intention can be inferred, as if the debts be annexed by way of schedule.

(2) Scrivener, etc., receiving money, & giving a note to place it out at interest is bound to do so, & is not discharged from paying interest for it, unless his employer accepts the security & interest. Balance of an account stated by such scrivener, etc., will carry interest.—BARWELL *v.* PARKER (1751), 2 Ves. Sen. 363; 28 E. R. 233, L. C.

Annotations:—*As to* (1) **Refd.** Pearce *v.* Slocombe (1838), 3 Y. & C. Ex. 84. *As to* (2) **Consd.** Blair *v.* Bromley (1847), 2 Ph. 354. **Refd.** Moore *v.* Knight (1890), 63 L. T. 831. *Generally*, **Refd.** *Re* German Mining Co., *Ex p.* Chippendale (1854), 4 De G. M. & G. 19.

80. —— ——.]—A debt by simple contract does not carry interest, because provision for its discharge is made by a deed of trust; such a deed *per se* does not import contract or trust for the payment of interest, especially where the creditors have not signed the deed, & no agreement is made to charge the land & discharge the person.—HAMILTON *v.* HOUGHTON (1820), 2 Bli. 169; 4 E. R. 290, H. L.

Annotations:—**Consd.** Bateman *v.* Margerison (1853), 16 Beav. 477. **Mentd.** Colclough *v.* Sterum (1821), 3 Bli. 181; White *v.* Parnther (1829), 1 Knapp, 179.

81. —— **Specialty debt.**]—BARWELL *v.* PARKER, No. 79, *ante*.

82. Rents & profits.]—MICKLETHWAIT *v.* BOATMAN (1660), 1 Rep. Ch. 184; 21 E. R. 544.

—— **Liability of the Crown.**]—*See* DESCENT, Vol. XVIII., pp. 34, 35, Nos. 342–345.

83. Money advanced.] — The taking of reasonable interest for the use of money was permitted

but is to compel punctual payment, or to obtain compensation for the delay.—FRANKFORT *v.* THORPE (1813), 2 Ball & B. 372.—IR.

p. —— *Whether intention of lender material.*] — CHRISTIE *v.* MATHESON (1871), 10 Macph. (Ct. of Sess.) 9; 44 Sc. Jur. 7.—SCOT.

PART III. SECT. 2, SUB-SECT. 1.—A.

77 i. *Money had & received.*]—COUNTY OF WELLINGTON MUNICIPAL COUNCIL *v.* TOWNSHIP OF WATERLOO MUNICIPALITY (1858), 8 C. P. 358.—CAN.

83 i. *Money advanced.*] — BLACKBURN *v.* PAUL (1839), 2 Dunl. (Ct. of Sess.) 220.—SCOT.

by the common law.—HARRIS *v.* RICHARDS (1632), Cro. Car. 272 ; 79 E. R. 838.

84. ——.]—In *assumpsit* for work & labour & money paid, the jury will in their verdict calculate interest on the money really advanced, but not on the damages for the work & labour.—TRELAWNEY *v.* THOMAS (1789), 1 Hy. Bl. 303 ; 126 E. R. 178.

85. ——.]—A., who was resident in France, being indebted to B. for money lent, promised by a written instrument to pay B. the sum therein mentioned within one month after his, A.'s, arrival in England. A. arrived in England in 1814. In 1818 B. applied to the attorney of A. for payment, & in 1819 commenced an action, which was continued till Easter term, 1828, when the cause was tried :—*Held :* B. was not entitled to recover interest on the principal sum, either from the time of A.'s arrival in England, or from the time when B. endeavoured to obtain payment, interest not being due on money secured by a written instrument, unless it appears on the face of the instrument itself that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments.—PAGE *v.* NEWMAN (1829), 9 B. & C. 378 ; 4 Man. & Ry. K. B. 305 ; 7 L. J. O. S. K. B. 267 ; 109 E. R. 140.

Annotations :—**Apld.** Foster *v.* Weston (1830), 6 Bing. 709. **Consd.** Hare *v.* Rickards (1831), 5 Moo. & P. 35 ; Price *v.* G. W. Ry. (1847), 16 M. & W. 244. **Apld.** L. C. & D. Ry. *v.* S. E. Ry., [1893] A. C. 429. **Refd.** Rodger *v.* Comptoir D'Escompte de Paris (1871), L. R. 3 P. C. 465 ; Swift *v.* Board of Trade (1924), 93 L. J. K. B. 529.

.]—*See, also,* No. 75, *ante,* No. 107, *post.*

86. Bill of exchange.]—In debt upon a single bill pltf. shall recover interest.—LAPIERE *v.* ST. ALBANS (DUKE) (1702), 2 Ld. Raym. 773 ; 92 E. R. 16.

87. ——.]—In trover for a bill of exchange, the jury may, if they think fit, include the amount of the interest in the damages, & this although there is no mention of interest in the declaration, & no special damage laid.—PAINE *v.* PRITCHARD (1827), 2 C. & P. 558, N. P.

——.]—*See, also,* BILLS OF EXCHANGE, Vol. VI., pp. 91, 327–335, 403, Nos. 658, 2172–2226, 2629, 2630.

88. Undertaking to pay—Bill of exchange incidentally referred to.]—*Held :* interest was not payable on the following instrument, given by defts. to pltf : " We hereby undertake to pay you, agreeably to instructions from W., the sum of £1,262 on his account, as soon as we shall have received from R. & R., of New South Wales, the amount of moneys in their hands belonging to W., & now under attachment by you."

By the instructions from W., the payment was to be taken in discharge of a bill of W.'s at nine months after date, in the hands of pltf. & which defts. were to receive from him on payment of the £1,262.—HARE *v.* RICKARDS (1831), 7 Bing. 254 ; 5 Moo. & P. 35 ; 9 L. J. O. S. C. P. 86 ; 131 E. R. 98.

Bill of sale.]—*See* BILLS OF SALE, Vol. VII., p. 60, Nos. 335, 336.

89. Account stated — Whether interest recoverable.]—BARWELL *v.* PARKER, No. 79, *ante.*

90. —— ——.]—In an *assumpsit* upon an account stated between merchant & merchant, the jury may give interest from the day the account was stated.—BLANEY *v.* HENDRICK (1771), 3 Wils. 205 ; 2 Wm. Bl. 761 ; 95 E. R. 1015.

Annotations :—**Expld.** Calton *v.* Bragg (1812), 15 East, 223. **N.F.** Higgins *v.* Sergeant (1823), 2 L. J. O. S. K. B. 33. **Refd.** Trelawney *v.* Thomas (1789), 1 Hy. Bl. 303.

91. —— ——.]—No interest on the balance of a stated account is provable under a commission, unless by express contract.—*Ex p.* FURNEAUX (1790), 2 Cox, Eq. Cas. 219 ; 30 E. R. 101, L. C.

92. —— ——.]—CALTON *v.* BRAGG, No. 75, *ante.*

93. —— —— **From what date.**]—ANON. (1709), 2 Eq. Cas. Abr. 8 ; 22 E. R. 7.

94. Money due from person in position of quasi trustee.]—In Nov. 1909, pltfs. chartered a steamship from the owners for seven consecutive St. Lawrence seasons commencing with the spring 1912. The charter contained the usual exceptions including " restraint of princes." In Oct. 1915, defts. took over from the owners all rights & obligations under the charterparty, the terms of which were at the same time varied, but in no way

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q. *When allowed—On sums to be awarded at particular time.*]—Interest is usually allowed, without demand made, on sums awarded to be paid at a particular time.—TOWNSLEY *v.* WYTHES (1857), 16 U. C. R. 139.—**CAN.**

r. —— *Interest on principal & interest.*]—Where principal & interest are paid for another, interest may be recovered on the whole payment.—COUNTY OF WELLINGTON *v.* TOWNSHIP OF WILMOT, COUNTY OF WELLINGTON *v.* TOWNSHIP OF WELLESLEY (1858), 17 U. C. R. 82.—**CAN.**

t. —— *Enforcement of debt—Delayed by defendant.*]—RIDLEY *v.* SEXTON (1871), 18 Gr. 580 ; *affd.* (1872), 19 Gr. 146.—**CAN.**

a. —— *Necessity for demand in writing.*]—Where interest was claimed on a sum of $96, admitted to be due before action commenced, for extra work & material furnished by the pltf. but not under a written contract, & no demand in writing of interest was proved :—*Held :* the claim for interest could not be allowed.—INGLIS *v.* WELLINGTON HOTEL CO. (1878), 29 C. P. 387.—**CAN.**

b. —— ——.]—Interest will not be allowed upon a commission unless after a demand in writing.—MCKENZIE *v.* CHAMPION (1887), 4 Man. L. R. 158. —**CAN.**

c. —— *Money in hands of prothonotary.*]—WILKINS *v.* GEDDES (1879), 3 S. C. R. 203.—**CAN.**

d. —— *Borrower in flourishing circumstances.*]—Where money is lent to be repaid when the borrower is able, his ability may be shown by a slight amount of evidence, such as is open to public observation, of a flourishing condition of his affairs, & it is not necessary to show that the borrower is in a position to discharge the debt without inconvenience.—*Re* ROSS (1881), 29 Gr. 385.—**CAN.**

e. —— *Loose mode of dealing between parties.*]—It is not usual to allow interest on claims where there is no fraud or wilful withholding of accounts, only a loose mode of dealing between the parties.—*Re* KIRKPATRICK, KIRKPATRICK *v.* STEVENSON (1883), 10 P. R. 4.—**CAN.**

f. —— *Conditions precedent.*]—To be entitled to interest before action pltf. must show (1) an express contract for interest, or (2) that the nature of the claim is such that the contract can be implied, or (3) that the debt is payable by virtue of a written instrument, or (4) that there was a demand with notice that interest would be claimed under 3 & 4 Will. 4, c. 42, s. 28.—NICHOL *v.* GOCHER (1898), 12 Man. L. R. 177.—**CAN.**

g. —— ——.]—Interest may be allowed when authorised by statute or when payable by contract, & such contract may be inferred from trade or mercantile usage, or from a course of dealing between the parties.—DUFFY *v.* DUFFY (1915), 43 N. B. R. 555.—**CAN.**

h. —— *Debt improperly withheld.*]—In all cases where in the opinion of the ct. the payment of a just debt has been improperly withheld & it seems to be fair & equitable that the party in default should make compensation by payment of interest, it is incumbent upon the ct. to allow interest from the date of the demand.—LAST WEST LUMBER CO. *v.* HADDAD (1915), 33 W. L. R. 15 ; 9 W. W. R. 518 ; 25 D. L. R. 529 ; 8 Sask. L. R. 407.—**CAN.**

k. —— ——.]—Interest will not be allowed merely because a just debt has been withheld, but only where it has been improperly withheld.—JONES *v.* SHAW, [1921] 1 W. W. R. 293 ; 14 Sask. L. R. 63.—**CAN.**

l. —— ——.]—In the absence of a demand in writing, interest up to the date of suit cannot be awarded on sums not payable under a written instrument of which the payment has been illegally delayed.—KISARA RUKKUMMA RAU *v.* CRIPATI VIYANNA DIKSHATULU (1863), 1 Mad. 369.—**IND.**

m. —— *On costs.*]—Deft. who pays costs prior to his appeal to the Supreme Ct. is not entitled to interest on such costs upon their return after his appeal has succeeded.—ROYAL BANK *v.* WHIELDON, [1917] 2 W. W. R. 58 ; 23 B. C. R. 436.—**CAN.**

n. —— *Absence of written agreement.*]—In the absence of any provincial statute dealing with the recovery of interest where there is no

Sect. 2.—*When payable: Sub-sect.* 1, *A., B., C.*

important to the present decision. In Feb. 1915, the steamship was requisitioned by the Director of Transport on behalf of H.M. Govt. & was employed in Govt. service from May to Sept. 1915. For this period £10,500 was paid to defts. by the Govt. by way of compensation. The amount payable by pltfs. to defts. under the charterparty would have been about £6,000 & pltfs. claimed £4,500, the difference between these two sums, from defts. The ship was again requisitioned in 1916, & pltfs. made a similar claim for £500 in respect of this period. Upon this amount they also claimed interest:—*Held:* (1) pltfs. were entitled to recover the excess of Govt. payments over charterparty hire for the years 1915 & 1916; (2) in respect of the excess due to pltfs. for 1916, defts. were in the position of quasi-trustees for pltfs. & were liable to them for interest at 5 per cent. thereon as from the end of 1916.—DOMINION COAL CO. *v.* MASKINONGE S.S. CO., [1922] 2 K. B. 132; 91 L. J. K. B. 673; 127 L. T. 307; 38 T. L. R. 591; 27 Com. Cas. 337; 16 Asp. M. L. C. 8.

Money obtained by fraud.]—*See* No. 154, *post.*

Money due for agent in fiduciary position.]—*See* AGENCY, Vol. I., pp. 457, 458, Nos. 1459–1461.

Interest for goods sold.]—*See* SALE OF GOODS.

Interest on judgments.]—*See* ARBITRATION, Vol. II., pp. 534, 535, Nos. 1707, 1708; CONFLICT OF LAWS, Vol. XI., p. 472, Nos. 1257–1259; JUDGMENTS, Vol. XXX., pp. 164, 165, 172–180, Nos. 332–339, 402–488.

Interest on insurance claims.]—*See* INSURANCE, Vol. XXIX., p. 391, Nos. 3123–3126.

Interest on bank deposits.]—*See* BANKERS, Vol. III., pp. 195, 196, Nos. 412–416.

B. Under Express Agreement.

95. General rule.]—BARWELL *v.* PARKER, No. 79, *ante.*

96. ——.]—In an action for money had & received, pltf. is not entitled to interest even from the time of making a demand of the principal; unless, he give in evidence an express promise to pay interest; or show something from which such a promise may be inferred; or prove that the money has been used by deft., & interest has been made of it. *Semble:* the only other instance in which interest is recoverable, is upon a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, etc.—DE HAVILLAND *v.* BOWERBANK (1807), 1 Camp. 50; 170 E. R. 872, N. P.

Annotations:—**Expld.** Gordon *v.* Swan (1810), 2 Camp. 429, n. **Apld.** Bell *v.* Free (1818), 1 Swan. 90; Hare *v.* Rickardo (1831), 7 Bing. 254. **Distd.** *Re* Maria Anna & Steinbank Coal & Coke Co., McKewan's Case (1877), 6 Ch. D. 447. **Dbtd.** L. C. & D. Ry. *v.* S. E. Ry., [1893] A. C. 429. **Refd.** De Bernales *v.* Fuller (1810), 2 Camp. 426; Higgins *v.* Sargent (1823), 2 B. & C. 348; Fruhling Schroder (1835), 2 Scott, 135.

97. ——.]—CALTON *v.* BRAGG, No. 75, *ante.*

98. ——.] — Pltf. who has laid out & expended money at the request of deft. cannot recover interest, in the absence of a contract to pay interest.—CARR *v.* EDWARDS (1822), 3 Stark. 132, N. P.

99. ——.]—Interest is only payable on a sum of money, when there is an express promise to pay it, or it is due on a mercantile security, or it has been paid by the usage of trade. Therefore interest cannot be claimed on the amount of a policy of insurance on a life, which has not been paid for a long time after it ought to have been discharged.

The general practice of late years has been to allow interest only upon mercantile securities, such as promissory notes, & bills of exchange, which carry interest by the custom of merchants, or in those instances where interest is secured, by the express undertaking of the parties, or where such undertaking is implied from the usage of trade, or other circumstances. That is the general rule. . . . This is not one of those mercantile instruments which carry interest by law, & inasmuch as there was no promise express or implied, on the part of deft. to pay interest, I cannot hold that the jury ought to have been told they were bound to give interest (ABBOTT, C.J.).—HIGGINS *v.* SARGENT (1823), 2 B. & C. 348; 3 Dow. & Ry. K. B. 613; 2 L. J. O. S. K. B. 33; 107 E. R. 414.

Annotations:—**Consd.** Page *v.* Newman (1829), 9 B. & C. 378. **Folld.** Foster *v.* Weston (1830), 6 Bing. 709. **Expld.** Gaunt *v.* Taylor (1834), 3 L. J. Ch. 135. **Apld.** Hill *v.* South Staffordshire Ry. (1874), L. R. 18 Eq. 154. **Distd.** L. C. & D. Ry. *v.* S. E. Ry., [1892] 1 Ch. 120. **Refd.** Frühling *v.* Schroeder (1835), 2 Bing. N. C. 77; Price *v.* G. W. Ry. (1847), 16 L. J. Ex. 87; The Northumbria (1869), L. R. 3 A. & E. 6; Swift *v.* Board of Trade (1924), 93 L. J. K. B. 529.

100. ——.]—PAGE *v.* NEWMAN, No. 85, *ante.*

101. ——.] — Defts. bound themselves by deed to pay £1,500 to be delivered to D. in goods, by three payments of £500 each, at three, five, & seven months:—*Held:* the instrument did not carry interest.

If it be the intention of the party to obtain

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valid written agreement providing for the payment thereof:—*Held:* pltf., who had been held entitled to the return of a sum of money, advanced to deft. co. under an *ultra vires* written agreement & applied by it in the payment of its debts, was not entitled to interest on the sum.—MCKINNON & MCKILLOP *v.* CAMPBELL RIVER LUMBER CO. (B. C.), [1922] 2 W. W. R. 556; 66 D. L. R. 266.—**CAN.**

o. —— *On amount expended on repairs of ship.*]—GREAT LAKES S.S. CO. *v.* MAPLE LEAF MILLING CO., [1926] 1 D. L. R. 675; 58 O. L. R. 244.—**CAN.**

p. —— *Money deposited for safe keeping.*]—Where money had been deposited for safe keeping & was not forthcoming when payment was demanded, interest was allowed on the sum due at the date of the last account, & to be computed to date of judgment.—COONEY *v.* WINTER (1817), 1 Nfld. L. R. 27.—**NFLD.**

q. —— *Whether after record closed.*]—EDINBURGH & GLASGOW UNION CANAL CO. *v.* CARMICHAEL (1842), 1 Bell, Sc. App. 316.—**SCOT.**

r. —— *On open accounts.*]—SOMERVELL'S TRUSTEE *v.* EDINBURGH LIFE ASSURANCE CO., [1911] S. C. 1069.—**SCOT.**

t. —— *On instalments of purchase money.*]—Where property is sold for a certain price, payable in monthly instalments, & no stipulation is made providing for the payment of interest on the purchase money, interest can only be claimed by the vendor on each instalment from the date it falls due till its payment.—BAKER *v.* HAWKINS (1895), 9 E. D. C. 214.—**S. AF.**

a. *Implication of averment of forbearance.*]—The averment that money was forborne at interest implies an agreement to pay interest for the forbearance.—LAWLESS *v.* BRYCE (1870), I. R. 5 C. L. 190.—**IR.**

PART III. SECT. 2, SUB-SECT. 1.—B.

95 i. *General rule.*]—At common law, where interest is payable by the terms of a contract it runs ordinarily up to the date of payment.—LAL BATCHA SAHIB *v.* ARCOT NARAINASWAMI MUDALIYAR & MEENAMBA AMMAL (1910), I. L. R. 34 Mad. 320.—**IND.**

95 ii. ——.]—Interest depends on contract express or implied, or on some rule of law allowing it. If there is no contract, allowance of interest can be made only as a matter of law.—SWALA PRASAD *v.* HOTI LAL (1924), I. L. R. 46 All. 625.—**IND.**

95 iii. ——.]—Interest is not recoverable upon a debt without some evidence of a contract to pay interest.—REID *v.* BANK OF NEW ZEALAND, 3 J. R. N. S. 40.—**N.Z.**

95 iv. ——.]—If a debt is due on a certain day, interest as reckoned from that day must be paid. If no date is fixed for payment, interest runs from the time action is brought.—BECKER *v.* STUSSER, [1910] C. P. D. 289.—**S. AF.**

95 v. ——.]—Whether interest is payable must, in the absence of express agreement, depend on the circumstances of each case.—DAVIS *v.* JOOSTE, [1907] E. D. C. 43.—**S. AF.**

interest, it is always in his power to insert in the contract an express stipulation to that effect. In the present case, there is no stipulation for interest on the face of the contract. The instrument on which it is sought to recover it is not a commercial instrument, nor one on which there has been any usage to allow interest (TINDAL, C.J.).—FOSTER *v.* WESTON (1830), 6 Bing. 709; 4 Moo. & P. 589; 8 L. J. O. S. C. P. 295; 130 E. R. 1454.

Annotations :—**Apld.** Hill *v.* South Staffordshire Ry. (1874), L. R. 18 Eq. 154. **Refd.** L. C. & D. Ry. *v.* S. E. Ry., [1892] 1 Ch. 120; *Re* Dixon, Heynes *v.* Dixon, [1900] 2 Ch. 561.

102. Interest made payable on default of payment of principal.]—Pltf. lent deft. 560 rupees & deft. signed an agreement to pay pltf. 840 rupees in twenty monthly instalments, the whole amount to become payable at once on failure to pay any instalment, & if deft. was then unable to pay the whole amount interest was to be payable. In an action to recover the whole amount together with interest on the ground of failure to pay an instalment, there was evidence of the loan, but no specific evidence of defts. alleged default, & the judge gave judgment for pltf. for the principal claimed, but dismissed the claim for interest on the ground that the onus lay on pltf. to prove a liability to pay interest, & that as there was no evidence of default this onus had not been discharged :—*Held :* the fact that pltf. was entitled to judgment for the principal showed that deft. must have made a default, & therefore pltf. was entitled to judgment for the interest as well as for the principal.—VELCHAND *v.* ATHERTON (1917), 33 T. L. R. 232, C. A.

C. Under Implied Agreement.

103. General rule — Implied from course of dealing.]—NICHOL *v.* THOMPSON (1807), 1 Camp. 52, n.; 170 E. R. 873, N. P.

104. —— ——.]—The special circumstance distinguishing this petition from former applications of the kind, namely that the bkpts. had been in the habit of paying interest upon such notes & therefore that a contract to pay interest was to be inferred from such habit is now abandoned. . . . If from such habit the contract could be inferred the debt would carry interest (LORD ELDON, C.).—*Re* WILCOCKS, *Ex p.* WILLIAMS (1813), 1 Rose, 399.

105. —— ——.]—Where one of several partners, with the privity of the others, draws bills of exchange in his own name upon the partnership firm, in favour of persons who advance him the amount, which he applies to the use of the partnership, although the partners are not jointly liable on the bills, they may be jointly sued by the payees for money lent.

From the course of dealing pltfs. are entitled to interest although they did not recover upon the written securities (LORD ELLENBOROUGH, C.).—DENTON *v.* RODIE (1813), 3 Camp. 493; 170 E. R. 1458, N. P.

Annotations :—**Refd.** Rhodes *v.* Rhodes (1860), 29 L. J. Ch. 418. **Mentd.** Smith *v.* Craven (1831), 9 L. J. O. S. Ex. 174; Bawden *v.* Howell (1841), 3 Man. & G. 638; Maclae *v.* Sutherland (1854), 3 E. & B. 1.

106. —— ——.]—Count in the declaration for interest upon the forbearance of money on request; this is well laid, a promise to pay interest being implied.—DORAN *v.* O'REILLY (1817), 5 Dow. 133; 3 E. R. 1278, H. L.

Annotation :—**Refd.** Butler *v.* Stoveld (1823), 1 Bing. 368.

107. —— ——.]—Interest is not payable on money lent, unless by the usage of trade, or from the course of dealing between the parties, a bargain to pay interest can be inferred.—SHAW *v.* PICTON (1825), 4 B. & C. 715; 7 Dow & Ry. K. B. 201; 4 L. J. O. S. K. B. 29; 107 E. R. 1226.

Annotations :—**Mentd.** Shaw *v.* Dartnall (1826), 6 B. & C. 56; Hume *v.* Bolland (1832), 1 Cr. & M. 130; Pierce *v.* Evans (1835), 2 Cr. M. & R. 294; Bate *v.* Lawrence (1844), 7 Man. & G. 405; Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477; Cave *v.* Mills (1862), 7 H. & N. 913; Swan *v.* North British Australasian Co. (1862), 7 H. & N. 603.

108. —— ——.]—In the administration of the estate of deceased debtor, claims were made in respect of certain tradesmen's accounts, which included charges for interest. In each case accounts had been sent in, during the lifetime of debtor, charging interest after one year's credit. No objection was made by the debtor to the charges, & he from time to time made payments on account of the amounts shown to be due. The heading of the accounts sent to debtor by one of the claimants contained the words " 5 per cent. interest charged after twelve months' credit " :—*Held :* interest could not be charged, as no agreement to pay interest could be implied from the circumstances, & no demand with notice of a claim for interest had been made within Civil Procedure Act, 1833 (c. 42), s. 28.—*Re* EDWARDS, WILLIAMS *v.* TRENCH (1891), 61 L. J. Ch. 22; 65 L. T. 453.

Annotations :—**Apld.** Tautz *v.* Archdale (1895), 11 T. L. R. 452. **Folld.** *Re* Anglesey, Willmot *v.* Gardner, [1901] 2 Ch. 548 (*See*, [1901] 2 Ch. 551).

109. —— ——.]—During a series of years a tradesman, in the yearly accounts which he delivered to his customer, charged him with interest on amounts which had been due for three years & longer. The customer never objected to the charge for interest, & he from time to time made payments to the tradesman on account generally. At the time of the customer's death a large amount was due from him to the tradesman for goods supplied :—*Held :* an agreement on the part of the customer to pay interest ought to be inferred from the course of dealing, & the tradesman was entitled to prove in the administration of the customer's estate for interest as it had been charged, as well as for principal.—*Re* ANGLESEY (MARQUIS), WILLMOT *v.* GARDNER, [1901] 2 Ch. 548; 70 L. J. Ch. 810; 85 L. T. 179; 49 W. R. 708; 45 Sol. Jo. 738, C. A.

Annotation :—**Mentd.** Pocahontas Fuel Co. (Incorporated) *v.* Ambatielos (1922), 27 Com. Cas. 148.

See, further, BANKERS, Vol. III., pp. 265–267, Nos. 811–824; COMPANIES, Vol. X., p. 932, No. 6394; SALE OF GOODS.

D. By Custom.

Mercantile securities.]—*See* BILLS OF EXCHANGE, Vol. III., pp. 327 *et seq.*

110. Interest payable.]—COOK *v.* OLIVER (1658), 2 Sid. 116; 82 E. R. 1287.

111. ——.]—CALTON *v.* BRAGG, No. 75, *ante*.

112. ——.]—PAGE *v.* NEWMAN, No. 85, *ante*.

113. ——.]—FOSTER *v.* WESTON, No. 101, *ante*.

114. ——.]—The Legislative Act, No. XXXII., 1839, extending to India the provisions of 3 & 4 Will. 4, c. 42, s. 28, concerning the allowance of interest in certain cases enacts that upon all debts of sums certain, payable at a certain time, the ct. before which they may be recovered, may, if it shall think fit, allow interest to the creditor, at a

PART III. SECT. 2, SUB-SECT. 1.—C.

103 i. *General rule—Implied from course of dealing.*]—HARIDAS RANCHORDAS *v.* MERCANTILE BANK OF INDIA (1919), I. L. R. 44 Bom. 474.—IND.

PART III. SECT. 2, SUB-SECT. 1.—D.

b. *Interest not payable—Custom unknown to plaintiff.*]—DE HERTEL *v.* SUPPLE (1868), 14 Gr. 421.—CAN.

Sect. 2.—When payable: Sub-sect. 1, D.; sub-sect. 2, A.]

rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time. Where a usage was established by which it appeared that interest was paid upon such contracts :—*Held:* according to such usage interest ought to have been allowed upon the principal sum recovered in an action.—JUGGOMOHUN GHOSE *v.* MANICKCHUND (1859), 7 Moo. Ind. App. 263; 7 W. R. 715; 19 E. R. 308, P. C.

Annotation :—**Consd.** Geake *v.* Ross (1875), 44 L. J. C. P. 315.

115. —— Custom of Lloyd's.]—THE ESTHER, STURGE *v.* HALDEMAND (1848), as reported in 9 L. T. 87, N. P.

116. —— Custom of bankers.]—The affidavit on which the application is founded, for interest on the balance of a banking account from the entering up till the affirmance of final judgment, must state that it was the custom of the bankers to charge interest on their advances, & at what rate.—GIBSON *v.* CARTER (1820), 8 Price, 516; 146 E. R. 1280, Ex. Ch.

—— ——.]—*See* BANKERS, Vol. III., p. 265, Nos. 813, 814.

Agent's right to interest.]—*See* AGENCY, Vol. I., p. 559, Nos. 2077–2080.

SUB-SECT. 2.—BY STATUTE.

A. Under Civil Procedure Act, 1833, *s.* 28.

See Civil Procedure Act, 1833 (c. 42), s. 28.

117. Debt or sum certain.]—Interest at 4 per cent. will be allowed on the amount of a demand for work & labour in an administration suit from the time when the demand for interest was made.

The question now is, whether by virtue of the demand of payment, & notice of his claim for interest, claimant is entitled to interest from the date of the notice? & that depends upon the question whether Civil Procedure Act, 1833 (c. 42), s. 28 applies. Now that sect. applies to debts or sums certain, & the question is, whether this is a debt or sum certain? In considering the case in reference to that & to the next sect., it appears to me that this is a case of a debt or sum certain & that claimant is entitled to interest at 4 per cent. from the date of his demand & notice (KINDERSLEY, V.-C.).—MILDMAY *v.* METHUEN (1854), 3 Drew. 91; 61 E. R. 837.

Annotations :—**Dbtd.** Hill *v.* South Staffordshire Ry. (1874), L. R. 18 Eq. 154. **Reld.** Mackintosh *v.* G. W. Ry. (1865), 4 Giff. 683; Geake *v.* Ross (1875), 44 L. J. C. P. 315; Ward *v.* Eyre (1880), 15 Ch. D. 130.

118. ——.]—The arts. of a limited co. provided that, after certain sums had been paid, 10 per cent. of the residue of the net profits should be paid as remuneration to the directors, & that the ultimate residue of net profits, should be applied in paying such dividend on the ordinary shares, or in such manner as, subject to the regulations, a general meeting might determine. At a general meeting held in Apr. 1883, it was resolved that a sum treated as the balance of net profits should be dealt with in accordance with the last-mentioned provisions of the articles. It was objected that some of the items which were then treated as valuable had no substantial value, & that the directors could not, acting reasonably, take the view that they were valuable. The directors acted on the report of their auditor, & after consultation with him. The co. was wound up voluntarily in 1883, & all the creditors were paid in full, & certain directors claimed to be paid their shares of the 10 per cent. of the residue of the net profits, a claim which was opposed by the liquidator, on the ground that the assets were overestimated at the time the resolution was passed, & that the proposed distribution of the residue was in effect a payment of dividends out of capital: —*Held:* the directors were entitled to the 10 per cent. claimed, but without interest.

I doubt very much whether there was any sum certain due to the directors until it was ascertained by the order just made (WRIGHT, J.).—*Re* PERUVIAN GUANO CO., *Ex p.* KEMP, [1894] 3 Ch. 690; 63 L. J. Ch. 818; 71 L. T. 611; 43 W. R. 170; 10 T. L. R. 585; 38 Sol. Jo. 664; 1 Mans. 423; 8 R. 544.

119. ——.]—A sum awarded by an umpire, under Lands Clauses Acts as compensation for injurious affection in a case where no land has been purchased & the costs, not yet taxed, given by the statute in such a case, although not sums "payable on a fixed day under an instrument in writing," are "debts." Therefore a jury or judge sitting alone may give interest on such sums from the date of a formal demand claiming payment & notifying that interest will be charged.—FLETCHER *v.* BIRKENHEAD CORPN., [1906] 1 K. B. 605; 75 L. J. K. B. 183; 94 L. T. 18; 70 J. P. 170; 22 T. L. R. 206; 4 L. G. R. 483; *affd.*, [1907] 1 K. B. 205, C. A.

Annotations :—**Mentd.** Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822; Price's Patent Candle Co. *v.* L. C. C., [1908] 2 Ch. 526; Martins *v.* Fowler, [1926] A. C. 746.

120. —— Set-off pleaded against sum claimed.]—A claim may be for a "sum certain" within Civil Procedure Act, 1833 (c. 42), s. 28, upon which interest may be claimed, notwithstanding that a set-off is pleaded which may cause a reduction in the amount which may finally be found due to pltf.—ALEXANDRA DOCKS & RY. CO. *v.* TAFF VALE RY. CO. (1911), 28 T. L. R. 163, C. A.

121. —— Payable at certain time — By virtue of written instrument.]—Pltfs. were assignees of a mtge. granted by W. W. & J. K. W. for £2,000; & had procured an advance for them from a client, on the same security, of £325; & were creditors of W. W. & J. K. W. for a further sum of £164. They had commenced actions for the first two sums, & obtained a verdict in an action for the last. Under these circumstances, deft., an attorney, but not employed as such in the business, induced pltfs. to stay proceedings for two months in the last action, & to allow judgment to be suffered by default in the other two, on which no execution was to issue for two months from Aug. 1, 1841. The consideration for this stay of proceedings was set out in a correspondence, from which it appeared, that deft. undertook that the money should be paid, whenever the necessary securities should be completed; stating at the same time the name of another party through whom the

PART III. SECT. 2, SUB-SECT. 2.—A.

117 i. *Debt or sum certain.*]—*Re* BRIGHOUSE ESTATE, *Re* ASPINALL, [1924] 1 D. L. R. 150; [1924] 1 W. W. R. 55; 33 B. C. R. 191.—**CAN.**

117 ii. ——.]—RAJAH BOMMARAUZE BAHADUR & KUMARA VENCATAPERMAUL RAUZE BAHADUR *v.* RANGASAMY MUDALY (1855), 6 Moo. Ind. App. 232. —**IND.**

117 iii. ——.]—There is no demand within 3 & 4 Will. 4, c. 42, if there is no existing debt payable when the demand is made.—UNION BANK OF AUSTRALIA & MORGAN *v.* WATERSTON (1894), 12 N. Z. L. R. 672.—**N.Z.**

117 iv. ——.]—AITCHISON *v.* KAITANGATA RAILWAY & COAL CO., LTD. (No. 3) (1901), 21 N. Z. L. R. 151.—**N.Z.**

money was to be produced, & to whom the mtges. were to be transferred. Ultimately, the third party in question refused to execute:—*Held:* on the effect of the whole circumstances & correspondence, deft. had rendered himself personally liable in respect of all these sums; also, interest on these sums, from Oct. 1, 1841, could not properly be allowed by a jury on the trial of the issue, under Civil Procedure Act, 1833 (c. 42), s. 28, as the sums were not payable by virtue of any written instrument at a certain time, nor had any demand of payment in writing, within the Act, been made; but, as to the former two sums, such jury would have been recommended to add the interest on them to the damages, independently of the statute. —HARPER *v.* WILLIAMS (1843), 4 Q. B. 219; 12 L. J. Q. B. 227; 114 E. R. 880.

Annotations:—**Consd.** Duncombe *v.* Brighton Club (1875), L. R. 10 Q. B. 371. **Mentd.** Jenkins *v.* Hutchinson (1849), 18 L. J. Q. B. 274; Lewis *v.* Nicholson (1852), 18 Q. B. 503.

122. —— —— ——.] — The contract between a railway co. & a contractor provided that payments should be made monthly, as the works proceeded, on the certificates of the co.'s engineer. There was no stipulation in the contract in reference to the payment of interest to the contractor on any sums due, but not paid to him. The contractor made a demand in writing for a sum as the balance due to him, & claimed interest thereon. His accounts were disputed, but on a bill filed by him against the co., the result showed that he was entitled to a balance less than one half of the sum which he had claimed to be due from the co.:—*Held:* the contractor was not entitled to interest either under the contract, there being no express stipulation on the part of the co. to pay any, or under Civil Procedure, 1833 (c. 42), s. 28, the demand in writing for payment not being of a sum certain payable at a certain time.—HILL *v.* SOUTH STAFFORDSHIRE RY. CO. (1874), L. R. 18 Eq. 154; 43 L. J. Ch. 556.

Annotations:—**Consd.** Geake *v.* Ross (1875), 44 L. J. C. P. 315. **Apld.** Ward *v.* Eyre (1880), 15 Ch. D. 130. **Refd.** L. C. & D. Ry. *v.* S. E. Ry., [1892] 1 Ch. 120.

123. —— —— ——.] — Where the instrument under which a sum is payable makes the day of payment depend on a future contingent event, such time is not a time certain within Civil Procedure Act, 1833 (c. 42), s. 28, & such sum does not carry interest unless there has been a demand for payment with notice that interest would be claimed, & interest cannot be given as damages for detention of the debt.

An award made upon a joint traffic agreement between two railway cos. determined that accounts should be rendered by each co. to the other in May; that a payment of not less than 75 per cent. should be made on account of the balance appearing to be due on the face of the accounts so exchanged, & that this payment should be made as soon after June 1 as possible & not later than June 15. A large balance became due from one of the cos. to the other, to recover which an action was brought & interest claimed:—*Held:* no interest could be recovered under Civil Procedure Act, 1833 (c. 42), s. 28; since there was no "debt or sum certain payable by virtue of a written instrument at a certain time," within that statute; nor had any demand of payment claiming interest been made in writing; & interest could not be given by way of damages for detention of the debt, the law upon that subject, unsatisfactory as it is, having been too long settled to be now departed from.—LONDON, CHATHAM & DOVER RY. CO. *v.* SOUTH EASTERN RY. CO., [1893] A. C. 429; 63 L. J. Ch. 93; 69 L. T. 637; 58 J. P. 36; 1 R. 275, H. L.

Annotations:—**Refd.** Page *v.* Cloete (1892), 36 Sol. Jo. 647; Phillips *v.* Homfray, [1892] 1 Ch. 465; *Re* Horner, Fooks *v.* Horner, [1896] 2 Ch. 188; Fletcher *v.* L. & Y. Ry., [1902] 1 Ch. 901; Johnson *v.* R., [1904] A. C. 817; Thakur Ganesh Bakhsh *v.* Thakur Harihar Bakhsh (1904), 20 T. L. R. 401; Toronto Ry. *v.* Toronto Corpn., [1906] A. C. 117; Di Ferdinando *v.* Simon, Smits, [1920] 3 K. B. 409. **Mentd.** Stearns *v.* Village Main Reef Gold Mining Co. (1904), 48 Sol. Jo. 700; Swift *v.* Board of Trade, [1925] A. C. 520.

124. —— —— —— **Application for loan.**] — A letter of application for a loan until a day named therein, which does not show an obligation to pay on the face of it, is not "an instrument by virtue of which the debt is payable at a certain time," within Civil Procedure Act, 1833 (c. 42), s. 28.—TAYLOR *v.* HOLT (1864), 3 H. & C. 452: 34 L. J. Ex. 1; 11 L. T. 347; 13 W. R. 78; 159 E. R. 607.

Annotation:—**Mentd.** Dene *v.* Sawyer (1872), 26 L. T. 646.

125. —— —— **Date ascertainable — "After entire discharge" not sufficient.**] — MERCHANT SHIPPING CO. *v.* ARMITAGE (1873), L. R. 9 Q. B. 99; 43 L. J. Q. B. 24; 29 L. T. 809; 2 Asp. M. L. C. 185, Ex. Ch.

Annotations:—**Apprvd.** L. C. & D. Ry. *v.* S. E. Ry., [1893] A. C. 429. **Refd.** *Re* Horner, Fooks *v.* Horner, [1896] 2 Ch. 188; Thkuar Ganesh Bakhsh *v.* Thakur Harihar Bakhsh (1904), 20 T. L. R. 401. **Mentd.** Williams *v.* Canton Insce. Office, [1901] A. C. 462; London Transport Co. *v.* Trechmann, [1904] 1 K. B. 635; Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171; Muller, Maclean *v.* Leslie & Anderson, [1921] W. N. 235.

126. —— —— ——.] — In order to entitle a creditor under Civil Procedure Act, 1833 (c. 42), s. 28, to interest on a debt from the time when the debt was payable, "if such debt be payable by virtue of some written instrument at a certain time," it is not necessary that the day for the payment should be mentioned in the instrument; it is sufficient if a time or event be fixed, the date of which can be ascertained afterwards. Therefore, where pltf. supplied furniture to defts. on the written terms, "one third in cash, & bills at six & twelve months for the balance":—*Held:* the case was within the sect., & pltf. was entitled to interest on the one third from the time the goods were delivered.—DUNCOMBE *v.* BRIGHTON CLUB CO. (1875), L. R. 10 Q. B. 371; 44 L. J. Q. B. 216; 32 L. T. 863; 40 J. P. 38; 23 W. R. 795.

Annotations:—**Consd.** L. C. & D. Ry. *v.* S. E. Ry., [1893] A. C. 429. **Refd.** Thakur Ganesh Bakhsh *v.* Thakur Harihar Bakhsh (1904), 20 T. L. R. 401.

127. —— —— ——.] — Testator covenanted that his exors. or administrators should pay a sum of £2,000 within six calendar months after his decease. Default was made in payment of the sum at the time named:—*Held:* the sum carried interest from the time named to the date of payment; the sum being "payable at a certain time" within Civil Procedure Act, 1833 (c. 42).—*Re* HORNER, FOOKS *v.* HORNER, [1896] 2 Ch. 188; 65 L. J. Ch. 694; 74 L. T. 686; 44 W. R. 556; 40 Sol. Jo. 498.

128. —— —— **Sum ascertainable on certain data.**]—MACKINTOSH *v.* GREAT WESTERN RY. CO. (1865), 4 Giff. 683; 6 New Rep. 336; 13 L. T. 84; 11 Jur. N. S. 631; 66 E. R. 881.

Annotations:—**Consd.** Hill *v.* South Staffordshire Ry. (1874), L. R. 18 Eq. 154. **Refd.** L. C. & D. Ry. *v.* S. E. Ry., [1893] A. C. 429.

129. Demand in writing — Necessity for.] — HARPER *v.* WILLIAMS, No. 121, *ante*.

130. —— ——.]—LONDON, CHATHAM & DOVER RY. CO. *v.* SOUTH EASTERN RY. CO., No. 123, *ante*.

131. —— **Sufficiency of — Demand after notice of action.**]—Pltf. having, after notice of action,

Sect. 2.—When payable: Sub-sect. 2, A., B. & C.; sub-sect. 3, A.]

served the co. with a written demand of interest under Civil Procedure Act, 1833 (c. 42), s. 28:—*Held:* the arbitrator, under a submission of "all matters in difference," might award pltf. interest, notwithstanding the notice of action did not contain a demand of interest; &, further, assuming a notice of action to have been necessary, the want or insufficiency of such notice could not be taken advantage of, since Limitations of Actions & Costs Act, 1842 (c. 97), s. 3, unless pleaded specially.—EDWARDS *v.* GREAT WESTERN RY. CO. (1851), 11 C. B. 588; 21 L. J. C. P. 72; 138 E. R. 603.

Annotations:—**Mentd.** Crouch *v.* G. N. Ry. (1854), 9 Exch. 556; Crouch *v.* G. N. Ry. (1856), 11 Exch. 742; Baxendale *v.* G. W. Ry. (1863), 14 C. B. N. S. 1; G. W. Ry. *v.* Sutton (1869), L. R. 4 H. L. 226; Lyles *v.* Southend-on-Sea Corpn. (1905), 92 L. T. 586.

132. —— —— Demand for interest from date prior to letter.]—A letter, sent after the return of part of the deposit, demanding the residue, & stating that pltf. would expect to be paid interest on the part withheld, from a day before the date of the letter, is a sufficient demand of interest under Civil Procedure Act, 1833 (c. 42), s. 28, to entitle him to recover it from the date of the demand.—MOWATT *v.* LONDESBOROUGH (LORD) (1854), 4 E. & B. 1; 119 E. R. 1; *sub nom.* LONDESBOROUGH (LORD) *v.* MOWATT, 2 C. L. R. 1181; 23 L. T. O. S. 235; 18 Jur. 1094; 2 W. R. 568, Ex. Ch.

Annotations:—**Consd.** Geake *v.* Ross (1875), 44 L. J. C. P. 315. **Refd.** Tautz *v.* Archdale (1895), 11 T. L. R. 452. **Mentd.** Johnson *v.* Goslett (1856), 18 C. B. 728; R. *v.* Saddlers' Co. (1861), 3 E. & E. 72.

133. —— —— Demand of amount due.] — It is not necessary in order to enable a jury, under Civil Procedure Act, 1833 (c. 42), s. 28, to allow interest upon a debt not payable at a time certain, that the demand in writing should be of a specific sum, it is sufficient to satisfy that enactment that the demand be of what is due, with notice that debtor is required to pay interest thereon.

Pltf. having for some years supplied coal to an unregistered mining co., wrote a letter to deft who was a shareholder, containing the following passages: "I feel it my duty to write to you about my claim on this co. They owe me for balance of coal account & interest over £1,100. . . . Now I must ask you the plain question why is not my account paid? . . . I must now give you notice that if my account with this mine be not settled on or before Nov. 1 next, I shall instruct my solr. to take the necessary proceedings to recover the money this company owes me":—*Held:* a sufficient demand within Civil Procedure Act, 1833 (c. 42), s. 28, to justify a jury giving interest from the date of such letter.—GEAKE *v.* ROSS (1875), 44 L. J. C. P. 315; 32 L. T. 666; 23 W. R. 658.

Annotation:—**Refd.** Tautz *v.* Archdale (1895), 11 T. L. R. 452.

134. —— —— Amount rendered charging interest.]—In May, 1872, a country solr. commenced a suit against his London agent, claiming an account & taxation of the bills of costs between them. Deft. filed his answer in Oct. 1872, thereby alleged a large balance due to him & claimed interest thereon. He had also, in 1869, furnished pltf. with an account which contained items for interest. In 1875 a copy of the account was inclosed in a letter which referred to the account, but made no formal demand of payment & which was signed by a firm of solrs. as his agents —*Held:* neither the answer nor the letter inclosing the account was a sufficient demand in writing or notice within Civil Procedure Act, 1833 (c. 42), s. 28.—WARD *v.* EYRE (1880), 15 Ch. D. 30; 49 L. J. Ch. 657; 43 L. T. 525; 28 W. R. 12, C. A.

Annotations:—**Refd.** Ward *v.* Lawson (1890), 43 Ch. D. 353; Reid *v.* Burrows, [1892] 2 Ch. 413; Sheba Gold Mining Co. *v.* Trubshawe, Ryley *v.* Master (1892), 61 L. J. Q. B. 219; Tautz *v.* Archdale (1895), 11 T. L. R. 452. **Mentd.** *Re* Wilde, [1910] 1 Ch. 100.

135. —— —— Notice on tradesman's account of intention to charge interest after one year's credit.]—*Re* EDWARDS, WILLIAMS *v.* TRENCH, No. 08, *ante*.

136. —— —— ——.] — TAUTZ & SON *v.* ARCHDALE (1895), 11 T. L. R. 452.

137. —— —— Claim on writ.] — A claim in the writ for interest upon the amount claimed from the date of the writ till payment or judgment is not a good demand for the purposes of Civil Procedure Act, 1833 (c. 42), s. 28.—RHYMNEY RY. CO. *v.* RHYMNEY IRON CO. (1890), 25 Q. B. D. 146; 59 L. J. Q. B. 414; 63 L. T. 407; 38 W. R. 764; T. L. R. 342, C. A.

Annotations:—**Consd.** Ryley *v.* Master, Sheba Gold Mining Co. *v.* Trubshawe, [1892] 1 Q. B. 674. **Mentd.** Stearns *v.* Village Main Reef Gold Mining Co. (1904), 48 Sol. Jo. 700.

138. —— —— Inclusion in statement of claim.]—GENVRAIN *v.* BECK (1925), 41 T. L. R. 629.

See, also, BONDS, Vol. VII., p. 217, No. 590; COMPANIES, Vols. IX. & X., pp. 332, 333, 927, Nos. 2099–2106, 6352.

B. Under Civil Procedure Act, 1833, s. 29.

See Civil Procedure Act, 1833 (c. 42), s. 29.

139. Interest on moneys recoverable on policies of insurance.]—Policies of assurance were effected by a debtor, & forwarded by him to his creditor, pltf., as security for a debt largely exceeding the amount assured. No legal assignment was effected. The policies were kept up, & the assured died in 1874. In 1875 pltf.'s solr. gave notice to the office of his claim, which notice the office acknowledged, & for which, it made the statutory charge of 5*s.*, but denied pltf.'s claim on the ground of there having been no legal assignment. Pltf. brought this action for the policy moneys & interest. The co. resisted, on the ground above mentioned, & insisted that pltf. could not give a valid discharge, & that the personal representative of the deceased was a necessary party. The deceased died insolvent, & there was no personal representative:—*Held:* pltf. was entitled to interest at 4 per cent. on the sum assured under above Act.—CROSSLEY *v.* CITY OF GLASGOW LIFE ASSURANCE CO. (1876), 4 Ch. D. 421; 46 L. J. Ch. 65; 36 L. T. 285; 25 W. R. 264.

Annotations:—**Folld.** *Re* Rosier's Trusts (1877), 37 L. T. 426. **Consd.** Webster *v.* British Empire Mutual Life Assce. (1880), 15 Ch. D. 169. **Mentd.** Curtius *v.* Caledonian Fire & Life Insce. (1881), 51 L. J. Ch. 80.

140. ——.] — In 1847 A. deposited a policy on his own life with B. as security for an advance of money, & died in 1874, insolvent, & no administration was taken out to his estate. In 1875 B. proved A.'s death to the satisfaction of the assurance co., & demanded payment of the policy moneys, which were insufficient to pay his debt, but the co. refused to pay him without the consent of the legal representative of A. In 1878 B. died, & on action brought by his exors. against the co. claiming a declaration that they were entitled to the policy moneys, & payment with interest from the time when the demand of payment was made, the judge held that the co. was justified in refusing to pay over the policy moneys without the consent of A.'s legal personal representative; dispensed with the legal personal representative of A. under 15 & 16 Vict. c. 86, s. 44, &, ordered payment of

the policy moneys, with interest at 4 per cent., from the date when demand of payment was made.

On appeal on the question of interest:—*Held:* as the default or delay in payment of the policy moneys had been caused, not by the co., but by B.'s neglect to clothe himself with a legal title to the money, interest did not commence to run till the order for payment of the principal was made.—WEBSTER *v.* BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO. (1880), 15 Ch. D. 169; 49 L. J. Ch. 769; 43 L. T. 229; 28 W. R. 818, C. A.

Annotations:—**Refd.** L. C. & D. Ry. *v.* S. E. Ry., [1892] 1 Ch. 120; *Re* Drax, Savile *v.* Drax, [1903] 1 Ch. 781. **Mentd.** Curtius *v.* Caledonian Fire & Life Insce. (1881), 19 Ch. D. 534.

141. ———.] — The Admlty. requisitioned a steamer upon the terms of a charterparty, clause 19 of which provided that the risks of war which are taken by the Admlty. are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause warranted free of capture, seizure & detention & the consequences thereof, or of any attempt thereat, piracy excepted, & also from all consequences of hostilities or warlike operations, whether before or after declaration of war. Such risks are taken by the Admlty. on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury. The steamer was lost by war risks, & the owners claimed to be paid by the Admlty. interest on the ascertained value of the steamer from the date of the loss on the footing that clause 19 was either a policy of insurance or was a contract of indemnity:—*Held:* the shipowners were not entitled to interest under above sect. because clause 19 of the Admlty. charterparty was not a policy of marine insurance within 6 Edw. 7, c. 41, s. 23, as the sum insured was not stated therein; nor was it a contract of indemnity, as the liability of the Admlty. was in terms limited to the ascertained value of the steamer at the time of the loss.—ADMIRALTY COMRS. *v.* ROPNER & CO., LTD. (1917), 86 L. J. K. B. 1030; 117 L. T. 58; 33 T. L. R. 362; 14 Asp. M. L. C. 89, D. C.

See, also, INSURANCE, Vol. XXIX., p. 391, Nos. 3123–3126. *Compare* No. 173, *post.*

142. Damages for trover or trespass.] — By the decree made in this suit in 1870, it was declared that defts. S. & R., & the estate of deceased deft. W., were answerable for all minerals gotten or removed from under pltfs.' farm; & an inquiry was directed what quantities of minerals had been so gotten or removed, & it was ordered that the value at the pit's mouth of all minerals so gotten or removed, with just allowances for carriage, but none for getting, should be certified. The decree was silent as to interest, no claim for interest being made at the hearing.

After the decree defts. S. & R. died, & the suit was continued, so far as the inquiry was concerned, against their representatives.

The official referee having, in Dec. 1889, reported the value at the pit's mouth of the minerals taken to be £9,028 6*s.*, pltfs., upon the further consideration of the suit in 1891, claimed to be entitled to damages in the nature of interest on that amount on the ground that the action was in the nature of an action of trover or trespass *de bonis asportatis* within above sect.:—*Held:* the action must be treated as an equitable action to recover the benefits that defts. or their respective estates had received from the wrongful taking of the minerals belonging to pltfs., & not as an action of trover or trespass; & although according to the settled practice in the case of such an equitable action, pltfs. might, at the hearing, have been allowed interest on the value of the minerals wrongfully taken, yet, pltfs. not having claimed interest at the hearing & the decree being silent as to interest, it was too late to claim it for the first time twenty years after the date of the decree.

In an equitable action to recover from the estate of a deceased person the profits he has received from a wrongful act, such as taking coal belonging to pltf., the ct. will at the trial, make the estate liable, not only for the amount of profits actually received, but also for interest thereon at 4 per cent. from the death of the wrongdoer.—PHILLIPS *v.* HOMFRAY, [1892] 1 Ch. 465; 61 L. J. Ch. 210; 66 L. T. 657; 36 Sol. Jo. 199, C. A.

Annotation:—**Refd.** Omnium Insce. Corpn. *v.* United London & Scottish Insce. (1920), 36 T. L. R. 386.

C. Under Other Statutes.

In bankruptcy.]—*See* BANKRUPTCY, Vols. IV. & V., pp. 93, 119, 125, 204, 271, 274, 305–307, 338, 378, 379, 428, 608, Nos. 840–842, 1082, 1138–1141, 1884, 2547–2550, 2570, 2852–2875, 3171, 3488–3499, 3862, 3866, 5463.

Bills of exchange.]—*See* BILLS OF EXCHANGE, Vol. II., pp. 327–335, Nos. 2172–2226.

Under Companies Acts.]—*See* COMPANIES, Vols. IX. & X., pp. 245, 324, 333, 460, 510, 738, 781, 811–814, 932–933, 1026, Nos. 1534, 2049, 2101, 2984, 3339, 4614, 4889, 5187–5196, 6385–6397, 7118.

Compulsory purchase of land—Interest on purchase-money.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 163, 231–233, 274, 293, Nos. 412, 1203–1215, 2014, 2219.

On estate & other death duties.]—*See* ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 6, 82, 115, 128, Nos. 863, 864.

See, also, Land Drainage Act, 1845 (c. 56), ss. 8, 9, 10; Improvement of Land Act, 1864 (c. 114), s. 49; Public Health Act, 1875 (c. 55), s. 257; Public Works Loans Acts, 1879 (c. 77), s. 2; 1892 (c. 61), s. 2; 1896 (c. 42), s. 2; 1897 (c. 51), s. 1; 1917 (c. 32), s. 4; 1918 (c. 27), s. 4.

SUB-SECT. 3.—IN EQUITY.

A. In General.

143. Accounts stated.] — Stated accounts shall carry interest, especially in the case of mtges., & more strongly when settled by a master of the ct. pursuant to any order.—STROUD *v.* MOOR (1717), 2 Eq. Cas. Abr. 529; 22 E. R. 447.

PART III. SECT. 2, SUB-SECT. 2.—C.

c. Under Common Law Procedure Act, 1899—Necessity to mention date of payment in interest.]—Interest on a debt under a written instrument is not recoverable unless the date of payment is also fixed by the instrument.—HOUGH *v.* WHITTY (1903), 3 S. R. N. S. W. 677; 20 N. S. W. W. N. 218. —**AUS.**

d. Under 58 Vict. c. 12.]—MCCULLOUGH *v.* NEWLOVE (1896), 27 O. R. 627.—**CAN.**

e. Under 60 Vict. c. 24—Debt or sum certain.]—MAYES *v.* CONNOLLY (1902), 35 N. B. R. 701.—**CAN.**

f. Under Ontario Judicature Act, 1897.]—TORONTO RY. CO. *v.* CITY OF TORONTO CORPN., [1906] A. C. 117, P. C.—**CAN.**

g. Demand in writing — Necessity for.]—HART *v.* GREER (No. 1) (1915), 33 W. L. R. 39.—**CAN**

h. ——— ———.] — Interest is not claimable where there is no agreement to pay interest & no demand in writing so as to bring the case within the provisions of Interest Act.—SUBRAMANIA AIYAR *v.* SUBRAMANIA AIYAR (1908), I. L. R 31 Mad. 250.—**IND.**

k. Interest on judge's salary — When allowed.]—PROWSE *v.* NEWFOUNDLAND GOVERNMENT (1900), 8 Nfld. L. R. 386.—**NFLD.**

Sect. 2.—When payable: Sub-sect. 3, A., B., C., D., E., F., G., H., J. & K.; sub-sects. 4, 5, 6, 7, 8 & 9.]

144. ——.]—BODDAM *v.* RYLEY (1787), 4 Bro. Parl. Cas. 561 ; 2 E. R. 382, H. L.

Annotations :—**Folld.** Fergusson *v.* Fyffe (1841), 8 Cl. & Fin. 121. **Refd.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1.

145. Money laid out for use of another — Notwithstanding current account between parties.]—Equity will allow interest upon a gross sum laid out by one merchant for another, though there was an account current between them.—OMICHUND *v.* BARKER (1745), as reported in Ridg. *temp.* H. 285 ; 22 E. R. 831, L. C.

Annotations :—**Refd.** *Re* German Mining Co., *Ex p.* Chippendale (1854), 4 De G. M. & G. 19 ; Rhodes *v.* Rhodes (1860), John. 653. **Mentd.** East India Co. *v.* Campbell (1749), 1 Ves. Sen. 246 ; Atcheson *v.* Everitt (1776), 1 Cowp. 382 ; R. *v.* Gilham (1795), 1 Esp. 285 ; Spain (King) *v.* Hullett (1833), 7 Bli. N. S. 359 ; Boelen *v.* Melladew (1851), 10 C. B. 898 ; Parkes *v.* Parkes (1852), 2 Rob. Eccl. 518 ; Salomons *v.* Miller (1853), 8 Exch. 778 ; Maden *v.* Catanach (1881), 7 Ch. D. 667 ; Bowman *v.* Secular Soc., [1917] A. C. 406.

146. Express contract to pay—At a day certain or on demand—Interest due from day fixed or from time of demand.]—A written undertaking to pay at a day certain, or on demand, as a promissory note, carries interest from the day or the demand ; as at law it is given by way of damages.—UPTON *v.* FERRERS (LORD) (1801), 5 Ves. 801 ; 31 E. R. 866.

Annotations :—**Folld.** Lowndes *v.* Collens (1810), 17 Ves. 27. **Refd.** Webster *v.* British Empire Mutual Life Assce. (1880), 15 Ch. D. 169. **Mentd.** Ralph *v.* Carrick (1879), 11 Ch. D. 873 ; *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378.

147. —— —— ——.]—(1) Under a written contract for a sum of money payable on demand or a day certain interest is in equity as at law payable from the time of demand made or from the fixed period of payment.

(2) Interest at 5 per cent. under a contract to give promissory notes.—LOWNDES *v.* COLLENS (1810), 17 Ves. 27 ; 34 E. R. 11.

Annotations :—*As to* (1) **Consd.** Webster *v.* British Empire Mutual Life Assce. (1880), 15 Ch. D. 169. *As to* (2) **Refd.** Gaunt *v.* Taylor (1834), 3 L. J. Ch. 135 ; Hart *v.* Cradock (1837), 1 Jur. 735.

148. —— —— ——.]—Where A. retired from a certain partnership, but left £60,000 capital in the business ostensibly as part of the partnership capital of B. such sum to be repaid at the end of three years, being the agreed term of the new co-partnership, & where B. retained & employed in the business the said sum beyond the expiration of the said period :—*Held :* interest at 5 per cent. *per annum* was payable on the £60,000 from the expiration of the three years, & also on the profits from the time of the realisation of the different portions of the same.

The courts of equity are not limited by Civil Procedure Act, 1833 (c. 42), s. 28, as to the allowance of interest.

Even if the statute were being resorted to, I think the statute would furnish a sufficient authority for directing the payment of interest. But I do not rely upon the statute. The statute has been recognised by the ct. on many occasions, but never in the shape of a limiting or binding authority upon the ct., but as a reason if any one wanted it, in addition why the ct. should direct the payment of interest. The sums which were payable from time to time are capable of easy ascertainment. The days on which they ought to have been paid can also be easily ascertained. The sum was become certain & a day was become certain. Then upon that which I take to be a principle higher than any which is recognised by the statute alone, upon the well established law of this ct., the money being payable at the times which will be ascertained, which may now be said to have been easily ascertained, I think from each of these times, whenever the money was received, the persons entitled to receive the money at that time are entitled to interest upon the same money from that day (BACON, V.-C.).—SPARTALI *v.* CONSTANTINIDI (1872), 20 W. R. 823 ; *on appeal*, 21 W. R. 116, L. JJ.

149. ——.]—COURTENEY (LORD) *v.* GODSCHALL (1804), 9 Ves. 473 ; 32 E. R. 685, L. C.

150. Contract to give promissory note — Contract to pay interest inferred.]—LOWNDES *v.* COLLENS, No. 147, *ante*.

151. —— ——.]—Deft. wrote to his receiver & professional agent as follows : If you will remit the £400 I can give you a note for it when you come to London. The money was advanced but no note was signed :—*Held :* a special contract must be inferred, & interest was payable by deft.—[illegible] (LORD) (1840), 2 Beav. 359 ; 48 [illegible]

152. Money expended by person entitled to be indemnified—Out of funds in court.]—A party was directed to pay certain costs, & make other payments, but was declared to be entitled to be indemnified out of funds in ct. :—*Held :* he was entitled to interest at 4 per cent. on all sums paid for costs or otherwise.—WAINMAN *v.* BOWKER (1845), 8 Beav. 363 ; 50 E. R. 142.

153. Defendants obstructing recovery of interest at law.]—A railway co., having agreed to let its line to another, which had taken possession under the agreement, filed a specific performance bill against the other, which thereupon gave notice that it would pay the rent into ct. Pltfs. then gave the defts. notice, that, unless the rent were paid to pltfs., interest would be claimed on it under Civil Procedure Act, 1833 (c. 42), s. 28. Defts. obtained *ex p.* an order that they might be at liberty to pay the rent into ct., & paid it in accordingly :—*Held :* they thereby obstructed the recovery of interest at law, & the ct. had jurisdiction to order payment of interest.—HULL & SELBY RY. CO. *v.* NORTH EASTERN RY. CO. (1854), 5 De G. M. & G. 872 ; 24 L. J. Ch. 109 ; 24 L. T. O. S. 164 ; 3 W. R. 129 ; 43 E. R. 1109, L. JJ.

Annotation :—**Refd.** *Re* East of England Banking Co. (1868), L. R. 6 Eq. 368.

154. Money obtained by fraud — Necessity for proof of fraud.]—Money obtained by fraud can be recovered with interest, whether the proceedings be taken in a ct. of equity or in a ct. of law. But the fraud must be proved in the proceedings by which the money is recovered, otherwise no interest will be allowed ; & it is not sufficient that the fraud has been proved in other proceedings in a criminal ct.—JOHNSON *v.* R., [1904] A. C. 817 ; 73 L. J. P. C. 113 ; 91 L. T. 234 ; 53 W. R. 207 ; 20 T. L. R. 697, P. C.

Annotations :—**Mentd.** A.-G. *v.* Till (1909), 5 Tax Cas. 440 ; Vaithinatha Pillai *v.* King-Emperor (1913), 29 T. L. R. 709 ; The Zamora, [1916] 2 A. C. 77 ; *Re* Letters Patent No. 139207, *Re* Carbonit Akt., [1924] 2 Ch. 53.

155. Effect of Civil Procedure Act, 1833 (c. 42), s. 28.] — SPARTALI *v.* CONSTANTINIDI, No. 148, *ante*.

B. Between Mortgagor and Mortgagee.

See LIMITATION OF ACTIONS, Vol. XXXII., pp. 421 *et seq.* ; &, *generally*, MORTGAGE, Part XVII., *post*.

C. Between Obligor and Obligee of Bond.

See BONDS, Vol. VII., pp. 215–218, Nos. 573–605.

D. Between Executors and Beneficiaries.

Liability of Crown—Interest on debts—On grant of administration to Crown.]—*See* EXECUTORS, Vol. XXIII., p. 156, Nos. 1654–1656.

Interest payable by representative—On legacies.]—*See* EXECUTORS, Vol. XXIII., pp. 405 *et seq.*

—— —— **To infants.**]—*See* EXECUTORS, Vol. XXIII., pp. 448, 449, 452, 453, 455, Nos. 5184, 5200, 5249, 5256, 5287, 5289.

—— —— **On admission of assets.**]—*See* EXECUTORS, Vol. XXIV., pp. 708, 709, Nos. 7331–7340.

—— —— **On accounts being taken.**]—*See* EXECUTORS, Vol. XXIV., pp. 696 *et seq.*

—— **On debt—Administration of insolvent estate by court.**]—*See* EXECUTORS, Vol. XXIV., pp. 819, 820, Nos. 8515–8521.

Liability of representative—For failure to keep down or pay interest.]—*See* EXECUTORS, Vol. XXIV., p. 663, Nos. 6898–6902.

Payment of interest under terms of will.]—*See* SETTLEMENTS; TRUSTS & TRUSTEES; WILLS.

E. Between Principal and Agent.

Principal's right to interest.]—*See* AGENCY, Vol. I., pp. 456 *et seq.*

Agent's right to interest.]—*See* AGENCY, Vol. I., p. 559, Nos. 2077–2080.

Agent's liability for interest — Stakeholder — Auctioneer.]—*See* AUCTIONS & AUCTIONEERS, Vol. III., p. 25, Nos. 178–184.

F. Between Principal and Surety.

Liability of surety.]—*See* GUARANTEE, Vol. XXVI., pp. 85–87, 95, 131, Nos. 599–611, 660, 952.

Right of surety.]—*See* GUARANTEE, Vol. XXVI., pp. 136, 137, Nos. 990–997.

Right of co-surety—Contribution.]—*See* GUARANTEE, Vol. XXVI., p. 146, Nos. 1082–1085.

Liability to payment by way of indemnity.]—*See* GUARANTEE, Vol. XXVI., pp. 234, 235, Nos. 1828–1831.

G. Between Trustee and cestui que trust.

See TRUSTS & TRUSTEES.

H. Between Vendor and Purchaser.

See SALE OF LAND.

J. On Arrears of Rentcharges and Annuities.

See RENTCHARGES & ANNUITIES.

K. On Dissolution of Partnership.

See PARTNERSHIP.

SUB-SECT. 4.—BY OFFICER OF COURT ON MONEY OBTAINED IN LEGAL PROCEEDINGS.

156. Receiver — Interest on balance retained — After failure to pass accounts.]—A receiver neglecting to pass his accounts & pay the balance was, under Consolidated Ords., Ord. 24, disallowed his poundage, & charged at the rate of 5 per cent. *per annum* interest on the balances that were in his hands.—BRISTOWE *v.* NEEDHAM (1863), 8 L. T. 652; 9 Jur. N. S. 1168; 11 W. R. 926.

——.]—*See, further,* RECEIVERS.

157. Sheriff — Proceeds of goods wrongfully claimed & retained.]—Where a sheriff had retained for several years a sum of money in his hands, the balance of the produce of effects of a Crown debtor seized by him & sold under an extent after the Crown debt had been satisfied, claiming himself a lien thereon for poundage, etc., the ct. ordered that he should pay interest on the amount of such balance to the parties from whom he had withheld it, from the time when the ct. had determined, on a former occasion, that the claim of the sheriff was unfounded, notwithstanding which determination he had continued to keep the question before the ct.; & that although the sheriff should not have made interest or any use or advantage of the money in the meantime, the ct. proceeding wholly on the ground of the injury done to the party entitled to it.—R. *v.* VILLERS (1823), 11 Price, 575; 147 E. R. 569.

Solicitor.]—*See* SOLICITORS.

SUB-SECT. 5.—AWARDS OF INTEREST IN ARBITRATION PROCEEDINGS.

Validity of award.]—*See* ARBITRATION, Vol. II., pp. 472, 473, Nos. 1171–1177.

SUB-SECT. 6.—ON DEBTS DUE TO THE CROWN.

Simple contract debt.]—*See* CROWN PRACTICE, Vol. XVI., p. 227, No. 185.

SUB-SECT. 7.—ON DEBTS PAYABLE ABROAD.

See CONFLICT OF LAWS, Vol. XI., p. 407, Nos. 760–762.

SUB-SECT. 8.—ON JUDGMENTS.

See JUDGMENTS, Vol. XXX., pp. 172–180, Nos. 402–488.

SUB-SECT. 9.—ON COSTS.

158. Costs paid pending appeal — On undertaking to refund.]—EDGE & SONS *v.* GALLON (W.) & SON, [1899] W. N. 137, C. A.

Annotation:—**Distd.** Ashworth *v.* English Card Clothing Co. (No. 2), [1904] 1 Ch. 704.

159. —— Appeal to House of Lords — Interest allowed by other side on appeal to Court of Appeal.]—Pltf. whose action was dismissed with costs paid deft.'s costs with interest to date. The Ct. of Appeal having reversed the decision of the ct. of first instance, defts. repaid the sum they had received with interest to date. Upon further appeal the House of Lords restored the original order, whereupon the pltf. repaid to defts. the sum he had received from them, but without any further interest:—*Held:* defts. were entitled to interest on that sum from the time when they had paid it to the pltf. down to the time of repayment to themselves.—ASHWORTH *v.* ENGLISH CARD CLOTHING CO., LTD. (No. 2), [1904] 1 Ch. 704; 73 L. J. Ch. 282; 90 L. T. 263; 21 R. P. C. 355.

160. —— ——.]—A decision in favour of pltf. was reversed by the Ct. of Appeal & restored by

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PART III. SECT. 2, SUB-SECT. 4.

157i. ***Sheriff — Proceeds of goods wrongfully claimed & retained.***]—The ct. has power to award to a successful applt. interest upon an amount found on appeal to have been improperly levied in execution of a decree.—AYYAVAYYAR *v.* SHASTRAM AYYAR (1886), I. L. R. 9 Mad. 506.—**IND.**

157ii. —— ——.]—PHUL CHAND *v.* SHANKAR SARUP (1898), I. L. R. 20 All. 430.—**IND.**

Sect. 2.—*When payable: Sub-sect.* 9. *Sects.* 3 & 4: *Sub-sects.* 1, 2 & 3, *A., B. & C.*]

the House of Lords. No order was made as to pltf.'s costs of the appeal to the Ct. of Appeal prior to the judgment in the House of Lords:—*Held:* pltf. was entitled to interest at the rate of 4 per cent. *per annum* on his costs of the appeal to the Ct. of Appeal as from the date of the judgment of that ct.—STICKNEY *v.* KEEBLE (No. 2) (1915), 84 L. J. Ch. 927; 112 L. T. 1107; 31 T. L. R. 221.

See, further, JUDGMENTS, Vol. XXX., p. 177, Nos. 448–455.

SECT. 3.—PERIOD DURING WHICH INTEREST RUNS.

See ADMIRALTY, Vol. I., p. 218, No. 1430; BILLS OF EXCHANGE, Vol. VI., pp. 331–333, Nos. 2191–2217; BILLS OF SALE, Vol. VII., p. 135, No. 704; CONTRACT, Vol. XII., p. 588, No. 4905; JUDGMENTS, Vol. XXX., pp. 164, 165, 175–177, Nos. 332–336, 433–455; Civil Procedure Act, 1833 (c. 42), s. 28.

SECT. 4.—RECOVERY OF INTEREST.

SUB-SECT. 1.—UNDER CONTRACT.

161. Recovery apart from principal.]—Debt will lie for interest of money.—HERRIES *v.* JAMIESON (1794), 5 Term Rep. 553; 101 E. R. 310.

Annotations:—**Refd.** Dickenson *v.* Harrison (1817), 4 Price, 282. **Mentd.** Powell *v.* Fullerton (1801), 2 Bos. & P. 420; Hill *v.* White (1839), 6 Bing. N. C. 23; Davies *v.* Thomson (1845), 14 M. & W. 161.

162. ——.]—DICKENSON *v.* HARRISON, No. 71, *ante.*

163. ——.]—Interest cannot be recovered on money had & received, or money paid, without a special agreement; but if money was at first had & received, & there is a subsequent agreement to pay interest, pltf. may recover such money & interest on a count for money had & received, & on a count for interest, & need not declare specially.—HICKS *v.* MARECO (1833), 5 C. & P. 408, N. P.

164. —— **Implied agreement to pay interest.**]—The common *indebitatus* count for interest is good; & where a writ of error assigned for cause, that no promise could be implied by law from the forbearance of money at deft.'s request:—*Held:* the error assigned was frivolous, & the ct., on motion, allowed execution to go notwithstanding the writ of error.—NORDENSTROM *v.* PITT (1845), 13 M. & W. 723; 14 L. J. Ex. 150; 4 L. T. O. S. 357; 153 E. R. 303.

Annotation:—**Refd.** M'Intyre *v.* Miller (1845), 14 L. J. Ex. 180.

165. Recovery as debt.]—To a declaration in an action of debt on a promissory note, alleging a promise to pay £40, on demand, with lawful interest & on counts for money lent, & on an account stated, deft. pleaded, as to the said debts that deft. paid & pltf. received £150 in full satisfaction of the said debts & of all damages sustained by reason of their detention:—*Held:* the interest was not merely damages but part of the debt & recoverable as such upon this issue.—HUDSON *v.* FAWCETT (1844), 7 Man. & G. 348; 2 Dow. & L. 81; 8 Scott, N. R. 32; 13 L. J. C. P. 141; 3 L. T. O. S. 57; 135 E. R. 145.

SUB-SECT. 2.—AS DAMAGES.

Interest payable by way of damages generally, *see* Part II., Sect. 2, sub-sect. 1, *ante.*

166. Recovery in action to recover principal.]—SWEATLAND *v.* SQUIRE (1699), 2 Salk. 623; 91 E. R. 527.

167. ——.]—On an award directing payment of money at a certain time, interest, from that time till payment, may be recovered by action, but not by motion for an attachment.—CHURCHER *v.* STRINGER (1831), 2 B. & Ad. 777; 1 Dowl. 332; 9 L. J. O. S. K. B. 318; 109 E. R. 1334.

168. ——.]—COOK *v.* FOWLER, No. 67, *ante.*

169. Recovery after payment of principal—Bond.]—A bond conditioned for the payment of a specified sum to A. after the death of B. & C. & the survivor of them, will bear interest after the death of B. & C. although the engagement was perfectly voluntary, & although the principal was payable on a contingency. One issue in such case having been taken on the plea of payment, according to the condition of the bond, deft. is not entitled to a verdict on that issue, on proof of

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PART III. SECT. 4, SUB-SECT. 1.

161 i. *Recovery apart from principal.*]—An action of debt is not maintainable for interest only on debentures, the principal not being due.—LYALL *v.* LONDON CORPN. (1859), 8 C. P. 365.—**CAN.**

161 ii. ——.]—When by the terms of a contract money is to bear interest, interest is as much payable by virtue of the contract as the principal, & the ct. has no power in such a case to withhold interest.—BABOO BUNWAREE LALLSAHOO *v.* MAHARAJAH MOHESHUR SINGH (1863), Marsh. 544; 2 Hay, 644.—**IND.**

161 iii. ——.]—Where a decree is silent as to future interest, interest cannot be recovered by proceeding in execution of the decree, but it may be recovered as damages by a separate suit.—SETH GOKUL DASS GOPAL DASS *v.* MURLI & ZALIM (1878), I. L. R. 3 Calc. 602; 2 C. L. R. 156; L. R. 5 Ind. App. 78.—**IND.**

161 iv. ——.]—Pltf. sued to recover a sum of money due to her on an oral contract together with interest. No agreement or usage giving a right to interest was alleged, & no written demand & notice had been given under Interest Act:—*Held:* pltf. was not entitled to interest.—KAMALAMMAL *v.* PEERU MEERA LEVVAI ROWTHEN (1897), I. L. R. 20 Mad. 481.—**IND.**

161 v. ——.]—An agreement for a loan, provided that the borrower should pay to the lender interest on the sum agreed to be advanced, from a day specified until the completion of the loan, or until it should be broken off & such interest paid; the loan having been broken off & the interest left unpaid:—*Held:* the borrower was only liable for interest down to the day of the breaking off of the loan.—CAIRNES *v.* LAMBERT (1873), I. R. 7 C. L. 564.—**IR.**

165 i. *Recovery as debt.*]—*Held:* it was no objection to a replication that it showed for the first time that interest only was claimed, for that being merely an accessary to the principal, need not be claimed as damages.—MONTREAL CITY & DISTRICT SAVINGS BANK *v.* COUNTY OF PERTH (1881), 32 C. P. 18.—**CAN.**

l. —— *By Crown.*]—The Crown can recover interest where a private individual would be entitled to it, as in an action for money paid under a written contract, on account of a third person, in which it may be recovered from the date of service of process.—A.-G. *v.* BLACK (1828), S. R. C. 324.—**CAN.**

PART III. SECT. 4, SUB-SECT. 2.

m. *Recovery after payment of principal.*]—Upon a bond for the payment of money on a certain day with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest cannot be implied, & thereafter interest is not recoverable as interest but as damages.—R. *v.* GRAND TRUNK RY. CO. (1890), 2 Exch. C. R. 132.—**CAN.**

n. *Interest on foreign judgment.*]—*Held:* though interest on a foreign judgment could not be recovered as incident thereto, a jury might allow interest as damages.—BANK OF MONTREAL *v.* CORNISH (1879), *Temp.* Wood, 272.—**CAN.**

o. *Action for non-delivery.*]—Interest on the amount recovered in an action for non-delivery of goods may be allowed at the legal rate as damages for delay.—HAMILTON *v.* HUDSON'S BAY CO. (1884), 1 B. C. R., pt. 2, 176.—**CAN.**

p. *Petition of right.*]—R. *v.* MACLEAN (1885), Cass. Dig. 2 ed. 399.—**CAN.**

q. *Account stated.*]—Interest is not chargeable upon an account stated unless a fixed time for payment was agreed upon or a demand for payment made, or upon an account endorsed

payment of the principal without interest. *Qu.*: whether in such case after payment of the principal, an action can be maintained for the interest only.—HELLIER *v.* FRANKLIN (1816), 1 Stark. 291.

SUB-SECT. 3.—DEFENCES TO ACTION.

A. Merger of Principal Debt in Judgment.

See, generally, JUDGMENTS, Vol. XXX., pp. 162–165, Nos. 323–339.

170. Interest accrued before judgment.] — Pltf. discounted for deft. a bill for £250, drawn by the latter, upon one A., deft., & A. at the same time signing the following memorandum addressed to pltf.: "Sir,—In consideration of your discounting the undermentioned bill, we do hereby jointly & severally undertake, if the same is not wholly paid at maturity, to pay, as interest thereon £20 for each month any portion of which shall have elapsed after maturity of the said bill, & until the same is wholly paid & satisfied." At the foot of this memorandum was written, "£250, Jenings on A., at three months." The bill not having been paid at maturity, pltf. sued deft. thereon, claiming by the particulars indorsed on the writ interest at the rate of £20 per month, as per agreement, but declaring only on the bill, & obtained a verdict & judgment thereon. Pltf. afterwards brought another action against deft. upon the agreement for the stipulated interest of £20 per month:—*Held:* the former judgment was no answer to pltf.'s claim for interest accruing before the recovery of such judgment, but pltf. was not entitled to recover in the second action interest accruing since.—FLORENCE *v.* JENINGS (1857), 2 C. B. N. S. 454; 26 L. J. C. P. 274; 30 L. T. O. S. 53; 3 Jur. N. S. 772; 140 E. R. 494.

Annotations:—**Consd.** *Re* Sneyd, *Ex p.* Fewings (1883), 25 Ch. D. 338. **Refd.** *Re* King & Beesley, *Ex p.* King & Beesley, [1895] 1 Q. B. 189; Faber *v.* Lathom, Gye, Third Party (1897), 77 L. T. 168.

171. Interest accrued subsequent to judgment.] —FLORENCE *v.* JENINGS, No. 170, *ante*.

172. Judgment for principal — In action for principal & interest—Subsequent action for arrears of interest—No power in court to grant.]—DU BELLOIX *v.* WATERPARK (LORD), No. 65, *ante*.

173. —— —— Subsequent application to vary judgment by adding interest.]—Pltf., as extrix., claimed the amount of a policy of insurance for which her husband's life had been insured in the defts.' office, & also interest thereon. Two years after his death she obtained a verdict & judgment for the principal sum only, & subsequently applied to the judge before whom the case was tried to vary the judgment entered for her by adding the amount of the interest. This he refused on the ground that he had no power to do it:—*Held:* the decision was right, as the question, being one which depended upon whether or not the claim had been improperly resisted, was one solely for the jury.—LOTINGA *v.* COMMERCIAL UNION ASSURANCE CO. (1885), 2 T. L. R. 3, D. C.

B. Tender of Amount Due.

174. Whether good defence.] — The maker of a promissory note pays money into the hands of an agent to retire it: the agent tenders the money to the holder of the note, on condition of having it delivered up; the note being mislaid, this condition is not complied with; & the agent afterwards becomes bkpt. with the money in his hands:—*Held:* the maker was still responsible on the note; but the interest was not recoverable after the time of the tender.—DENT *v.* DUNN (1812), 3 Camp. 296; 170 E. R. 1388.

C. Principal Unpaid for Reason outside Debtor's Control.

175. Lost policy — Whether insurance co. liable to pay interest.]—Interest is not payable on a sum recovered, on a lost policy, from a life insurance co.—BUSHNAN *v.* MORGAN (1833), 5 Sim. 635; 58 E. R. 478.

176. Delay not owing to debtors wilful default.] —After some disputes between a corpn. & trustees of charity estates, a compromise was agreed on & confirmed by Act of Parliament, under which the corpn. were to sell certain estates, & out of the proceeds pay to the trustees a gross sum of money by a fixed day. The money was not paid by the time appointed; but there being no case of wilful default made against the corpn.:—*Held:* they were not liable to pay interest on the gross sum.—A.-G. *v.* LUDLOW CORPN. (1849), 1 H. & Tw. 216; 47 E. R. 1390.

177. Principal not wrongfully withheld.] — Where a pecuniary claim has been left by creditor for years unascertained & unexamined, debtor having always been ready & willing to meet the demand, it was held by the House of Lords reversing the decision below, that the right to interest on the principal sum did not commence until after the debt had been established, & the precise amount settled. A sheriff's jury awarding compensation to a landlord against a railway co. in 1864, found that so far back as 1852 he was entitled to £5,272; saying, however, nothing as to interest. The ct. below added to the principal sum twelve years' interest. Their order reversed.

Interest can be demanded only in virtue of a contract, expressed or implied, or by virtue of the principal sum of money having been wrongfully withheld (LORD WESTBURY).—CALEDONIAN RY. CO. *v.* CARMICHAEL (1870), L. R. 2 Sc. & Div. 56.

Annotations:—**Distd.** Fletcher *v.* L. & Y. Ry., [1902] 1 Ch. 901. **Apld.** Borthwick *v.* Elderslie S.S. Co. (No. 2), [1905] 2 K. B. 516. **Consd.** *Re* Richard & G. W. Ry., [1905] 1 K. B. 68. **Refd.** Webster *v.* British Empire Mutual Life Assce. (1880), 15 Ch. D. 169; *Re* Northumberland & Tynemouth Corpn., [1909] 2 K. B. 374; Swift *v.* Board of Trade (1924), 93 L. J. K. B. 529.

178. Non-payment occasioned by creditor's own conduct.]—A fund was established at Bombay by the covenanted civil servants of the East India co. serving in that Presidency, for granting pensions & annuities to members, their widows & children. By the original articles, certain persons were appointed managers, & they were declared to

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showing that the parties have allowed interest upon balances outstanding, though a jury might & probably would allow such interest as damages.—GEORGE *v.* GREEN (1907), 8 O. W. R. 247, 787; 13 O. L. R. 189; 10 O. W. R. 292; 14 O. L. R. 578; *affd.*, 42 S. C. R. 219.—**CAN.**

r. *Recovery when principal unpaid.*] —Where a sum of money becomes due & payable at a specified time, the ct. may award interest in the shape of damages for such period thereafter as the money remains unpaid.—TARA CHAND BISWAS *v.* NAFAR ALI BISWAS (1877), 1 C. L. R. 236.—**IND.**

PART III. SECT. 4, SUB-SECT. 3.—B.

1741. *Whether good defence.*]—A. gave an absolute deed of land to S. subject to an agreement to re-convey on payment of amount of indebtedness with interest as agreed upon within one year:—*Held:* tender of the amount of indebtedness with interest stopped the accruing of further interest.—ANGEVIN *v.* SMITH (1893), 26 N. S. R. 44.—**CAN.**

PART III. SECT. 4, SUB-SECT. 3.—C.

t. *General rule — Where no wilful default.*]—The existence of a state of war between the respective countries of the debtor & the creditor suspends the accrual of interest when it would ordinarily be recoverable as damages & not as a substantive part of the debt, the reason being that a party should not be called upon to pay damages for retaining money which it was his duty to withhold.—PADGETT *v.* JAMSHETJI HORMUSJI CHOTHIA (1917), I. L. R. 41 Bom. 390.—**IND.**

Sect. 4.—Recovery of interest: Sub-sect. 3, C., D. & E.; sub-sect. 4. Sect. 5: Sub-sects. 1 & 2.]

be the trustees of the fund, & the property was vested in them. Payments were to be made annually to certain persons who were entitled to annuities chargeable on the fund :—*Held :* where such persons had, by their own conduct, occasioned the non-payment of the annual sums, they were not entitled to interest on those sums for the time during which they had so occasioned the non-payment.—EDWARDS *v.* WARDEN (1876), 1 App. Cas. 281 ; 45 L. J. Ch. 713 ; 35 L. T. 174, H. L.

Annotations :—**Mentd.** Hughes *v.* Coles (1884), 27 Ch. D. 231 ; *Re* Turner, Klaftenberger *v.* Groombridge, [1917] 1 Ch. 422.

179. Delay on part of creditor.] — Interest refused upon a stale demand.—MERRY *v.* RYVES (1757), 1 Eden, 1 ; 28 E. R. 584.

Annotations :—**Refd.** Eley *v.* Read (1897), 76 L. T. 39. **Mentd.** *Re* Brown, Ingall *v.* Brown, [1904] 1 Ch. 120.

180. ——.] — PHILLIPS *v.* HOMFRAY, No. 142, *ante*.

181. ——.] — Purchaser cannot be compelled to pay interest for delay under a condition that "the purchaser in default" shall pay interest on the remainder of his purchase-money, where the delay has been occasioned by the default of the vendor.—JONES *v.* GARDINER, [1902] 1 Ch. 191 ; 71 L. J. Ch. 93 ; 86 L. T. 74 ; 50 W. R. 265.

182. Negligence of creditor.] — The general & common rule is, that bills & notes carry interest ; & it would be highly inconvenient to leave it to the caprice of a jury to give or withhold it at their pleasure ; it would be introducing confusion where there ought to be certainty. There may be cases of very extraordinary circumstances, such as where it is the holder's own fault that he had not been paid, in which the jury should be directed not to give interest which, in this case, is in the nature of damages, & not the debt itself (BAYLEY, J.).—LAING *v.* STONE (1828), 2 Man. & Ry. K. B. 561 ; Mood. & M. 229, n.

Annotation :—**Refd.** Florence *v.* Jennings (1857), 2 C. B. N. S. 454.

183. —— **Neglect to sue sureties on bond.**] — Where deft. conveyed an estate to pltf. with a covenant for quiet enjoyment, & also gave an indemnity bond with sureties against all costs, claims, demands, damages & expenses whatsoever, pltf. having been obliged to pay divers sums for arrears of an annuity charged on the estate, sued deft. on the bond to recover them back with interest ; the jury found that pltf. had been negligent in not suing the sureties on the bond at the time the payments were made :—*Held :* this finding prevented pltf. from recovering the interest. —ANDERTON *v.* ARROWSMITH (1839), 2 Per. & Dav. 408 ; *previous proceedings* (1837), 1 Jur. 793.

Annotation :—**Refd.** Petre *v.* Duncombe (1851), 2 L. M. & P. 107.

184. —— **Creditor recovering lower rate than rate due—Subsequent action for balance.**]—Deft. borrowed money of pltf. & he gave his promissory note for the amount with interest at 60 per cent. together with an equitable charge on copyholds as a collateral security for the note. Pltf. sued at law on the note & by mistake he claimed & recovered interest at 5 instead of 60 per cent., which was paid :—*Held :* pltf. could not afterwards sue in this ct. upon the mtge. to recover the deficiency, & his bill for that purpose was dismissed with costs.—DARLOW *v.* COOPER (1865), 34 Beav. 281 ; 55 E. R. 643.

185. —— **Neglect to clothe himself with title to sue.**]—WEBSTER *v.* BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO., No. 140, *ante*.

D. Smallness of Sum Due.

186. General rule.] — Mtgee. in receipt of rents & profits, under a covenant that he should receive them till his debt should be satisfied, having received more than his debt, & retained the overplus in his hands for a considerable time, ordered to pay it in, with interest on the amount, & on the annual balances in his hands, from the time of his receiving notice from a subsequent mtgee. that he should hold him chargeable with interest, unless the money received were paid over in aid of the other incumbrancers. The rate at which such interest was ordered to be paid was 4 per cent. The ct. will require a very strong case to be made out against the party required to pay 5 per cent. The present case, on the facts stated in the master's report, was not considered sufficient to justify a departure from rule as to the usual rate of interest adopted by the practice of Cts. of Equity ; & the time for which such interest was ordered to be calculated was from the receipt of the notice by the subsequent incumbrancer that interest would be demanded, to the time of deft. paying it in. Where the subject-matter is of small amount, the ct. will not take into consideration the question of interest, lest the necessary inquiry should lead to an expense that would exhaust the principal which is the object of it.—ARCHDEACON *v.* BOWES (1824), 13 Price, 353 ; M'Cle. 149 ; 147 E. R. 1015.

187. Whether good defence — De minimis non curat lex.]—I am of opinion the tender was sufficient ; that the £2 10*s.*, as the extrix. was a stranger in blood to the legatee, must be presumed to be money advanced in part of payment of the legacy ; & as to interest upon such small legacies as this, upon which no interest could be supposed to have been made, the ct. never allowed interest, especially to a stranger, *de minimis non curat lex* (SIR GEORGE LEE).—BRADSHAW *v.* BRADSHAW (1756), 2 Lee, 289 ; 161 E. R. 344.

E. Statutes of Limitation.

See LIMITATION OF ACTIONS, Vol. XXXII., pp. 319. 381, 421–425, 542, Nos. 52, 643, 974–1012, 1948.

SUB-SECT. 4.—PRACTICE.

188. Sufficiency of indorsement of writ—Omission to state rate of interest—& date from which interest claimed.]—Where pltf. claims interest on his debt, he should state the amount, or the time from which he claims to ; & a general indorsement of "£150 & interest for debt," is bad.—

179 i. *Delay on part of creditor.*]—If a creditor has been delayed in the recovery of his debt by another creditor procuring the appointment of a receiver over the debtor's property, such delay will not give him a right to interest.—STIRLING *v.* WYNNE, COLES *v.* WYNNE (1834), 1 Jo. Ex. Ir. 51.—**IR.**

179 ii. ——.]—SCOTT *v.* SANDEMAN (1852), 1 Macq. 293.—**SCOT.**

PART III. SECT. 4, SUB-SECT. 4.

a. *Specially indorsed writ.*]—Where a claim for interest is made under a specially indorsed writ, it is not necessary to show on the face of the writ that the interest claimed is referable to some contract express or implied.—HOLLIBONE *v.* COLONIAL PINE MILLING CO., LTD. (1914), 14 S. R. N. S. W. 467 ; 31 N. S. W. W. N. 171.—**AUS.**

b. ——.] — Interest claimed under a statute cannot be the subject of special indorsement, unless it is stated in the indorsement under what Act the interest is claimed.—MACAULAY BROTHERS *v.* VICTORIA YUKON TRADING CO. (1902), 22 C. L. T. 377 ; 9 B. C. R. 136.—**CAN.**

c. *Interest calculated in advance.*] —A statement made on Jan. 28, stated the amount due for interest as it would

CHAPMAN *v.* BECKE (1845), 3 Dow. & L. 350; 15 L. J. Q. B. 5; 6 L. T. O. S. 131; 9 Jur. 1012.

Annotation:—**Mentd.** Russell *v.* Joy (1847), 11 Jur. 824.

189. —— ——.] — An indorsement on a writ of summons, that pltf. claims so much, "& interest thereon, from Sept. 8, 1846, until payment," is sufficient, it being intended that the legal rate of interest, at 5 per cent. is meant.—ALLEN *v.* BUSSEY (1846), 8 L. T. O. S. 94; 11 Jur. 88.

190. Specially indorsed writ — Interest claimed under terms of will—Not by way of damages.]—Pltfs., by their writ, claimed to have a legacy of £2,750, bequeathed by the will of John Brogden, "which has remained unpaid by reason of a breach of trust on the part of defts., & which is now due from them upon a trust" paid by defts., with interest thereon at 4 per cent. *per annum* from Apr. 12, 1885. John Brogden, by his will, directed that interest at the rate of 4 per cent. *per annum* should be paid on this legacy from the death of his wife; she died on Apr. 12, 1885. On an application by pltfs. for leave to enter final judgment against defts. for the amount of principal & interest due in respect of the legacy:—*Held:* the writ claimed the interest payable under the will, & did not claim interest by way of damages arising out of a breach of trust; &, therefore, that the writ was specially indorsed within R. S. C., Ord. 3, r. 6.—HAMILTON *v.* BROGDEN (1890), 60 L. J. Ch. 88.

191. —— **Interest not claimed under agreement —Or fixed by statute.**]—An indorsement, purporting to be a special indorsement under R. S. C., Ord. 3, r. 6, claimed a balance due for goods sold. After stating the "place of trial," & after the signature of pltfs.' solrs., there came a claim for interest, at the rate of 5 per cent. *per annum*, from the date of the writ till payment or judgment, & after that claim a statement that if the amount claimed was paid to pltfs., or their solrs., within four days from the service of the writ, further proceedings would be stayed. On an application for leave to sign judgment under R. S. C., Ord. 14, r. 1, pltfs.' affidavits showed that the claim for interest was not made upon any contract to pay interest; but that they supposed they were entitled to recover it, & asked for judgment, not only for the balance due, but also for the interest claimed:—*Held:* the claim for interest must be treated as part of what purported to be the special indorsement, &, therefore, the writ was not "specially indorsed" under R. S. C., Ord. 3, r. 6, so as to entitle pltfs. to have final judgment under R. S. C., Ord. 14, r. 1.—RYLEY *v.* MASTER, SHEBA GOLD MINING CO. *v.* TRUBSHAWE, [1892] 1 Q. B. 674; 61 L. J. Q. B. 219; 66 L. T. 228; 40 W. R. 381; 8 T. L. R. 369; 36 Sol. Jo. 329, D. C.

Annotations:—**Expld.** Gold Ores Reduction Co. *v.* Parr, [1892] 2 Q. B. 14. **Distd.** London Universal Bank *v.* Clanclarty, [1892] 1 Q. B. 689. **Apprvd.** Wilks *v.* Wood, [1892] 1 Q. B. 684. **Refd.** Stearns *v.* Village Main Reef Gold Mining Co. (1904), 48 Sol. Jo. 700. **Mentd.** Gerrard *v.* Clowes, [1892] 2 Q. B. 11; Dando *v.* Boden (1893), 68 L. T. 90.

192. —— —— ——.]—Where pltf. claims by his writ interest not arising under a statute or by contract express or implied, he does not "seek only to recover a debt or liquidated demand" within R. S. C., Ord. 3, r. 6, & the writ is consequently not a specially indorsed writ on which an order for judgment can be made under R. S. C., Ord. 14, r. 1.—WILKS *v.* WOOD, [1892] 1 Q. B. 684; 61 L. J. Q. B. 516; 66 L. T. 520; 40 W. R. 418; 8 T. L. R. 465; 36 Sol. Jo. 379, C. A.

193. —— —— ——.] — A specially indorsed writ, in which interest is claimed on the sum sought to be recovered, is bad unless the indorsement itself shows on the face of it that such interest is payable either by statute or under any contract between the parties.—GOLD ORES REDUCTION CO. *v.* PARR, [1892] 2 Q. B. 14; 61 L. J. Q. B. 522; 66 L. T. 687; 40 W. R. 526; 36 Sol. Jo. 524.

—— **Bill of exchange.**]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 471–473, Nos. 3001–3012.

SECT. 5.—RATE OF INTEREST.

SUB-SECT. 1.—WHERE RATE AGREED.

Excessive interest charged on loan—Relief of borrower by court.] —*See* Sect. 8, *post.*

SUB-SECT. 2.—WHERE RATE FIXED BY USAGE.

194. Bonds.]— —— *v.* —— (1714), Gilb. 238; 93 E. R. 316.

195. As between banker & customer.] — Interest allowed, on affirmance of a judgment, for the balance due from a banker on account of money deposited with him, it being the custom of the bank to allow interest, but at the rate only which

be on Jan. 31, the day of re-filing:—*Held:* no objection.—FRASER *v.* BANK OF TORONTO (1860), 19 U. C. R. 381.—**CAN.**

d. *Declaration.*] — A count for interest for the forbearance of money at the rate of 30 per cent. *per annum*:—*Held:* good as a common count, for that the rate stated was wholly unimportant, as would be the price of goods sold if alleged.—BLEAKLEY *v.* EASTON (1863), 22 U. C. R. 348.—**CAN.**

e. *Discretion of court — Court of Appeal.*]—Where the Ct. of Appeal orders payment of money, & says nothing as to any antecedent interest thereon, such interest cannot afterwards be added by the Ct. of Ch.; at all events, in cases in which, though interest is usually given, it is not a matter of strict legal right, but of discretion.—BOX *v.* PROVINCIAL INSURANCE CO. (1872), 19 Gr. 48.—**CAN.**

f. —— *Lower court.*] — The discretion exercised by a lower court in allowing interest upon a money demand ought not to be interfered with on appeal.—BUCKLEY *v.* VAIR (1917), 40 O. L. R. 465; 39 D. L. R. 796.—**CAN.**

whether the discretion of the ct. in allowing or refusing to allow interest in cases within Act XXXII. of 1839 is liable to review or appeal.—JUGGOMOHUN-GHOSE *v.* MANICK-CHUND & KAISREE-CHUND (1859), 4 W. R. 8; 7 Moo. Ind. App. 263.—**IND.**

h. —— ——.] — Interest after date of suit is in the discretion of the ct., notwithstanding that a fixed rate of interest is mentioned as payable "up to realization" in the bond sued upon. — MANGHIRAM MARWARI *v.* DHOWTAL ROY (1886), I. L. R. 12 Calc. 569.—**IND.**

k. —— ——.] — In an action on promissory notes the jury were not asked any question as to interest on the amount of the notes. The judge disallowed interest:—*Held:* this decision could not be interfered with.—BROWN *v.* BENNETT, COLONIAL BANK OF NEW ZEALAND *v.* SAME (1891), 9 N. Z. L. R. 487.—**N.Z.**

l. *Right to interest must be shown.*] —Interest is not recoverable unless a case for its allowance is made by the statement of claim; but, if such case is made, interest may be allowed under the prayer for general relief.—FENSOM *v.* BULMAN (1907), 17 Man. L. R. 307.—**CAN.**

m. *Defence.*] — To a count for interest in a summons & plaint, a defence that no interest accrued due or became payable for the forbearance of money, etc., as in the summons & plaint alleged, held a good defence, & not amounting to the general issue.—KELLY *v.* DUFFY (1857), 7 I. C. L. R. 36.—**IR.**

PART III. SECT. 5, SUB-SECT. 2.

194 l. *Bonds.*]—*Semble:* where there is no express agreement fixing the rate of interest to be paid after the date a bond becomes due, an agreement to pay at the rate of interest agreed to be paid before such date cannot be implied, but the ct. must determine what would be a reasonable rate to allow.—BALDEO PANDAY *v.* GOKAL RAI (1878), I. L. R. 1 All. 603.—**IND.**

195 l. *As between banker & customer.*] —BRITISH BANK OF NORTH AMERICA *v.* BOSSUYT (1903), 15 Man. L. R. 266.—**CAN.**

n. *Meaning of "legal interest."*]—On demurrer to a plea of usury:—

Sect. 5.—Rate of interest: Sub-sects. 2 & 3, A., B.

the bank were accustomed to allow.—IKIN *v.* BRADLEY (1818), 8 Taunt. 250; 5 Price, 536; 2 Moore, C. P. 206; 129 E. R. 379, Ex. Ch.

——.]—*See* BANKERS, Vol. III., pp. 265-267, Nos. 811-824.

196. Legal interest under will.]—Legal interest, in a will, means interest at 5 per cent.—NORWAY *v.* NORWAY (1834), as reported in 3 L. J. Ch. 111.

Annotation:—**Mentd.** Millward *v.* Millward (1834), 3 L. J. Ch. 141.

197. Indemnity.] — A surety is entitled to interest upon the sum which he has been compelled by the default of his principal to pay.

Pltf., as surety, & deft. having covenanted to pay A. an annuity, deft., by way of indemnity to pltf., covenanted with him that he would pay A. the annuity, & observe the covenants of the annuity deed, & also conveyed to the plaintiff real estates, with power by sale or mtge. to raise adequate sums to indemnify him against all costs, charges, damages, & expenses which he should incur by his being surety. Pltf. was compelled to pay the annuity, & after several payments, an account containing these was submitted to deft., with interest charged upon them at the rate of 5 per cent. & a balance stated, which deft. acknowledged to be correct, & "recoverable under the trusts of the deed of indemnity." In an action upon the covenant of indemnity, to recover these & subsequent sums paid by pltf.:—*Held:* interest upon the payments was recoverable as damages; & in estimating the damages, the jury might take into consideration the rate of interest stated in the account approved by deft.—PETRE *v.* DUNCOMBE (1851), 2 L. M. & P. 107; 20 L. J. Q. B. 242; 16 L. T. O. S. 394; 15 Jur. 86.

Annotations:—**Consd.** Hitchman *v.* Stewart (1855), 3 Drew. 271. **Distd.** *Re* Maria Anna & Steinbank Coal & Coke Co., McKewan's Case (1877), 6 Ch. D. 447. **Apprvd.** *Re* Fox, Walker, *Ex p.* Bishop (1880), 15 Ch. D. 400. **Distd.** *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925.

SUB-SECT. 3.—WHERE RATE NOT AGREED OR FIXED BY USAGE.

A. In General.

198. Discretion of court.]—There is no general rule as to the rate of interest the ct. will allow on repayment of consideration money expressed in an absolute assignment, which is treated only as a security for such consideration money; &, in a case where the assignee of a reversionary interest in a trust fund was the solr. of the assignor & also solr. to the trust estate; & there was evidence of the assignment having been for an undervalue, the ct. allowed interest at 5 per cent.—*Re* UNSWORTH'S TRUST (1865), 2 Drew. & Sm. 337; 12 L. T. 49; 13 W. R. 448; 62 E. R. 649.

Annotation:—**Folld.** Macleod *v.* Jones (1884), 53 L. J. Ch. 534.

199. ——.] — Testator gave his property to trustees upon trust for H. for life, & after his decease upon trust as to one-third share for the children of G. equally, to be paid to them at twenty-one years of age, & directed that, if any of the children should be under age at the death of the survivor of himself & H., the income of such child's share, or any part thereof, might be applied for the maintenance, etc., of such child, & the surplus, if any, should accumulate & become part of the original share of such child. Pltf. being one of the children of G. survived the testator & H., & subsequently attained twenty-one, namely in 1849, previously to which his share under the will had come into the hands of G. as trustee of the will, of which fact pltf. alleged that he was never informed. G. had never paid the share over to pltf., but claimed to have expended the whole upon his maintenance & education. It appeared, however, that of the share part had been lost through improper investments, while during recent years the whole had been mixed with G.'s own moneys in his business as a solr. & otherwise. Upon an action by pltf. for account:—*Held:* (1) there was no trust to accumulate beyond minority, but G. must be taken to have held the share under the circumstances subject to such an obligation to accumulate after the period named as to render him chargeable with compound interest upon the whole share for the whole period during which it was in his hands; (2) there was no rule compelling the ct. to charge the interest at a higher rate than 4 per cent.—*Re* EMMET'S ESTATE, EMMET *v.* EMMET (1881), 17 Ch. D. 142; 50 L. J. Ch. 341; 44 L. T. 172; 29 W. R. 464.

Annotation:—*As to* (1) **Reld.** *Re* Barclay, Barclay *v.* Andrew, [1899] 1 Ch. 674.

200. ——.] — Pltf. had mortgaged her life interest in certain leasehold property to various persons. In the year 1880, deft., who was then acting as her solr., in order to release her from embarrassment, bought up several of the incumbrances with his own money, & took a transfer of them to himself:—*Held:* deft. must be allowed interest at the rate of five per cent. on the moneys he had actually advanced.

There is no rigid rule as to the rate of interest which the ct. will allow in such cases.—MACLEOD *v.* JONES (1884), 53 L. J. Ch. 534; 50 L. T. 358; 32 W. R. 660.

201. ——.] — Motion on behalf of W. asking that his name might be removed from the list of shareholders of the co. Appct. alleged that he had been induced to apply for shares on the faith of a statement in the prospectus that certain gentlemen were members of the council of administration, which statement was untrue, & that certain material facts were suppressed from the prospectus:—*Held:* W. was entitled to interest on the deposits paid by him from the date of such payment; the ct. was not bound by a hard & fast rule as to the rate of interest, &, having

Held: the ct. would intend that by the words "legal interest" six per cent. was meant.—NOURSE *v.* GOODEVE (1854), 12 U. C. R. 198.—**CAN.**

o. ——.] — "Legal interest" does not necessarily mean the highest rate of legal interest.—GORDON *v.* HOWDEN (1853), 15 Dunl. (Ct. of Sess.) 378; 25 Sc. Jur. 230; 2 Stuart, 210.—**SCOT.**

p. ——.]—"Legal interest," where the contrary is not specified, still means 6 per cent.—SMITH *v.* BARLAS (1857), 19 Dunl. (Ct. of Sess.) 267; 29 Sc. Jur. 135.—**SCOT.**

q. *Method of computing interest.*] —The proper mode of computing interest, in the absence of payments made specially on account of principal, is to compute it on the amount due up to the time of each payment, making rests, deducting the payments, & charging interest on the balance.—BETTES *v.* FARREWELL (1865), 15 C. P. 450.—**CAN.**

PART III. SECT. 5, SUB-SECT. 3.—A.

198 i. *Discretion of court.*]—A verdict for pltf. for $2,670, "with interest," is a verdict on which judgment may be entered up, though the note on which the action was brought specified no rate of interest; the rate of interest at the place of payment, at the time of the trial, to be ascertained by a master of the ct.—SOUTHER *v.* WALLACE (1881), 14 N. S. R. (2 R. & C.) 40; 1 C. L. T. 556.—**CAN.**

198 ii. ——.]—Where no rate of interest is proved, the rate is in the discretion of the ct. After date of decree, the ct. rate is 6 per cent.—GREGORY *v.* DULSOOK ROY (1864), Cor. 9.—**IND.**

198 iii. ——.]—When there is no contract as to the rate of interest to be paid, the ct. rate of interest must prevail, viz., 6 per cent.—PEPPER *v.* BLOOMFIELD (1843), 3 Dr. & War. 499. —**IR.**

regard to the present mercantile rate of interest, 4 per cent. was sufficient.—*Re* METROPOLITAN COAL CONSUMERS' ASSOCN., *Ex p.* WAINWRIGHT (1889), 59 L. J. Ch. 281; 62 L. T. 30; 1 Meg. 463; *on appeal* (1890), 63 L. T. 429, C. A.

Annotations:—**Refd.** L. C. & D. Ry. *v.* S. E. Ry., [1892] 1 Ch. 120; *Re* Davis, Davis *v.* Davis (1902), 71 L. J. Ch. 539. **Mentd.** *Re* Metropolitan Coal Consumers' Assocn., Grieb's Case (1890), 6 T. L. R. 416; Cocksedge *v.* Metropolitan Coal Consumers' Assocn. (1891), 64 L. T. 826; *Re* Metropolitan Coal Consumers' Assocn., Dunkley's Case (1891), 7 T. L. R. 234; *Re* Metropolitan Coal Consumers' Assocn., Karberg's Case, [1892] 3 Ch. 1.

Rates of interest on claims proved in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 306, 379, Nos. 2874, 3499.

Executor's accounts.]—*See* EXECUTORS, Vol. XXIV., pp. 700–702, Nos. 7261–7275.

Rates allowed in particular cases.]—*See* titles *passim*.

B. Interest partly in Nature of Penalty.

See, generally, TRUSTS.

202. Five per cent.—Breach of trust.]—Lands directed by a will to be sold & the produce divided. The lands were not sold, but were divided, & the share of A. remained vested in the trustees, one of whom was her father. Subsequently, this share was sold, & the money was not given over to the *cestui que trust*, nor invested for her benefit, but was paid to the father. On a bill filed for recovery of the money:—*Held*: both the trustees were liable, although one of them signed the receipt for the sake of conformity only, & refused to make any allowance to the father for maintenance: & the trustees should repay the amount of the purchase-money with interest at 5 per cent.—ENGLISH *v.* WILLATS (1831), 1 L. J. Ch. 84.

203. —— ——.]—A. being a partner in a mercantile house in India, was entitled to the interest of a sum of money, which was limited to his sons on his dying within a given period. The firm in India, at A.'s death, within that period, was greatly indebted to their agents in England, of which firm B., the administrator, was a partner. After A.'s death, notice was given to the firm of England, of there being male issue of A., but not stating their names. B. subsequently received the dividends, & credited the Indian firm with the amount in the books of the English firm:—*Held*: the partners of the English firm were liable to repay such dividends, with interest at 5 per cent.

It is perfectly well established, that if parties employ trust money in their trade, they are liable to pay interest (PEPYS, M.R.).—AGABEG *v.* HARTWELL (1835), 4 L. J. Ch. 190.

204. —— ——.]—Trustee wilfully applying trust moneys to his own use is chargeable with interest at 5 per cent.; but where, under the trusts of a doubtful will, the tenant for life, who was also a trustee, neglected to make proper investments, she was held chargeable with interest at 4 per cent. only.—MOUSLEY *v.* CARR (1841), 4 Beav. 49; 10 L. J. Ch. 260; 49 E. R. 256.

Annotation:—**Mentd.** Cooper *v.* Laroche (1869), 38 L. J. Ch. 591.

205. —— ——.]—Where trustees, upon some doubts entertained by themselves as to the status of a person claiming a sum, part of the fund in their hands, refused to pay him, & the status was afterwards satisfactorily established, the trustees were ordered to pay the sum, with 5 per cent. thereon—the account to be taken with rests—& all the costs of the suit.

A breach of trust of the grossest description has been established against all the parties (KNIGHT BRUCE, V.-C.).—HUTCHINS *v.* HUTCHINS (1851), 17 L. T. O. S. 196; 15 Jur. 869.

206. —— ——.]—D. in 1814 sailed from L. for R. J. & had never since been heard of. Pltfs., as next of kin, claimed a fund to which D. had become entitled; but deft. into whose possession as trustee the fund came in 1844 retained it in his own hands & refused to pay it over to pltfs. without first receiving direct & positive proof of the death of D.:—*Held*: the trustee must pay over the whole fund together with interest at 5 per cent. from the time when he ought to have invested it, & also the costs of the suit.—DOBSON *v.* PATTINSON (1857), 3 Jur. N. S. 1202; 5 W. R. 771.

207. —— ——.]—Where default has been made in performance of a covenant to pay a sum of money, the ct. will allow interest at 5 per cent.—KNAPP *v.* BURNABY (1861), 30 L. J. Ch. 844; 5 L. T. 52; 9 W. R. 765.

Annotation:—**Folld.** *Re* Horner, Fooks *v.* Horner, [1896] 2 Ch. 188.

208. —— ——.]—Where trustees & exors., after payment of testator's debts, kept the balance of the personal estate at their bankers, the ct. charged them with interest on the balance at 5 per cent. from the date of the payment of the debts, but allowed them their costs.—*Re* JONES, JONES *v.* SEARLE (1883), 49 L. T. 91.

209. —— —— **Unless more profit made by use of money.**]—Where a defaulting trustee has misapplied trust money, the ct. will charge him with 5 per cent. interest, unless it be shown that he has made more by the user of it.—BERWICK-UPON-TWEED CORPN. *v.* MURRAY (1857), 7 De G. M. & G. 497; 3 Jur. N. S. 847; 44 E. R. 194, L. C.

210. —— —— ——.]—If a trustee invests trust moneys in business with a view to benefiting the trust estate, he must account for the profit made by such investment, or at the option of the *cestui que trust* he must account for trade interest—*i.e.* 5 per cent.—*Re* DAVIS, DAVIS *v.* DAVIS, [1902] 2 Ch. 314; 71 L. J. Ch. 539; 86 L. T. 523; 51

211. —— **Withholding of dividend.**]—Assignees, on the representation of the solr. to the commission that he is authorised to receive it as agent, pay over a dividend to such solr. It turns out he had no such authority. Upon petition of creditor for payment to him of the dividend, charging that no authority was given to that solr.:—*Held*: being solr. to the commission he might be made resp. as well as the assignees, & a joint order might be made against them all for its payment. On dividend being withheld, assignees ordered to pay it, with five per cent. interest from time of application to them for payment.—*Re* JOHNSON, *Ex p.* STORY (1831), 4 Deac. & Ch. 504; 2 Mont. & A. 54; 4 L. J. Bcy. 11, Ct. of R.

212. Six per cent.—Breach of trust.]—DE CORDOVA *v.* DE CORDOVA (1879), 4 App. Cas. 692; 41 L. T. 43; 28 W. R. 105, P. C.

C. Commercial or Speculative Transactions.

213. Five per cent.—Unpaid purchase-money.]—Purchaser charged with 5 per cent. interest on the purchase-money unpaid.—BURNELL *v.* BROWN (1820), 1 Jac. & W. 168; 37 E. R. 339.

Annotations:—**Mentd.** Smithson *v.* Powell, Powell *v.* Smithson (1852), 20 L. T. O. S. 105; Edwards-Wood *v.* Marjoribanks (1860), 7 H. L. Cas. 806; *Re* Gloag & Miller's Contract (1883), 48 L. T. 629.

214. —— **Interest on moneys paid on behalf of company—By trustee.**]—A trustee for a co., who pays money on behalf of the co. under a contract by which he was legally bound to make such payment, is in no worse position than a stranger who makes advances; & is entitled, in the winding up

Sect. 5.—Rate of interest: Sub-sect. 3, C., D., E. & F.]

of the co., to interest at 5 per cent. on his debt.—*Re* BEULAH PARK ESTATE, SARGOOD'S CLAIM (1872), L. R. 15 Eq. 43.

215. —— Expense of winning coal.]—By a deed of grant & licence the licencee was allowed to win & work all & every or any of the coal mines, seam & seams of coal, within certain lands, &, in the first place, out of the profits to reimburse himself all expenses incurred in the winning thereof; & it was provided that, after repayment of all expenses of winning the said colliery, coal mines or coal mine, seam or seams of coal, he should pay such royalty as should from time to time be awarded by two arbitrators to be named by the parties respectively. There were three seams of coal under the land. The licencee reached one of them by a driftway from an adjoining colliery & worked the coal. He afterwards, by similar means, reached & worked another of them. The third was also reached, but this was abandoned as worthless. The licencee mixed the coals gotten under the licence with those gotten from his own colliery & sold them together. He alleged that the coals gotten under the licence were inferior in value to the other coals:—*Held:* interest at 5 & not 4 per cent. ought to be allowed on the expenses of winning.—ROKEBY (LORD) *v.* ELLIOT (1879), 13 Ch. D. 277; 49 L. J. Ch. 163; 41 L. T. 537; 28 W. R. 282, C. A.; *on appeal, sub nom.* ELLIOT *v.* ROKEBY (LORD) (1881), 7 App. Cas. 43, H. L.

Annotation:—**Mentd.** Kinsman *v.* Jackson (1880), 42 L. T. 558.

216. —— Interest as damages for detention of cargo.]—In an action in the Ch. Div. pltfs. claimed delivery of cargoes of guano, an injunction to restrain defts. from delivering otherwise than to pltfs., & the appointment of a receiver. Defts., who claimed the right to the cargoes, after the issue of the writ took possession of them under a consent order by which it was agreed that the receipt of the cargoes by defts. should be "without prejudice to any question between the parties, & that they would keep separate accounts of their expenditure & receipts in respect of the cargoes, & abide by any order the ct. should make with respect to the cargoes." An order for the appointment of a receiver was afterwards made, & to the receiver when appointed defts. delivered the unsold cargoes & the proceeds of the cargoes they had sold. The action was defended on the ground that the cargoes were not the property of pltfs. At the hearing the judge made a decree declaring that pltfs. were entitled to the cargoes, & that defts. were not entitled to reimbursement of any expenses, & directing an inquiry "what damages had been sustained by pltfs. by reason of the detention of the cargoes by defts." On appeal this House having regard to the terms of the consent order varied the decree by declaring that defts. were entitled to receive out of the proceeds of the cargoes payment of all sums properly disbursed by them on account of freight & landing cargoes, & otherwise, affirmed the decree. Upon the inquiry as to damages the chief clerk found that the detention began on the arrival of the cargoes respectively at their ports of discharge, & computing the damages on the principle that the illegal detention continued until the decree of the judge allowed interest at 5 per cent. upon the proceeds of the cargoes until the decree, less the interest gained in ct. & paid in by the receiver. Upon a summons to vary the chief clerk's certificate:—*Held:* the consent order did not convert an unlawful into lawful detention, but after the order for the appointment of a receiver the cargoes were in the possession of the ct. & any damages suffered by pltfs. were due to the law's delay & not to any wrongful act of defts.; interest at 5 per cent. ought therefore to be allowed until the order for the appointment of a receiver but not after.—PERUVIAN GUANO CO. *v.* DREYFUS BROTHERS & CO., [1892] A. C. 166; 61 L. J. Ch. 749; 66 L. T. 536; 8 T. L. R. 327; 7 Asp. M. L. C. 225, H. L.; *varying* S. C. *sub nom.* DREYFUS *v.* PERUVIAN GUANO CO. (1889), 43 Ch. D. 316, C. A.

Annotations:—**Consd.** Phillips *v.* Homfray (1890), 44 Ch. D. 694. **Mentd.** Dakshina Mohun Roy *v.* Saroda Mohun Roy (1893), 9 T. L. R. 582; Martin *v.* Price, [1894] 1 Ch. 276; Shelfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287; *Re* A. B. (No. 2), [1900] 2 Q. B. 429; Cowper *v.* Laidler, [1903] 2 Ch. 337; Leeds Industrial Co-op. Soc. *v.* Slack, [1924] A. C. 851.

217. —— Interest on bill of exchange.]—PAGE *v.* CLOETE (1892), 36 Sol. Jo. 647.

218. —— Compensation for requisition of ship—Quasi-trust.]—DOMINION COAL CO. *v.* MASKINONGE S.S. CO., No. 94, *ante*.

219. Four per cent.—Unpaid purchase-money.]—Where on the assignment of a reversionary legacy the purchase-money had not been paid to pltf. in cash or in any shape:—*Held:* pltf. was entitled to interest at the rate of 4 per cent. *per annum* for the whole period from the date of the sale.—*Re* STUCLEY, STUCLEY *v.* KEKEWICH, [1906] 1 Ch. 67; 75 L. J. Ch. 58; 93 L. T. 718; 54 W. R. 256; 22 T. L. R. 33; 50 Sol. Jo. 58, C. A.

Annotation:—**Mentd.** *Re* Beirnstein, Barnett *v.* Beirnstein, [1925] 1 Ch. 12.

D. Fund Wrongly Withheld from Owner.

220. Four per cent.]—Interest decreed to the full amount produced by a fund wrongfully withheld from the proprietor; at 4 per cent. upon a demand, established as a debt against the funds of others.—ORFORD (EARL) *v.* CHURCHILL (1814), 3 Ves. & B. 59; 35 E. R. 401.

Annotation:—**Mentd.** Sanderson *v.* Bayley (1838), 4 My. & Cr. 56.

221. —— Surplus in hands of mortgagee.]—ARCHDEACON *v.* BOWES, No. 186, *ante*.

222. —— Money of principal withheld by agent.]—HARSANT *v.* BLAINE, MACDONALD & CO. (1887), 56 L. J. Q. B. 511; 3 T. L. R. 689, C. A.

Annotations:—**Apld.** Barclay *v.* Harris & Cross (1915), 85 L. J. K. B. 115. **Refd.** Dominion Coal Co. *v.* Maskinongé S.S. Co., [1922] 2 K. B. 132.

E. Policies of Insurance.

223. Policy deposited to secure debt — Payment of premiums by creditor—Interest on debt & premiums.]—Where a policy of assurance was deposited to secure a simple contract debt, without any agreement as to interest, & creditor paid the premiums down to the death of debtor:—*Held:* the policy was charged not only with the original debt & the amount of the premiums, but also with interest on both sums at 4 per cent.—*Re* KERR'S POLICY (1869), L. R. 8 Eq. 331; 38 L. J. Ch. 539; 17 W. R. 989.

Annotations:—**Apld.** Lippard *v.* Ricketts (1872), L. R. 14 Eq. 291; *Re* Drax, Savile *v.* Drax, [1903] 1 Ch. 781. **Mentd.** Sadler *v.* Worley, [1894] 2 Ch. 170.

224. —— Loan by insurance company—Proof of collateral agreement.]—Pltf. was the holder of various policies of assurance on his own life in the Hand in Hand Fire & Life Assurance Society, & had obtained loans from the society on the security of his policies. By a prospectus issued by the society at the time when pltf.'s policies were effected, it was therein stated that loans were promptly made upon the security of the society's

policies at 4½ per cent. interest, except when the loan amounted to £200 or more, when the rate was only 4 per cent. The affairs of the society were regulated by certain rules under which the general management was committed to a board of directors, who had power to invest the funds of the society on mtge. of any life policies. Successive prospectuses were issued by the society containing statements as to collateral matters relating to the policies, but no mention was made as to the rate of interest on loans. As a fact the rate of interest was varied from time to time between 4½ per cent. & 5 per cent. down to 1899. In Jan. 1905, the undertaking of the society was acquired by deft. company according to an agreement. From 1921 deft. company had charged interest at 6½ per cent. & 5 per cent. from Aug. 1923, to the present time. By the agreement for the transfer to deft. co. that co. became liable for all the debts, contracts, & engagements of the society, including all the policies & the benefits then attached thereto, & the further benefits in the second schedule mentioned. By that schedule various benefits were secured to the policy holders, & by clause 12 thereof it was stated that the society's policy holders were to be entitled to all benefits established by the practice or prospectuses of the society, in addition to any benefits conferred by this schedule. Deft. co. claimed the right on any further loans being made to pltf. to charge a higher rate of interest than 4 per cent. & pltf. by his action claimed declarations that they were not so entitled:—*Held:* (1) although there was a collateral agreement on other matters, there was no collateral contract or agreement by the society that the rate of interest on loans should not be varied, but be at a uniform rate.

(2) No established practice to charge one uniform rate of interest had been proved, but it had been the uniform practice to make loans at the rate fixed by the board of directors; & further, the benefit claimed had not been established by any prospectus of the society. In the result the action failed on both points, & must be dismissed. —THISELTON *v.* COMMERCIAL UNION ASSURANCE CO., [1926] Ch. 888; 95 L. J. Ch. 447; 70 Sol. Jo. 892.

225. —— —— Established practice to charge fixed rate.]—THISELTON *v.* COMMERCIAL UNION ASSURANCE CO., No. 224, *ante*.

Apportionment as between tenant for life & remainderman.]—*See* Part III., Sect. 5, sub-sect. 7, *post*.

F. Other Cases.

226. Default in payment to trustees of settlement—Under covenant.]—Testator covenanted to pay a sum of money to trustees, on the trusts of his settlement. He made default:—*Held:* his estate was liable to pay 4 & not 5 per cent. interest.—SMITH *v.* COPLESTON (1849), 11 Beav. 482; 50 E. R. 903.

Annotation:—**N.F.** Knapp *v.* Burnaby (1861), 30 L. J. Ch. 844.

227. Work & labour in administration suit.]—MILDMAY *v.* METHUEN, No. 117, *ante*.

228. Debt become assets in hands of executor.]—Interest on the debt allowed at the rate of 4 per cent. from the date of the probate granted to the exor. until payment.—INGLE *v.* RICHARDS (No. 2) (1860), 28 Beav. 366; 3 L. T. 46; 25 J. P. 323; 6 Jur. N. S. 1178; 8 W. R. 697; 54 E. R. 406.

229. Profits made by company director—In absence of fraud.]—Applts. were a joint-stock co., registered under Cos. Act, 1862 (c. 89), the objects of the assocn. including the negotiation of loans, & the transaction generally of the business of a capitalist. A clause in the arts. of assocn. was, so far as is material, in the following terms:—"Disqualification of directors. The office of a director shall be vacated: . . . 3rd. If he contracts with the co., or is concerned in, or participates in, the profits of any contract with the co., or participates in the profit of any work done for the co., without declaring his interest at the meeting of directors at which such contract is determined on, or work ordered, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, & no director so interested shall vote at any meeting, or on any committee of the directors, on any question relating to such contract or work." Resps., K. & C., were stockbrokers, carrying on business in partnership as K. C. & Co. C. was a director of the applt. co., & he was also a member of a temporary board, by which the business of the co. was for a time conducted. C. agreed with contractors for a railway to place certain debentures of that railway at a commission of 5 per cent. The firm of K. C. & Co. then made a proposal to the applt. co. to place these shares at 1½ per cent. This proposal was submitted to a committee, of which C. was not a member, who recommended its acceptance, & subsequently the recommendation of the committee was adopted by the temporary board. C. was present at the meeting of the temporary board, & at the time stated that he was interested in the sale of the debentures, & offered to leave the room while the proposal was discussed. The chairman told him that this was unnecessary, & C. accordingly remained in the room. On a bill filed by the applt. co., praying the repayment by K. & C. of the profits made by them, viz., 3½ per cent. on the amount of the debentures placed:—*Held:* resps. were bound to refund, the fiduciary position of C. forbidding him to make a profit out of the funds of the assocn.; the transaction was not protected by the clause in the arts. of assocn.; since C. did not "declare his interest" within that clause, *i.e.* the nature, as well as the existence, of his interest; & K. & C. were jointly & severally liable for the whole amount claimed; further, no fraud having been intended, & C. having acted on the honest belief that he had brought himself within the terms of the clause in the arts. of assocn., interest should be ordered at the rate of 4, & not 5 per cent.—IMPERIAL MERCANTILE CREDIT ASSOCN. (LIQUIDATORS) *v.* COLEMAN (1873), L. R. 6 H. L. 189; 42 L. J. Ch. 644; 29 L. T. 1; 21 W. R. 696, H. L.

Annotations:—**Reid.** Dunne *v.* English (1874), L. R. 18 Eq. 524; Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha, & Telegraph Works Co. (1875), 10 Ch. App. 520, n.; Bagnall *v.* Carlton (1877), 6 Ch. D. 371; Emma Silver Mining Co. *v.* Grant (1879), 11 Ch. D. 918; Turnbull *v.* West Riding Athletic Club, Leeds (1894), 70 L. T. 92; Silkstone & Haigh Moore Coal Co. *v.* Edey (1899), 69 L. J. Ch. 73; Costa Rica Ry. *v.* Forwood, [1901] 1 Ch. 746; Transvaal Lands Co. *v.* New Belgium (Transvaal) Land & Developing Co., [1914] 2 Ch. 488.

PART III. SECT. 5, SUB-SECT. 3.—F.

r. *Claim for medical attendance.*]—An account for medical services contained a notice on its face, "Ten per cent. interest charged on all overdue accounts." Interest was allowed from the date the account was sent, but at the rate of 5 per cent. as being reasonable under the circumstances.—MCARTHUR *v.* BANMAN (Sask.), [1922] 3 W. W. R. 552; 70 D. L. R. 81.—**CAN.**

t. *Interest after filing plaint.*]—Interest at the stipulated rate should only be allowed up to the date of the filing of the plaint; afterwards at the court rate of 6 per cent.—ANDERSON *v.* SREEMUNTO, ANDERSON *v.* RAJNARAIN DOSS (1864), Cor. 3.—**IND.**

a. *Money deposited with company—Repayable on demand—Voluntary liquidation of company.*]—The amount of damages recoverable was simple interest at 6 per cent., being the rate

Sect. 5.—Rate of interest: Sub-sect. 3, F.; sub-sects. 4 & 5.]

Mentd. *Re* Coal Economising Gas Co., Gover's Case (1875), 1 Ch. D. 182; Chesterfield & Boythorpe Colliery Co. *v.* Black (1877), 26 W. R. 207; New Sombrero Phosphate Co. *v.* Erlanger (1877), 5 Ch. D. 73; Boston Deep Sea Fishing & Ice Co. *v.* Ansell (1888), 59 L. T. 345; Cackett *v.* Keswick, [1902] 2 Ch. 456.

230. Trust fund lost by failure to prosecute claim.]—*Re* BROGDEN, BILLING *v.* BROGDEN (1888), 38 Ch. D. 546; 59 L. T. 650; 37 W. R. 84; 4 T. L. R. 521, C. A.

Annotations:—**Mentd.** *Re* Hurst, Addison *v.* Topp (1890), 63 L. T. 665; *Re* Chapman, Cocks *v.* Chapman (1896), 45 W. R. 67; *Re* Stevens, Cooke *v.* Stevens, [1898] 1 Ch. 162; *Re* Greenwood, Greenwood *v.* Firth (1911), 105 L. T. 509.

231. Claim against lunatic's estate.]—*Re* HUNT, HARVEY'S CLAIM (1902), 86 L. T. 504, L. J.

SUB-SECT. 4.—DEBTS CONTRACTED ABROAD.

232. Interest at rate of foreign country.]—DUNGANNON (EARL) *v.* HACKETT (1702), 1 Eq. Cas. Abr. 288; 21 E. R. 1051.

233. ——.]—LANE *v.* NICHOLS (undated), 1 Eq. Cas. Abr. 288; 21 E. R. 1051.

234. ——.]—HARVEY *v.* EAST-INDIA CO. (1700), 2 Vern. 395; 1 Eq. Cas. Abr. 288; 23 E. R. 856.

Annotation:—**Mentd.** London Joint Stock Bank *v.* London Corpn. (1875), 1 C. P. D. 1.

235. ——.]—ANON. (undated), 1 Eq. Cas. Abr. 288; 21 E. R. 1051.

See, also, CONFLICT OF LAWS, Vol. XI., pp. 356–358, 407, 408, Nos. 395–408, 763–772.

236. —— **Surety—Compelled to pay under harsh circumstances.**]—A surety to the East India co. discharged by payment of a balance to the principal under an erroneous settlement by the officers of the co. without their authority or knowledge. The East India co. having compelled payment from a surety in India by their power over him, as one of their servants, without an account or proceeding against the principal though solvent, & otherwise under harsh circumstances, he was restored to the same situation by a decree for repayment with interest at 5 per cent. upon giving security for repayment, in case in a future suit by the co. he should be held liable. The ct. would not upon the circumstances give Indian interest.—LAW *v.* EAST INDIA CO. (1799), 4 Ves. 824; 31 E. R. 427.

Annotations:—**Mentd.** Mactaggart *v.* Watson (1835), 3 Cl. & Fin. 525; Newton *v.* Chorlton (1853), 2 Drew. 333; Kingston-upon-Hull Corpn. *v.* Harding, [1892] 2 Q. B. 494.

237. —— **Bill of exchange.**]—COUGAN *v.* BANKS (1817), Chitty on Bills of Exchange, 11th ed., p. 437, N. P.

Annotation:—**Consd.** Gibbs *v.* Fremont (1853), 9 Exch. 25.

See, also, BILLS OF EXCHANGE, Vol. VI., pp. 334, 335, Nos. 2220–2224.

238. —— **Partnership—Rate of interest allowed in the colony.**]—G. bought a share in a co-partnership business established by S., D., & L., in Sydney, New South Wales. No regular deed of co-partnership was executed, but by an agreement between them it was stipulated that some interest, the nature & extent of which was not defined, in a piece of land, wharf, & premises, upon which the partnership business was carried on, should form part of the partnership property. This property was then held by S., D., & L., under a lease, & was also subject to a mtge. During the negotiation for the partnership, S., D., & L., paid off the mtge., & acquired by purchase the fee of the property, & upon failure of the partnership concern sold the same, receiving the consideration money, which they refused to account for to G., or to treat as partnership assets, on the ground, that the property had been acquired by them on their separate account, & not purchased with the partnership assets:—*Held:* (1) S., D., & L., having purchased the fee in the property during the negotiation for the partnership, & the consideration money paid by G. for his share in such partnership being based upon the fact of the property being freehold, the purchase must be treated as being for the benefit of the partnership concern; & that G. was entitled to participate & share with S., D., & L. in the freehold interest so acquired, G. contributing in the sum paid by S., D., & L., for the purchase thereof, to the extent of his share in the partnership. (2) S., D., & L., were chargeable with interest from the date of the receipt by them of the purchase-money, at the rate of 8 per cent., the rate of interest allowed in the colony in the absence of any special contract.—GORDON *v.* SCOTT (1858), 12 Moo. P. C. C. 1; 14 E. R. 812, P. C.

SUB-SECT. 5.—RATE IN CASE OF DEFAULT IN PAYMENT.

239. General practice—Agreed rate continued.]—The owner of a vessel mortgaged it as a security for a debt, with a proviso for redemption on payment of the principal moneys & interest at the rate of 10 per cent. in six months. The principal not having been paid at that time:—*Held:* interest continued payable at the rate of 10 per cent.—MORGAN *v.* JONES (1853), 8 Exch. 620; 22 L. J. Ex. 232; 155 E. R. 1500.

Annotation:—**Apld.** Gordillo *v.* Weguelin (1877), 5 Ch. D. 287.

240. —— ——.]—COOK *v.* FOWLER, No. 67, *ante.*

241. —— ——.]—In the case of a mercantile security it is to be supposed that the parties intended interest to run on at the old rate if the money was not paid at the day. So they say with

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allowed by the ct. as being the value of money.—*Re* COMMERCIAL PROPERTY & FINANCE CO., LTD. & DICK (1911), 30 N. Z. L. R. 147.—**N.Z.**

PART III. SECT. 5, SUB-SECT. 4.

232 i. *Interest at rate of foreign country.*]—Where a contract is made & executed in a foreign country the question of interest would be governed by the law on interest where the contract was made.—BROOKS *v.* A.A. TELEGRAPH CO. (1879), 6 Nfld. L. R. 197.—**NFLD.**

232 ii. ——.]—Interest on an account with an Indian house of agency is due at the Indian rate of interest, till final decree in an action brought in this country against the debtor's representatives.—PALMER & CO.'S ASSIGNEES *v.* GLASS' TRUSTEE (1835), 13 Sh. (Ct. of Sess.) 308; 31 Fac. Coll. 175.—**SCOT.**

232 iii. ——.]—Where an acknowledgment of debt, executed in England, provided for the payment of interest without any statement as to the rate:—*Held:* interest should be granted at the legal rate obtaining in England.—*Re* SAVAGE'S ESTATE (1908), 29 N. L. R. 397.—**S. AF.**

PART III. SECT. 5, SUB-SECT. 5.

239 i. *General practice—Agreed rate continued.*]—The ct., proceeding upon certain correspondence between the agents for the parties, held the pursuer entitled to demand the legal rate of interest upon a loan, from & after a certain term, payment not having been made at that term.—BLACKBURN *v.* PAUL (1839), 2 Dunl. (Ct. of Sess.) 220; 15 Fac. Coll. 216.—**SCOT.**

239 ii. ——.]—In a suit brought to recover the principal & interest due upon a written security given for the payment of the principal money on a day specified, with interest at a stipulated rate up to such day, the ct. may, in its discretion, award interest on the principal sum from due date at such rate as it thinks fit, & is not bound to award such interest at the stipulated rate.—DEEN DOYAL LALL *v.* HET NARAIN SINGH (1876), I. L. R. 2 Calc. 41.—**IND.**

b. *Instances of departure from practice—"With interest till paid."*]—Where a contract is made for the loan of money "with interest at two & a

regard to a mtge. Having regard to what is the principle in equity with regard to the redemption of mtges., although the day for payment has passed & there is no provision with the creditor for payment of interest after that day, the ct. will assume that interest is payable after the day at the same rate as before. As I said before, what has to be paid may technically be called damages, but they are damages of a peculiar kind, for it would not be left to a jury to regulate their amount; the jury would be directed as a matter of law to find damages of the same amount as the interest which would have been payable if the covenant had extended over the period (AMPHLETT, L.J.).—GORDILLO *v.* WEGUELIN (1877), 5 Ch. D. 287; 46 L. J. Ch. 691; 36 L. T. 206; 25 W. R. 620, C. A.

242. —— ——.]—In Apr. 1879, A. deposited title deeds with B. to secure repayment of an advance of £1,000, & an agreement was at the same time executed that the deeds should be held as an equitable security for payment, on July 15, 1879, of the £1,000 & interest at 7½ per cent. *per annum*, & also that A. should execute to B. a legal mtge. of the property, with power of sale & such other powers as B. might require for further securing payment of the money which should then be owing on the security of the agreement, "with interest for the same after the rate aforesaid." In Jan. 1881, B. took out a debtor's summons for £150, on the footing that interest continued to be paid at the rate of 7½ per cent. down to the date of demand, & not merely until July 15, 1879, in which case the debt would have been under £50:—*Held:* the agreement amounted to a contract that if the £1,000 was not repaid in July, 1879, interest at 7½ per cent. should continue to be paid, & accordingly there was a liquidated demand of sufficient amount within Bkpcy. Act, 1869 (c. 71), s. 6, to support the debtor's summons.—*Re* KING, *Ex p.* FURBER (1881), 17 Ch. D. 191; 44 L. T. 319; 29 W. R. 524.

243. —— ——.]—In the case of a mtge. of reversionary personal estate, where there is no covenant for payment of interest after the date stipulated in the deed for the repayment of the capital with interest, the ct. will allow to the mtgee. in a redemption or foreclosure action interest by way of damages at the rate fixed by the deed to be paid up to the date stipulated for payment during the whole period, not exceeding twenty years, during which no interest had been paid; & there is no analogy between a mtge. of personal estate & one of real estate to induce the ct. to limit the amount of arrears of interest recoverable to six years.—MELLERSH *v.* BROWN (1890), 45 Ch. D. 225; 60 L. J. Ch. 43; 63 L. T. 189; 38 W. R. 732.

Annotation:—**Apld.** *Re* Stucley, Stucley *v.* Kekewich, [1906] 1 Ch. 67.

—— ——.]—*See, also*, BILLS OF EXCHANGE, Vol. VI., p. 331, No. 2193.

244. Instances of departure from practice—Interest as damages—Bill of exchange.]—If a party makes a promissory note, whereby he promises to pay pltf., or order, "£600, with interest thereon, at the rate of 6 per cent. *per annum*, twelve months after date," the judge will advise the jury, in allowing interest up to the time of signing judgment, to allow it at the rate of 5 per cent. only.—WARD *v.* MORRISON (1842), Car. & M. 368, N. P.

245. —— —— **Mortgage.**]—By a mtge. deed reciting an agreement for an advance at 10 per cent. the mtgor. covenanted for payment of the principal sum at the expiration of twelve months, & for the payment of interest in the meantime at the rate of 10 per cent. *per annum*, but there was no covenant as to payment of interest in the event of the principal sum or any part of it, remaining unpaid after the day named for repayment. The money was not repaid on the day but interest at 10 per cent. was paid for several years. The mtgor. having died & a decree having been made for administration of his estate the mtgee. proved as a creditor for the principal sum & interest:—*Held:* interest was recoverable only as damages & ought to be limited to 5 per cent.—*Re* ROBERTS, GOODCHAP *v.* ROBERTS (1880), 14 Ch. D. 49; 42 L. T. 666; 28 W. R. 870, C. A.

Annotations:—**Distd.** *Re* King, *Ex p.* Furber (1881), 17 Ch. D. 191; Mellersh *v.* Brown (1890), 45 Ch. D. 225. **Refd.** *Re* Frisby, Allison *v.* Frisby (1889), 43 Ch. D. 106.

246. —— **Specialty contract involving loan—Agreed rate to expiry of term—Five per cent. thereafter.**]—(1) Where an action is brought upon a specialty contract, involving loan transactions, if the verdict be for pltf., interest must be calculated according to the rate agreed upon in the contract until the term named in the contract expires, & after that period at 5 per cent.

(2) If a point of law is reserved at the trial, & deft. delays the ultimate decision, in the event of the pltf. succeeding, interest will be calculated to the time of the final judgment.—FINANCIAL CORPN. *v.* JERVIS (1867), 17 L. T. 324.

247. —— **Warrant of attorney—Judgment entered up—Merger.**]—A warrant of attorney to confess judgment for £2,000 given by H. to the bkpt. L., to secure the payment of certain bills of exchange drawn the same day upon & accepted by H., & judgment entered up & registered the day following. The bills were renewed, & the renewals deposited by L. with A. to secure a debt of £1,200 with a memorandum stating that the bills were secured by a judgment but no mention made of interest payable thereon. Interest, however, was paid by L. to A. for ten years at the rate of 12½ per cent. *per annum*:—*Held:* the original bill became merged in the judgment & by virtue thereof constituted a charge upon the real estate of H., & consequently that no new contract for loan or forbearance of money could be sustained at more than 5 per cent. *per annum* interest; & under any circumstances A. was not entitled to more than ordinary interest.—*Re* LANE, *Ex p.* HODGE (1857), 26 L. J. Bcy. 77; 29 L. T. O. S. 350.

248. —— —— **Judgment not entered up—Agreed interest 5 per cent. per month.**]—A memorandum indorsed on a warrant of attorney stated that the warrant had been given to secure the payment on June 2, 1864, of a sum of money, with interest thereon at the rate of 5 per cent. per month; that judgment was forthwith to be entered up, & that if the debt & interest were not

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half per cent. per month till paid," the borrower is not obliged to pay interest at said rate after maturity of the loan.—HOSSACK *v.* SHAW (Ont.) (1917), 56 S. C. R. 581; 42 D. L. R. 130.—**CAN.**

c. *Agreement for increase in rate after default—As penalty—Borrower relieved against penalty.*]—Upon a contract for the payment, on a day certain, of money borrowed with interest at a certain rate down to that day, further contract for the continuance of the same rate of interest after that day until actual payment is not to be implied. When, therefore, the agreed rate of interest is excessive & extraordinary, the ct. will reduce the rate to a reasonable amount.—MANCHUND HANSRAJ *v.* BAPUSAHEB RUSTAMBHAI (1878), I. L. R. 3 Bom. 131.—**IND.**

d. —— —— ——.]—A proviso for retrospective enhancement of interest, in default of payment of the interest at a due date, is generally a penalty which should be relieved against.—UMARKHAN MAHAMADKHAN DESHMUKH *v.* SALEKHAN (1892), I. L. R. 17 Bom. 106.—**IND.**

e. —— *Whether necessarily a penalty.*]

5.—Rate of interest: Sub-sects. 5, 6, 7 & 8. Sect. 6: Sub-sect. 1.]

paid on the day aforesaid, execution was to issue. The debt was not paid at the time named, & judgment was not entered up:—*Held:* after the day named for payment the debt carried interest at 4 per cent. *per annum* only.—ROBINSON *v.* WOOD (1869), 18 W. R. 32.

Annotation:—**Refd.** Cook *v.* Fowler (1874), L. R. 7 H. L. 27.

—— **Original agreement to pay interest merged in judgment.**]—*See* JUDGMENTS, Vol. XXX., pp. 164, 165, Nos. 332–339.

249. Ordinary interest.]—*Re* LANE, *Ex p.* HODGE, No. 247, *ante.*

250. Fair & reasonable rate—In light of circumstances.]—COOK *v.* FOWLER, No. 67, *ante.*

251. Agreement for increase in rate after default—As penalty—Borrower relieved against penalty—Mortgage.]—ANON. (1694), Freem. Ch. 197; 22 E. R. 1157.

252. —— Whether necessarily a penalty—Sale of land—Separate & distinct contract.]—A contract for sale of land provided that the purchaser should pay interest on the purchase-money at 4 per cent., from the time of taking possession until July 1, 1858, the day appointed by the contract for the payment of the purchase-money, & after that day at 5 per cent.; if the purchase-money should not be then paid, & after Jan. 1, 1859, at 8 per cent., with a proviso that this should not give the purchaser the right to delay the payment of the purchase-money on paying such higher rate of interest:—*Held:* the stipulation for payment of a higher rate of interest was not in the nature of a penalty to secure the punctual payment of the purchase-money, against which the purchaser was entitled to be relieved, but a separate & distinct contract which he was bound to perform.—HERBERT *v.* SALISBURY & YEOVIL RY. CO. (1866), L. R. 2 Eq. 221; 14 L. T. 507; 14 W. R. 706.

253. Where no rate agreed—Four per cent.]—A. being indebted to B. in £800 on a stated account, entered into articles for the payment of this debt by instalments, of £80 *per annum.* A. afterwards by deed, created a term of years for the payment of his debts out of the rents & profits of his estate, but not by sale or mtge. Only two of these instalments being paid, a bill was brought for recovering the rest; & on a question, whether they carried interest, it was held they did; they were accordingly decreed to be paid, with interest at 4 per cent.—KILDARE (COUNTESS) *v.* HOPSON (1734), 4 Bro. Parl. Cas. 550; 2 E. R. 374, H. L.

SUB-SECT. 6.—AS BETWEEN EXECUTORS AND BENEFICIARIES.

See CONFLICT OF LAWS, Vol. XI., pp. 376, 377, Nos. 552–554; EXECUTORS, Vol. XXIII., pp. 414, 415, Nos. 4853–4873.

SUB-SECT. 7.—AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

See SETTLEMENTS; TRUSTS & TRUSTEES; WILLS.

SUB-SECT. 8.—ON ADVANCEMENTS.

See, generally, SETTLEMENTS; WILLS.

254. Whether computed at three or four per cent.]—In the absence of any direction by a testator to the contrary advancements to his children on account of their portion bears no interest up to his death but from his death they bear interest at 4 per cent.—STEWART *v.* STEWART (1880), 15 Ch. D. 539; 49 L. J. Ch. 763; 43 L. T. 370; 29 W. R. 275.

Annotations:—**Folld.** *Re* Davy, Hollingsworth *v.* Davy, [1908] 1 Ch. 61. **Refd.** Ashworth *v.* Munn (1886), 34 Ch. D. 391. **Mentd.** Limpus *v.* Arnold (1884), 15 Q. B. D. 300; *Re* Lacy, Royal General Theatrical Fund Assocn. *v.* Kydd, [1899] 2 Ch. 149; *Re* Ford, Ford *v.* Ford, [1902] 1 Ch. 218; *Re* Roby, Howlett *v.* Newington, [1908] 1 Ch. 71.

255. ——.]—Testator gave his residuary estate to his widow for life with remainder to his children equally, with a proviso, in the common form for bringing into hotchpot all sums advanced to any of them by him in his lifetime. Testator made advances to some of his children. In distributing the residuary estate among the children after the death of the widow:—*Held:* the advanced children must bring their advances into hotchpot with interest at 4 per cent. up to the distribution of the estate. Such interest to be computed from the death of the widow & not from the date of respective advances or from the death of testator. —*Re* REES, REES *v.* GEORGE (1881), 17 Ch. D. 701; 50 L. J. Ch. 328; 44 L. T. 241; 29 W. R. 301.

Annotations:—**Expld.** *Re* Lambert, Middleton *v.* Moore, [1897] 2 Ch. 169. **Refd.** Ashworth *v.* Munn (1886), 34 Ch. D. 391; *Re* Dracup, Field *v.* Dracup (1893), 63 L. J. Ch. 238; *Re* Dallmeyer, Dallmeyer *v.* Dallmeyer, [1896] 1 Ch. 372; *Re* Hargreaves, Hargreaves *v.* Hargreaves (1902), 86 L. T. 43; *Re* Whiteford, Inglis *v.* Whiteford, [1903] 1 Ch. 889; *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 569. **Mentd.** *Re* Willoughby, Willoughby *v.* Decies, [1911] 2 Ch. 581; *Re* Forster-Brown, Barry *v.* Forster-Brown, [1914] 2 Ch. 584.

256. ——.] — Testator who died in 1878 bequeathed £30,000 with interest at 4 per cent. on trust for his widow for life, & after her death for division into four equal parts & payment of one part to his son, the remaining three fourths to fall into residue. He declared that any sum which he should advance or covenant to advance to any of his children should be taken in satisfaction *pro tanto* of the advanced child's provision, & this provision was to apply expressly to a sum of £6,000 which he had covenanted to advance to the trustees of one of his daughters' marriage settlement. He gave his real estate & his residuary personal estate to his trustees on trust to sell & convert & out of the proceeds to pay his debts & legacies, & to divide the residue into three equal shares, one of such shares for each of his three

—Where money is borrowed under a contract for repayment with interest on a certain day, & the contract stipulates that if the money is not paid at the due date it shall thenceforth carry interest at an enhanced rate, such a stipulation is not a penalty, & the enhanced rate agreed to be paid may be recovered in its entirety.—MACKINTOSH *v.* CROW, MACKINTOSH *v.* GORE (1883), I. L. R. 9 Calc. 689; 13 C. L. R. 102.—**IND.**

PART III. SECT. 5, SUB-SECT. 7.

f. Six per. cent.]—Upon reference to the master to ascertain the amount to which a widow was entitled for income out of the trust estate which had been devised to her for her life, some of the investments having been unproductive & realised at a loss:—*Held:* a calculation should be made of what principal invested at the date from which interest was to run, at 6 per cent. *per annum*, would amount with interest to the sum actually realised, & then the difference between this principal & the amount realised should go to the tenant for life, & the rest to the remaindermen.—MILLER *v.* DAHL (1894), 10 Man. L. R. 97.—**CAN.**

PART III. SECT. 5, SUB-SECT. 8.

g. Five per cent.]—Where the will gave to the trustees a power of advancement in favour of testator's sons the power was exercisable during the continuance of the life estate, but any son in whose favour an advancement was made was chargeable with interest thereon at the rate of 5 per cent.—*Re* FINDLAYSON, FINDLAYSON *v.* KEITH (1897), 5 B. C. R. 517.—**CAN.**

daughters for life, & after her death for her issue. His estate consisted chiefly of land, of which the trustees in exercise of their discretion under the will postponed the sale. They raised upon mtge a sum sufficient to pay the debts, including the £6,000 which they paid to the daughter's trustees but the £30,000 was not so raised. The rents of the real estate after providing for the interest on the £30,000 & on the mtge., produced a surplus income of about £200 a year, which was paid in equal shares to the two unadvanced daughters. The widow died in 1895 :—*Held :* upon the division of the residue, the period of distribution was the death of testator ; the advanced daughter, besides bringing into hotchpot the £6,000, must be charged with interest thereon as from the date of the advance ; but the rate of interest ought to be 3 & not 4 per cent.—*Re* LAMBERT, MIDDLETON *v.* MOORE, [1897] 2 Ch. 169 ; *sub nom. Re* LAMBERT. MOORE *v.* MIDDLETON, 66 L. J. Ch. 624 ; 76 L. T 752 ; 45 W. R. 661 ; 41 Sol. Jo. 560.

Annotations :—**Consd.** *Re* Hargreaves, Hargreaves *v.* Hargreaves (1902), 86 L. T. 43 ; *Re* Whiteford, Inglis *v.* Whiteford, [1903] 1 Ch. 889. **Dbtd.** *Re* Davy, Hollingsworth *v.* Davy, [1908] 1 Ch. 61. **Refd.** *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 568. **Mentd.** *Re* Willoughby, Willoughby *v.* Decies, [1911] 2 Ch. 581 ; *Re* Forster-Brown, Barry *v.* Forster-Brown, [1914] 2 Ch. 584.

257. ——.] — Testator by his will & codicil after giving certain legacies devised & bequeathed his residuary estate to trustees upon trust to pay out of the income thereof the annual sum of £2,000 to his widow during her life & subject thereto to divide the residuary estate into as many shares as there should be children living at his death & to pay the annual income of such shares to his children & then upon trusts therein expressed. Testator provided as to certain advances already made to some of his children & as to any future advances to his children exceeding at any one time the sum of £2,000, these advances should be treated as capital of the original shares & brought into hotchpot & accounted for accordingly. Testator died on July 3, 1887 & left surviving six children, of whom three had received advances & three had not. The widow died in Mar. 1900 :—*Held :* in bringing the advances into hotchpot for the purpose of determining the respective shares of the six children the shares of the advanced children must respectively be debited with 4 per cent. on the respective advances from testator's death down to the time when the estate ought or should be deemed to have been divided.—*Re* HARGREAVES, HARGREAVES *v.* HARGREAVES (1902), 86 L. T. 43 ; *varied on appeal* (1903), 88 L. T. 100, C. A.

Annotations :—**Dbtd.** *Re* Whiteford, Inglis *v.* Whiteford, [1903] 1 Ch. 889. **Consd.** *Re* Davy, Hollingsworth *v.* Davy, [1908] 1 Ch. 61. **Refd.** *Re* Poyser, Landon *v.* Poyser, [1908] 1 Ch. 828 ; *Re* Willoughby, Willoughby *v.* Decies, [1911] 2 Ch. 581 ; *Re* Forster-Brown, Barry *v.* Forster-Brown, [1914] 2 Ch. 584 ; *Re* Cooke, Randall *v.* Cooke, [1916] 1 Ch. 480 ; *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 567. **Mentd.** *Re* Gilbert, Gilbert *v.* Gilbert, [1908] W. N. 63 ; *Re* Hart, Hart *v.* Arnold (1912), 107 L. T. 757 ; *Re* Craven, Watson *v.* Craven, [1914] 1 Ch. 358.

258. ——.] — W. had three sons, H., S., & B. On the marriage of H. in 1866 W. conveyed upon the trusts of H.'s marriage settlement real estate of the value of £4,000, & by the settlement covenanted to pay £6,000 to the settlement trustees within six calendar months after the death of the covenantor. H. died before W. W. died in June, 1893, having by his will, after giving certain legacies, &, to his wife, an annuity, given his residuary estate to trustees upon trust, as to one-third for S., & as to another one-third for B. The remaining one-third was directed to be transferred to the trustee's of H.'s settlement to be held upon the trusts thereof, but subject to the proviso that after payment of the £6,000 the sum of £10,000, the £6,000 plus the £4,000, should be considered to have been received & advanced out of residue in respect of H.'s portion, & should for the purpose only of ascertaining the amount of that portion, be considered as part thereof, & should be accounted for in the way of hotchpot accordingly. On Dec. 6, 1893, the trustees of the will paid the £6,000 to the settlement trustees. B. died in Aug. 1893, & under his will his widow was tenant for life. The trustees of W.'s will made payments of equal amounts from time to time (1) to S. & (2) to B. & the trustees of his will. Part of each sum was treated as capital, & the rest (of which half was paid to B.'s widow) as income. On the death of W.'s widow in 1902 the sum set apart to answer her annuity fell into residue :—*Held :* the rate of interest to be charged was 3 per cent. only.—*Re* WHITEFORD, INGLIS *v.* WHITEFORD, [1903] 1 Ch. 889 ; 72 L. J. Ch. 540 ; 51 W. R. 491 ; 47 Sol. Jo. 336.

Annotation :—**Refd.** *Re* Davy, Hollingsworth *v.* Davy, [1908] 1 Ch. 61.

259. ——.] — The general rule of the ct. that interest must be calculated at 4 per cent. has not been altered. Interest on advances which have to be brought into hotchpot must still be paid at that rate.—*Re* DAVY, HOLLINGSWORTH *v.* DAVY, [1908] 1 Ch. 61 ; 77 L. J. Ch. 67 ; 97 L. T. 654, C. A.

Annotation :—**Folld.** *Re* Cooke, Randall *v.* Cooke, [1916] 1 Ch. 480.

260. ——.] — *Re* COOKE, RANDALL *v.* COOKE, [1916] 1 Ch. 480 ; 85 L. J. Ch. 452 ; 114 L. T. 555 ; 60 Sol. Jo. 403.

SECT. 6.—COMPOUND INTEREST.

SUB-SECT. 1.—GENERAL RULE.

261. Compound interest not allowed.]—Interest upon interest not given.—WARING *v.* CUNLIFFE 1790), 1 Ves. 99 ; 30 E. R. 249, L. C.

Annotation :—**Refd.** *Ex p.* Morris (1790), 1 Ves. 132.

262. ——.]—A Scotsman in Calcutta opened an account with a banking & agency house there in 786 ; & died in 1810, having been insane from 793. A partner in the house, being in Scotland n 1812, enclosed, in a letter to the customer's elatives there, an account current with him from 787 to 1810, signed by the firm, bringing out nnual balances in his favour, composed of annual ccumulations of Indian interest, the last balance xpressed "to bear interest at 9 per cent. *per nnum.*" In 1835, the customer's relatives btained administration of his estate, & prosecuted ctions, which were before commenced in the cottish cts., on the account current, against nother partner who joined the firm in 1793, & ontinued a partner through several changes till 820 ; & they claimed interest at 9 per cent. pon the last balance in 1810, & upon the annual ccumulations thereof since :—*Held :* (1) a debt as sufficiently constituted against the firm by the account rendered by them, together with interest t 9 per cent. on the last balance in 1810, down to

PART III. SECT. 6, SUB-SECT. 1.

261 i. *Compound interest not allowed.*] —BARNUM *v.* TURNBULL (1855), 13 U. C. R. 277.—**CAN.**

261 ii. ——.]—FERGUSSON *v.* FYFFE (1841), 2 Robin. App. 267.—**SCOT.**

261 iii. ——.]—RAWSON *v.* HARRISON, [1916] N. Z. L. R. 1195.—**N.Z.**

261 iv. ——.]—WHITEWAY *v.* NEWFOUNDLAND GOVERNMENT (1900), 8 Nfld. L. R. 414.—**NFLD.**

Sect. 6.—*Compound interest: Sub-sects.* 1 & 2, *A., B., C. & D. Sects.* 7 & 8.]

final decree; & one partner was bound by the account so rendered; (2) the debt did not carry compound interest from 1810.

(3) There cannot be a title to compound interest without a contract, express or implied, or custom.

(4) By the law of England, a contract for compound interest is not valid, except in mercantile accounts current for mutual transactions. —FERGUSSON *v.* FYFFE (1841), 8 Cl. & Fin. 121; 8 E. R. 49.

Annotations:—*As to* (2) **Refd.** Crosskill *v.* Bower, Bower *v* Turner (1863), 32 Beav. 86; Williamson *v.* Williamson (1869), 20 L. T. 389. *As to* (3) **Refd.** Crosskill *v.* Bower, Bower *v.* Turner (1863), 32 Beav. 86. *As to* (4) **Refd.** Crosskill *v.* Bower, Bower *v.* Turner (1863), 32 Beav. 86. *Generally*, **Mentd.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1.

263. Application of rule—Bond debt.]—Subsequent interest on a mtge. to be calculated upon the principal & interest reported due; but upon bonds or legacies, on the principal only.—PERKYNS *v.* BAYNTON (1784), 1 Bro. C. C. App. 574; 28 E. R. 1305, L. C.

Annotation:—**Refd.** Whatton *v.* Cradock (1836), 1 Keen, 267.

264. —— ——.]— Interest not to be allowed upon the interest of a bond debt computed in a report.—TURNER *v.* TURNER (1819), 1 Jac. & W. 39; 37 E. R. 290.

Annotations:—**Refd.** Whatton *v.* Cradock (1836), 1 Keen, 267. **Mentd.** Davenport *v.* Stafford (1851), 14 Beav. 319; *Re* Stevens, Cooke *v.* Stevens, [1898] 1 Ch. 162.

See, generally, BONDS, Vol. VII., pp. 215–218.

265. —— **Agreement for payment of purchase-money by instalments.**]—Agreement for the payment of the purchase-money of an estate by yearly instalments with interest, the four last of which are to be retained by the purchaser, as an indemnity until a good title shall be made, does not entitle the vendor to compound interest on such instalments, upon a bill by him for specific performance of the agreement, it appearing that until such bill was filed he was not prepared to make a good title to the premises in question.—STRATTON *v.* SYMON (1838), 2 Moo. P. C. C. 125; 12 E. R. 951, P. C.

266. —— ——.]— By a contract of sale, the purchaser is to pay a certain sum by six instalments, & also 5 per cent half yearly, from the day appointed for the payment of the second instalment, upon the four remaining instalments, until paid; such additional sums by way of percentage to be secured by the bond of the purchaser. In the contract, & also in the declaration thereon, this additional percentage is called "interest" upon the instalments. Neither the instalments nor the additional percentage are paid as they become due, nor is any bond given:—*Held:* the purchaser was chargeable with interest upon the last four instalments until actual payment of those instalments, but the jury were not bound, either at common law or under Civil Procedure Act, 1833 (c. 42), s. 28, to give interest upon the additional percentage treated by the parties as "interest."—ATTWOOD *v.* TAYLOR (1840), 1 Man. & G. 279; 1 Scott, N. R. 611; 133 E. R. 340.

Annotation:—**Refd.** Coats *v.* Direction der Disconto Gesellschaft (1916), 85 L. J. K. B. 973.

267. —— **Charge for principal & interest—Order for payment into court—Extension of time.**]—A. B., on whose estate pltf. had a charge for principal & interest, being desirous of paying it instead of having it raised out of the estate, was ordered to pay it into ct. by a given day. He made default, & applied for an extension of the time, which was granted:—*Held:* pltf. was not entitled to subsequent interest on the aggregate of principal & interest due, but on the principal only.—WILKINSON *v.* CHARLESWORTH (1840), 2 Beav. 470; 48 E. R. 1263.

Annotations:—**Folld.** Whitfield *v.* Roberts (1861), 7 Jur. N. S. 1268. **Refd.** Elton *v.* Curteis (1881), 45 L. T. 435.

—— **Mortgages.**]—*See* MORTGAGE, Part XVII., Sect. 6, *post*.

—— **Debt to bank.**]—*See* BANKERS, Vol. III., pp. 265–267, Nos. 815–824, 828, 829.

—— **Guarantee.**]—*See* GUARANTEE, Vol. XXVI., p. 136, Nos. 995, 996.

—— **Money borrowed by directors of company.**]—*See* COMPANIES, Vol. IX., p. 472, No. 3095.

—— **Money in hands of personal representative.**]—*See* EXECUTORS, Vol. XXIV., pp. 696, 698, 701, 702, Nos. 7209, 7227, 7268–7275.

—— **Payment of legacies.**]—*See* EXECUTORS, Vol. XXIII., p. 415, No. 4872.

—— **Shipping claim.**]—*See* SHIPPING.

SUB-SECT. 2.—EXCEPTIONS TO GENERAL RULE.

A. Express Agreement.

268. Compound interest allowed.]—Award not to be impeached for allowing compound interest; for it may be allowed in case of a contract for it either express or be inferred from the nature of the dealings between the parties; as if it is according to the course of their trade; therefore it is a conclusion of fact, on which the judgment of the arbitrators is final.—MORGAN *v.* MATHER (1792), 2 Ves. 15; 30 E. R. 500.

Annotations:—**Refd.** Rufford *v.* Bishop, Bishop *v.* Rufford (1829), 7 L. J. O. S. Ch. 108. **Mentd.** *Re* Plews & Middeton (1845), 6 Q. B. 845; *Re* Whiteley & Robert's Arbitration, [1891] 1 Ch. 558.

269. ——.]—FERGUSSON *v.* FYFFE, No. 262 *ante*.

270. Validity of express agreement.] — Though compound interest cannot be taken under an antecedent contract, accounts may be settled, even half yearly, upon that principle. Exception as to real securities.

It is clear you cannot *a priori* agree to let a man have money for twelve months, settling the balance at the end of six months; & that the interest shall carry interest for the subsequent six months. . . . But if you agree to settle accounts at the end of six months, that not being part of the prior contract, & then stipulate that you will forbear for six months upon those terms, that is legal (LORD ELDON, C.).—*Ex p.* BEVAN (1803), 9 Ves. 223; 32 E. R. 588, L. C.

Annotations:—**Apld.** Eaton *v.* Bell (1821), 5 B. & Ald. 34. **Expld.** Rufford *v.* Bishop (1829), 5 Russ. 346. **Refd.** Fergusson *v.* Fyffe (1841), 8 Cl. & Fin. 121.

271. ——.]—A contract on a loan of money to add the interest to the principal at the end of each year, & pay interest on the whole sum as principal, is valid in law, & may be inferred from accounts stated by the debtor on that footing.

If a party show, in an action for money lent, that it was the course of dealing between him & deft., to calculate the interest every year, & add that to the principal, & the next year to calculate upon the total, he may recover interest, calculated in same way, for the years subsequent to the striking of the last balance between the parties.—

PART III. SECT. 6, SUB-SECT. 2.—A.

268 i. *Compound interest allowed.*]—Where there is a clear agreement for payment of compound interest, it is, in the absence of disentitling circumstances, allowed.—HARI *v.* RAMJI (1904), I. L. R. 28 Bom. 371.—IND.

270 i. *Validity of express agreement.*]—NATAL BANK *v.* KURANDA, [1907] T. H. 155.—S. AF.

NEWAL *v.* JONES (1830), Mood. & M. 449; *nom.* NEWELL *v.* JONES, 4 C. & P. 124, N. P.

272. —— In current mercantile accounts.] — FERGUSSON *v.* FYFFE, No. 262, *ante*.

Agreement for payment of compound interest on legacies.]—*See* EXECUTORS, Vol. XXIII., p. 406 No. 4764.

Agreement for payment of compound interest on mortgages.]—*See* MORTGAGE, Part XVII., Sect. 6, *post*.

B. Implied Agreement.

273. Compound interest allowed.] — MORGAN *v.* MATHER, No. 268, *ante*.

274. ——.]—FERGUSSON *v.* FYFFE, No. 262, *ante*.

275. When agreement implied — From general course of dealing.]—NEWAL *v.* JONES, No. 271, *ante*.

276. —— —— Not from agreement to make up half-yearly balances.]—B., up to a certain period, made up half-yearly acknowledgments of the balances due from himself to P. On one occasion he gave an acknowledgment of a gross sum due from himself to P.; a part of the sum thus acknowledged to be due was formed of compound interest. B., by a subsequent agreement with P., bound himself to make up half-yearly balances, & to pay the sums found due in respect of the building as the different parts of the work were finished & valued. B. did not keep up these payments:—*Held:* when accounts were decreed, P. was not entitled to have them calculated with half-yearly rests, the agreement not necessarily giving him any such right, & the precedent of the acknowledgment not establishing this as a settled mode of dealing between the parties, if such a mode could be legal by agreement or by the practice of the parties.—PAGE *v.* BROOM (1837), 4 Cl. & Fin. 436; 7 E. R. 168, H. L.

Money advanced by agent.]—*See* AGENCY, Vol. I., p. 559, No. 2077.

Money advanced by bank.]—*See* BANKERS, Vol. III., p. 245, No. 706.

Agreement implied from rules of building society.]—*See* BUILDING SOCIETIES, Vol. VII., p. 469, Nos. 90, 97.

Apportionment of expenses of renewal of lease.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 84, No. 2286.

Money in hands of trustee.]—*See* TRUSTS & TRUSTEES.

C. Custom of Trade or Business.

277. Compound interest allowed.] — MORGAN *v.* MATHER, No. 268, *ante*.

278. ——.] — FERGUSSON *v.* FYFFE, No. 262, *ante*.

D. Where Money Employed in Trade.

279. Compound interest allowed.] — (1) There being no proof that an agent had made any interest or profit by the money in his hands, he was charged with simple interest at 5 per cent. Compound interest will only be given against an accounting party when he has employed the money in business. *Qu.:* whether it can be given without a case for it being expressly made by the bill.

(2) Mixing the money with the ordinary account of a firm of solrs. at a bankers is not such employment in business as will render a member of the firm liable to compound interest.—BURDICK *v.* GARRICK (1870), 5 Ch. App. 233; 39 L. J. Ch. 369; 18 W. R. 387, L. C. & L. J.; *subsequent proceedings*, 5 Ch. App. 453, L. J.

Annotations:—As to (1) **Apld.** Gilroy *v.* Stephens (1882), 51 L. J. Ch. 834. **Distd.** Phillips *v.* Homfray (1890), 44 Ch. D. 694. **Reld.** Silkstone & Haigh Moor Coal Co. *v.* Edey, [1900] 1 Ch. 167; Dominion Coal Co. *v.* Maskinonge S.S. Co., [1922] 2 K. B. 132. *Generally*, **Mentd.** Gray *v.* Bateman (1872), 21 W. R. 137; Boatwright *v.* Boatwright (1873), 43 L. J. Ch. 12; Watson *v.* Woodman (1875), L. R. 20 Eq. 721; Banner *v.* Berridge (1881), 18 Ch. D. 254; *Re* Exchange Banking Co., Flitcroft's Case (1882), 21 Ch. D. 519; *Re* Bell, Lake *v.* Bell (1886), 34 Ch. D. 462; Charles *v.* Jones (1887), 35 W. R. 645; Dooby *v.* Watson (1888), 39 Ch. D. 178; Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437; *Re* Sharpe, *Re* Bennett, Masonic & General Life Assce. *v.* Sharpe, [1892] 1 Ch. 154; Soar *v.* Ashwell, [1893] 2 Q. B. 390; Friend *v.* Young, [1897] 2 Ch. 421; North American Land & Timber Co. *v.* Watkins, [1904] 1 Ch. 242; Reid-Newfoundland Co. *v.* Anglo-American Telegraph Co., [1912] A. C. 555; Henry *v.* Hammond, [1913] 2 K. B. 515; *Re* Allsop, Whittaker *v.* Bamford, [1914] 1 Ch. 1; Nocton *v.* Ashburton, [1914] A. C. 932; *Re* Richardson, Pole *v.* Pattenden, [1920] 1 Ch. 423; Taylor *v.* Davies, [1920] A. C. 636.

280. What constitutes employment in trade—Not mixing with ordinary account at bank—Solicitors.]—BURDICK *v.* GARRICK, No. 279, *ante*.

By personal representative.]—*See* EXECUTORS, Vol. XXIV., pp. 698–701, Nos. 7226–7235, 7261–7264.

SECT. 7.—APPORTIONMENT OF INTEREST.

See Apportionment Act, 1834 (c. 22), s. 2; Apportionment Act, 1870 (c. 35).

281. Interest on bond—Accrues de die in diem——Though condition for half-yearly payments.]—Apportionment of interest upon a bond, according to the general rule, as accruing *de die in diem*, not as dividend, or rent, not provided for by the statute, is not prevented by the condition, reserving payment by equal half-yearly payments.—BANNER *v.* ROWE (1806), 13 Ves. 135; 33 E. R. 245, L. C.

——.]—*See, generally*, BONDS, Vol. VII., pp. 215–218, Nos. 573–605.

—— **Assignment by wife.**]—*See* HUSBAND & WIFE, Vol. XXVII., p. 114, No. 915.

Interest on share of partnership.]—*See* PARTNERSHIP.

SECT. 8.—USURY.

See, now, Usury Laws Repeal Act, 1854 (c. 90).

Relief against excessive interest.]—*See* Part IV., Sect. 7, *post*.

PART III. SECT. 6, SUB-SECT. 2.—C.

277 i. *Compound interest allowed.*]—*Semble:* land-agents may charge compound interest on advances made by them to the use of their principal, if such be the general usage.—CLENDINNING *v.* MOORE (1841), Arm. M. & O. 219.—**IR.**

PART III. SECT. 6, SUB-SECT. 2.—D.

h. *Whether compound interest allowed.*]—Where a person borrows a sum of money for a certain period, & in consideration of the loan the lender is to get a share of the profits of the business in which the money is to be employed during that period, though the loan is not repaid at the date agreed upon, the lender is not entitled to compound interest.—REEVES *v.* LANE (1889), 8 N. Z. L. R. 44.—**N.Z.**

PART III. SECT. 8.

k. *What amounts to.*]—*Semble:* there is no legal limit to the rate of interest.—MACDONALD *v.* LEVY (1) (1833), 1 Legge, 39.—**AUS.**

l. ——.]—Notes given bearing interest from a period antecedent to their date, are not usurious on that account, where the debt for which they were given was due at that period.—GATES *v.* CROOKS (1831), Dra. 446.—**CAN.**

m. ——.]— STEWART *v.* RENNIE (1836), 5 O. S. 151.—**CAN.**

n. ——.]—A commission of 2½ per cent. on drawing & accepting bills of exchange:—*Held:* usurious.—BRADBURY *v.* HOLTON (1839), 5 O. S. 735.—**CAN.**

o. ——.]—KNAPP *v.* FORREST (1842), 6 O. S. 557.—**CAN.**

p. ——.]—DAVIS *v.* CHUBB (1844), 2 Kerr, 395.—**CAN.**

q. ——.]—TURNER *v.* GILBERT (1844), 2 Kerr, 464.—**CAN.**

r. ——.]—BOAG *v.* LEWIS (1845), 1 U. C. R. 357.—**CAN.**

t. ——.] — An agreement that A. should allow D., a lumberer, in addition

Part IV.—Money-Lending.

SECT. 1.—REGISTRATION OF MONEY-LENDERS.

SUB-SECT. 1.—WHO IS A MONEY-LENDER.

A. In General.

See Money-lenders Act, 1900 (c. 51), s. 6; Money-lenders Act, 1911 (c. 38), s. 3.

282. Question of fact.]—Whether a person is carrying on business as a money-lender is in each case a question of fact. It is not enough to bring a person within Money-lenders Act, 1900 (c. 51), to show that he has on several occasions lent money at remunerative rates of interest; to bring him within the Act a certain degree of system & continuity about his transactions must be shown. —NEWTON *v.* PYKE (1908), 25 T. L. R. 127.

Annotations:—**Refd.** Fagot *v.* Fine (1911), 105 L. T. 583; Edgelow *v.* MacElwee, [1918] 1 K. B. 205.

283. Necessity for system — & continuity of transactions.]—NEWTON *v.* PYKE, No. 282, *ante*.

284. —— ——.] — KIRKWOOD *v.* GADD, No. 324, *post*.

285. —— ——.] — NEWMAN *v.* OUGHTON, No. 291, *post*.

286. Money-lending primary object — Advances to impecunious persons—For company promoting.] —(1) When a lender is in the habit of lending money to impecunious persons who are engaged in promoting cos. & taking shares in such cos. from them by way of bonus for so doing, without the money so advanced being necessarily lent to facilitate the promoting of such cos., such a lender is a "money-lender" within Money-lenders Act, 1900 (c. 51).

(2) Where the amount of such bonus has no ascertainable relation to the accommodation rendered, but is fixed arbitrarily with more regard to the necessities of the borrower than the risks which the vendor runs, the ct. will order the transactions to be reopened, on the ground that they are "harsh & unconscionable."—BONNARD *v.* DOTT (1905), 92 L. T. 822; 53 W. R. 678; 21 T. L. R. 491; *on appeal*, [1906] 1 Ch. 740, C. A.

Annotations:—*As to* (2) **Refd.** Levy *v.* Dott (1919), 35 T. L. R. 518. *Generally*, **Refd.** Lodge *v.* National Union Investment Co., [1907] 1 Ch. 300; *Re* Debtor, *Ex p.* Carden (1908), 52 Sol. Jo. 209; Whiteman *v.* Sadler, [1910] A. C. 514; *Re* Campbell, *Ex p.* Seal, [1911] 2 K. B. 992; *Re* Robinson, Clarkson *v.* Robinson, [1911] 1 Ch. 230; *Re* Robinson's Settlmt., Gant *v.* Hobbs, [1912] 1 Ch. 717; Edgelow *v.* MacElwee, [1918] 1 K. B. 205. **Mentd.** Lougher *v.* Molyneux, [1916] 1 K. B. 718; Brightman *v.* Tate, [1919] 1 K. B. 463; Anderson *v.* Daniel, [1924] 1 K. B. 138.

—.]—*See, further*, Sect. 1, sub-sect. 1, B., *post*.

Right to administer interrogatories.]—*See* DISCOVERY, Vol. XVIII., p. 222, No. 1703.

B. Exemptions from Registration.

See Money-lenders Act, 1900 (c. 51), s. 6.

287. Persons carrying on bonâ fide business — Where primary object other than money-lending—Discounting bills for customers.]—A. carried on business as an art dealer for many years prior to 1903, & in the course of his business it was necessary & incidental thereto to give long credit & to take from his customers bills in payment of the amounts they owed to him for their purchases,

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to legal interest, a further sum of 4 per cent. upon all moneys advanced for the purpose of getting out timber:—*Held:* usurious & void.—BRYSON *v.* CLANDINAN (1849), 7 U. C. R. 198.—**CAN.**

a. ——.] — A stipulation to make certain specified payments, or in default that the other party may do so, & charge more than the legal interest thereon:—*Held:* not usury.—EMMONS *v.* CROOKS (1850), 1 Gr. 159.—**CAN.**

b. ——.] — An agreement to discount a note on condition that the borrower would take part of the amount in bills of exchange, at a premium higher than the cash rate, is *primâ facie* usurious; but that alone will not amount to usury if the excess of premium can be ascribed to any real contingency, or was taken as a fair equivalent for any risk incurred by the lender.—BANK OF BRITISH NORTH AMERICA *v.* FISHER (1850), 2 All. 1.—**CAN.**

c. ——.] — POLLOCK *v.* BRADBURY (1853), C. R. 2 A. C. 46.—**CAN.**

d. ——.] — Deft. indorsed a note for the accommodation of S. who gave it to B. to raise money on it; B. applied to pltf., who discounted the note, deducting more than the legal interest:—*Held:* it was a loan by pltf., not a purchase of the note, & the transaction was usurious.—PETERS *v.* IRISH (1859), 4 All. 326.—**CAN.**

e. ——.]—HASTINGS *v.* HENNIGAR (1859), 4 All. 357.—**CAN.**

f. ——.]—STIMSON *v.* KERBY (1859), 7 Gr. 510.—**CAN.**

g. ——.]—LAWRENCE *v.* HAMMOND (1860), 4 All. 613.—**CAN.**

h. ——.] — EDINBURGH LIFE ASSURANCE CO. *v.* GRAHAM (1860), 19 U. C. R. 581.—**CAN.**

k. ——.]—GIRDLESTONE *v.* O'REILLY (1862), 21 U. C. R. 409.—**CAN.**

l. ——.]—CITY BANK *v.* MACDONALD (1865), 16 C. P. 215.—**CAN.**

m. ——.]—BANK OF MONTREAL *v.* SCOTT (1867), 17 C. P. 358.—**CAN.**

n. ——.]—KIERZKOWSKI *v.* DORION (1868), 20 L. T. 170, P. C.—**CAN.**

o. ——.]—JARDINE *v.* MCWILLIAMS (1869), 12 N. B. R. (1 Han.) 579.—**CAN.**

p. ——.]—WHEELOCK *v.* CHESLEY (1870), 8 N. S. R. 49.—**CAN.**

q. ——.]—A promissory note was expressed to be for £40, but the evidence went to show that deft. actually received only £38, although he paid interest upon the larger amount for two years:—*Held:* the transaction was usurious, & pltf. could not recover. —HUTCHINSON *v.* DILL (1871), 8 N. S. R. 448.—**CAN.**

r. ——.]—TRUEMAN *v.* WOOD (1880), 19 N. B. R. 522.—**CAN.**

t. ——.]—DORAN *v.* BUSH (1823–1909), 2 Ont. Dig. 3488.—**CAN.**

aa. ——.] — FULLER *v.* PARNALL (1872), 4 Ch. Ch. 70.—**CAN.**

bb. ——.] — In order to render a transaction usurious it must be proved to be tainted with extortion, oppression, or something akin to fraud. The rate of interest charged is no criterion. —SOUTH AFRICAN SECURITIES, LTD. *v.* GREYLING, [1911] T. P. 352.—**S. AF.**

cc. —— *Question for jury.*] — The question of usury or no usury, upon facts properly pleaded, is for the jury. —CANADA PERMANENT BUILDING & SAVINGS SOCIETY *v.* HARRIS (1865), 16 P. R. 54.—**CAN.**

dd. *Mortgage to secure debt tainted with usury—Whether mortgagee power to recover.*]—CHAMBERLIN *v.* CHAMBERS (1844), 1 U. C. R. 126.—**CAN.**

ee. *Securities given in furtherance of usurious transaction—Whether void.*] —*Held:* all securities given in furtherance of an usurious transaction, with the knowledge of the person who took the security, were void.—ARMSTRONG *v.* SOMERVILLE (1847), 3 U. C. R. 472.—**CAN.**

ff. *Sum advanced & interest must be offered—Where defence of usury raised.*]—The rule of the ct., that a person seeking to impeach a security on the ground of usury must offer to pay the amount actually advanced & interest, applies equally to the assignee of the debtor, although ignorant of the terms on which the security was effected.—DRAKE *v.* BANK OF TORONTO (1862), 9 Gr. 116.—**CAN.**

gg. *Exemption of building societies.*] —Building societies are virtually exempted from the usury laws.—FREEHOLD PERMANENT BUILDING & SAVINGS SOCIETY *v.* CHOATE (1871), 18 Gr. 412. —**CAN.**

hh. *Right to recover usurious interest.*] —PETERS *v.* HORTON (1874), 2 Pug. 176.—**CAN.**

kk. *Usurious transaction founded on fraud—Jurisdiction of court to set aside.*] —LALLI *v.* RAM PRASAD (1886), I. L. R. 9 All. 74.—**IND.**

ll. —— ——.]—The repeal of the usury laws does not affect the power of a Ct. of Equity to review & set aside usurious transactions where they are founded on fraud.—HOWLEY *v.* COOK (1873), 8 I. R. Eq. 571.—**IR.**

PART IV. SECT. 1, SUB-SECT. 1.—A.

283 i. *Necessity for system—& continuity of transactions.*]—RABONE *v.* DEANE (1915), 20 C. L. R. 636.—**AUS.**

mm. *Liability of salaried employee.*] —A person in the employment of another person, not a resident of Canada, whose money is lent, acting as the manager of his business, although paid by salary & having no share in the excessive interest charged, may be convicted as a moneylender.—R. *v.* GLYNN (1909), 19 Man. L. R. 63.—**CAN.**

& to discount & renew the bills from time to time. In 1903 he retired from the business & sold off his stock by public auction, & took bills for the greater part of the purchase-moneys, which he discounted & renewed from time to time, & some of which were still running. After his retirement he carried on business as an expert art valuer & adviser, & he also assisted two art businesses, in which he was largely interested, by discounting for them their customers' bills & by taking bills for the interest from time to time due on the debentures he held in one of those businesses. He also assisted some old friends in the curio trade, & a few persons with whom he had been connected in business, about ten in all, with loans & by discounting bills for them. He did not advertise as a money-lender, & did not discount bills for any outsiders. In an action by A. on bills given him in 1904 for a loan made by him to an old customer :—*Held :* A. was not, & never had been, a money-lender within Money-lenders Act, 1900 (c. 51), s. 6 ; &, as to the bills given on the sale of his stock & renewed & still running, he came within the exception in Money-lenders Act, 1900 (c. 51), s. 6 (*d*).—LITCHFIELD *v.* DREYFUS, [1906] 1 K. B. 584 ; 75 L. J. K. B. 447 ; 22 T. L. R. 385 ; 50 Sol. Jo. 391.

Annotations :—**Consd.** Newman *v.* Oughton, [1911] 1 K. B. 792 ; Edgelow *v.* MacElwee, [1918] 1 K. B. 205. **Reld.** Newton *v.* Pyke (1908), 25 T. L. R. 127.

288. —— —— Advances on bills of sale.]—Pltf., who carried on business as an auctioneer, surveyor, & valuer, was in the habit of advancing money upon bills of sale to any person, against whom there was no personal objection, where the security was sufficient, charging 15 per cent. interest. He did so because by that means he obtained a valuation fee in the first instance, & the business brought him into contact with a class of persons from whom he got other business. He never lent money on personal security :—*Held :* the pltf. carried on a *bonâ fide* business not having for its primary object the lending of money, in the course of which & for the purposes whereof he lent money, within Money-lenders Act, 1900 (c. 51), s. 6 (*d*), & therefore he did not require to be registered as a money-lender.—FURBER *v.* FIELDINGS, LTD. (1907), 23 T. L. R. 362.

Annotation :—**Consd.** Edgelow *v.* MacElwee, [1918] 1 K. B. 205.

289. —— —— Jeweller's loans to customers.]—When, in answer to a claim for money lent, the defence is set up that the person seeking to recover is carrying on business as a money-lender & is not registered under Money-lenders Act, 1900 (c. 51), the *onus* of proving this fact is upon deft. In determining the question whether the business of a person is that of money-lending the whole of the transactions by way of loan into which he has entered must be considered, including those cases which may fall within the exceptions to Money-lenders Act, 1900 (c. 51), s. 6.

A person carried on business as a jeweller & lent money to customers & persons who came in contact with him in connection with his jewellery business :—*Held :* such loans did not fall within the exception contained in Money-lenders Act, 1900 (c. 51), s. 6 (*d*), as being loans made in the course of & for the purpose of a business not having for its primary object the lending of money.—FAGOT *v.* FINE (1911), 105 L. T. 583 ; 56 Sol. Jo. 35, D. C.

Annotation :—**Reld.** Edgelow *v.* MacElwee, [1918] 1 K. B. 205.

290. —— —— Solicitor advancing money to clients & others.]—Where a solr. carries on business as a money-lender, apart from any *bonâ fide* motive or object of professional fees or legal practice, & his vocation as a solr. is used in order to give a colourable professional appearance to ordinary money-lending transactions, he is not within Money-lenders Act, 1900 (c. 51), s. 6, exception (*d*), & unless he is registered under the Act, he cannot recover the money advanced.—EDGELOW *v.* MACELWEE, [1918] 1 K. B. 205 ; 87 L. J. K. B. 738 ; 118 L. T. 177.

Annotations :—**Reld.** Levy *v.* Dott (1918), 35 T. L. R. 197 ; Lipton *v.* Powell, [1921] 2 K. B. 51.

291. Pawnbroker — Where business carried on in accordance with Pawnbrokers Acts.]—A pawnbroker who on an isolated occasion lends money on a bill of sale is not, for that reason merely, a money-lender within Money-lenders Act, 1900 (c. 51).

Money-lenders Act, 1900 (c. 51), s. 6, excludes pawnbrokers from the operation of that Act as long as they only carry on the business of pawnbrokers within Pawnbrokers Acts.—NEWMAN *v.* OUGHTON, [1911] 1 K. B. 792 ; 80 L. J. K. B. 673 ; 104 L. T. 211 ; 27 T. L. R. 254 ; 55 Sol. Jo. 272.

Annotation :—**Reld.** Edgelow *v.* MacElwee, [1918] 1 K. B. 205.

—— ——.]—*See, generally,* PAWNS & PLEDGES.

Bank.]—*See, generally,* BANKERS, Vol. III., pp. 257–267, Nos. 767–831.

Building societies.]—*See, generally,* BUILDING SOCIETIES, Vol. VII., pp. 471–485, Nos. 105–188 ; Benefit Building Societies Act, 1836 (c. 32).

Friendly societies.]—*See* Money-lenders Act, 1900 (c. 51), s. 6.

Loan societies.]—*See* Money-lenders Act, 1900 (c. 51), s. 6.

SUB-SECT. 2.—REGULATIONS AS TO REGISTRATION.

A. In General.

See Money-lenders Act, 1900 (c. 51), ss. 2, 3.

292. How registration may be effected—Registered post.]—(1) A money-lending co. which acquires another place of business in addition to an already existing place of business makes a "change" in its place or places of business within Money-lenders Act, 1900 (c. 51).

(2) A money-lending co. which sends by post to the registry a return in the prescribed form duly filled up with the required particulars effects a "registration" within Money-lenders Act, 1900 (c. 51).

(3) A money-lending co. acquiring another place of business in addition to an already existing place of business does not effect the fresh registration entailed by such change in its place or places of business unless in making its return it inserts in the space left in the form for the names of places where the business is carried on the address of its existing as well as that of its additional place of business.—STAFFORDSHIRE FINANCIAL CO. *v.* VALENTINE, [1910] 2 K. B. 233 ; 79 L. J. K. B. 680 ; 102 L. T. 467 ; 26 T. L. R. 362, C. A.

Effect of failure to register.]—*See* Sect. 2, subsect. 1, *post.*

B. As to Name.

See Money-lenders Act, 1900 (c. 51), s. 2.

293. "Usual trade name" — Whether name adopted for purpose of registration included.]—(1) The expression "usual trade name" means the name by which the money-lender elects at the time of registration to be known, whether he adopted it before or after the commencement of Money-lenders Act, 1900 (c. 51).

(2) A money-lender who carries on business at

Sect. 1.—*Registration of money-lenders: Sub-sect.* 2, *B. & C.; sub-sect.* 3. *Sect.* 2: *Sub-sects.* 1 & 2.]

one address as a member of a firm with a partnership name, & at the same time carries on business alone at another address in a name different from that of the partnership, commits a breach of Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*), for which he is liable to a penalty under Money-lenders Act, 1900 (c. 51), s. 2 (2), & a promissory note given to him at the address where he carries on business alone, by way of security for a loan made by him at that address in the name he uses there, is void.—STIRLING *v.* SILBURN & PYMAN, [1910] 1 K. B. 67; 79 L. J. K. B. 336; 101 L. T. 945; 26 T. L. R. 13.

Annotations:—*As to* (1) **Refd.** Whiteman *v.* Sadler (1910), 103 L. T. 296. *Generally*, **Refd.** *Re* Robinson, Clarkson *v.* Robinson (1910), 80 L. J. Ch. 39.

294. —— ——.]—(1) Under Money-lenders Act, 1900 (c. 51), s. 2 (1) (*a*), a name assumed by a money-lender for the first time for the purpose of registration cannot be described as his "usual trade name."

(2) A money-lender who under different names carries on one business as an individual & another as a member of a partnership firm carries on business "in more than one name" within Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*), & incurs the penalty imposed by Money-lenders Act, 1900 (c. 51), s. 2 (2).

(3) The provision in Money-lenders Act, 1900 (c. 51), s. 2 (1) (*c*), strikes at a money-lender who is actually registered by the registration authorities & contracts otherwise than in his registered name, & not at a money-lender who being so registered contracts in that name.—WHITEMAN *v.* SADLER, [1910] A. C. 514; 79 L. J. K. B. 1050; 103 L. T. 296; 26 T. L. R. 655; 54 Sol. Jo. 718; 17 Mans. 296, H. L.; *varying* S. C. *sub nom.* SADLER *v.* WHITEMAN, [1910] 1 K. B. 868, C. A.

Annotations:—*As to* (1) **Consd.** Cornelius *v.* Phillips, [1918] A. C. 199. *As to* (2) **Consd.** Whiteman *v.* Public Prosecutions Director, [1911] 1 K. B. 824; Cornelius *v.* Phillips, [1918] A. C. 199. *As to* (3) **Consd.** Cornelius *v.* Phillips, [1918] A. C. 199. **Refd.** *Re* Campbell, *Ex p.* Seal, [1911] 2 K. B. 992; *Re* Robinson, Clarkson *v.* Robinson, [1911] 1 Ch. 230; Blair *v.* Holcombe (1912), 28 T. L. R. 198. *Generally*, **Refd.** Blaiberg *v.* Calvert (1910), 26 T. L. R. 328. **Mentd.** *Re* Vagliano Anthracite Collieries (1910), 79 L. J. Ch. 769; *Re* Bagley, [1911] 1 K. B. 317; R. *v.* Holden, [1912] 1 K. B. 483; *Re* Blair Open Hearth Furnace Co., [1914] 1 Ch. 390; Jubilee Cotton Mills *v.* Lewis, [1924] A. C. 958.

295. "Own name"—Whether initials sufficient.]—In registering his "own" name within Money-lenders Act, 1900 (c. 51), s. 2 (1) (*a*), the money-lenders need not register his Christian name in full, but may register its initial letter only.

A money-lender, named Mary Wallace, registered as "M. Wallace":—*Held*: the registration was sufficient.

My attention was called to a number of cases in which very learned judges had expressed views as to what was & what was not an excessive rate of interest. It is clear upon the authorities that in considering this question all the circumstances of the case must be weighed. . . . I think it is important to give the ct. reliable evidence, first, as to the risk the money-lender ran in lending to the particular borrower, & secondly, as to the profit which the transaction would yield the money-lender (LAWRENCE, J.).—HART *v.* HUNGERFORD (1916), 85 L. J. K. B. 1029; 114 L. T. 663; 32 T. L. R. 259; 60 Sol. Jo. 369.

Breach of regulations & effect.]—*See* Sect. 2, sub-sects. 2, 4, *post.*

C. As to Address.

See Money-lenders Act, 1900 (c. 51), s. 2.

296. Additional place of business—Necessity for separate registration.]—STAFFORDSHIRE FINANCIAL CO. *v.* HUNT, [1907] W. N. 258.

Annotations:—**Distd.** King *v.* Turnbull (1908), 24 T. L. R. 434. **Refd.** *Re* Debtor, *Ex p.* Carden (No. 2) (1908), 52 Sol. Jo. 209.

297. —— ——.]—STAFFORDSHIRE FINANCIAL CO. *v.* VALENTINE, No. 292, *ante*.

298. —— **Whether "change" of place of business.**]—STAFFORDSHIRE FINANCIAL CO. *v.* VALENTINE, No. 292, *ante*.

Breach of regulation & effect.]—*See* Sect. 2, sub-sect. 3, *post.*

SUB-SECT. 3.—CANCELLATION OF REGISTRATION.

See Money-lenders Act, 1900 (c. 51), s. 3.

299. Power to cancel.]—Where a registered money-lender, during the currency of the period for which he is registered, writes to the official in charge of the register a letter requesting that his registration shall be cancelled, the annexation by the official of the letter to the register so as to be seen by any person inspecting it has not the effect of cancelling the registration.

Qu.: whether there is any power under Money-lenders Act, 1900 (c. 51), or otherwise, to cancel a subsisting registration.—SCHAVERIEN *v.* CORBETT, [1923] 1 K. B. 699; 92 L. J. K. B. 646; 129 L. T. 407; 39 T. L. R. 243; 67 Sol. Jo. 484.

300. What amounts to cancellation — Not annexation of letter to register.]—SCHAVERIEN *v.* CORBETT, No. 299, *ante*.

SECT. 2.—BREACH OF STATUTORY RESTRICTIONS.

SUB-SECT. 1.—FAILURE TO REGISTER.

See Money-lenders Act, 1900 (c. 51), s. 2 (1) (*a*).

301. Effect of failure to register—Transaction void.]—If a money-lender enters into any agreement or takes any security in contravention of Money-lenders Act, 1900 (c. 51), s. 2 (1) (*c*), without having registered himself as required by Money-lenders Act, 1900 (c. 51), s. 2 (1) (*a*), his contract cannot be enforced, & there is no transaction to re-open under the powers Money-lenders Act, 1900 (c. 51), s. 1 (1).—VICTORIAN DAYLESFORD SYNDICATE, LTD. *v.* DOTT, [1905] 2 Ch. 624; 74 L. J. Ch. 673; 93 L. T. 627; 54 W. R. 231; 21 T. L. R. 742; 49 Sol. Jo. 725; *on appeal*, [1906] 1 Ch. 747, n., C. A.

Annotations:—**Folld.** Bonnard *v.* Dott, [1906] 1 Ch. 740; Lodge *v.* National Union Investment Co., [1907] 1 Ch. 300. **Apprvd. & Distd.** Whiteman *v.* Sadler, [1910] A. C. 514. **Folld.** *Re* Robinson, Clarkson *v.* Robinson, [1911] 1 Ch. 230. **Apld.** Lougher *v.* Molyneux, [1916] 1 K. B. 718. **Refd.** Dott *v.* Brickwell (1906), 23 T. L. R. 61; Litchfield *v.* Dreyfus, [1906] 1 K. B. 584; *Re* Robinson's Settlmt., Gant *v.* Hobbs (1912), 106 L. T. 443; Levy *v.* Dott (1919), 35 T. L. R. 518. **Mentd.** Brightman *v.* Tate, [1919] 1 K. B. 463; Anderson *v.* Daniel, [1924] 1 K. B. 138.

302. —— —— **Right of borrower to recover security.**]—Money-lenders Act, 1900 (c. 51), s. 2 (1) (*c*), applies to a money-lender who has not registered himself as such under the regulations of the Act, & prohibits him from making any agreement with respect to the advance & repayment of money, & from taking any security for money, in the course of his business as a money-lender. Consequently any such agreement is

301 l. *Effect of failure to register—Transaction void.*]—BULL *v.* SIMPSON (1915), 15 S. R. N. S. W. 365.—AUS.

illegal & void, &, the statutory prohibition being intended for the protection of the borrower, the borrower under any such agreement may recover any securities which he has given to the money-lender, although the money-lender cannot recover the money which he has advanced.—BONNARD *v.* DOTT, [1906] 1 Ch. 740; 75 L. J. Ch. 446; 94 L. T. 656; 22 T. L. R. 399, C. A.

Annotations:—**Follid.** Lodge *v.* National Union Investment Co., [1907] 1 Ch. 300. **Appd.** *Re* Debtor, *Ex p.* Carden (No. 2) (1908), 52 Sol. Jo. 209. **Apprvd. & Distd.** Whiteman *v.* Sadler, [1910] A. C. 514. **Follid.** *Re* Robinson, Clarkson *v.* Robinson, [1911] 1 Ch. 230. **Apld.** Lougher *v.* Molyneux, [1916] 1 K. B. 718. **Consd.** Edgelow *v.* MacElwee, [1918] 1 K. B. 205. **Reld.** *Re* Campbell, *Ex p.* Seal, [1911] 2 K. B. 992; *Re* Robinson's Settlmt., Gant *v.* Hobbs, [1912] 1 Ch. 717; Levy *v.* Dott (1919), 35 T. L. R. 518. **Mentd.** Brightman *v.* Tate, [1919] 1 K. B. 463; Anderson *v.* Daniel, [1924] 1 K. B. 138.

303. —— —— —— On terms of repaying money lent.]—In an equitable action by a borrower against an unregistered money-lender for the return of certain securities mortgaged by the borrower to secure advances:—*Held:* on the authority of *Victorian Daylesford Syndicate Ltd.* v. *Dott*, No. 301, *ante*, & *Bonnard* v. *Dott*, No. 286, *ante*, the loan transactions were void for illegality; in the case of loan transactions void for illegality the usual rule was that neither party could sue the other for the restoration of property or the repayment of money, but borrowers in illegal loan transactions came within the exception to this rule in *Bonnard* v. *Dott*, No. 286, *ante*, &, as it was an appeal to equitable jurisdiction, pltf. ought to be put on terms, as he could not obtain equity without himself doing equity by repaying the money which had been advanced to him.—LODGE *v.* NATIONAL UNION INVESTMENT CO., LTD., [1907] 1 Ch. 300; 76 L. J. Ch. 187; 96 L. T. 301; 23 T. L. R. 187.

Annotations:—**Distd.** Chapman *v.* Michaelson, [1909] 1 Ch. 238. **Mentd.** Sinclair *v.* Brougham, [1914] A. C. 398; *Re* Jubilee Cotton Mills, [1922] 1 Ch. 100.

304. —— —— Money borrowed on mortgage.]—By his marriage settlement R. assigned funds to trustees upon trusts under which he took a protected life interest & the trustees were empowered to pay his debts & for that purpose to raise money upon his request in writing. In Nov. 1906, he committed an act of bkpcy., on which he was adjudicated a bkpt. in Apr. 1907. In Dec. 1906, he signed a request to the trustees to raise £800, for payment of his debts. They borrowed the money from G. & executed a mtge. in which they covenanted "as such trustees but not otherwise" to repay the money with interest at 6 per cent. G. brought this action to enforce his security:—*Held:* the mtge. was taken by G. in the course of his business as a money-lender & was therefore entirely void, inasmuch as he was not registered; that being so, the debt was gone & G. could not succeed in a claim for money had & received; G. had not been taken by surprise, & under the circumstances the omission of one of the trustees to plead Money-lenders Act, 1900 (c. 51), was immaterial.—*Re* ROBINSON'S SETTLEMENT, GANT *v.* HOBBS, [1912] 1 Ch. 717; 81 L. J. Ch. 393; 106 L. T. 443; 28 T. L. R. 298, C. A.

Annotations:—**Consd.** Edgelow *v.* MacElwee, [1918] 1 K. B. 205. **Reld.** Lipton *v.* Powell, [1921] 2 K. B. 51. **Mentd.** Pirie *v.* Richardson (1926), 70 Sol. Jo. 1023.

305. —— —— Advances by solicitor.]—EDGELOW *v.* MACELWEE, No. 290, *ante*.

306. Effect of lapse of registration—Transaction void—Effect on subsequent agreement.]—At a time when deft., who had been registered as a money-lender, but had allowed the registration to lapse, was nevertheless still carrying on business as a money-lender, an agreement was made between pltf. & deft., whereby, in return for an advance of £500 to pltf. for six months & a guarantee of a loan of £1,000 which was made to pltf. by a third party & was otherwise secured, it was agreed that 25 per cent. of the profits of a theatre, the lease of which pltf. had agreed to buy, should belong to deft. for eighty-seven years, subject to pltf.'s being able to carry out the purchase, & it was further agreed between pltf. & deft. that pltf. was to be liable for losses, deft. being only responsible for his guarantee. Subsequently pltf., in order to carry out the purchase, required to mortgage the theatre, & a second agreement was made, whereby it was agreed between pltf. & deft. that deft., in consideration of his consenting to the mtge. of the whole interest, including his quarter share, should have his share increased to 50 per cent.:—*Held:* under Money-lenders Act, 1900 (c. 51), both agreements were void.—LEVY *v.* DOTT (1919), 35 T. L. R. 518, C. A.

307. Loan induced by fraud—Right of action for misrepresentation.]—An unregistered money-lender can maintain an action to recover damages for fraudulent misrepresentations whereby he was induced to advance money on loan.—DOTT *v.* BRICKWELL (1906), 23 T. L. R. 61.

308. Proof of registration—Onus of proof—On party setting up non-registration.]—FAGOT *v.* FINE, No. 289, *ante*.

309. —— Examined or certified copy not necessary.]—Pltf., a money-lender, brought an action in the county ct. on a promissory note made in her favour by defts., who did not deny that the sum claimed had not been paid. Defts. had not given notice that they relied upon the statutory defence that pltf. was not registered as a money-lender, & they were therefore prevented from setting up that defence at the trial. Nothing appeared on the face of the transaction between the parties or in the course of the proceedings to suggest that pltf. was not registered. Pltf.'s agent gave evidence on her behalf, stating that she was registered, & producing a copy of her return of particulars for registration which he said had been obtained from the registration authorities; & defts. did not attempt to shake his evidence by cross-examination or otherwise. The county ct. judge held that pltf. must give strict proof of her registration by an examined or certified copy thereof, &, as she had not done so, he gave judgment for defts. On appeal to the Div. Ct.:—*Held:* in the circumstances it was not necessary pltf. should prove her registration by an examined or certified copy thereof, & she was entitled to judgment.—LIPTON *v.* POWELL, [1921] 2 K. B. 51; 90 L. J. K. B. 366; 125 L. T. 89; 37 T. L. R. 280; 65 Sol. Jo. 275.

SUB-SECT. 2.—CARRYING ON BUSINESS IN OTHER THAN REGISTERED NAME.

See Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*).

310. What amounts to—Fraudulent concealment of identity.]—Pltf., a money-lender, advertised under a fictitious name, & deft. borrowed money & gave a promissory note to secure the sum borrowed & interest. In an action on the promissory note the jury found that pltf. intentionally concealed his identity to induce deft. to borrow money of him as if from another, & that deft. was so induced; that pltf. did so fraudulently; that deft. entered into the contract believing that he was doing so with a person of the fictitious name

Sect. 2.—Breach of statutory restrictions: Sub-sects. 2 & 3.]

given by pltf., & that deft. repudiated the contract within a reasonable time after he discovered that pltf. was the person with whom he had contracted:—*Held:* the fraudulent concealment by pltf. of his identity with a person whose reputation in business was such that deft. would not have dealt with him was material to the inducement which brought about the contract, which deft. was therefore entitled to repudiate within a reasonable time after the discovery of the fraud.—GORDON *v.* STREET, [1899] 2 Q. B. 641; 69 L. J. Q. B. 45; 81 L. T. 237; 48 W. R. 158; 15 T. L. R. 445; 43 Sol. Jo. 621, C. A.

Annotations:—**Consd.** Peizer *v.* Lefkowitz (1912), 106 L. T. 776. **Refd.** Wilton *v.* Osborn, [1901] 2 K. B. 110; Sadler *v.* Whiteman, [1910] 1 K. B. 868. **Mentd.** Said *v.* Butt, [1920] 3 K. B. 497.

311. —— Carrying on more than one registered business—Trading in partnership & in own name.] —STAFFORDSHIRE FINANCIAL CO. *v.* HUNT, [1907] W. N. 258.

Annotations:—**Refd.** *Re* Debtor, *Ex p.* Cardon (1908), 52 Sol. Jo. 209; King *v.* Turnbull (1908), 24 T. L. R. 434.

312. —— —— ——.] — STIRLING *v.* SILBURN & PYMAN, No. 293, *ante*.

313. —— —— ——.]—WHITEMAN *v.* SADLER, No. 294, *ante*.

314. —— —— —— Registered in both names.] —A money-lender who in fact carries on business in more than one name does not the less offend against Money-lenders Act, 1900 (c. 51), s. 2 (2), because through a mistake of the registration authorities he has succeeded in getting himself registered in respect of both businesses.—WHITEMAN *v.* PUBLIC PROSECUTIONS DIRECTOR, [1911] 1 K. B. 824; 80 L. J. K. B. 681; 104 L. T. 102; 75 J. P. 136; 27 T. L. R. 180, D. C.

315. —— Name wrongly registered.] — WHITEMAN *v.* SADLER, No. 294, *ante*.

316. —— Variation in name—Not trivial variation—Question of law.]—P. was registered as a money-lender under the name of the "Wentworth Loan & Discount Office, of 27, Strafford Houses, Wentworth-street, E." She lent money to defts. on promissory notes, which described her as P., of the "Wentworth Loan & Discount Co., of 27, Strafford Houses, Wentworth-street, E." In an action on the promissory notes, defts. contended that, as the word "co." appeared on the notes instead of the word "office," P. was not trading in her registered name within Money-lenders Act, 1900 (c. 51), s. 2:—*Held:* as there was no pretence for suggesting that the identity of P. was in any way concealed by the substitution of the word "co." for the word "office," the variation did not vitiate the transaction.

I think that the difference in the variance is a question of law & not of fact (VAUGHAN WILLIAMS, L.J.).—PEIZER *v.* LEFKOWITZ, [1912] 2 K. B. 235; 81 L. J. K. B. 718; 106 L. T. 776; *sub nom.* WENTWORTH LOAN CO. *v.* LEFKOWITZ, 28 T. L. R. 334, C. A.

Annotation:—**Consd.** Finegold *v.* Cornelius, [1916] 2 K. B. 719.

317. —— Transaction by unregistered partnership—Though members separately registered.]—T. was in need of money for the purpose of his business, & asked pltf. to lend him the money; but pltf. said he was not a money-lender, but if T. would form his business into a co. the money could be lent. Pltf. introduced T. to B. as his partner. Both pltf. & B. were separately registered as money-lenders. The business was formed into a co., & a debenture of the same amount as the loan was issued to T. containing a condition that principal & interest should become payable if execution was levied. Pltf. & B. lent the money in equal moieties, & were appointed as managing directors of the co. at a salary of £12 10*s.* each per week, but were exonerated from any obligation to attend to the business of the co. The business was ample security for the loan, for which no interest was charged. T. subsequently transferred the debenture to pltf. Pltf. & B., their salary being in arrear, issued a writ, obtained judgment on it, & issued execution. Pltf. then brought an action on his debenture for the usual relief; & a receiver was appointed, who sold the business for more than the amount of the loan. Pltf. brought this action, claiming that the debenture constituted a charge on all the property of the co., & the co. counterclaimed that the debenture & transfer were void & the transaction a fraud on the co.:—*Held:* the transaction was a partnership transaction by pltf. & B. & also was a money-lending transaction, & the loan, having been made by an unregistered partnership, was void under Money-lenders Act, 1900 (c. 51), s. 2 (1) (*c*), both as to the loan itself & the security taken for it.—*Re* TAYLOR (LONDON), LTD., MILLER *v.* TAYLOR (LONDON), LTD., TAYLOR (LONDON), LTD. *v.* MILLER & FINGARD (1916), 86 L. J. Ch. 49; 115 L. T. 756.

318. —— Transaction by member of registered partnership—In own name—Where member not separately registered.]—A person named Louis Vorst was registered under Money-lenders Act, 1900 (c. 51), as carrying on a money-lending business in partnership with his son under the name of Louis & Sidney Vorst. Louis Vorst lent money & took a security in his own name alone, & then claimed to recover on the security:—*Held:* he could not recover, as he had not taken the security in his registered name. Registration of a man's name as part of a firm name does not cover business done by him separately.—VORST *v.* GOLDSTEIN, [1924] 2 K. B. 372; 93 L. J. K. B. 965; 131 L. T. 569, D. C.

319. Effect of breach — Transaction void.] — A registered money-lender who carries on a money-lending business otherwise than in his registered name or at his registered address, or enters into any agreement, or takes any security for money in the course of his business as a money-lender otherwise than in his registered name, cannot recover, or present a bkpcy. petition in respect of, money so lent.—*Re* A DEBTOR, *Ex p.* CARDEN (1908), 52 Sol. Jo. 209, C. A.

Annotations:—**Apld.** Gadd *v.* Provincial Union Bank, [1909] 2 K. B. 353. **Refd.** Blair *v.* Buckworth (1908), 24 T. L. R. 474; King *v.* Turnbull (1908), 24 T. L. R. 434.

320. —— ——.] — STIRLING *v.* SILBURN & PYMAN, No. 293, *ante*.

321. —— —— Effect on security for loan.] — *Re* TAYLOR (LONDON), LTD., MILLER *v.* TAYLOR (LONDON), LTD., TAYLOR (LONDON), LTD. *v.* MILLER & FINGARD, No. 317, *ante*.

322. —— —— ——.] — VORST *v.* GOLDSTEIN, No. 318, *ante*.

323. —— No right to present bankruptcy petition.]—*Re* A DEBTOR, *Ex p.* CARDEN, No. 319, *ante*.

3191. *Effect of breach—Transaction void.]*—SAGAR *v.* M'ADAM, [1914] 1 S. L. T. 93.—SCOT.

SUB-SECT. 3.—CARRYING ON BUSINESS AT OTHER THAN REGISTERED ADDRESS.

See Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*).

324. What amounts to—Question of fact.]—Money-lenders Act, 1900 (c. 51), in requiring that a money-lender "shall carry on the money-lending business in his registered name & in no other name & under no other description, & at his registered address or addresses & at no other address," does not mean that every stage & every incident of every piece of the money-lending business is to be transacted at the registered office.

The question is a question of fact, not of law, & must be answered according to the circumstances of the case.

What is carrying on business? It imparts a stress or repetition of acts (LORD LOREBURN, C.).—KIRKWOOD *v.* GADD, [1910] A. C. 422; 79 L. J. K. B. 815; 102 L. T. 753; 26 T. L. R. 530; *sub nom.* GADD *v.* KIRKWOOD, 54 Sol. Jo. 599, H. L.; *revsg.* S. C. *sub nom.* GADD *v.* PROVINCIAL UNION BANK, [1909] 2 K. B. 353, C. A.

Annotations:—**Consd.** Blaiberg *v.* Calvert (1910), 26 T. L. R. 328; Sadler *v.* Whiteman, [1910] 1 K. B. 868; Bowen *v.* Samuels (1918), 34 T. L. R. 487; Cornelius *v.* Phillips, [1918] A. C. 199. **Refd.** Rueter *v.* Bradford Advance Co. (1910), 26 T. L. R. 533; Newman *v.* Oughton, [1911] 1 K. B. 792; Pelzer *v.* Lefkowitz, [1912] 2 K. B. 235. **Mentd.** Hadsley *v.* Dayer-Smith, [1914] A. C. 979.

325. —— Single transaction at other than registered address.]—A money-lending transaction was re-opened, under Money-lenders Act, 1900 (c. 51), s. 1 (1), where the ct. came to the conclusion that, the borrower being under the necessity of raising a sum of money at short notice, the money-lender took advantage of that necessity to induce him to sign a promissory note payable in three months with interest at the rate of 44 per cent. *per annum*, the primary security being an equitable mtge. of real property, which was sufficient security for the advance.

Qu.: whether the carrying out of a single money-lending transaction at a place which was not the registered address of the money-lender is a breach of Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*).—BLAIR *v.* BUCKWORTH (1908), 24 T. L. R. 474, C. A.

Annotations:—**Consd.** Gadd *v.* Provincial Union Bank, [1909] 2 K. B. 353; Finegold *v.* Cornelius, [1916] 2 K. B. 719.

326. —— ——.]—Pltf., who was a money-lender with a registered address, met defts. at a house which was not his registered address, & made an advance to them there, taking from them a promissory note payable at his registered address. Pltf., except for this transaction, transacted his business at his registered address:—*Held*: notwithstanding this isolated transaction, pltf. carried on his money-lending business at his registered address within Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*), & therefore the note was valid.—KING *v.* TURNBULL (1908), 24 T. L. R. 434.

327. —— ——.]—Applt. was asked by a friend to assist him in raising money, & was introduced by him to resp., who was a registered money-lender, though this fact was not known to applt. Applt. signed a promissory note for £300 which was produced by resp., & received from resp. a cheque for a smaller amount, which he indorsed & handed to his friend. This transaction was carried out at an hotel at some distance from resp.'s registered address:—*Held*: (1) the transaction amounted to a carrying on of his business by the money-lender at an address other than his registered address in contravention of Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*); (2) the effect of Money-lenders Act, 1900 (c. 51), was to avoid the transaction.—CORNELIUS *v.* PHILLIPS, [1918] A. C. 199; 87 L. J. K. B. 246; 118 L. T. 228; 34 T. L. R. 116; 62 Sol. Jo. 140, H. L.; *revsg.* S. C. *sub nom.* FINEGOLD *v.* CORNELIUS, [1916] 2 K. B. 719, C. A.

Annotation:—*As to* (1) **Consd.** Bowen *v.* Samuels (1918), 34 T. L. R. 487.

328. —— Several transactions at other than registered address.]—A registered money-lender lent deft. sums of money on three different occasions, taking on each occasion a promissory note for the amount advanced. In each case the money was lent to, & the promissory note was given & signed by, deft. at his residence. From the evidence it appeared that these were not isolated transactions, but were illustrative of the manner in which pltf. carried on his money-lending business:—*Held*: the transactions were void under Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*).—LAZARUS *v.* GARDNER (1909), 25 T. L. R. 719, C. A.

329. —— Completion of transaction at other than registered address.]—Pltf., who was a registered money-lender, called upon deft. at the latter's place of business with reference to a proposed loan, but no arrangement was come to, & deft. then called upon pltf. at his registered office, but did not see him. Deft. thereupon wrote a letter addressed to pltf. at his registered office about a loan of £100 or £200, & in reply thereto pltf. called upon deft. at the latter's office, & terms were there arranged & an advance was made, & deft. signed a promissory note there:—*Held*: the business was carried on at pltf.'s registered address, notwithstanding that it was completed at deft.'s office.—KING *v.* MASSEY (1908), 24 T. L. R. 710.

330. —— ——.]—KIRKWOOD *v.* GADD, No. 324, *ante*.

331. —— ——.]—Where the negotiations for, & substantially the whole of the transaction in respect of, a loan took place at the money-lender's registered address, but a bill of sale granted by the borrower was executed elsewhere:—*Held*: the transaction had been carried out at the money-lender's registered address within Money-lenders Act, 1900 (c. 51), s. 2.—RUETER *v.* BRADFORD ADVANCE CO. (1910), 26 T. L. R. 533.

332. —— ——.]—The substantial negotiations for a loan took place at a money-lender's registered address, but neither the payment to the borrower took place at such address nor was the promissory note given by the latter signed there:—*Held*: the transaction had been carried out at the money-lender's registered address.—BLAIBERG *v.* CALVERT (1910), 26 T. L. R. 328.

333. —— ——.]—SHAFFER *v.* SHEFFIELD, No. 346, *post*.

334. —— —— **By one of two borrowers.**]—Two promissory notes were given by defts. to pltf., a registered money-lender, for an advance made by him to them. The notes were signed by

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PART IV. SECT. 2, SUB-SECT. 3.

329 i. *What amounts to—Completion of transaction at other than registered address.*]—Where a transaction is entered into between a money-lender & a borrower at the registered office of the former, the transaction is not vitiated under Money-lenders Act, 1900 (c. 51), s. 2 (1) (b), because the promissory note was also signed by the borrower's wife (with whom the lender had no previous communication) at a place other than the lender's office.—WELLS *v.* KERR (1913), 47 I. L. T. 66.—IR.

329 ii. —— ——.]—TANNER *v.* HARE (1910), 30 N. Z. L. R. 431.—N.Z.

329 iii. —— ——.]—SOLOMON *v.* MACNAMEE, [1915] 1 S. L. T. 38.—SCOT.

Sect. 2.—*Breach of statutory restrictions: Sub-sects.* 3 & 4. *Sect.* 3: *Sub-sect.* 1, *A.*]

one of defts. at pltf.'s registered address, but were signed by the other deft. elsewhere. The money advanced was handed over by pltf. at his registered address:—*Held:* the fact that the promissory notes were signed by one of defts. elsewhere than at pltf.'s registered address did not avoid the transaction under Money-lenders Act, 1900 (c. 51), s. 2.—LEVENE *v.* GARDNER & KILMOREY (EARL) (1909), 25 T. L. R. 711.

Annotations:—**Folld.** Blaiberg *v.* Calvert (1910), 26 T. L. R. 328; Jackson *v.* Price, [1910] 1 K. B. 143. **Consd.** Sadler *v.* Whiteman (1910), 102 L. T. 37. **Refd.** Finegold *v.* Cornelius, [1916] 2 K. B. 719.

335. —— —— Effect of subsequent transaction at registered address.]—Pltfs., a firm of money-lenders, wrote to deft. from their registered address & asked him for an interview at his office with a view to lending him money. The interview took place at deft.'s office, & there pltfs. made a loan to deft. in return for a promissory note. A further advance was afterwards made by pltfs. to deft. at their registered office in return for another promissory note. Ultimately these promissory notes were cancelled at pltfs.' registered office in return for a third promissory note. In an action on the third note:—*Held:* there was no violation of the Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*), & pltfs. were entitled to recover.—BOWEN (H.) & Co. *v.* SAMUELS (1918), 34 T. L. R. 487, C. A.

336. —— Repayment at other than registered address.]—A money-lender who receives at a place which is not his registered address money in repayment of loans previously made does not thereby carry on business elsewhere than at his registered address within Money-lenders Act, 1900 (c. 51), s. 2 (1).—HOPKINS *v.* HILLS, [1910] 2 K. B. 29; 79 L. J. K. B. 825; 102 L. T. 574; 74 J. P. 213; 26 T. L. R. 394, D. C.

337. —— Loan transacted by correspondence.]—The terms of a loan having been arranged by correspondence between the borrower & a money-lender, the latter sent to the former an unsigned promissory note, which the borrower signed & returned to the money-lender, who then sent the borrower a cheque for the amount of the loan. The money-lender's letters, the unsigned promissory note, & the cheque were all sent by post from the money-lender's registered address to the borrower's residence:—*Held:* the business of the loan had been carried on by the money-lender at his registered address within Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*).—*Re* SEED, *Ex p.* KING, [1910] 1 K. B. 661; 102 L. T. 366; 26 T. L. R. 348; 54 Sol. Jo. 343; 17 Mans. 121; *sub nom. Re* DEBTOR (No. 2), *Ex p.* PETITIONING CREDITOR, 79 L. J. K. B. 421, D. C.

338. —— Cheque sent by registered post.]—The terms of a loan were arranged between a registered money-lender & the borrower at the money-lender's registered address, & the promissory notes which were given as security for the loan were signed there. For the mutual convenience of both parties a cheque for the amount of the loan was sent by the money-lender by post to the borrower's address:—*Held:* the mere fact that the cheque for the money advanced was sent to the borrower by post, instead of being handed to the borrower at the money-lender's registered address, did not make the transaction void as being a carrying on of the money-lending business elsewhere than at the registered address in contravention of Money-lenders Act, 1900 (c. 51), s. 2 (1) (*b*).—JACKSON *v.* PRICE, [1910] 1 K. B. 143; 79 L. J. K. B. 130; 26 T. L. R. 106.

Annotations:—**Folld.** Blaiberg *v.* Calvert (1910), 26 T. L. R. 328. **Consd.** Sadler *v.* Whiteman (1910), 102 L. T. 37. **Refd.** *Re* Seed, *Ex p.* King, [1910] 1 K. B. 661.

339. Effect of breach — Transaction void.]—*Re* A DEBTOR, *Ex p.* CARDEN, No. 319, *ante.*

340. —— ——.]—LAZARUS *v.* GARDNER, No. 328, *ante.*

341. —— ——.]—CORNELIUS *v.* PHILLIPS, No. 327, *ante.*

SUB-SECT. 4.—MAKING AGREEMENT OR TAKING SECURITY IN OTHER THAN REGISTERED NAME.

See Money-lenders Act, 1900 (c. 51), s. 2 (1) (*c*).

342. Object of restriction.]—WHITEMAN *v.* SADLER, No. 294, *ante.*

343. —— Distinguished from "carrying on business in other than registered name."]—I should like to add a word as to the existence in Money-lenders Act, of 1900 (c. 51), s. 2, of two sub-sects. of so similar a character as sub-sects. (*b*) & (*c*). One possible explanation is this: If in a particular transaction a contract is made in a name which is not the money-lender's registered name. The object of sub-sect. (*c*) is to enable the person with whom it is made to ask the ct. to say that the agreement was an invalid one. Under sub-sect. (*b*), . . . if it can be shown that the money-lender is in the habit of "carrying on business in a name other than his registered name," then the object of the sub-sect. is to allow proceedings for penalties to be taken against the money-lender (LUSH, J.).—PEIZER *v.* LEFKOWITZ, [1912] 2 K. B. 235; *sub nom.* WENTWORTH LOAN & DISCOUNT CO. *v.* LEFKOWITZ, 105 L. T. 585, D. C.; *on appeal*, [1912] 2 K. B., p. 238, C. A.

Annotation:—**Consd.** Finegold *v.* Cornelius, [1916] 2 K. B. 709.

344. Taking security otherwise than in registered name—Absolute deed of transfer—No covenant to repay.]—*Re* ROBINSON, CLARKSON *v.* ROBINSON, No. 369, *post.*

345. —— Post-dated cheques — Payable to employees of money-lender.]—Pltfs., who were money-lenders registered in the name of C. Stirling, advanced to deft. the sum of £1,000 on the security of a promissory note for £1,600 to be repaid in eight consecutive monthly payments of £200 each. At the same time deft. gave to pltfs. eight cheques, each post dated so as to correspond with one of the eight consecutive monthly payments stipulated for in the promissory note. The cheques were made payable, not to pltfs. in their registered name, but to nominees who were in their employ. Two of the cheques were duly met, but the next two were dishonoured. In an action by pltfs. to recover the amounts unpaid with interest:—*Held:* the taking of the cheques by pltfs. in the names of nominees was the taking of "a security for money" otherwise than in the money-lenders' registered name, within Money-lenders Act, 1900 (c. 51), s. 2 (1), & the transaction was consequently illegal & void.—STIRLING *v.* JOHN, [1923] 1 K. B. 557; 92 L. J. K. B. 353; 128 L. T. 560; 39 T. L. R. 123; 67 Sol. Jo. 168, C. A.

346. —— Security endorsed in blank.]—Money-lenders Act, 1900 (c. 51), s. 2 (1) (*c*), which provides that a money-lender as defined by the Act shall not take any security for money in the course of his business as a money-lender otherwise than in his registered name does not prohibit him from taking a security in which his name does not

appear at all, but prohibits him from taking it in a name other than his registered name.

Pltf. carried on business as a registered money lender at Manchester, & prior to the loan the subject-matter of this action had had several money-lending transactions with deft., S. S. sent a letter to pltf.'s registered address at Manchester asking him to come to London for the purpose of granting a loan on the security of certain furniture belonging to deft. M., who knew of the suggested visit & its object. Pltf. accordingly interviewed deft. at the St. Pancras Hotel, London, & there lent S. £150, taking as security a bill of exchange for £175, payable one month after date, drawn by S. upon, & accepted by, M. as surety, & indorsed in blank to pltf.:—*Held:* (1) pltf. had not taken the security "otherwise than in his registered name"; (2) he had not carried on business otherwise than at his registered address; (3) interest would only be allowed at the rate previously charged by pltf., namely, £5 on a loan of £50 for a month.—SHAFFER *v.* SHEFFIELD, [1914] 2 K. B. 1; 83 L. J. K. B. 817; 110 L. T. 1023; 30 T. L. R. 276; 58 Sol. Jo. 363.

347. Agreement in other than registered name—With respect to advance & repayment of money—Compromise of bankruptcy proceedings.]—Pltf., a money-lender, obtained judgment in his registered name against C. his debtor, &, as the judgment was not satisfied, he presented a bkpcy. petition, in the same registered name, against C. When the petition was about to be heard, & in consideration of it being withdrawn, an arrangement was entered into between pltf., in the same registered name as that in which he had obtained judgment, & deft. H., by which H. paid a portion of the debt & agreed to redeem certain shares for £50 within fourteen days. At the time this agreement was entered into, but after he had obtained judgment against C., pltf. had changed his registered name. H. not having paid the £50, pltf. sued him to recover same:—*Held:* (1) the agreement was one "with respect to the advance & repayment of money" within Money-lenders Act, 1900 (c. 51), s. 2 (1) (*c*); (2) as it was ancillary to the bkpcy. petition it was rightly entered into on the part of pltf. in the registered name under which he had obtained judgment & presented the bkpcy. petition; (3) H. was liable.—BLAIR *v.* HOLCOMBE (1912), 28 T. L. R. 198.

348. —— —— Compromise of judgment debt.]—Applt., an unregistered money-lender, became the holder of certain promissory notes made by the debtor in respect of a money-lending transaction & obtained judgment in default of defence against the debtor in an action upon the notes. An arrangement was subsequently made whereby the debtor agreed to pay the debt with certain interest by instalments, & all further proceedings upon the judgment were to be stayed. The debtor having been adjudicated a bkpt., applt. claimed to prove in the bkpcy. for the amount due under the arrangement:—*Held:* (1) the arrangement was an agreement entered into by the money-lender in the course of his business as a money-lender "with respect to the advance & repayment of money" within Money-lenders Act, 1900 (c. 51), s. 2 (1) (*c*); (2) the original transaction being unlawful, the judgment would not have been conclusive against the trustee for the purposes of proof, & the subsequent arrangement did not prevent the ct. from going behind the transaction & rejecting the proof.—*Re* CAMPBELL, *Ex p.* SEAL, [1911] 2 K. B. 992; 81 L. J. K. B. 154; 105 L. T. 529; 19 Mans. 1, C. A.

Annotation:—As to (1) **Apld.** Blair *v.* Holcombe (1912), 28 T. L. R. 198.

349. —— Where registered name changed—Compromise of judgment debt in old name—Judgment obtained before name changed.]—BLAIR *v.* HOLCOMBE, No. 347, *ante*.

350. Effect of breach—Money not recoverable.]—*Re* A DEBTOR, *Ex p.* CARDEN, No. 319, *ante*.

351. —— Right to declaration of illegality of transaction.]—(1) In an action by the trustee of a debtor, under a scheme of arrangement with his creditors, against a money-lender who in the course of his business has taken a mtge. security from the debtor in a name other than his registered name, the ct. will, under R. S. C., Ord. 25, r. 5, give a declaratory judgment that the security is illegal & void under Money-lenders Act, 1900 (c. 51), s. 2, notwithstanding that a mere declaration without any specific consequential relief is claimed. The declaratory judgment is not equitable relief, & terms as to repayment of the money actually advanced will not be imposed upon pltf., as a condition of his obtaining the judgment.

(2) *Semble:* a statutory illegality, if it can be waived at all, is not waived unless both the parties to the transaction expressly recognise its invalidity at the time of the alleged waiver.—CHAPMAN *v.* MICHAELSON, [1909] 1 Ch. 238; 78 L. J. Ch. 272; 100 L. T. 109; 25 T. L. R. 101, C. A.

Annotation:—Generally, **Mentd.** Guaranty Trust Co. of New York *v.* Hannay, [1915] 2 K. B. 536.

352. —— No right to bring bankruptcy proceedings.]—*Re* A DEBTOR, *Ex p.* CARDEN, No. 319, *ante*.

353. —— No right to prove in bankruptcy.]—*Re* CAMPBELL, *Ex p.* SEAL, No. 348, *ante*.

—— **Where money-lender unregistered.**]—*See* Sub-sect. 1, *ante*.

SECT. 3.—LOANS BY UNREGISTERED PERSONS.

SUB-SECT. 1.—PERSONS OTHER THAN MONEY-LENDERS.

A. Evidence of Loan.

354. Delivery of money—When amount borrowed from third party.]—A loan of money by A. to B. is not to be inferred from the bare fact that A. delivered a sum of money to B. which A. had borrowed from another.—WELCH *v.* SEABORN (1816), 1 Stark. 474, N. P.

355. Drawing cheque in favour of another.]—The mere fact of a person's drawing a cheque in favour of another is not evidence of a debt.—PEARCE *v.* DAVIS (1834), 1 Mood. & R. 365, N. P.

*Annotations:—***Refd.** Garden *v.* Bruce (1868), 17 L. T. 545; Marreco *v.* Richardson, [1908] 2 K. B. 584.

356. —— Amount placed to credit of defendants.]—In an action by assignees, proof that a cheque for a certain sum in defts.' favour was drawn by the bkpts. upon their bankers, & that the amount thereof was placed by their bankers to defts.' credit, no evidence to go to the jury of a loan of money to defts. by the bkpts.—GRAHAM *v.* COX (1848), 2 Car. & Kir. 702, N. P.

357. Delivery of note—Presumption as to value.]—Evidence that pltf. had handed deft. a note, without proof of the value of such note, is good evidence of money lent to the extent of £5 the

Sect. 3.—*Loans by unregistered persons: Sub-sect.* 1, *A. & B.; sub-sect.* 2. *Sects.* 4, 5 & 6.]

lowest English current note.—NORTON *v.* SWEENEY (1844), 4 L. T. O. S. 98.

358. Payment of sums equal to interest.] — A., in 1837, transferred £1,000 in the 4 per cents. to B., who possessed other stock of the same description. B., after some years, sold out all his stock, including the £1,000. B. made payments to A. equal to interest at 5 per cent. upon that sum until A.'s death. After the death of A., her exor. wrote to B. referring to the transaction as a loan of money: B. in reply asserted that he was employed by A. to purchase an annuity for her, & that he had done so. No purchase of an annuity was proved:—*Held:* there was evidence to go to the jury in support of a count for money lent.—HOWARD *v.* DANBURY (1846), 2 C. B. 803; 135 E. R. 1160; *sub nom.* HOWARD *v.* BUNBURY, 7 L. T. O. S. 44.

359. Payment of notes to defendant's credit — Defendant's subsequent knowledge of balance.]—In an action for money lent, the payment of certain notes having been made to deft.'s credit, & the fact that he had been told the balance afterwards, held sufficient proof that the notes were paid, & had therefore been received by him.—GILL *v.* GILLINGHAM (1858), 1 F. & F. 284.

Payment of cheque.] — *See* EVIDENCE, Vol. XXII., p. 378, Nos. 3864, 3865.

Delivery of I.O.U.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 459, 460, Nos. 2925–2933.

Contract to pay interest.]—*See* BILLS OF EXCHANGE, Vol. VI., p. 18, No. 87.

Acknowledgment of debt in instrument.]—*See* CONTRACT, Vol. XII., pp. 517, 518, Nos. 4293–4298.

B. Action for Money Lent.

360. Condition precedent to action — Return of security not necessary.]—A. lends money to B. & receives a gun as security for the repayment. A. may recover the amount without first returning the gun.—LAWTON *v.* NEWLAND (1817), 2 Stark. 72, N. P.

Request for payment.]—*See* ACTION, Vol. I., pp. 52–59, Nos. 422–485; GUARANTEE, Vol. XXVI., pp. 67–69, Nos. 473–486.

361. When action lies — Effect of subsisting security—Mortgage.]—*Semble:* an express security of a higher nature does not destroy an implied security of a lower. Thus a mtge. given as a security for money lent, does not preclude the lender seeking his remedy in an action of *assumpsit* for the money lent, though, at the time of the commencement of the action, the mtge. may have become absolute by forfeiture. The mtge. is not to be treated as a satisfaction, or as a suspension of the common law right of action.

Accordingly, where a sum of money has been advanced, upon the surrender of copyhold property to the use of the party making that advance, on condition that such surrender shall become void, if payment with interest be made at a particular time, otherwise to be of full force & virtue; & interest has been paid from time to time, subsequent to the day appointed for repayment; & where other circumstances in the conduct of the party to whom the advance was made, show that it was considered as money borrowed. This transaction will not be treated as a conditional purchase, but as a loan for which the surrender is a collateral security; & the administrator of the lender may recover principal & interest in arrear, in an action of *assumpsit*.—ALLENBY *v.* DALTON (1827), 5 L. J. O. S. K. B. 312.

Annotation:—**Distd.** Price *v.* Moulton (1851), 10 C. B. 561.

362. —— —— —— Where no covenant for repayment.]—Where a mtge. deed contains no covenant for repayment, so that no action can be maintained on the deed, debt for money lent may be brought in the ordinary *indebitatus* form.—YATES *v.* ASTON (1843), 4 Q. B. 182; 3 Gal. & Dav. 351; 12 L. J. Q. B. 160; 7 Jur. 83; 114 E. R. 866.

Annotations:—**Distd.** Price *v.* Moulton (1851), 10 C. B. 561; Mathew *v.* Blackmore (1857), 1 H. & N. 762. **Dbtd.** Painter *v.* Abel (1863), 2 New Rep. 83. **Refd.** Barber *v.* Butcher (1846), 8 Q. B. 863.

Merger.]—*See* CONTRACT, Vol. XII., pp. 515–519.

—— **Implication of covenant to pay.**] — *See* DEEDS, Vol. XVII., pp. 394, 395, Nos. 2036–2047.

363. —— Effect of subsisting agreement.] — Pltf. engaged to let deft. land on building leases, & to lend him £4,000 to assist him in the erection of twenty houses; the money to be repaid by June, 1828. Deft. agreed to build the houses, to convey them as security for the loan, & repay the money: when six houses were built, & £1,168 had been advanced, pltf. requested deft. not to go on with the other fourteen houses: deft. desisted:—*Held:* after June, 1828, pltf. might recover the £1,168 on a count for money lent; & it was not necessary to sue on the agreement.—JAMES *v.* COTTON (1831), 7 Bing. 266; 5 Moo. & P. 26; 9 L. J. O. S. C. P. 55; 131 E. R. 103.

364. —— ——.] — Pltf. lent deft. money, & received from deft. shares in a co. as a security, & agreed to give twenty-one days notice to deft. before proceeding to compel the repayment of the loan, or of any part thereof, &, upon repayment of any part of the loan, to give back a proportionate amount of shares:—*Held:* after twenty-one days pltf. was not bound to declare specially, averring a tender of the shares, but he might declare in *indebitatus assumpsit* for money lent.—SCOTT *v.* PARKER (1841), 1 Q. B. 809; 1 Gal. & Dav. 258; 10 L. J. Q. B. 244; 113 E. R. 1341.

Annotations:—**Refd.** National Assce. Assocn. *v.* Stoy (1863), 11 W. R. 959. **Mentd.** Jonassohn *v.* Young (1863), 32 L. J. Q. B. 385.

365. —— —— Condition to execute mortgage.] —Money advanced upon a contract to repay it on demand, or to execute a mtge., may after refusal to execute a mtge., be recovered back under a count for money lent.—BRISTOWE *v.* NEEDHAM (1842), 9 M. & W. 729; 11 L. J. Ex. 278; 152 E. R. 309.

366. —— —— Covenant in mortgage deed.]—L. devised certain lands to deft. on trust to sell the same & apply the proceeds in payment of debts, etc. Deft. mortgaged the lands to pltf. as a security for money lent to him. The mtge. deed contained a covenant by deft. that he would, out of the moneys which should come to his hands as such trustee, from the lands comprised in the mtged. security & the personal estate, if any, of L. pay to pltf. the principal & interest:—*Held:* as there was an express covenant by deft. to pay in a qualified manner, no contract by parol could be implied for the repayment, & consequently an action for money lent would not lie.—MATHEW *v.* BLACKMORE (1857), 1 H. & N. 762; 26 L. J. Ex. 150; 28 L. T. O. S. 325; 156 E. R. 1409; *sub nom.* MATTHEW *v.* BLACKMORE, 5 W. R. 363.

367. —— Money advanced on forged bills.]—Where a party advances money on exchequer bills which are afterwards repudiated at the Exchequer Office, on the ground that the comptroller's signature to them is forged, he is entitled to recover

it back in an action for money lent.—BANK OF ENGLAND *v.* TOMKINS (1842), 6 Jur. 347.

368. Where right of action arises — Where no time stipulated for repayment.]—Where a person advances money, if there is no stipulated time for repayment, he may sue instantly for the money; & it would be monstrous to tie up his hands by a claim for damages, which is only the subject of a cross action.—ATTERBURY *v.* JARVIE (1857), 2 H. & N. 114; 26 L. J. Ex. 178; 29 L. T. O. S. 128; 157 E. R. 47.

——.]—*See, further*, BILLS OF EXCHANGE, Vol. VI., pp. 463–466, Nos. 2956–2967; DEEDS, Vol. XVII., p. 360, No. 1710; LIMITATION OF ACTIONS, Vol. XXXII., pp. 336, 337, Nos. 202–205.

Money lent by friendly society.]—*See* FRIENDLY SOCIETIES, Vol. XXV., pp. 317, 318, Nos. 203–210.

Money lent for gaming & wagering.]—*See* GAMING & WAGERING, Vol. XXV., pp. 414–416, Nos. 180–194.

SUB-SECT. 2.—UNREGISTERED MONEY-LENDERS.

See Sect. 2, sub-sect. 1, *ante*.

SECT. 4.—TRANSFER OF SECURITIES TAKEN BY MONEY-LENDERS

369. Void security — Position of assignee for value without notice—Money-lenders Act, 1900 (c. 51), ss. 1, 2.]—A *bonâ fide* holder for value without notice of a security given to a money-lender which is invalidated by reason of non-compliance with above Act, sect. 2, is in no better position than the original holder of the security.

A firm was registered under above Act, in the firm name, & was stated to consist of two partners, C. & J. C. was in fact not a partner, but merely a nominee of C., who supplied all the capital of the firm, which consisted of himself & J.:—*Held:* securities given to the firm in respect of money-lending transactions were void, as the money-lenders were not properly registered, & an assignee of the securities for value without notice was in no better position than the original lenders, & could obtain no benefit from the securities.—*Re* ROBINSON, CLARKSON *v.* ROBINSON, [1911] 1 Ch. 230; 80 L. J. Ch. 309; 103 L. T. 857; 27 T. L. R. 182, C. A.; *subsequent proceedings*, 104 L. T. 712, C. A.

See, now, Moneylenders Act, 1911 (c. 38), s. 1.

As to position of holder in due course of bill of exchange, generally, *see* BILLS OF EXCHANGE, Vol. VI., pp. 135–144, Nos. 896–937.

SECT. 5.—LOANS TO INFANTS.

For purchase of necessaries.]—*See* INFANTS, Vol. XXVIII., pp. 171, 172, Nos. 316–323.

Securities given by infants for necessaries supplied.]—*See* INFANTS, Vol. XXVIII., pp. 172, 173, Nos. 324–333.

Bond given for sum spent in advancement.]—*See* BONDS, Vol. VII., p. 178, No. 163.

SECT. 6.—LOANS TO EXPECTANT HEIRS.

370. Equitable rule — Onus on plaintiff to show fairness of transaction.]—DAVIS *v.* MARLBOROUGH (DUKE) (1819), 2 Swan. 108; 2 Wils. Ch. 130; 36 E. R. 555, L. C.

Annotations:—**Consd.** Bromley *v.* Smith, Boustead *v.* Bromley, Smith *v.* Bromley (1859), 26 Beav. 644. **Reld.** Portmore *v.* Taylor (1831), 4 Sim. 182; King *v.* Hamlet (1835), 9 Bli. N. S. 575; Mansfield *v.* Ogle (1855), 24 L. J. Ch. 450; Webster *v.* Cooke (1867), 36 L. J. Ch. 753; O'Rorke *v.* Bolingbroke (1877), 2 App. Cas. 814. **Mentd.** Cooper *v.* Reilly (1829), 2 Sim. 560; Pelly *v.* Wathen (1849), 7 Hare, 351; Paynter *v.* Carew (1854), Kay, App. XXXVI.; Fry *v.* Lane, *Re* Fry, Whittet *v.* Bush (1888), 40 Ch. D. 312.

371. —— —— No application to loan by money-lender.]—There was no evidence to support the finding of the jury that pltf., a money-lender, at the time he made the loan & took a promissory note in respect thereof, fraudulently represented that it was his intention to renew the note, if renewal was required, on easier terms. The doctrine of equity as to bargains with expectant heirs has no application to the ordinary case of a loan by a money-lender.—GORDON *v.* FOWLER (1901), 17 T. L. R. 243, C. A.

372. —— —— Interest at rate of five per cent.]—SAMUEL *v.* NICHOL (1902), 18 T. L. R. 513.

373. —— —— —— Whether applicable where expectant heir of full age.]—(1) In cases under Money-lenders Act, 1900 (c. 51), where the ct. is asked to reopen a transaction on the ground that the interest charged is excessive, all the circumstances, such as time & risk, &, further, whether the interest was deducted in cash or still remained in the region of speculation, have to be taken into consideration. Merely to say that the percentage of interest is too high affords no assistance to the ct. in determining the question.

(2) *Qu.*: whether the equitable rule that in money-lending transactions with an expectant heir the onus is on the money-lender to prove that the transaction is fair, & that if it is not fair only 5 per cent. interest is allowed, applies where the expectant heir is of full age.—KING (J.), LTD. *v.* HAY CURRIE (1911), 28 T. L. R. 10.

Annotation:—*As to* (1) **Consd.** Glaskie *v.* Griffin (1914), 111 L. T. 712.

374. Bond given by expectant heir—For double sum lent—Unconscionable.]—Gift obtained from an heir-at-law ignorant of his rights, by one who undertook to support him in obtaining possession of his estate, set aside under the circumstances: also money having been advanced to him by a subscription from different persons, & among the rest from his attorney, to enable him to prosecute suits; & an absolute bond having been taken from him for double the sum lent, with a defeasance executed some days after, declaring that, if he did not recover the estate, or half of it, the bond was to be delivered up:—*Held:* unconscionable, savouring of champerty, & dangerous to public justice.—STRACHAN *v.* BRANDER (1759), 1 Eden, 303; 28 E. R. 701.

Annotations:—**Reld.** Wood *v.* Downes (1811), 18 Ves. 120; James *v.* Kerr (1889), 40 Ch. D. 449. **Mentd.** Wild *v.* Simpson, [1919] 2 K. B. 544.

——.]—*See* BONDS, Vol. VII., pp. 175, 176, Nos. 129–137.

PART IV. SECT. 6.

n. *General rule.*]—Although the number of persons in this country in the position of expectant heirs & reversioners is but small, still the same rule applies here as in England, the principle of the doctrine being that such persons need to be protected against the consequences of their own improvidence in dealing with designing men.—MOREY *v.* TOTTEN (1857), 6 Gr. 176.—**CAN.**

370 i. *Equitable rule — Onus on plaintiff to show fairness of transaction.*]—The result of the English cases regarding "hard" or "unconscionable bargains" is that in dealings with expectant heirs, reversioners, or remaindermen, the fact that the bargain was declined by others as not being sufficiently advantageous, does not raise a presumption that it was fair & reasonable; & that until the contrary is satisfactorily proved by the party trying to maintain the bargain, the ct. may presume that a bargain which apparently provides, in the opinion of the ct. for an unusually high return or an exceptionally high rate of interest is a hard & unconscionable bargain against which relief should be granted.—CHUNNI KUAR *v.* RUP SINGH (1888), I. L. R. 11 All. 57.—**IND.**

Sect. 6.—Loans to expectant heirs. Sect. 7: Sub-sect. 1, A., B. & C. (a) & (b).]

Unconscionable bargains with expectant heirs.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 266, 269–279, Nos. 907, 933–1049.

SECT. 7.—RELIEF OF BORROWERS.

SUB-SECT. 1.—UNDER MONEY-LENDERS ACTS.

A. Jurisdiction of Court to give Relief.

See Money-lenders Act, 1900 (c. 51), s. 1 (4).

375. Where transaction harsh & unconscionable—"Such that a court of equity would give relief"—Money-lenders Act, 1900 (c. 51), s. 1.]—By above sect. sub-sect. 1, where proceedings are taken in any ct. by a money-lender for the recovery of money lent after the commencement of above Act, & there is evidence which satisfies the ct. that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, & that, in either case, the transaction is "harsh & unconscionable, or is otherwise such that a ct. of equity would give relief," the ct. may reopen the transaction & give relief to the person sued:—*Held:* the words "or otherwise is such that a ct. of equity would give relief" are not exclusive of the words "harsh & unconscionable," & in order to entitle the person sued to relief the transaction must be such that a ct. of equity would relieve against it on the ground of its being harsh & unconscionable.—WILTON & CO. *v.* OSBORN, [1901] 2 K. B. 110; 70 L. J. K. B. 507; 84 L. T. 694; 17 T. L. R. 431.

Annotations:—**Overd.** *Re* A Debtor, *Ex p.* The Debtor, [1903] 1 K. B. 705. **Dbtd.** Samuel *v.* Newbold, [1906] A. C. 461. **Consd.** Carringtons *v.* Smith, [1906] 1 K. B. 79; *Re* A Debtor, *Ex p.* Petitioning Creditor, [1917] 2 K. B. 60.

376. —— —— ——.]—Under above sect., a transaction with a money-lender can be reopened when the ct. is satisfied that the transaction is "harsh & unconscionable," even though it is not "such that a ct. of equity would have given relief" before above Act.

This power to give relief can be exercised by the ct. of bkpcy. upon the hearing of a petition by a money-lender for a receiving order against a borrower, the petition being founded on a final judgment recovered in an action in which the debtor did not apply for relief under above sect.

Semble: the interest charged upon a loan may be so excessive as of itself to render the transaction "harsh & unconscionable."—*Re* A DEBTOR, *Ex p.* THE DEBTOR, [1903] 1 K. B. 705; 72 L. J. K. B. 382; 88 L. T. 401; 51 W. R. 370; 19 T. L. R. 288; 47 Sol. Jo. 334; 10 Mans. 130, C. A.

Annotations:—**Apld.** Wells *v.* Allott, [1904] 2 K. B. 842; Part *v.* Bond (1906), 94 L. T. 390. **Expld.** Carringtons *v.* Smith, [1906] 1 K. B. 79. **Apprvd.** Samuel *v.* Newbold, [1906] A. C. 461. **Distd.** *Re* Attree, *Ex p.* Ward, [1907] 2 K. B. 868. **Consd.** *Re* Debtor, *Ex p.* Petitioning Creditor, [1917] 2 K. B. 60.

377. —— —— ——.]—(1) The relief which above Act extends to a borrower is not limited to cases in which before the above Act the Ct. of Ch. would have given relief.

Above Act confers upon the cts. of this country a new jurisdiction, & gives to borrowers a form of relief different in kind & range from that theretofore granted to any class of tribunal in this country. The relief given . . . is not that theretofore administered by cts. of equity, but differs from it in character, nature & extent (LORD ATKINSON).

(2) The policy of above Act is to enable the ct. to prevent oppression, leaving it in the discretion of the ct. to weigh each case upon its own merits & to look behind a class of contracts which peculiarly lend themselves to an abuse of power.

(3) An excessive rate of interest, having reference to the nature of the risk, & other circumstances, is in itself *primâ facie* evidence that the transaction is harsh & unconscionable within above Act.

(4) In certain cases which, in modern times at any rate, have been confined to dealings with expectant heirs, including the whole class of persons for the sake of convenience comprehended under that designation, the Ct. of Ch. gave relief on terms. On pltf. submitting to do equity by repaying what was justly due, the ct. set aside the transaction which it considered unrighteous, & ordered that the securities impeached should stand as a security for the money actually advanced with interest (LORD MACNAGHTEN).

(5) Under above sect. sub-sect. 1, a ct. may reopen a transaction & take an account between the money-lender & the person sued upon two conditions. The first condition is that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges, are excessive. . . . The second condition is that the contract is harsh & unconscionable, or is otherwise such that a ct. of equity would give relief (LORD LOREBURN, C.).—SAMUEL *v.* NEWBOLD, [1906] A. C. 461; 75 L. J. Ch. 705; 95 L. T. 209; 22 T. L. R. 703; 50 Sol. Jo. 650, H. L.; *affg.* S. C. *sub nom.* SAUNDERS *v.* NEWBOLD, [1905] 1 Ch. 260, C. A.

Annotations:—*As to* (1) & (2) **Refd.** Sadler *v.* Whiteman, [1910] 1 K. B. 868. *As to* (3) **Consd.** Carringtons *v.* Smith, [1906] 1 K. B. 79; Abrahams *v.* Dimmock, [1914] 2 K. B. 372. **Refd.** Jacobs *v.* Joicey (1919), 35 T. L. R. 362. *Generally*, **Refd.** Bonnard *v.* Dott (1905), 92 L. T. 822.

378. Contract for loan made abroad—Intended to be performed abroad.]—Money-lenders Act, 1900 (c. 51), s. 1, does not apply to a contract for a loan made & intended to be performed abroad.—SHRICHAND & CO. *v.* LACON (1906), 22 T. L. R. 245; 50 Sol. Jo. 223.

Annotation:—**Folld.** Velchand *v.* Manners (1909), 25 T. L. R. 329.

379. —— ——.]—Money-lenders Act, 1900 (c. 51), s. 1, does not apply to a contract made in India & intended to be performed there.—VELCHAND *v.* MANNERS (1909), 25 T. L. R. 329.

Jurisdiction of Bankruptcy Court.]—*See* BANKRUPTCY, Vol. IV., pp. 144, 243, 326, Nos. 1345, 2304, 3059–3061.

PART IV. SECT. 7, SUB-SECT. 1.—A.

378 i. *Contract for loan made abroad—Intended to be performed abroad.*]—Money-lenders Act, 1900 (c. 51), s. 1, does not apply to a contract made in India & intended to be performed there.—VELCHAND *v.* MANNERS (1909), 25 T. L. R. 329.—**IND.**

o. *Jurisdiction of Bankruptcy Court.*]—Where the arranging debtor having already paid the creditors in full, an application was made by the arranging debtor for an order that the money-lenders should pay to him such amount as, on taking the accounts with interest at 30 per cent. might be shown to have been overpaid by him the money-lenders:—*Held:* the ct. ought to make the order sought.—*Re* T. (1918), 52 I. L. T. 126.—**IR.**

p. *Jurisdiction of county court.*]—Money-lenders Act, 1915, s. 5, does not give jurisdiction to the county ct. to entertain a counterclaim, in an action brought by a money-lender, for an amount in excess of £500.—MCCRORY *v.* CAMPBELL, [1921] V. L. R. 476.—**AUS.**

q. *Whether Acts retrospective.*]—Deft.'s plea is virtually a contention that 6 Edw. 7, c. 32, is retrospective in its application. Nothing in that statute can be so construed, because there is no declaration to that effect.—TAPLEY *v.* MARKS (1907), 2 E. L. R. 555.—**CAN.**

380. Order to restrain sale of goods held as security—Pending action for relief—Necessity for payment of amount due & interest as claimed into court.]—CAVENAGH *v.* COHEN (1919), 147 L. T. Jo. 252.

B. Excessive Interest.

381. What is excessive interest — Interest over ten per cent—On reasonably safe security.]—PART *v.* BOND, No. 394, *post.*

382. —— Circumstances of each case must be considered.]—CARRINGTONS, LTD. *v.* SMITH, No. 409, *post.*

383. —— ——.] — Transaction re-opened on the ground that the interest was excessive having regard to the circumstances of the case—the knowledge on the part of pltfs. of the temporary difficulties of deft., the position of deft. in life, the financial position of deft.'s father, & the terms upon which deft. stood with him, & the amount of deft.'s furniture & stock.—KING *v.* BARNETT (1908), 25 T. L. R. 52.

384. —— ——.] — Transaction re-opened on the ground that the interest was excessive under all the circumstances of the case & having regard to the respective positions of the parties.—WOLFE *v.* BATTERS (1909), 25 T. L. R. 575.

385. —— ——.]—The ct., being of opinion that the rate of interest charged was, in the circumstances, excessive, reduced it to 30 per cent.—WHEATLEY *v.* PART (1911), 27 T. L. R. 303.

386. —— ——.]—The ct., being of opinion that the interest charged was, in the circumstances, excessive, reduced it to 50 per cent.—FORTESCUE (L.), LTD. *v.* BRADSHAW (1911), 27 T. L. R. 251.

387. —— ——.] — KING (J.), LTD. *v.* HAY CURRIE, No. 373, *ante.*

388. —— ——.] — The ct. being of opinion that the interest charged by the money-lender for a loan was, in view of the borrower's financial position, excessive, re-opened the transaction of loan & reduced the rate of interest.—STIRLING *v.* MUSGRAVE (1913), 29 T. L. R. 333.

389. —— ——.] — HART *v.* HUNGERFORD, No. 295, *ante.*

Excessive interest rendering transaction harsh & unconscionable, *see* Sub-sect. 1, C. (*d*), *post.*

C. What Transactions are Harsh and Unconscionable.

(a) In General.

390. Circumstances of each case must be considered.]—Transaction re-opened on the ground that it was harsh & unconscionable.

It was possible that the interest might be deemed excessive, & yet the transaction might not be deemed harsh & unconscionable; & it was possible that the interest might be deemed so extravagantly excessive as alone to satisfy the ct. that the transaction was harsh & unconscionable. . . . The circumstances of each case must be considered, including the necessities of the borrower, his pecuniary position, the presence or absence of security, the relation in which the money-lender stood to the borrower, & the total remuneration derived by the money-lender from the whole transaction (COZENS-HARDY, L.J.).—PONCIONE *v.* HIGGINS (1904), 21 T. L. R. 11, C. A.

Annotation:—**Distd.** Carringtons *v.* Smith, [1906] 1 K. B. 79.

391. ——.] — CARRINGTONS, LTD. *v.* VALERIE (1905), 49 Sol. Jo. 500.

392. ——.] — Pltf., a registered money-lender, sued deft. for money lent. Deft. contended that under the Money-lenders Act, 1900 (c. 51), s. 1, the transaction ought to be re-opened on the ground that, in view of the high rate of interest charged, it was harsh & unconscionable. Pltf. submitted that excessive interest was not, in itself, sufficient ground for the re-opening of the transaction:—*Held:* in considering whether to re-open a transaction under sect. 1, the ct. must have regard to all the facts in the case, for instance, the financial embarrassment of the borrower at the time of the making of the loan.—GLASKIE *v.* GRIFFIN (1914), 111 L. T. 712.

Apart from Money-lenders Act, 1900 (c. 51).]—*See* Sub-sect. 2, *post.*

(b) Risk to Money-Lender.

393. Excessive rate of interest — Full disclosure of facts influencing risk.]—CARRINGTONS, LTD. *v.* VALERIE (1905), 49 Sol. Jo. 500.

394. —— Loan on reasonably good security.]—P., a widow, was in 1903 in need of a loan. Against the advice of her solrs., she authorised an architect, with whom she had become acquainted, to obtain it for her; & he eventually obtained an advance of £1,000 at 45 per cent. *per annum* from a registered firm of money-lenders, on the security of a second mtge. of certain life interests & a reversion to which P. was entitled under settlements & of a life policy which was comprised in the first mtge., which was to an insurance co. P.'s total income under the settlements amounted to about £1,200 a year; but it was reduced to £600 by the interest & premiums payable on the first mtge. & policy.

The solr. of the money-lenders having threatened to enforce the security by sale, P. in 1904 obtained through her solrs. a loan of 5½ per cent., & discharged the claims of the money-lenders. She

PART IV. SECT. 7, SUB-SECT. 1.—B.

r. *What is excessive interest.*]—Where the rate of interest charged by a money-lender upon a loan is, either originally or in the result, larger than in the opinion of the ct. is fair & reasonable under the circumstances, it is excessive, & the rate of interest may itself be evidence that it is excessive.—WILSON *v.* MOSS (1909), 8 C. L. R. 146. —**AUS.**

t. ——.] — PATTERSON *v.* DUFFUS (1872), 9 N. S. R. 52.—**CAN.**

s. ——.]—R. *v.* CLEGG (1908), 8 W. L. R. 572; 18 Man. L. R. 9; 14 Can. Crim. Cas. 217.—**CAN.**

b. ——.]—R. *v.* DUBE (1909), 18 O. L. R. 367; 14 O. W. R. 45.—**CAN.**

c. ——.]—An action lies for interest exacted in excess of the rate fixed by Money-lenders Act.—WATTS *v.* TOLMAN (1912), 22 W. L. R. 55; 6 D. L. R. 5; 22 Man. L. R. 471; 2 W. W. R. 1019.—**CAN.**

d. ——.]—Sect. 7 of Money-lenders Act applies only to a case where it is contended that the interest paid, or claimed, exceeds the rate of 12 per cent. *per annum.* — BELAMY *v.* PORTER (1913), 28 O. L. R. 572; 4 O. W. N. 1171.—**CAN.**

——.] — BELLAMY *v.* TIMBERS (1914), 31 O. L. R. 613; 19 D. L. R. 488; 6 O. W. N. 578.—**CAN.**

f. ——.]—KERING RUPCHAND & CO. *v.* BAYLEY (1919), I. L. R. 44 Bom. 775. —**IND.**

g. ——.]—BALKIND *v.* BATCHELOR, [1923] N. Z. L. R. 1122.—**N.Z.**

h. ——.]—A firm of money-lenders on Dec. 18, 1903, lent £600, to be repaid with £100 of bonus or interest, £50 on the 18th of each month commencing with Jan. & until & including July, 1904, & the balance of £350 on the 19th of that month, with further interest on arrears in payments 30 per cent. *per annum*:—*Held:* in the circumstances of the case the rate of interest was not excessive, nor the transaction harsh & unconscionable.—PALL MALL BANK *v.* PHILP (1904), 41 Sc. L. R. 621.—**SCOT.**

PART IV. SECT. 7, SUB-SECT. 1.—C. (a).

390 i. *Circumstances of each case must be considered.*]—SHAW *v.* HOSSACK (1917), 39 O. L. R. 440; 12 O. W. N. 108, 183; 36 D. L. R. 760.—**CAN.**

390 ii. ——.] — MOORE *v.* M'KAY (1829), Beat. 282.—**IR.**

k. *Want of fairness in money-lender.*] — Observed that expression "harsh & unconscionable" implies some want of fairness in the transaction for which the money-lender might be held responsible.—MIDLAND DISCOUNT CO., LTD. *v.* MACDONALD, [1909] S. C. 477; 46 Sc. L. R. 331; [1909] 1 S. L. T. 125.—**SCOT.**

Sect. 7.—Relief of borrowers: Sub-sect. 1, C. (b), (c), (d), (e) & (f).]

brought an action against them to obtain the re-opening of the transaction on the ground that it was harsh & unconscionable, & the rate of interest excessive, & repayment of the excess of interest paid by her:—*Held:* under the circumstances of the case the transaction was harsh & unconscionable, & defts. must repay all interest paid above 10 per cent.—PART *v.* BOND (1906), 94 L. T. 390; 22 T. L. R. 253, C. A.

Annotation:—**Distd.** Carringtons *v.* Smith, [1906] 1 K. B. 79.

395. —— ——.]—BLAIR *v.* BUCKWORTH, No. 325, *ante*.

396. —— ——.]—Where an advance granted to a borrower by a registered money-lender was on the security of certain real estate, interest at the rate of 50 per cent., or, in one view, 40 per cent. being charged for same:—*Held:* as a secured advance stood in a different position from an unsecured advance, the interest was so excessive as to render the transaction "harsh & unconscionable" within Moneylenders Act, 1900 (c. 51), s. 1 (1); the transaction ought, therefore, to be re-opened; & having regard to all the circumstances, it was reasonable that the money-lender should receive interest at the rate of 20 per cent. as "fairly due" within the sub-sect.—SALAMAN *v.* BLAIR, BLAIR *v.* JOHNSTONE (1914), 111 L. T. 426, C. A.

397. —— ——.]—By a promissory note, dated July 10, 1922, pltf., who was a married lady, promised to pay £500 to deft., a money-lender, for a loan of £300. The money was to be repaid by twenty-four consecutive monthly instalments, & on default in payment of any instalment the whole amount remaining unpaid became due. Interest was to be at the rate of 1*s.* in the pound per month. By an instrument of charge dated the same day, in consideration of this advance of £300 secured by the promissory note for £500, it was provided that certain furniture & chattels belonging to pltf. & which had been delivered into deft.'s possession should be held by him as security for the payment of £500. In the event of default of payment of the promissory note, or any instalment, deft. was to be at liberty to sell the furniture & chattels & repay himself thereout for all principal, interest, & costs. The furniture had been purchased some eighteen months before for £1,750. Pltf. had expected to receive £400 as previously suggested by deft., but being in extreme financial straits she had no alternative but to execute the two documents when put before her on July 10, 1922. Pltf. failed to pay the first instalment due under the promissory note, & the whole £500 became payable. If all payments had been duly made the rate of interest would have been at 82½ per cent.:—*Held:* inasmuch as the loan was not made on personal security only, but was adequately secured by the goods pledged, the rate of interest, which might not have been regarded as necessarily excessive for a loan on personal security only, became outrageous & extortionate for an advance upon good security; also deft. had made an unconscionable bargain & tricked pltf. into the position in which she was placed on July 10, 1922; & in the exercise of its jurisdiction the ct. would accordingly direct that the contract should stand as a security for £300 with interest at the rate of 15 per cent. from July 10, 1922, & pltf. must pay the costs of the storage of the furniture & of the insurance. On these payments being made deft. must deliver up the furniture to pltf.—KRUSE *v.* SEELEY, [1924] 1 Ch. 136; 93 L. J. Ch. 67; *sub nom.* JENNINGS *v.* SEELEY, 40 T. L. R. 97; 68 Sol. Jo. 139.

398. —— **Loan advanced in full expectation of payment.**]—SHAFFER *v.* BLYTH (1920), 36 T. L. R. 689.

399. "**Fair average risk**" — **Transaction involving payment of interest upon interest.**]—HALSEY *v.* WOLFE, No. 405, *post*.

(c) Clause not explained to Borrower.

400. Effect of clause rendering interest excessive.]—The ct. has jurisdiction to re-open a transaction between a borrower & a money-lender where it appears that by reason of a term of the bargain between them, understood by the money-lender, but not explained to or understood by the borrower, the rate of interest is considerably increased beyond that contemplated by the borrower.—LEVENE *v.* GREENWOOD (1904), 20 T. L. R. 389.

Annotations:—**Distd.** Carringtons *v.* Smith, [1906] 1 K. B. 79. **Refd.** Halsey *v.* Wolfe, [1915] 2 Ch. 330.

401. —— **Default clause.**]—CARRINGTONS, LTD. *v.* SMITH, No. 409, *post*.

402. —— ——.]—Where, in consideration of an advance of £50, a promissory note for £70 was taken by a money-lender from a borrower, the £20 being for interest, & the £70 was payable by twenty-two weekly instalments, & upon default in payment of any instalment the whole sum was to become due, the ct. re-opened the transaction upon the ground that the interest might turn out to be very excessive & the rate was not understood by most people.—LEVENE *v.* TITCHENER (1907), 23 T. L. R. 508.

403. —— ——.]—Where, in a money-lending agreement, a clause is inserted by which the whole amount for which the borrower has given a promissory note becomes due if default is made in the payment of one instalment, with the result that the rate of interest is largely increased, the transaction is *primâ facie* harsh & unconscionable, unless such a clause is very clearly explained to the borrower.—HARRIS *v.* CLARSON (1910), 27 T. L. R. 30.

Annotation:—**Folld.** Stirling *v.* Rose (1913), 30 T. L. R. 67.

404. —— ——.]—Deft. borrowed from pltf., who was a money-lender, the sum of £1,000, & gave a promissory note for £1,600, which was payable in instalments spread over twelve months, the first payment to be £150 at the end of three months, & there was the usual default clause. Deft. made default in paying the first instalment & pltf. brought an action to recover the £1,600. Deft. gave evidence that pltf. agreed that the interest should be 60 per cent. *per annum*, but did not explain the default clause, & that it was agreed that he should be at liberty to pay off the whole amount at any time & only pay interest at 60 per cent. After action deft. paid the principal & offered to pay 60 per cent. interest:—*Held:* the note did not contain all the terms of the bargain, deft. did not understand the effect of the default clause, the transaction was harsh & unconscionable, & pltf. should have judgment for 60 per cent. on £1,000 up to the date when the offer was made.—STIRLING *v.* ROSE (1915), 30 T. L. R. 67.

405. —— ——.]—Deft., a registered money-lender, on four occasions advanced money to pltf., a tradesman, upon what deft. himself described as a fair average risk. For the first advance of £100 pltf. gave a promissory note for £150 payable by fourteen equal monthly instalments, & after twelve of these had been duly paid the second advance of £50 was made, upon deft.'s own invitation, & for this advance pltf. gave a bill for £65, falling due three months after date. The rate

of interest on the first advance was admittedly at least 72 per cent., & on the second advance 120 per cent. *per annum*. While the last-mentioned £65 & £20 of the first loan were still owing but not yet due, deft. advanced pltf. £15 in cash, making with the moneys so owing £100, for which deft. gave a promissory note for £150, the extra £50 representing interest, repayable by monthly instalments of £10 15*s*. After ten of these instalments had been duly paid deft. advanced pltf. £150 in cash & took his promissory note for £281 10*s*. repayable by instalments & made up of the £150 advanced £37 10*s*. being the money due on the last promissory note less a rebate of £5, & £94, presumably for interest. All the promissory notes contained a proviso that upon default in payment of any instalment the whole of the money then remaining due on the note, *i.e.*, including both capital & unaccrued interest, should immediately become payable. The effect of the third & fourth transactions involved the payment of interest upon interest charged in respect of the balance then outstanding of the earlier loans. After six of the instalments had been paid under the last promissory note, pltf. commenced this action to re-open the transactions & for an account & consequential relief:—*Held:* (1) in the circumstances, the charges made by the deft. were exorbitant & excessive; the whole course of dealing with pltf. in respect of interest & otherwise was harsh & unconscionable within Money-lenders Act, 1900 (c. 51); pltf. was entitled to relief; & in taking the account interest at the rate of 15 per cent. *per annum* would be allowed.

(2) It is settled that the questions as to the rate of interest & whether the transactions are harsh & unconscionable are for the judge to decide (JOYCE, J.).

(3) The accounts must be taken upon the footing of a lower rate of interest. I doubt very much whether, in the circumstances, I ought to allow more than 10 per cent., but I will allow 15 per cent., 20 per cent. being, in my opinion, more than ample to cover this fair average risk (JOYCE, J.).—HALSEY *v.* WOLFE, [1915] 2 Ch. 330; 84 L. J. Ch. 809; 113 L. T. 720.

Annotation:—As to (1) **Follid.** Cohen *v.* Jonesco (1925), 69 Sol. Jo. 381.

(*d*) *Excessive Interest.*

406. Whether sufficient in itself to render transaction harsh & unconscionable.]—*Re* A DEBTOR, *Ex p.* THE DEBTOR, No. 376, *ante*.

407. ——.] — PONCIONE *v.* HIGGINS, No. 390, *ante*.

408. ——.] — SAMUEL *v.* NEWBOLD, No. 377, *ante*.

409. ——.] — Deft., a director of a co. with an income of £1,000 a year & possessed of furniture & pictures of considerable value, being in want of £150 in order to pay sundry creditors, but not being in great necessity, as his creditors, though pressing for payment, were not threatening proceedings, obtained a loan of £150 from pltfs., who were money-lenders, & gave them two promissory notes, one for £150 & one for £72, repayable respectively by twelve & six equal monthly instalments. The notes each contained a default clause, the nature & effect of which deft. clearly understood, providing that on default of payment of any instalment the whole of the amount of the note then remaining unpaid should become due & payable. The interest on the loan worked out at 75 per cent. *per annum*. Pltfs. obtained no security for the loan, but at the time were informed by deft. as to his financial position. Deft. paid off all the instalments of the £72 note, &, after paying seven instalments of the £50 note, made default, & on being sued for £62 10*s*., the balance, claimed relief under Money-lenders Act, 1900 (c. 51):—*Held:* although the rate of interest was high, that fact did not of itself necessarily render the transaction "harsh & unconscionable," & having regard to the risk & to all the circumstances of the case, amongst which the ct. was entitled to consider the fact that deft. understood the transaction, & without any misrepresentation or pressure by pltfs. voluntarily agreed to pay the interest asked, 75 per cent. *per annum* was a reasonable rate of interest, & not "excessive" within the Act, & the transaction was not "harsh & unconscionable," & deft. was therefore not entitled to relief.—CARRINGTONS, LTD. *v.* SMITH, [1906] 1 K. B. 79; 75 L. J. K. B. 49; 93 L. T. 779; 54 W. R. 424; 22 T. L. R. 109; 50 Sol. Jo. 171.

Annotations:—**Distd.** Samuel *v.* Bell (1905), 22 T. L. R. 118. **Dbtd.** Samuel *v.* Newbold, [1906] A. C. 461. **Distd.** Kruse *v.* Seeley, [1924] 1 Ch. 136.

410. ——.] — GLASKIE *v.* GRIFFIN, No. 392, *ante*.

(*e*) *Position of Parties.*

411. Lender taking advantage of borrower's necessities.]—CARRINGTONS, LTD. *v.* VALERIE (1905), 49 Sol. Jo. 500.

412. ——.] — BLAIR *v.* BUCKWORTH, No. 325, *ante*.

413. ——.]—LEVY *v.* DOTT, No. 306, *ante*.

414. Parties on equal terms — Absence of pressure by lender.]—There had been a previous negotiation where the rate of interest was 30 per cent. which had failed to go through because the lady had not been candid, & in consequence deft. had refused to lend her any money at all. The lady, according to deft.'s evidence, then begged & prayed him to lend her £300. She offered to pay interest at the rate of 40 per cent. instead of 30 per cent. & also offered her daughter's guarantee. One of the circumstances in this case undoubtedly was that deft. relied upon the guarantee. The pressure that was put upon pltf. was by other persons & not by deft. (*per* CUR.).—OAKES *v.* GREEN (1907), 23 T. L. R. 560.

(*f*) *Particular Instances.*

415. Loans to company promoter — Shares exacted as bonus for renewals.]—BONNARD *v.* DOTT, No. 286, *ante*.

416. Transaction induced by sending money—Borrower having recently refused loan—No negotiation as to terms.]—When a person who has recently refused a loan from a money-lender writes to him shortly afterwards in order to ascertain his terms, & the money-lender induces a transaction by sending him money & thereby avoiding the negotiation of terms, the transaction may be re-opened under Money-lenders Act, 1900 (c. 51), s. 1.—LEWIS *v.* MILLS (1914), 30 T. L. R. 438.

PART IV. SECT. 7, SUB-SECT. 1.—C. (d).

406 i. *Whether sufficient in itself to render transaction harsh & unconscionable.*]—*Held:* interest amounting to several hundreds per cent. *per annum*, was, in the absence of explanation, so monstrous as to show by itself that the transaction was harsh & unconscionable.—BALLANTYNE *v.* EVANS (1921), 24 W. A. L. R. 43.—**AUS.**

406 ii. ——.]—THOMAS *v.* ASHBROOK, [1913] 2 I. R. 416.—**IR.**

406 iii. ——.]—Excessive interest is sufficient alone to render a transaction harsh & unconscionable & liable to be reopened.—BALKIND *v.* RALPH, [1918] N. Z. L. R. 929.—**N.Z.**

Sect. 7.—Relief of borrowers: Sub-sect. 1, C. (f), D., E. (a), (b) i. & ii., (c) & (d), F. (a) & (b).]

417. Lender taking advantage of man of peculiar tastes—Borrower ignorant of value of money.]—JACOBS BROTHERS *v.* JOICEY (1919), 35 T. L. R. 362.

D. Money-Lender's Knowledge of Circumstances.

418. Ignorance of facts material to fairness of transaction—Facts obtainable by reasonable inquiry—No defence to application for relief.]—A money-lender cannot escape the consequences of an application for relief under Money-lenders Act, 1900 (c. 51), s. 1 (1), by showing that he was unaware of facts material in determining the fair terms of the bargain, if reasonable inquiry on his part would have elicited those facts.—GARDE *v.* KERMAN (1925), 41 T. L. R. 597; 69 Sol. Jo. 694.

E. Nature of Relief.

(a) In General.

419. Statutory relief different from that given by court of equity.]—SAMUEL *v.* NEWBOLD, No. 377, *ante*.

(b) Re-Opening Transaction.

i. *In General.*

See Money-lenders Act, 1900 (c. 51), s. 1 (1).

420. Reduction of rate of interest.] — STIRLING *v.* MUSGRAVE, No. 388, *ante*.

421. ——.] — SALAMAN *v.* BLAIR, BLAIR *v.* JOHNSTONE, No. 396, *ante*.

422. ——.] — Pltf., who was a money-lender, advanced £1,000 to deft. on July 29, 1914, & received from him a promissory note for £1,600 payable in four consecutive monthly instalments of £400 each, the first instalment to be paid on Oct. 1, 1914. There was a default clause to the effect that if any instalment was unpaid the whole amount was to become payable & interest at 60 per cent. was to be paid from the date of default. Default was made in the payment of the first instalment. Deft. had an income of about £2,000 a year, & was entitled to the reversion of certain property worth about £4,000 a year. Deft. had had previous transactions with pltf. & had settled them voluntarily. In an action on the promissory note:—*Held:* in the circumstances deft. was not entitled to relief under the equitable doctrine as to catching bargains made with expectant heirs & the past transactions ought not to be opened up, but as the terms on which the money was lent in the present case were out of all reason the transaction must be opened up under Money-lenders Act, 1900 (c. 51), s. 1, & pltf. would have judgment for the principal with interest at 30 per cent.—WOLFE *v.* LOWTHER (1915), 31 T. L. R. 354.

423. —— Direction of account.]—CARRINGTONS, LTD. *v.* VALERIE (1905), 49 Sol. Jo. 500.

424. —— ——.]—HALSEY *v.* WOLFE, No. 405, *ante*.

Re-opening in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., p. 326, Nos. 3059–3061.

ii. *Closed Transaction.*

425. Amount paid under pressure of writ.] — Transaction re-opened under Money-lenders Act, 1900 (c. 51), s. 1 (1), upon the ground that the interest charged was excessive & the transaction was harsh & unconscionable, the borrower being at the time in such a position that his agreement to repay was no guide as to what was a reasonable rate of interest to be charged. The transaction was re-opened after payment of the amount had been made under pressure of a writ of summons in an action.—SAMUEL *v.* BELL (1905), 22 T. L. R. 118.

426. Whether re-opened in absence of deception or pressure.]—Where there has been no deception or pressure on the part of a money-lender the ct. will not re-open a closed transaction of loan.—MICHAELSON *v.* NICHOLS (1910), 26 T. L. R. 327.

Annotation:—**Expld.** Kerman *v.* Wainewright (1916), 32 T. L. R. 295.

427. ——.] — In an action by a money-lender the ct. gave deft. relief on the ground that the transaction was harsh & unconscionable, but declined in the circumstances to re-open a previous transaction which had been closed.

There is no rule that in the absence of deception or pressure by the money-lender the ct. ought not to re-open a transaction which has been closed (PICKFORD, L.J.).—KERMAN *v.* WAINEWRIGHT (1916), 32 T. L. R. 295; 60 Sol. Jo. 336, C. A.

428. Borrower consenting to judgment.] — Money-lenders Act, 1900 (c. 51), s. 1, which provides that a ct. may, in certain circumstances, re-open a money-lending transaction "notwithstanding . . . any agreement purporting to close previous dealings & create a new obligation," does not empower a judge to re-open a money-lending transaction where the money-lender has brought an action in respect of that transaction, & deft. borrower has consented to judgment, although the judgment may never have been drawn up & entered. The agreement to pay has become merged in the judgment, which is *res judicata* & not an agreement within the sect.—COHEN *v.* JONESCO, [1926] 1 K. B. 119; 95 L. J. K. B. 100; 90 J. P. 18; 42 T. L. R. 41; 70 Sol. Jo. 138; *revsd.* on other grounds, [1926] 2 K. B. 1, C. A.

(c) Repayment of Money Paid.

429. Lender returning shares given as bonuses—Borrower repaying loan & reasonable interest.]—BONNARD *v.* DOTT, No. 286, *ante*.

430. Sums paid in excessive interest.] — PART *v.* BOND, No. 394, *ante*.

(d) Setting aside Security.

See Money-lenders Act, 1900 (c. 51), s. 1 (5).

431. Amount realised by sale — Treated as amount due.]—RUETER *v.* BRADFORD ADVANCE CO. (1910), 26 T. L. R. 533.

432. Contract to stand as security for amount advanced—With interest at reasonable rate.]—KRUSE *v.* SEELEY, No. 397, *ante*.

PART IV. SECT. 7, SUB-SECT. 1.—E. (b) i.

420 i. *Reduction of rate of interest.*]—GREGORY *v.* LUCAS (1914), 16 W. A. L. R. 61.—**AUS.**

420 ii. ——.]—BAILEY *v.* NEW SOUTH WALES MONT DE PIÉTÉ DEPOSIT & INVESTMENT CO., LTD., [1918] V. L. R. 16.—**AUS.**

420 iii. ——.] — WELLS *v.* JOYCE, [1905] 2 I. R. 134.—**IR.**

423 i. —— *Direction of account.*]—*Held:* defts. should have leave to amend & also claim relief by way of counterclaim under Money-lenders Act, 1911, to have the whole transaction from the beginning re-opened & an account taken & to be relieved from payment of any sum in excess of the amount fairly due in respect of principal, interest & charges.—STUART & STUART, LTD. *v.* BOSWELL (1916), 50 N. S. R. 16.—**CAN.**

423 ii. —— ——.]—PLUTO *v.* WASHINGTON FINANCE CORPN. & FILER (Alta.), [1923] 3 D. L. R. 280; [1923] 2 W. W. R. 806.—**CAN.**

PART IV. SECT. 7, SUB-SECT. 1.—E. (b) ii.

426 i. *Whether re-opened in absence of deception or pressure.*]—*Held:* in the absence of any active malpractice, deception, or unfair pressure on the part of pltfs., it was impossible to re-open dealings voluntarily settled so long ago.—STONE *v.* HAMILTON, [1918] 2 I. R. 193.—**IR.**

426 ii. ——.]—MIDLAND DISCOUNT CO., LTD. *v.* MACDONALD, [1909] S. C. 477; 46 Sc. L. R. 331; [1909] 1 S. L. T. 125.—**SCOT.**

F. Practice and Procedure.

(a) In General.

433. Concurrent actions in King's Bench & Chancery Divisions—Application to stay proceedings—By lender.]—A money-lender issued in the K. B. Div. a specially indorsed writ claiming £450 on a promissory note signed by deft. The borrower admitted the facts, but said that various transactions between him & the money-lender were harsh & unconscionable, & a week after the issue of the writ in the K. B. Div. issued a writ against the money-lender in the Ch. Div. asking that these transactions might be re-opened & for an account. On a motion by the money-lender that the Chancery action might be dismissed with costs, as an abuse of the process of the ct., or stayed:—*Held:* the motion failed; although the money-lender's proceedings in the K. B. Div. came first in point of time, & although the K. B. Div. could decide all other questions between the parties on a counterclaim by the borrower, yet the Ch. Div. had the better machinery for taking accounts, which, moreover, were assigned to it by Jud. Act, 1873 (c. 66), s. 34 (3), & as a general rule it was preferable to allow that action to go on in which the burden of proof rested on pltf.; both actions must continue, unless the King's Bench transferred or stayed the King's Bench action, or until the Ct. of Appeal, which controlled both divisions, had pronounced judgment.—RECHNITZER *v.* SAMUEL (1906), 95 L. T. 75.

Annotation:—**Apld.** Tumin *v.* Levi (1911), 28 T. L. R. 125.

434. —— —— By borrower.] — (1) Deft., who had a number of transactions with pltf., a registered money-lender, offered pltf. just before the last sum he had borrowed had become due the balance of the principal & a sum for interest which the money-lender declined. The borrower thereupon issued a writ in the Ch. Div. claiming an account of all transactions between him & the money-lender, & a declaration that some of them were harsh & unconscionable, & for relief under Money-lenders Act, 1900 (c. 51). The money-lender shortly thereafter issued a writ in the K. B. Div. for the full amount said to be owing by the borrower. The borrower thereupon took out a summons asking for a stay of the proceedings in the K. B. Div. on the ground that they were an abuse of the process of the ct. in view of the proceedings pending in the Ch. Div.:—*Held:* in the circumstance of the case, the proceedings in the K. B. Div. should be stayed.

(2) In the present case £10 was due for the principal & as to that R. S. C., Ord. 14, could be appealed to, but it would be wrong to make use of that Ord. so as to alter the right of pltf. to an inquiry as to the interest. It would be an abuse of the Ord. to deprive a litigant of his right of action on the ground that one item of the action fell within the purview of the Ord. & I think such a case was never intended to come into the short cause list (BUCKLEY, L.J.).—TUMIN *v.* LEVI (1911), 28 T. L. R. 125, C. A.

Annotation:—*As to* (2) **Folld.** Bennett *v.* Stubbs, [1926] 1 K. B. 272.

435. "Excessive interest"—"Harsh & unconscionable transaction"—Whether questions for judge or jury.]—In an action to recover damages for trespass & conversion of pltf.'s goods, which had been seised under a bill of sale, the question arose whether defts. were money-lenders, & whether, if so, the interest charged & certain other charges were excessive; & whether the transaction was harsh & unconscionable. It was contended that those questions, except as to whether defts. were money-lenders, were for the ct. & not for the jury:—*Held:* if there was any evidence upon them, the questions must be left to the jury.—BURTON *v.* COMPANIES REGISTRATION AGENCY (1906), 23 T. L. R. 151; *affd.* on other grounds (1907), 23 T. L. R. 337, C. A.

Annotations:—**Folld.** Samuel *v.* Pazolt (1907), 23 T. L. R. 622. **Consd.** Abrahams *v.* Dimmock, [1915] 1 K. B. 662.

436. —— —— ——.] — SAMUEL *v.* PAZOLT (1907), 23 T. L. R. 622.

Annotation:—**Consd.** Abrahams *v.* Dimmock, [1915] 1 K. B. 662.

437. —— —— ——.]—ABRAHAMS *v.* DIMMOCK, No. 439, *post.*

438. —— —— ——.]—HALSEY *v.* WOLFE, No. 405, *ante.*

439. Basis of account — Allocation of payments —To interest or principal.]—(1) Under Money-lenders Act, 1900 (c. 51), s. 1 (1), the questions whether the interest charged is excessive & whether the transaction is harsh & unconscionable are for the judge & not for the jury, though these questions may partly depend on the facts determined by the jury.

(2) In taking an account payments made from time to time by the borrower ought not to be allocated to the payment of principal instead of the interest due from the borrower.—ABRAHAMS *v.* DIMMOCK, [1915] 1 K. B. 662; 84 L. J. K. B. 802; 112 L. T. 386; 31 T. L. R. 87; 59 Sol. Jo. 188; 78 J. P. Jo. 592, C. A.

Annotations:—*Generally,* **Mentd.** Kimpson *v.* Markham, [1921] 2 K. B. 157; Simmons *v.* Crossley, [1922] 2 K. B. 95.

CONTRACT, Vol. XII., p. 481, Nos. 3939-3942.

440. Loan secured by pledge — Judgment for money-lender—Terms of order restraining sale.]—CAVENAGH *v.* COHEN (1919), 147 L. T. Jo. 252.

441. Form of judgment — Re-opening transaction & directing account.]—SAMUEL *v.* NEWBOLD, No. 377, *ante.*

442. Party seeking relief—Ordered to pay costs.]—CARRINGTONS, LTD. *v.* VALERIE (1905), 49 Sol. Jo. 500.

(b) Application for Summary Judgment.

See, generally, R. S. C., Ord. 14.

443. General principle.] — TUMIN *v.* LEVI, No. 434, *ante.*

444. Interest primâ facie excessive — Summary judgment for principal—Whether summary judgment for interest—At reasonable rate.]—PARKER *v.* BRAND (1891), 7 T. L. R. 462, D. C.

445. —— —— ——.] — Where in an action by a money-lender to recover money lent with interest it appears that the interest claimed is *primâ facie* excessive, the case cannot, as regards the claim for interest, be dealt with upon an application for summary judgment under R. S. C., Ord. 14, but the action must go to trial for the purpose of having it determined whether the interest is so excessive as to render the transaction harsh & unconscionable within Money-lenders Act, 1900 (c. 51), &

PART IV. SECT. 7, SUB-SECT. 1.—F. (a).

1. *General plea—Sufficiency of.*]—CASTLES *v.* FREIDMAN (1910), 11 C. L. R. 580.—**AUS.**

m. *Part of claim admitted — Payment in before appeal—Form of order on motion for final judgment.*]—BLUMBERG *v.* MCCORMIC, [1915] 2 I. R. 402.—**IR.**

PART IV. SECT. 7, SUB-SECT. 1.—F. (b).

n. *Interest primâ facie excessive — Remission to county court.*]—*Held:* having regard to the amount of interest claimed, amounting to £133 per cent. on the original loan of £30, it was not reasonable to allow the case to be disposed of by summary jurisdiction, & deft. was entitled to have the case

Sect. 7.—Relief of borrowers: Sub-sect. 1, F. (b); sub-sect. 2. Sect. 8. Part V.]

to entitle deft. to relief under that Act.—WELLS *v.* ALLOTT, [1904] 2 K. B. 842; 73 L. J. K. B. 1023; 91 L. T. 749; 53 W. R. 195; 20 T. L. R. 799, C. A.

Annotations:—**Folld.** Dott *v.* Bonnard (1904), 21 T. L. R. 166. **Distd.** Lazarus *v.* Smith, [1908] 2 K. B. 266. **Folld.** Bennett *v.* Stubbs, [1926] 1 K. B. 272. **Refd.** Saunders *v.* Newbold (1904), 92 L. T. 67; Carringtons *v.* Smith, [1906] 1 K. B. 79; Parker *v.* Guinness (1910), 27 T. L. R. 129; Tumin *v.* Levi (1911), 28 T. L. R. 125.

446. —— —— —— Right to unconditional leave to defend.]—Pltf., who was a money-lender, lent to deft. at various times sums of money amounting in all to £940, which, with a cash bonus of £100 agreed to be paid to pltf., made a debt of £1,040. Upon each advance deft. gave to pltf. a bonus in the shape of shares in a co. In this way pltf. received from deft. shares to the value of £1,800 & he also held an undertaking to deliver a number of other shares. Deft. brought an action in the Ch. Div. to have these transactions re-opened, & pltf. sued in the K. B. Div. to recover the £1,040. Upon an application in this latter action for judgment under R. S. C., Ord. 14, deft. alleged that the transactions were harsh & unconscionable & that he was entitled to relief under Money-lenders Act, 1900 (c. 51). The master & judge gave deft. leave to defend upon bringing £1,040 into ct.:—*Held:* the case was not one for R. S. C., Ord. 14, & deft. must have unconditional leave to defend.—DOTT *v.* BONNARD (1904), 21 T. L. R. 166, C. A.; *subsequent proceedings, sub nom.* BONNARD *v.* DOTT, [1906] 1 Ch. 740, C. A.

Annotations:—**Folld.** Bennett *v.* Stubbs, [1926] 1 K. B. 272. **Refd.** Tumin *v.* Levi (1911), 28 T. L. R. 125.

447. —— —— —— ——.]—Where pltf. in a money-lender's action applies for leave to sign final judgment under R. S. C., Ord. 14, & deft. sets up a defence under Money-lenders Act, 1900 (c. 51), but admits that he still owes some part of the money actually advanced, the proper order is to order summary judgment for the amount admitted to be due without interest & to give leave to defend for the residue of the claim.—LAZARUS *v.* SMITH, [1908] 2 K. B. 266; 77 L. J. K. B. 791; 99 L. T. 77; 24 T. L. R. 592; 52 Sol. Jo. 481, C. A.

Annotations:—**Refd.** Parker *v.* Guinness (1910), 27 T. L. R. 129; Tumin *v.* Levi (1911), 28 T. L. R. 125.

448. —— —— —— Whether case put into short cause list.]—Where in an action by a money-lender to recover money lent with interest it appears that the whole of the principal has been repaid with interest thereon at the rate of 75 per cent. & that the sole issue is whether the interest claimed is so excessive as to render the transaction harsh & unconscionable within Money-lenders Act, 1900 (c. 51), the case cannot be entered for trial in the short cause list under R. S. C., Ord. 14.—BENNETT *v.* STUBBS, [1926] 1 K. B. 272; 95 L. J. K. B. 334; 134 L. T. 307, C. A.

449. —— —— —— ——.]—In a money-lender's action properly brought before the judge or master at chambers on a specially indorsed writ supported by an affidavit in proper form the judge or master still retains the full jurisdiction, under R. S. C., Ord. 14, to direct a disputed claim for interest, alleged to be excessive, to be sent to the short cause list for trial, but that jurisdiction ought to be exercised very sparingly & only in simple & plain cases.—GLASKIE *v.* WATKINS (1927), 43 T. L. R. 314.

SUB-SECT. 2.—APART FROM MONEY-LENDERS ACTS.

450. Principle of relief—Applicant must do what is fair & equitable.]—SAMUEL *v.* NEWBOLD, No. 377, *ante*.

451. —— ——.]—LODGE *v.* NATIONAL UNION INVESTMENT CO., LTD., No. 303, *ante*.

452. Loan advertised on "easy terms"—Money lent on very hard terms—Misrepresentation.]—Deft., a money-lender, issued an advertisement headed, "Money on easy terms," & containing a statement that money would be advanced on note of hand to, among others, farmers, on easy terms, & on reversions, etc., at 5 per cent. No other rate of interest was mentioned in the advertisement. Pltf., a farmer, having seen the advertisement, went to deft.'s office, & applied for a loan of £100. He swore that deft.'s agent then told him he could have it at 5 per cent., & after negotiations agreed to take 4½, & that he executed a bill of sale, as he believed, to secure £100, with interest at 4½ per cent. by weekly instalments. The bill of sale was in fact a security for the repayment of £150 by weekly instalments of £2 10*s*. In an action to set it aside:—*Held:* where a man represented to the public by advertisement that he would lend money on easy terms, & afterwards lent it on very hard terms, the *onus* lay upon him to show that he had removed from a borrower's mind the impression produced by such representation, & clearly explained to him the terms on which the loan had been made.—MOORHOUSE *v.* WOOLFE (1882), 46 L. T. 374.

Annotation:—**Refd.** Gordon *v.* Street, [1899] 2 Q. B. 641.

Relief against unconscionable bargains.]—*See* EQUITY, Vol. XX., pp. 249, 250, Nos. 140–145; FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 266–279, 280, Nos. 903–1049, 1058, 1059.

Relief against penalties on default of payment.]—*See* EQUITY, Vol. XX., pp. 516, 517, 518, 519, Nos. 2436, 2441, 2451–2461.

SECT. 8.—**OFFENCES BY MONEY-LENDERS.**

453. Sending circulars to minors—Circular sent to undergraduate—To address in university town—Betting & Loans (Infants) Act, 1892 (c. 4), s. 3.]—A circular sent to a person at an address in a university town is not sent to a person "at a university" within above sect., unless the sender knows that the address is that of a house at which undergraduates are permitted by the university authorities to reside.—MILTON *v.* STUDD, [1910] 2 K. B. 118; 79 L. J. K. B 638; 102 L. T. 573; 74 J. P. 217; 26 T. L. R. 392, D. C.

454. —— "Send or cause to be sent"—Betting & Loans (Infants) Act, 1892 (c. 4), s. 2.]—Resp., who carried on business as a money-lender,

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remitted to the county ct.—GORDON *v.* TOWNSEND (1899), 33 I. L. T. 109.—**IR.**

PART IV. SECT. 7, SUB-SECT. 2.

o. *General rule.*]—The ct. will afford no protection to persons who wilfully & knowingly enter into extortionate & unreasonable bargains.—MACKINTOSH *v.* WINGROVE (1878), I. L. R. 4 Calc. 137; 2 C. L. R. 433.—**IND.**

p. *Principle of relief—Borrower must clearly understand bargain.*]—Although the ct. will not interfere with any bargain made by competent parties, since the repeal of the usury laws, for the payment of interest, still if any dispute as to such contract exists, it is the duty of the ct. to see that the parties to any agreement for payment or exorbitant interest clearly understood the bargain before effect will be given to it.—TEETER *v.* ST. JOHN (1863), 10 Gr. 85.—**CAN.**

gave instructions to his clerk to send a number of money-lending circulars to captains & lieutenants in the army. He knew that many second lieutenants were minors, & he told his clerk to send the circulars to captains & lieutenants but not to second lieutenants. Without his knowledge the clerk sent one of the circulars to a second lieutenant, who was in fact under twenty-one years of age. The circular invited the person receiving it to borrow money. The magistrate held that resp. did not send or cause to be sent the circular to the minor, but that, if he was bound by the act of his clerk, he had reasonable ground for believing that all persons to whom the circulars were sent were of full age, & he accordingly dismissed the summons :—*Held :* there was evidence upon which he could so find.—PUBLIC PROSECUTIONS DIRECTOR *v.* WITKOWSKI (1911), 104 L. T. 453 ; 75 J. P. 171 ; 27 T. L. R. 211 ; 22 Cox, C. C. 425, D. C.

455. —— Reasonable grounds for believing minor of full age—Money-lenders Act, 1900 (c. 51), s. 5.] — PUBLIC PROSECUTIONS DIRECTOR *v.* WITKOWSKI, No. 454, *ante.*

456. —— —— Conviction of money-lender — Right to indemnity against addressing agency.] — Pltfs., who were money-lenders &, as such, issued from time to time circulars to the public, employed defts. to address & send out circulars on their behalf. No circular was to be sent to a minor. Owing to the negligence of defts. a circular was sent to a minor, & in respect thereof pltfs. were convicted & fined under Betting & Loans (Infants) Act, 1892 (c. 4), s. 2, & Money-lenders Act, 1900 (c. 51), s. 5. Pltfs. claimed to be indemnified by defts. in respect of the fine & the costs they had had to pay :—*Held :* as pltfs. had been convicted of sending the circular without having reasonable ground for believing the addressee to be of full age, the claim was not maintainable.—LESLIE (R.), LTD. *v.* RELIABLE ADVERTISING & ADDRESSING AGENCY, LTD., [1915] 1 K. B. 652 ; 84 L. J. K. B. 719 ; 112 L. T. 947 ; 31 T. L. R. 182.

Annotations :—**Mentd.** Proops *v.* Chaplin (1920), 37 T. L. R. 112 ; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

Failure to register.]—*See* Part IV., Sect. 2, sub-sect. 1, *ante.*

Carrying on business in other than registered name.]—*See* Part IV., Sect. 2, sub-sects. 2, 4, *ante.*

Carrying on business at other than registered address.]—*See* Part IV., Sect. 2, sub-sect. 3, *ante.*

Part V.— Loans to Local Authorities.

See LOCAL GOVERNMENT, Vol. XXXIII., pp. 18, 19, 87–89, Nos. 70–75, 579–589 ; PUBLIC HEALTH.

457. Power of poor law guardians to borrow money—For immediate redemption of outstanding instalments on loan—Without consent of lender.]—34 & 35 Vict. c. 11, s. 2, does not enable poor law guardians to borrow money & redeem at once the outstanding instalments of a loan contracted since the passing of 34 & 35 Vict. c. 11, & repayable by instalments according to the form of security entered into under the authority of the Acts therein referred to, where the persons to whom the loan is owing do not consent to such immediate redemption.—WEST DERBY UNION *v.* METROPOLITAN LIFE ASSURANCE SOCIETY, [1897] A. C. 647 ; 66 L. J. Ch. 720 ; 77 L. T. 284 ; 61 J. P. 820 ; 13 T. L. R. 536, H. L. ; *affg.* S. C. *sub nom.* WEST DERBY UNION GUARDIANS *v.* METROPOLITAN LIFE ASSURANCE SOCIETY, WEST DERBY UNION GUARDIANS *v.* PRIESTMAN, [1897] 1 Ch. 335, C. A.

Annotations :—**Mentd.** Dartford R. C. *v.* Bexley Heath Ry. (1897), 67 L. J. Q. B. 231 ; Sheffield Corpn. *v.* Sheffield Electric Light Co., [1898] 1 Ch. 203 ; *Re* New River Co. & Metropolitan Water Board (1904), 68 J. P. 329 ; A.-G. *v.* Liverpool Corpn., [1922] 1 Ch. 211.

Power of education authority to raise temporary loan.]—*See* EDUCATION, Vol. XIX., p. 574, No. 123.

PART V.

q. *Conclusiveness of entry in plaintiff's books—As to name of borrower.]*—GILBERT *v.* PORTER (1844), 2 Kerr, 390.—**CAN.**

MONEY PAID.

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MONEY PAID INTO COURT.

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MONITION.

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MONTH.

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MORTGAGE.

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Unconscionable Bargains	,, EQUITY; FRAUDULENT AND VOIDABLE CONVEYANCES; MONEY AND MONEY-LENDING.
Vendor and Purchaser	,, SALE OF LAND.

Part I.—Nature of Mortgage.

SECT. 1.—IN GENERAL.

See Law of Property Act, 1925 (c. 20), s. 205 (1) (xvi), Sched. I., Parts VII. and VIII.; Trustee Act, 1925 (c. 19), s. 68 (7); Settled Land Act, 1925 (c. 18), s. 117 (1), (xi.).

1. Definition—Conveyance of property as security for payment of debt—Or discharge of other obligation.]—(1) A mtge. is a conveyance of property as a security for the payment of a debt, or the discharge of some other obligation, & the security is redeemable on such payment or discharge, & any provision inserted to prevent such redemption is a fetter on the equity of redemption, & is void; but the amount or nature of the debt or obligation is not a fetter.

(2) A mtgee. may in the mtge. stipulate for a collateral advantage for himself, provided that the bargain is not unconscionable or oppressive; & there is no presumption that where a mtgee. has stipulated for such a collateral advantage it has been obtained by pressure.

(3) A covenant in a mtge. of a term of years that the mtgor. will, during the residue of the term, notwithstanding that all principal moneys & interest may have been paid, pay to the mtgee. one-third of the net profit rental derived from any underlease or tenancy affecting same, with provisions for continuing the relative positions of mtgee. & mtgor. for the purpose of securing the said share of rental, is not void as clogging the equity of redemption.

(4) The right to redeem is not a personal right, but an equitable estate or interest in the property mtged. (LINDLEY, M.R.).—SANTLEY *v.* WILDE, [1899] 2 Ch. 474; 68 L. J. Ch. 681; 81 L. T. 393; 48 W. R. 90; 15 T. L. R. 528, C. A.

Annotations:—*As to* (1) **Apprvd.** Noakes *v.* Rice, [1902] A. C. 24; London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515. *As to* (2) **Reid.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. *As to* (3) **N.F.** Noakes *v.* Rice, [1902] A. C. 24. **Overd.** Bradley *v.* Carritt, [1903] A. C. 253. **Dbtd.** Jarrah Timber & Wood Paving Corpn. *v.* Samuel, [1903] 2 Ch. 1. **Reid.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25.

2. Conditional devise—Gift over in default of performance.]—MAN'S (SIR THOMAS) CASE (prior to 1695), cited in Freem. Ch. at p. 206; 22 E. R. 1162.

Annotation:—**Mentd.** Anon. Case (1695), Freem. Ch. 206.

For purposes of Conveyancing & Law of Property Acts.]—*See, now,* Law of Property Act, 1925 (c. 20), ss. 205, 207, sched. VII.

For purposes of Increase of Rent & Mortgage Interest Acts.]—*See* Part XIX., *post.*

Bills of sale.]—*See* BILLS OF SALE, Vol. VII., pp. 5 *et seq.*

Mortgage distinguished from similar transactions.]—*See* Sect. 6, *post.*

SECT. 2.—PERSONAL OBLIGATION TO PAY DEBT.

3. General rule.] — [A mortgage] consists of two things; it is a personal contract for a debt secured by an estate, & in equity the estate is no more than a pledge or security for the debt (PLUMER, V.-C.).—QUARRELL *v.* BECKFORD (1816), 1 Madd. 269; 56 E. R. 100.

Annotations:—**Reid.** Archdeacon *v.* Bowes (1824), M'Cle. 149; Wilson *v.* Metcalfe (1826), 1 Russ. 530; Lewes *v.* Morgan (1829), 3 Y. & J. 394; Smith *v.* Pilkington (1859), 1 De G. F. & J. 120; Charles *v.* Jones (1887), 35 Ch. D. 544; Eley *v.* Read (1897), 76 L. T. 39; Bagot *v.* Chapman, [1907] 2 Ch. 222. **Mentd.** Wood *v.* Surr (1854), 19 Beav. 551; Krehl *v.* Park (1875), 10 Ch. App. 334; Brown *v.* Burdett (1887), 37 Ch. D. 207.

4. ——.] — It has been decided that if there is no covenant & no accompanying bond, there is still the implied promise to pay; & 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 ct. will imply even a covenant to pay. That being so, every mtge. contains within itself, so to speak, a personal liability to repay the amount advanced (JESSEL, M.R.).—SUTTON *v.* SUTTON (1882), 22 Ch. D. 511; 52 L. J. Ch. 333; 48 L. T. 95; 31 W. R. 369, C. A.

Annotations:—**Mentd.** Fearnside *v.* Flint (1883), 22 Ch. D. 579; *Re* Powers, Lindsell *v.* Phillips (1885), 30 Ch. D. 291; Firth *v.* Slingsby (1888), 58 L. T. 481; *Re* Frisby, Allison *v.* Frisby (1889), 43 Ch. D. 106; *Re* Turner, Turner *v.* Spencer (1894), 43 W. R. 153; *Re* England, Steward *v.* England, [1895] 2 Ch. 820; Kibble *v.* Fairthorne, [1895] 1 Ch. 219; Powell *v.* Kempton Park Racecourse Co., [1897] 2 Q. B. 242; Barnes *v.* Glenton, [1899] 1 Q. B. 885; London & Midland Bank *v.* Mitchell, [1899] 2 Ch. 161; Kirkland *v.* Peatfield, [1903] 1 K. B. 756; Hervey

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PART I. SECT. 1.

a. *Essentials of mortgage.*]—The three essentials of an English mtge. are (i) that the mtgor. should bind himself to repay the mtge. money on a certain day, (ii) that the property mtged. should be transferred absolutely to the mtgee., (iii) that such absolute transfer should be made subject to a proviso that the mtgee. will reconvey the property to the mtgor., upon payment by him of the mtge. money on the day on which the mtgor. bound himself to repay the same.—NARAYANA AYYAR *v.* VENKATARAMANA AYYAR (1902), I. L. R. 25 Mad. 220.—IND.

PART I. SECT. 2.

3 i. *General rule.*]—Where there is nothing to show a contrary intention of the parties, every mtge. carries with it a personal liability to pay the money advanced; but a mtgee. must sue for his remedy against the property first.—

Sect. 2.—Personal obligation to pay debt. Sects. 3 & 4: Sub-sects. 1 & 2.]

v. Wynn (1905), 22 T. L. R. 93; De Beauvais *v.* Green (1906), 22 T. L. R. 816; *Re* Lacey, Howard *v.* Lightfoot, [1907] 1 Ch. 330; Shaw *v.* Crompton, [1910] 2 K. B. 370; *Re* Turner, Klaftenberger *v.* Groombridge, [1917] 1 Ch. 422; *Re* Jordison, Raine *v.* Jordison, [1922] 1 Ch. 440; *Re* Jauncey, Bird *v.* Arnold, [1926] Ch. 471.

5. No covenant for repayment—Simple contract debt.]—THOMAS *v.* TERRY (1715), Gilb. Ch. 110; 25 E. R. 77.

6. —— ——.]—A man mortgages his estate without covenant, yet because the money was borrowed the mtgee. becomes a simple contract creditor & in that case the mtge. is a collateral security, & if there is a bond or a covenant then there is a collateral security of a higher species but no higher by means of the mtge. merely (LORD THURLOW, C.).—ANCASTER (DUKE) *v.* MAYER (1785), 1 Bro. C. C. 454; 28 E. R. 1237.

Annotations:—**Refd.** Bagot *v.* Chapman, [1907] 2 Ch. 222. **Mentd.** Webb *v.* Jones (1786), 2 Bro. C. C. 60; Brummel *v.* Prothero (1796), 3 Ves. 111; Burton *v.* Knowlton (1796), 3 Ves. 107; Reade *v.* Litchfield (1797), 3 Ves. 475; Tait *v.* Northwick (1799), 4 Ves. 816; Hartley *v.* Hurle (1800), 5 Ves. 540; Watson *v.* Brickwood (1804), 9 Ves. 447; Hancox *v.* Abbey (1805), 11 Ves. 179; Bootle *v.* Blundell (1815), 1 Mer. 193; Greene *v.* Greene (1819), 4 Madd. 148; Lushington *v.* Sewell (1827), 1 Sim. 435; Blacklow *v.* Laws (1842), 2 Hare, 40; Collis *v.* Robins (1847), 1 De G. & Sm. 131.

7. —— ——.]—Where a mortgage deed contains no covenant for repayment, so that no action can be maintained on the deed, debt for money lent may be brought in the ordinary *indebitatus* form.—YATES *v.* ASTON (1843), 4 Q. B. 182; 3 Gal. & Dav. 351; 12 L. J. Q. B. 160; 7 Jur. 83; 114 E. R. 866.

Annotations:—**Refd.** Barber *v.* Butcher (1846), 8 Q. B. 863; Mathew *v.* Blackmore (1857), 1 H. & N. 762. **Mentd.** Price *v.* Moulton (1851), 10 C. B. 561; Painter *v.* Abel (1863), 3 New Rep. 83.

8. —— ——.] — Every mtge., though no covenant or bond to pay the money, implies a loan, & every loan implies a debt; therefore an heir of a mtgor. shall compel an application of the personal estate to pay off a mtge., notwithstanding there was no covenant, etc., from the mtgor.—KING *v.* KING (1735), 3 P. Wms. 358; 24 E. R. 1100.

Annotations:—**Refd.** Bagot *v.* Chapman, [1907] 2 Ch. 222. **Mentd.** Walnewright *v.* Elwell (1816), 1 Madd. 627.

9. —— ——.]—SUTTON *v.* SUTTON, No. 4, *ante*.

10. —— **When court will imply covenant.**]—SUTTON *v.* SUTTON, No. 4, *ante*.

11. Effect of covenant for repayment—Operation not dependent on passing of estate by deed.]—In a mtge. deed a covenant for the payment of the mtge. money does not depend on the passing of the estate by the deed.—NORTHCOTT *v.* UNDERHILL (1698), 1 Ld. Raym. 388; 1 Salk. 199; 91 E. R. 1157.

Annotation:—**Mentd.** Johnson *v.* Wilson (1740), Willes, 248.

12. —— **Specialty debt.**]—ANCASTER (DUKE) *v.* MAYER, No. 6, *ante*.

Liability of trustees.]—*See* Nos. 369–371, *post*.

SECT. 3.—PLEDGE OR SECURITY FOR DISCHARGE OF DEBT.

13. Property conveyed the security for the debt.]—QUARRELL *v.* BECKFORD, No. 3, *ante*.

14. ——.]—SANTLEY *v.* WILDE, No. 1, *ante*.

15. Effect of proviso for redemption not in conformity with title.]—When a mtge. is made by an instrument not containing a recital of any intention of doing more than making a mtge., the ct. 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 mtgee. for the money advanced; & the mere circumstance that the proviso for redemption points in terms to a mode of reconveyance of the interest not in conformity with the title, is generally not sufficient to induce the ct. to depart from the presumption (KNIGHT BRUCE, V.-C.).—CLARK *v.* BURGH (1845), 2 Coll. 221; 14 L. J. Ch. 398; 5 L. T. O. S. 494; 9 Jur. 679; 63 E. R. 708.

Annotation:—**Refd.** Pigott *v.* Pigott (1867), L. R. 4 Eq. 549.

SECT. 4.—RIGHT OF REDEMPTION.

SUB-SECT. 1.—RIGHT ESSENTIAL.

Equity of redemption generally.]—*See* Part IV., *post*.

16. Agreement preventing redemption void.]—No words in the same conveyance for excluding the redemption in case of a failure to do it within the time limited can bar a redemption (*per* CUR.).—JASON *v.* EYRES (1681), Freem. Ch. 69; 2 Cas. in Ch. 33; 22 E. R. 1064, L. C.

Annotation:—**Refd.** Newcombe *v.* Bonham (1681), Freem. Ch. 67.

17. ——.]—No agreement in a mtge. can make it irredeemable, either after the death of the mtgor. or upon failure of issue male of his body. Restrictions of redemption in mtges. are discountenanced in equity. A mtge. cannot be a mtge. of one side only.—HOWARD *v.* HARRIS (1683), 1 Vern. 190; 2 Cas. in Ch. 147; 1 Eq. Cas. Abr. 312; Freem. Ch. 86; 23 E. R. 406.

Annotations:—**Consd.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. **Refd.** Newcombe *v.* Bonham (1681), Freem. Ch. 67; Clay *v.* Willis (1823), 1 L. J. O. S. K. B. 144; Rice *v.* Noakes, [1900] 2 Ch. 445. **Mentd.** Bunning *v.* Bunning (1822), 1 L. J. O. S. Ch. 56.

18. ——.]—Time not regarded in this ct., as at law; for instance, the case of redemption of a mtge.; which cannot be prevented even by special agreement. So upon a mtge. at 5 per cent. with condition for 4 if regularly paid or at 4 per cent. to have 5, if not regularly paid; the 5 per cent. regarded in this ct. only as a penalty to secure the 4, & relief given upon that principle.

That is a doctrine, upon which the ct. acts against what is the *primâ facie* import of the terms of the agreement itself; which does not import at law, that, once a mtge., always a mtge.; but equity says that (LORD ELDON, C.).—SETON *v.*

MUSAHEB ZAMAN KHAN *v.* INAYAT-UL-LAH (1892), I. L. R. 14 All. 513.—**IND.**

PART I. SECT. 3.

13 i. *Property conveyed the security for the debt.*]—BROWNLEE *v.* CUNNINGHAM (1867), 13 Gr. 586.—**CAN.**

13 ii. ——.]—MCINTYRE *v.* THOMPSON (1883), 6 O. R. 710.—**CAN.**

13 iii. ——.]—A registered instrument creating a charge or incumbrance upon land showed on its face that it was given for a debt due by deft. to pltf.:—*Held:* it was in effect a mtge.—SHORE *v.* WEBER (1913), 24 W. L. R. 343; 4 W. W. R. 714; 11 D. L. R. 148; 6 Sask. L. R. 75.—**CAN.**

13 iv. ——.]—MOORE *v.* MCDONALD (1920), 52 N. S. R. 489.—**CAN.**

PART I. SECT. 4, SUB-SECT. 1.

16 i. *Agreement preventing redemption void.*]—CORY *v.* VALE (1852), 1 P. R. 210.—**CAN.**

16 ii. ——.]—AITCHISON *v.* COOMBS (1858), 6 Gr. 643.—**CAN.**

16 iii. ——.]—Where a document is, on its face, a mtge., the right to redeem is so much an essential as not to be variable by agreement.—SAMATHAL *v.* MATHOOSRI KAMATCHI AMMA BOYI SAIB AVERGUL (1874), 7 Mad. 395.—**IND.**

16 iv. ——.]—Any clause introduced into a mtge. deed, to limit the period of redemption, is in equity totally disregarded; as the parties can not by any such clause restrict the equity of redemption, for it would be an oppression on the mtgor.—GOODMAN *v.* GRIERSON (1813), 2 Ball & B. 274.—**IR.**

SLADE, HUNTER *v.* SETON (1802), 7 Ves. 265; 32 E. R. 108, L. C.

Annotations:—**Consd.** Stains *v.* Banks (1863), 9 Jur. N. S. 1049. **Reld.** Leeds & Hanley Theatre of Varieties *v.* Broadbent, [1898] 1 Ch. 343. **Mentd.** Halsey *v.* Grant (1806), 13 Ves. 73; Hall *v.* Smith (1808), 14 Ves. 426; Jenkins *v.* Reynolds (1821), 6 Moore, C. P. 86; Hipwell *v.* Knight (1835), 1 Y. & C. Ex. 401; Laythoarp *v.* Bryant (1836), 2 Bing. N. C. 735; Hicks *v.* Gardner (1837), 1 Jur. 541; Parkin *v.* Thorold (1851), 2 Sim. N. S. 1; Roberts *v.* Berry (1853), 3 De G. M. & G. 284.

19. ——.] — In a mtge. of a leasehold public-house by a licensed victualler to brewers the mtgor. covenanted with the mtgees. that he & all persons deriving title under him should not during the continuance of the term, & whether any money should or should not be owing on the security of the mtge., use or sell in the house any malt liquors except such as should be purchased of the mtgees.:—*Held:* this covenant was a "clog" on the equity of redemption, & the mtgor., on payment of all that was due upon the security, was entitled to have a reconveyance of the property, or at his option a transfer of the security, free in either case from the "tie."

The first doctrine to which I refer is expressed in the maxim, "Once a mortgage always a mortgage" . . . it is only another way of saying that a mtge. cannot be made irredeemable, & that a provision to that effect is void (LORD DAVEY).

The principle is this, that a mtge. must not be converted into something else; & when once you come to the conclusion that a stipulation for the benefit of the mtgee. is part of the mtge. transaction, it is but part of his security, & necessarily comes to an end on the payment off of the loan (LORD DAVEY).—NOAKES & CO., LTD. *v.* RICE, [1902] A. C. 24; 71 L. J. Ch. 139; 86 L. T. 62; 66 J. P. 147; 50 W. R. 305; 18 T. L. R. 196; 46 Sol. Jo. 136, H. L.; *affg.* S. C. *sub nom.* RICE *v.* NOAKES & CO., [1900] 2 Ch. 445, C. A.

Annotations:—**Consd.** Bradley *v.* Carritt, [1903] A. C. 253. **Apld.** Samuel *v.* Jarrah Timber & Wood Paving Corpn., [1904] A. C. 323. **Distd.** Davies *v.* Chamberlain (1909), 25 T. L. R. 766. **Consd.** British South Africa Co. *v.* De Beers Consolidated Mines, [1910] 2 Ch. 502. **Distd.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25; *Re* Cuban Land Co., [1921] 2 Ch. 147. **Reld.** London & Globe Finance Corpn. *v.* Montgomery (1902), 18 T. L. R. 661; Morgan *v.* Jeffreys, [1910] 1 Ch. 620. **Mentd.** L. C. C. *v.* Allen, [1914] 3 K. B. 642.

20. ——.] — There is now no rule in equity that a mtgee. cannot stipulate in the mtge. deed for a collateral advantage to endure beyond redemption, provided that such collateral advantage is not neither (*a*) unfair & unconscionable, or (*b*) in the nature of a penalty clogging the equity of redemption, or (*c*) inconsistent with or repugnant to the contractual or equitable right to redeem. *Semble:* the equitable doctrine against clogging applies to a floating charge as much as to any other mtge. security.

By an agreement dated Aug. 24, 1910, a firm of wool-brokers agreed to lend to a co. carrying on the business of meat preservers a sum of £10,000 at 6 per cent. If the interest was punctually paid the loan was not to be called in until Sept. 30, 1915, but the co. might pay off at any time on giving one calendar month's notice. The loan was secured by a floating charge on the undertaking of the co. The agreement provided that for a period of five years from the date thereof the co. should not sells sheepskins to any person other than the lenders so long as the latter were willing to buy at the best price offered by any other person & that the co. should pay to the lenders a commission on all sheepskins sold by the co. to any other person. The loan having been paid off by the co. in Jan. 1913, in accordance with the agreement, the lenders claimed to exercise their option of pre-emption notwithstanding the payment off of the loan:—*Held:* the stipulation for the option of pre-emption formed no part of the mtge. transaction, but was a collateral contract entered into as a condition of the co. obtaining the loan; that it was not a clog on the equity of redemption or repugnant to the right to redeem; & the lenders were entitled to an injunction restraining the co. from selling sheepskins to any person other than the lenders in breach of the agreement.

The equity to redeem, which arises on failure to exercise the contractual right of redemption, must be carefully distinguished from the equitable estate, which, from the first, remains in the mtgor., & is sometimes referred to as an equity of redemption (LORD PARKER).—KREGLINGER *v.* NEW PATAGONIA MEAT & COLD STORAGE CO., LTD., [1914] A. C. 25; 83 L. J. Ch. 79; 109 L. T. 802; 30 T. L. R. 114; 58 Sol. Jo. 97, H. L.

Annotations:—**Consd.** *Re* Rainbow Syndicate, Owen *v.* Rainbow Syndicate, [1916] W. N. 178; Hopkinson *v.* Mortimer, Harley, [1917] 1 Ch. 646. **Reld.** *Re* Cuban Land Co., [1921] 2 Ch. 147.

SUB-SECT. 2.—OMISSION OF PROVISO FOR REDEMPTION.

See, now, Law of Property Act, 1925 (c. 20), ss. 85, 86.

21. Whether transaction absolute conveyance or mortgage.]—BOWEN *v.* EDWARDS (1661), 1 Rep. Ch. 221; 21 E. R. 555.

Annotations:—**Reld.** Clay *v.* Willis (1823), 1 L. J. O. S. K. B. 144. **Mentd.** James *v.* Kerr (1889), 40 Ch. D. 449.

PART I. SECT. 4, SUB-SECT. 2.

21 i. *Whether transaction absolute conveyance or mortgage.*]—BOSTWICK *v.* PHILLIPS (1858), 6 Gr. 427.—**CAN.**

21 ii. ——.]—WATSON *v.* MONRO (1860), 8 Gr. 60.—**CAN.**

21 iii. ——.]—SAMPSON *v.* MCARTHUR (1860), 8 Gr. 72.—**CAN.**

21 iv. ——.]—Where there was a conveyance of land upon an advance of money, & a bond given by the lender to reconvey at the end of a year upon payment of the sum advanced, & an additional sum calculated upon the value of the money for that time:—*Held:* the transaction was a mtge., notwithstanding that the instrument termed it a sale & purchase.—FINK *v.* PATTERSON (1860), 8 Gr. 417.—**CAN.**

21 v. ——.]—BARTELS *v.* BENSON (1861), 21 U. C. R. 143.—**CAN.**

21 vi. ——.]—Where a deed was absolute in form, & the alleged consideration was, in part, promissory notes theretofore held by the grantee against the grantor, the fact of such notes being left with the grantee, is not alone sufficient to prove that the deed was intended as a mtge.—HEALEY *v.* DANIELS (1868), 14 Gr. 633.—**CAN.**

21 vii. ——.]—HENDERSON *v.* COMEAU (*circa* 1870), R. E. D. 87.—**CAN.**

21 viii. ——.]—MARSHALL *v.* STEEL (*circa* 1875), R. E. D. 116.—**CAN.**

21 ix. ——.] — KNOLAN *v.* DUNN (*circa* 1883), R. E. D. 504.—**CAN.**

21 x. ——.] — BLUNT *v.* MARSH (1888), 1 Terr. L. R. 126.—**CAN.**

21 xi. ——.]—LINTON *v.* SUTHERLAND (1896), 40 N. S. R. 149.—**CAN.**

21 xii. ——.]—KINNEY *v.* MELANSON (1900), 40 N. S. R. 258.—**CAN.**

21 xiii. ——.]—MCLEAN *v.* MCKAY (1904), Cout. 334.—**CAN.**

21 xiv. ——.] — HETHERINGTON *v.* SINCLAIR (1915), 34 O. L. R. 61; 8 O. W. N. 383; 23 D. L. R. 630.—**CAN.**

21 xv. ——.]—WHITMAN *v.* HILTZ (1905), 38 N. S. R. 174.—**CAN.**

21 xvi. ——.]—BEATON *v.* WILBUR (1906), 3 N. B. Eq. Rep. 309; 1 E. L. R. 472.—**CAN.**

21 xvii. ——.]—NIXON *v.* CURREY (1908), 7 E. L. R. 269.—**CAN.**

21 xviii. ——.]—STUART *v.* BANK OF MONTREAL (1913), 24 O. W. R. 714; 4 O. W. N. 1280; 10 D. L. R. 841.—**CAN.**

21 xix. ——.]—A. assigned to B. by instrument in writing under seal, absolute in form, all his interest in certain mineral claims. By contemporaneous memorandum they further agreed that B. might dispose of the property if $500 due him from A. was not paid within 30 days. In an action by A.'s heirs for a declaration that the instruments were given as security by way of mtge.:—*Held:* the assignment & the contemporaneous agreement must be read together, from which it was clear that the transaction was one

Sect. 4.—Right of redemption: Sub-sect. 2.]

22. ——.] — Pltf. for £80 conveys an estate absolutely to deft., & brings a bill to redeem. Deft. insists the conveyance was absolute, but confesses that after the £80 paid with interest, it was to be in trust for pltf.'s wife & children. Pltf. replies to the answer, & no proof of the trust; yet decreed the trust for the benefit of the wife & children.—HAMPTON *v.* SPENCER (1693), 2 Vern. 287; 23 E. R. 785.

23. ——.] — A conveyance made by a man who afterwards became a bkpt. set aside as an absolute conveyance & ordered to stand as security for so much as was really due.—BARWELL *v.* WARD (1745), Ridg. *temp.* H. 286; 1 Atk. 260; 27 E. R. 831, L. C.

Annotation:—**Mentd.** *Re* Bush, *Ex p.* Fussell (1837), 2 Deac. 158.

24. ——.]—Construction of several instruments as a mtge.; though one imported a purchase.—SEVIER *v.* GREENWAY (1815), 19 Ves. 413; 34 E. R. 570.

Annotations:—**Distd.** Williams *v.* Owen (1840), 5 My. & Cr. 303. **Consd.** Gossip *v.* Wright (1863), 2 New Rep. 152.

25. ——.] — GREGSON *v.* EAST ANGLIAN RY. Co. (1849), 12 L. T. O. S. 397.

26. ——.] — In 1840, A., in consideration of an amount then due by him to B., assigned to B. his interest in certain lands in Canada, to which he was equitably entitled. In 1843 B. with the privity of A. obtained the legal title to those lands, & remained in possession of them up to his death in 1850. In 1844 A. became bkpt., but he did not return B. as a creditor under his bkpcy., nor did he assert any right to an equity of redemption. The deed of assignment was lost. A.'s assignee filed a bill to redeem. It appeared by parol evidence that the intention of the parties to the assignment was that at some time & upon some terms A. should have the power of redeeming: —*Held:* the presumption was that, although the assignment was not intended in the first instance to be absolute & unconditional, A.'s right of redemption was divested before B. obtained the legal title.—HOLMES *v.* MATHEWS (1855), 9 Moo. P. C. C. 413; 3 Eq. Rep. 450; 14 E. R. 354, P. C.

27. ——.]—An agreement was entered into between pltf. & deft., which, after reciting that the latter was entitled to two leasehold farms, & that pltf. had lent to him a certain sum, & had agreed to make him further advances in consideration of the agreement thereinafter contained, it was agreed that the said sum & such further sums as should be thereafter advanced, with interest, should be repaid on a day named, but if default should be made in payment deft. agreed to assign to pltf. the said leases for the residue of the terms without any further consideration, together with the furniture, growing crops, etc., at a valuation. Pltf. agreed to pay the amount of such valuation, after deducting therefrom the moneys so advanced. The valuation was made, & a further payment was made by pltf. to deft., & the former entered into possession of the farms & tendered the amount of the balance due under the valuation, but deft. refused to receive same, contending that the agreement was for a mtge., & not for a sale:—*Held:* the relation of vendor & purchaser, & not that of mtgor. & mtgee., was constituted by the agreement.—TAPPLY *v.* SHEATHER (1862), 7 L. T. 298; 8 Jur. N. S. 1163; 11 W. R. 12, L. C.

28. —— **Possession given on conveyance.**]—A mtge. will not easily be presumed against an absolute conveyance; especially where possession has gone along with the conveyance, & an acquiescence for many years; although there be an incongruous covenant in the deed. A defeasance contained in a separate deed is suspicious, &, ought to be discouraged.—COTTERELL *v.* PURCHASE (1734), Cas. *temp.* Talb. 61; 25 E. R. 663, L. C.

29. —— **Intention of parties.**]—FRANCKLYN *v.* FERN (1740), Barn. Ch. 30; 27 E. R. 542.

Annotation:—**Refd.** Troughton *v.* Binkes (1801), 6 Ves. 573.

30. —— ——.] — Conveyances held upon the circumstances & answer of deft. to be mtges., & not absolute conveyances; & deft. having insisted upon their being absolute conveyances; pltfs. were allowed to redeem with costs.—ENGLAND *v.* CODRINGTON (1758), 1 Eden. 169; 28 E. R. 649.

Annotations:—**Consd.** Lincoln *v.* Wright (1859), 28 L. J. Ch. 705. **Refd.** Dryden *v.* Frost (1838), 3 My. & Cr. 670.

31. —— ——.]—In 1792 husband & wife, in consideration of a sum of money, executed a conveyance, with a fine, of the wife's estates of M. & F. to O. in fee. In Aug. 1798, they conveyed the M. estate alone to O. in fee, with a declaration, that the fine already levied should enure to the uses of that deed. In Nov. 1798, by a deed reciting that the original transaction was only a mtge., & that it had been lately discovered that the wife had only a life interest in the F. estate, the husband & wife, in consideration of a further advance of money from O., conveyed to him the wife's life interest in that estate. O. never executed the last-mentioned deed, but he entered into possession of both estates at the time of its execution. Upon a bill filed in 1836, by the heir of the wife, to redeem the F. estate:—*Held:* he was not entitled to relief; for, with the exception of the recital in the deed of Nov. 1798, the circumstances of the case were consistent with the original transaction being a purchase; & although O. entered into possession under that deed, yet not

of mtge. & not of sale.—CLEARY *v.* AITKEN (1914), 19 B. C. R. 369.—**CAN.**

21 xx. ——.] — EAST *v.* CLARKE (1915), 33 O. L. R. 624; 23 D. L. R. 74; 8 O. W. N. 342.—**CAN.**

21 xxi. ——.] — FLYNN *v.* FLYNN (1922), 70 D. L. R. 462.—**CAN.**

21 xxii. ——.]—WELSH *v.* POPHAM, [1925] S. C. R. 549; [1925] 3 D. L. R. 851; 20 Alta. L. R. 449.—**CAN.**

21 xxiii. ——.]—Wherever the security for money is an object of the transaction, no sale can become absolute.—LAKSHMI CHELLIAH GARU *v.* SRIKRISHNA BHUPATI DEVU MAHARAJ GARU (1871), 7 Mad. 6.—**IND.**

21 xxiv. ——.] — KAPUJI APAJI *v.* SENAVARJI MARVADI (1877), I. L. R. 2 Bom. 231.—**IND.**

21 xxv. ——.]—The question whether a document operates as a mtge., or as a conditional sale, must be determined on a consideration of the whole document.—KOLA VENKATANARAYANA *v.* VUPALA RATNAM (1906), I. L. R. 29 Mad. 531.—**IND.**

21 xxvi. ——.]—KASTURCHAND LAKHINAJI *v.* JAKHIA PADIA (1916), I. L. R. 40 Bom. 74.—**IND.**

21 xxvii. ——.]—NAMDEO SATVASHET *v.* DHONDU (1920), I. L. R. 44 Bom. 961.—**IND.**

21 xxviii. ——.]—TASBURGH *v.* ECHLIN (1733), 2 Bro. Parl. Cas. 265.—**IR.**

21 xxix. ——.]—Where the grantee of lands, subject to a limited power of redemption, has not all the remedies of a mtgee., the conveyance is not a mtge. but a conditional sale.—GOODMAN *v.* GRIERSON (1813), 2 Ball & B. 274.—**IR.**

21 xxx. ——.] — NEAL *v.* MORRIS (1818), Beat. 597.—**IR.**

21 xxxi. ——.]—MCNAMARA *v.* INDER (1889), 7 N. Z. L. R. 353.—**N.Z.**

29 i. —— *Intention of parties.*]—The intention of the parties as to whether a mtge. or a conditional sale was intended was to be ascertained by considering the situation & the surrounding facts, & that the existence of a debt between the parties was to be regarded as conclusive proof that a mtge. was intended.—ROBINSON *v.* CHISHOLM (1894), 27 N. S. R. 74.—**CAN.**

29 ii. —— ——.]—To induce a ct. to declare a deed, absolute on its face, to have been intended to operate as a mtge. only, the evidence of such intention must be of the clearest, most conclusive, & unquestionable character.—MCMICKEN *v.* ONTARIO BANK (1892), 20 S. C. R. 548.—**CAN.**

having signed it, he was not bound by its recitals. —TULL *v.* OWEN (1840), 4 Y. & C. Ex. 192 ; 9 L. J. Ex. Eq. 33 ; 4 Jur. 503 ; 160 E. R. 975.

32. —— ——.]—A conveyance, as upon an absolute sale, accompanied by a contemporaneous agreement for reconveyance, upon payment, on a day certain, of the purchase-money, with interest, & of the expenses of the present conveyance, which had been paid by the purchaser :—*Held :* on a bill for redemption, brought after the day certain had passed, to have been a sale, with a proviso for repurchase, & not a mtge.

That this ct. will treat a transaction as a mtge., although it was made so as to bear the appearance of an absolute sale, if it appear that the parties intended it to be a mtge., is, no doubt, true ; but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for repurchase, not acted upon, will not of itself entitle the vendor to redeem (LORD COTTENHAM, C.).—WILLIAMS *v.* OWEN (1840), 5 My. & Cr. 303 ; 12 L. J. Ch. 207 ; 5 Jur. 114 ; 41 E. R. 386, L. C.

Annotations :—**Distd.** Alderson *v.* White (1857), 30 L. T. O. S. 206 ; Gossip *v.* Wright (1863), 2 New Rep. 152.

33. —— ——.]—There is not to be found in the deeds the usual proviso for redemption, but it was clearly intended that pltf. should have power to call on deft. for an account of the rents & profits to be received by him (*per* CUR.).—PRICE *v.* PRICE (1845), 15 L. J. Ch. 13 ; 8 L. T. O. S. 49.

34. —— ——.] — B., the owner of land in West Canada, under a contract of sale from the Chancellor & scholars of King's College, being indebted to T. & Co., induced P. to assume the debt, & to secure him from any loss in consequence of such assumption, by deed poll endorsed on his original contract of sale, absolutely assigned the land to P. Up to the time of this assignment, B. himself had never been in the actual possession of the land, his father having managed same as his agent. P. afterwards, in satisfaction of certain debts due by him, assigned the land conveyed to him by B., with other property, to G. This assignment was also endorsed on the original contract of sale. Prior to the execution of this assignment, G. made some inquiries about the ownership of the property, but it did not appear that he received any information that B. was the owner :—*Held :* under the circumstances, the transaction between B. & P., although in form an absolute assignment & sale, was in effect a mtge. only.—BARNHART *v.* GREENSHIELDS (1853), 9 Moo. P. C. C. 18 ; 2 Eq. Rep. 1217 ; 22 L. T. O. S. 178 ; 14 E. R. 204, P. C.

Annotations :—**Mentd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421 ; Natal Land, etc. Co. *v.* Good (1868), L. R. 2 P. C. 121 ; Lewis *v.* Stephenson (1898), 67 L. J. Q. B. 296 ; Hunt *v.* Luck, [1902] 1 Ch. 428 ; Green *v.* Rheinberg (1911), 104 L. T. 149 ; Reeves *v.* Pope, [1914] 2 K. B. 284.

35. —— ——.] —Where applt. had deposited with resp. bank his title deeds to certain property in order to secure a cash credit, & afterwards executed an absolute conveyance thereof to the bank in pursuance of an agreement recited therein to the effect that the price paid should be by deducting £400 from the amount due :—*Held :* although collateral evidence was admissible to show that notwithstanding the plain terms of the deed the relationship of mtgee. & mtgor. still subsisted between the parties, yet in this case it was wholly insufficient to overcome the presumption that the deed of conveyance truly stated the transaction.—BARTON *v.* BANK OF NEW SOUTH WALES (1890), 15 App. Cas. 379, P. C.

36. —— ——.] — By an indenture dated in 1890 the Duchess of M., in consideration of natural love & affection, assigned to her husband the Duke a leasehold house belonging to her. The deed was in form an absolute assignment. The Duke subsequently mortgaged the house for the purpose of raising money to pay his debts. The Duchess joined with the Duke in covenanting to pay the mtge. debt, but the equity of redemption was reserved to the Duke alone. Upon the death of the Duke in 1892, the Duchess claimed to be entitled to the house subject to the mtge. There was evidence that she had assigned the house to the Duke solely to enable him to mtge. it in his own name, & that it was part of the arrangement between them that he should reassign to her, which, if he had lived, he would have done :—*Held :* the case fell within the authorities which forbid Stat. of Frauds to be used to cover what would amount to a fraud, & consequently the statute could not be successfully pleaded in opposition to the claim of the Duchess.—*Re* MARLBOROUGH (DUKE), DAVIS *v.* WHITEHEAD, [1894] 2 Ch. 133 ; 63 L. J. Ch. 471 ; 70 L. T. 314 ; 42 W. R. 456 ; 10 T. L. R. 296 ; 38 Sol. Jo. 289 ; 8 R. 242.

Annotations :—**Refd.** Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196. **Mentd.** Isaacs *v.* Evans (1899), 16 T. L. R. 113.

37. —— **Admissibility of parol evidence.**] — (1) A mtgee. in an agreement for a mtge. omits to insert a covenant for redemption, the mtgor. shall be permitted to read evidence to show the omission.

(2) A mtge. drawn in two deeds, one an absolute conveyance, the other a defeasance, which mtgee. omits to execute, the mtgor. shall be admitted to show the mistake.—JOYNES *v.* STATHAM (1746), 3 Atk. 388 ; 26 E. R. 1023, L. C.

Annotations :—*Generally,* **Mentd.** Rogers *v.* Earl (1757), 1 Dick. 295 ; Rich *v.* Jackson (1794), 4 Bro. C. C. 514 ; Townshend *v.* Stangroom (1801), 6 Ves. 328 ; Woollam *v.* Hearn (1802), 7 Ves. 211 ; Mason *v.* Armitage (1806), 13 Ves. 25 ; Ramsbottom *v.* Gosden (1812), 1 Ves. & B. 165 ; London & Birmingham Ry. *v.* Winter (1840), Cr. & Ph. 57 ; Smith *v.* Wheatcroft (1878), 9 Ch. D. 223.

38. —— ——.] — An absolute conveyance decreed to be only a security for money on parol evidence ; it being clear, on the written evidence, & the accounts of the parties, that the agreement was not what the deed purported it to be.—CRIPPS *v.* JEE (1793), 4 Bro. C. C. 472 ; 29 E. R. 994.

Annotations :—**Refd.** Clay *v.* Willis (1823), 1 L. J. O. S. K. B. 144 ; Leman *v.* Whitley (1828), 4 Russ. 423.

39. —— ——.]—Pltf., in 1842, executed an absolute conveyance of certain property to deft. in fee, as on a sale. In 1860 he filed his bill to have the transaction treated as a mtge. transaction & to redeem. The ct. being satisfied by parol evidence that the real agreement between the parties had been that deft. should only hold the estate as a security for the money which he paid & should receive the rents in lieu of interest :—

37 i. —— *Admissibility of parol evidence.*]—Parol evidence cannot be received that a deed absolute in its terms was intended only as a security. —GILMOUR *v.* HAYES (1837), 6 O. S. 631.—**CAN.**

37 ii. —— ——.]—Where an absolute deed of real estate had been executed, & the grantor, by his bill, alleged that the deed so executed was intended as a security only, & that it had been verbally agreed to execute a defeasance at some future time, but it did not appear that any acts of the grantee were inconsistent with his supposition that the conveyance was intended to be absolute, & not by way of security, parol evidence of the alleged agreement was held inadmissible. — HOWLAND *v.* STEWART (1850), 2 Gr. 61.—**CAN.**

37 iii. —— ——.]—ROSE *v.* HICKEY (1878), Cass. Dig. 2nd ed. 534.—**CAN.**

37 iv. —— ——.]—A deed purporting to be an absolute sale, will not be held a mtge. on the evidence of the grantor, supported by the testimony of third parties, as to alleged declarations to that effect made by the grantee long after the deed was executed.—*Re* NAGHTEN (1860), 12 Ir. Jur. 196. —**IR.**

Sect. 4.—Right of redemption: Sub-sects. 2 & 3. Sects. 5 & 6: Sub-sect. 1.]

Held: the case was not to be treated as one of conditional sale, but deft. must account as a mtgee. in possession, & with rests, being allowed interest at £5 per cent. on the money he had advanced, & he had been rightly ordered to pay the costs of the suit.—DOUGLAS *v.* CULVERWELL (1862), 4 De G. F. & J. 20; 31 L. J. Ch. 543; 6 L. T. 272; 10 W. R. 327; 45 E. R. 1089, L. JJ.

Annotations:—**Refd.** Macleod *v.* Jones (1884), 53 L. J. Ch. 534. **Mentd.** *Re* Unsworth's Trust (1865), 2 Drew. & Sm. 337.

40. —— —— **Fraud.**]—Grant of annuity, bill filed to redeem, suggesting that it was part of the agreement that it should be redeemable, but the agreement left out of the deed, on the idea that if inserted the transaction would be usurious; parol evidence offered to this, but not admitted to contradict the deed, not being charged to have been omitted by fraud.—IRNHAM (LORD) *v.* CHILD (1781), 1 Bro. C. C. 92; 2 Dick. 554; 28 E. R. 1006, L. C.

Annotations:—**Apld.** Cripps *v.* Jee (1793), 4 Bro. C. C. 472. **Distd.** *Re* Marlborough, Davis *v.* Whitehead, [1894] 2 Ch. 133. **Refd.** Townshend *v.* Stangroom (1801), 6 Ves. 328; Squire *v.* Campbell (1836), 1 My. & Cr. 459; Jervis *v.* Berridge (1873), 8 Ch. App. 351; Jacobs *v.* Batavia & General Plantations Trust, [1924] 1 Ch. 287. **Mentd.** Bonnett *v.* Sadler (1808), 14 Ves. 526; Fowler *v.* Fowler (1859), 4 De G. & J. 250.

41. —— —— ——.] — If the real agreement was that . . . the transaction should be a mtge. transaction it is in the eye of this ct. a fraud to insist on the conveyance being absolute & parol evidence must be admissible to prove fraud (TURNER, L.J.).—LINCOLN *v.* WRIGHT (1859), 4 De G. & J. 16; 28 L. J. Ch. 705; 33 L. T. O. S. 35; 5 Jur. N. S. 1142; 7 W. R. 350; 45 E. R. 6, L. JJ.

Annotations:—**Apld.** Douglas *v.* Culverwell (1862), 4 De G. F. & J. 20. **Consd.** *Re* Marlborough, Davis *v.* Whitehead, [1894] 2 Ch. 133. **Mentd.** Haigh *v.* Kaye (1872), 7 Ch. App. 469; Booth *v.* Turle (1873), L. R. 16 Eq. 182; James *v.* Smith, [1891] 1 Ch. 384; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196.

42. —— **Surrounding circumstances—Relationship of parties.**] — Deeds set aside, as absolute securities & conveyances, & ordered to stand as security only for what should appear due upon a general account, after a considerable lapse of time, seventeen years, upon the nature of the deeds themselves, the circumstances, under which, & the confidential relation of the person by whom, they were obtained; & no confirmation; the other parties being throughout under the same influence, control, & ignorance of their rights.—PURCELL *v.* MCNAMARA (1806), 14 Ves. 91; 33 E. R. 455, L. C.

Annotations:—**Mentd.** Smyth *v.* Smyth (1817), 2 Madd. 75; Whalley *v.* Whalley (1821), 3 Bli. 1.

43. —— —— ——.]—An absolute conveyance of a reversionary interest to a solr. reduced, by decree, to a mtge., the solr. standing in a *quasi* though not absolute relationship of trustee & solr., & failing to prove that the transaction was clearly understood & that full value was given.—DENTON *v.* DONNER (1856), 23 Beav. 285; 53 E. R. 112.

Annotations:—**Mentd.** Plowright *v.* Lambert (1885), 52 L. T. 646; Readdy *v.* Prendergast (1886), 55 L. T. 767.

44. —— —— ——.]—A father by agreement took all his son's property, undertaking to pay his debts:—*Held:* in the absence of proof to the contrary the son was entitled to the surplus, if any.—MAY *v.* MAY (1863), 33 Beav. 81; 55 E. R. 297.

Annotation:—**Mentd.** *Re* Blakely Ordnance Co., Coates's Case (1876), 46 L. J. Ch. 367.

45. —— **Vendor of feeble intellect.**] — J. M., an illiterate & weak-minded man, when seventy-two years of age, & when labouring under domestic annoyances, in consideration of £1 per week & the use of a cottage for life, conveyed landed property worth £800 to L., a person to whom he owed £150. On a bill filed by the heiress of J. M., & her husband, this conveyance was set aside as an absolute conveyance, & declared to stand as security only for sums advanced by L., or properly expended by him on the property.—LONGMATE *v.* LEDGER (1860), 2 Giff. 157; 2 L. T. 256; 6 Jur. N. S. 481; 8 W. R. 386; 66 E. R. 67.

Annotations:—**Consd.** Clark *v.* Malpas (1862), 31 Beav. 80. **Mentd.** Fry *v.* Lane, *Re* Fry, Whittet *v.* Bush (1888), 40 Ch. D. 312.

SUB-SECT. 3.—PROVISO FOR REDEMPTION IN SEPARATE INSTRUMENT.

46. Regarded with suspicion.] — COTTERELL *v.* PURCHASE, No. 28, *ante*.

47. Court will prevent prejudice to mortgagor.] —Where a clause of redemption is in a separate deed, the ct. adheres to it strictly to prevent the equity of redemption from being entangled to the prejudice of the mtgor.—BAKER *v.* WIND (1748), 1 Ves. Sen. 160; 27 E. R. 956, L. C.

Annotation:—**Distd.** Williams *v.* Owen (1840), 5 My. & Cr. 303.

48. —— **Refusal of mortgagee to execute.**] — Where a person advancing money, refuses, after an absolute conveyance, to execute a defeasance, this ct. will relieve.—WALKER *v.* WALKER (1740), as reported in 2 Atk. 98; 26 E. R. 461, L. C.

Annotations:—**Refd.** Young *v.* Peachy (1741), 2 Atk. 254. **Mentd.** Robinson *v.* Gee (1749), 1 Ves. Sen. 251; Pitcairn *v.* Ogbourne (1751), 2 Ves. Sen. 375; Rich *v.* Jackson (1794), 4 Bro. C. C. 514; Woollam *v.* Hearn (1802), 7 Ves. 211; Podmore *v.* Gunning (1836), 7 Sim. 644; Wood *v.* Midgley (1854), 5 De G. M. & G. 41; Maddison *v.* Alderson (1883), 8 App. Cas. 467.

49. —— ——.]—JOYNES *v.* STATHAM, No. 37, *ante*.

50. —— ——.] — DIXON *v.* PARKER (1750), 2 Ves. Sen. 219; 28 E. R. 142, L. C.

Annotations:—**Mentd.** Wolley *v.* Brownhill (1824), M'Cle. 317; Ashton *v.* Parker (1845), 14 Sim. 632.

SECT. 5.—RIGHT OF FORECLOSURE.

See Part XIII., Sect. 7, *post*.

SECT. 6.—MORTGAGE DISTINGUISHED FROM OTHER SIMILAR TRANSACTIONS.

SUB-SECT. 1.—SALE WITH OPTION OF REPURCHASE.

51. Whether transaction mortgage or sale with option of repurchase.]—Bargain & sale of lands in consideration of £5,000 & this was for one thousand years, on condition to be void on repayment of £5,000 on any 10th day of Aug. during that term,

42 i. —— *Surrounding circumstances.*]—TRUSTS & GUARANTEE CO., LTD. *v.* GRAND VALLEY RY. CO. (1919), 44 O. L. R. 390; 15 O. W. N. 247.—**CAN.**

PART I. SECT. 6, SUB-SECT. 1.

51 i. *Whether transaction mortgage or sale with option of repurchase.*]—MURPHY *v.* MITCHELL (1879), 5 V. L. R. (L.) 194.—**AUS.**

51 ii. ——.]—An absolute assignment, containing nothing to show that the relation of debtor & creditor is to exist between the parties, or that the assignee is only to have the remedies of a mtgee., does not become a mortgage merely by reason of a collateral verbal stipulation for a right to repurchase.—ROWE *v.* OADES (1905), 3 C. L. R. 73.—**AUS.**

51 iii. ——.]—STEWART *v.* HORTON (1850), 2 Gr. 45.—**CAN.**

& £400 *per annum* till it was paid; decreed that this was a mtge.—DANBY *v.* READ (1675), Cas. *temp.* Finch, 226; 23 E. R. 124.

Annotation:—**Refd.** Stokes *v.* Verrier (1677), 3 Swan. 634.

52. ——.] — BARRELL *v.* SABINE (1684), 1 Vern. 268; 23 E. R. 462.

Annotations:—**Consd.** Williams *v.* Owen (1840), 5 My. & Cr. 303. **Refd.** Joy *v.* Birch (1836), 10 Bli. 201.

53. ——.]—The proviso in a mtge. is, that if the mtgor. fails in payment of the principal money & interest at a time limited, the estate of the mtgee. shall be absolute & indefeasible, as well in equity as at law. Default is made, & many years elapse without any application to redeem. In this case, the mtgee. is considered in the light of a conditional purchaser, & no redemption shall be decreed against him.—TASBURGH *v.* ECHLIN (1733), 2 Bro. Parl. Cas. 265; 1 E. R. 934, H. L.

54. ——.] — A. conveys lands to B. & his heirs by lease & release, & by a defeasance bearing date with the release agrees that if he pays £1,000 borrowed of B. within a year, that B. should reconvey to him; but if he failed to pay the money within the year, then B. should mortgage or absolutely sell same lands free from redemption. The money not being paid at the time, B. agreed to convey the estate to C. & in the agreement & conveyances an exception was made, & the defeasance was mentioned; & a question arising whether C. had an absolute estate, the ct. determined that he had purchased an estate subject to a redemption by A.—CROFT *v.* POWEL (1738), 2 Com. 603; 92 E. R. 1230.

Annotation:—**Refd.** James *v.* Kerr (1889), 40 Ch. D. 449.

55. ——.] — (1) Pltf.'s grandfather, in 1689, mortgaged the estate in question to the Whiteheads, they afterwards mortgaged it to Cartwright & Heywood, & their heirs, for £200, who, to secure the interest, leased the estate to pltf.'s father, in June 1689, & to his assigns, for five thousand years, at £12 a year rent for the three first years, & £10 a year rent for the remainder of the term; & if at three years end, the £200 was paid, & interest, then the premises were to be reconveyed: Receipts given, sometimes for interest, & sometimes for a rentcharge, the last in 1730; the £200 lent was charity-money, directed to be laid out in the purchase of lands in fee, & the rents to be applied for clothing twenty-four needy housekeepers. In 1738, pltf. gave notice he would pay in the money, but deft. refused to take it, & insisted it was an absolute purchase, & so decreed.

(2) Where a mtgee. by agreement, either in the mtge. deed, or a separate one, fetters the redemption, with a fraudulent design to get the estate, it will not avail.—MELLOR *v.* LEES (1742), 2 Atk. 494; 26 E. R. 698, L. C.

Annotations:—*As to* (1) **Consd.** Williams *v.* Owen (1840), 5 My. & Cr. 303. **Refd.** Bulwer *v.* Astley (1844), 1 Ph. 422. *As to* (2) **Consd.** Davis *v.* Thomas (1831), 1 Russ. & M. 506. **Refd.** Samuel *v.* Jarrah Timber & Wood Paving Corpn., [1904] A. C. 323; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25.

56. ——.] — An agreement, made upon an advance of money, to convey property, & containing a power of redemption within a given time, & in default the sale to be absolute:—*Held:* under the circumstances, to be a conditional sale & not a mtge.

A. having agreed to purchase a property for £1,435, borrowed £185, the amount of auction duty & deposit, from B. B. afterwards advanced A. £600 on account of the purchase, but which was not so applied, & £1,291 of the purchase-money remained unpaid. A. & B. afterwards entered into an agreement, by which it was agreed, in consideration of the £185 & the £600, & of a further sum of £400 to be paid by B. to A. that the property should be conveyed to B. provided that if A. paid B. on a day specified the £1,435, & the sum of £1,000 advanced, the agreement should be void; & A. was to have permission to make sales in the meantime, subject to the approval of B., so as to reimburse the purchase-money & advances made; "but if not then made, the sale was absolutely confirmed to B." The agreement contained no engagement to pay. B. afterwards completed the purchase:—*Held:* this was a conditional purchase, & not a mtge., & A. having made default in payment, the estate belonged absolutely to B.—PERRY *v.* MEDDOWCROFT (1841), 4 Beav. 197; 49 E. R. 314; *affd.* (1842), 12 L. J. Ch. 104, L. C.

Annotations:—**Mentd.** *Re* De Sommery, Coelenbier *v.* De Sommery, [1912] 2 Ch. 622; *Re* Scott, Scott *v.* Scott, [1915] 1 Ch. 592; *Re* Hewett, Eldridge *v.* Hewett (1920), 90 L. J. Ch. 126.

57. ——.] — Conveyance by lease & release in fee, in the circumstances, held to be subject to a parol defeasance, & to be in the nature of a mtge., with a power of repurchase on the footing of redemption; & a reconveyance decreed.—MUTTYLOLL SEAL *v.* ANNUNDOCHUNDER SANDLE (1849), 5 Moo. Ind. App. 72; 18 E. R. 822, P. C.

58. ——.]—W., being indebted to M., made an absolute assignment of a reversion, but took a memorandum from M. that M. would reconvey, on repayment, with interest, by W., in six months, W. paying part of the costs. Nothing further was done for eighteen years:—*Held:* the transaction was a mtge.—WATERS *v.* MYNN (1850), 15 L. T. O. S. 157; 14 Jur. 541.

59. ——.]—A. conveyed lands to B. on trust, n case a sum & interest should not be paid by a day named, to sell, & after payment of principal, interest, & costs, to reconvey the lands remaining unsold, or pay over the residue of the money; & B. covenanted not to sell without giving six months' notice, but the deed contained no proviso or redemption:—*Held:* this was a mere mtge.—BELL *v.* CARTER (1853), 17 Beav. 11; 22 L. J. Ch.

51 iv. ——.] — SHAW *v.* JEFFERY (1860), C. R. 3 A. C. 483.—**CAN.**

51 v. ——.]—BULLEN *v.* RENWICK (1862), 9 Gr. 202.—**CAN.**

51 vi. ——.]—BERNARD *v.* WALKER (1862), 2 E. & A. 121.—**CAN.**

51 vii. ——.]—FALLON *v.* KEENAN (1866), 12 Gr. 388.—**CAN.**

51 viii. ——.]—A mtgee. took a release of the equity of redemption, & thereupon an agreement was signed by both parties for the purchase of the property by the grantor for a sum exceeding the amount due on the mtges., not giving the grantor a mere option to purchase, but binding him to buy & pay the stipulated price:—*Held:* the transaction was one of mtge.—HAWKE *v.* MILLIKEN (1866), 12 Gr. 236.—**CAN.**

51 ix. ——.]—RAPSON *v.* HERSEE (1869), 16 Gr. 685.—**CAN.**

51 x. ——.]—DOYLE *v.* DULHANTY (1890), 23 N. S. R. 78.—**CAN.**

51 xi. ——.]—ANGEVINE *v.* SMITH (1893), 26 N. S. R. (14 R. & G.) 44.—**CAN.**

51 xii. ——.] — BAPU *v.* BHAVANI (1896), I. L. R. 22 Bom. 245.—**IND.**

51 xiii. ——.]—A mere stipulation for repurchase does not make a transaction a mtge. To make a mtge. there must be a debt.—VASUDEO BHIKAJI JOSHI *v.* BHAU LAKSHMAN RAVUT (1896), I. L. R. 21 Bom. 528.—**IND.**

51 xiv. ——.]—The mere fact of a deed of absolute sale being accompanied by another giving a right of repurchase will not, for that reason alone, constitute the transaction one of mtge.—BALKISHAN DAS *v.* LEGGE (1899), I. L. R. 22 All. 149; L. R. 27 Ind. App. 58; 4 C. W. N. 153.—**IND.**

51 xv. ——.] — NARAYAN RAMKRISHNA *v.* VIGHNESHWAR (1918), I. L. R. 40 Bom. 378.—**IND.**

51 xvi. ——.]—In deciding whether a given transaction is an out-and-out sale with a condition for repurchase or a mtge. by conditional sale, it is the intention of the parties at the time of entering into the transaction which must be regarded.—BISKAWBAD NATH *v.* MUKAMNAD UBAIDULLAH KHAN (1923), I. L. R. 45 All. 581.—**IND.**

Sect. 6.—Mortgage distinguished from other similar transactions: Sub-sects. 1 & 2.]

933; 21 L. T. O. S. 41; 17 Jur. 478; 1 W. R. 270; 51 E. R. 935.

60. ——.]—O., a cotton spinner, being under advances from B., a cotton broker, for which B. held an equitable mtge. of the mills & premises, came to a general composition with his creditors in July, 1850, paying them the amount of their compositions by means of promissory notes, in which B. joined, & which B. had ultimately to pay. B. got no composition, but the whole spinning mills & business, as a going concern, was sold to B. by O. with a proviso, that if within ten years O. should repay B. principal & interest, or if the profits of the business, after deductions for necessaries & repairs, should within ten years repay the principal & interest, then B. should reconvey to O. It was further agreed, that if at any period of the ten years the result of six months' business, on an account thereof being taken, should be that there was not enough net profit to pay interest on the whole principal moneys advanced by B., B. might give O. two months' notice to bar the right of repurchase; & if within that period of two months O. should not pay up to B. all principal & interest then due, all the right & equity of redemption should be barred. B. further agreed to continue to employ O. as manager at £3 per week. In Nov. 1850, stock was taken, & showed sufficient profit. In Sept. 1851, an account was taken, which showed, as B. alleged, a loss of £3,000. Thereupon B. sent a notice dismissing O. from his situation as manager, on the ground of disobedience & calling on him to pay up in two months the amount of principal & interest, or to stand barred:—*Held:* the notice to bar the right of repurchase might well be given on the account in question, although it was a nine months' account, not a six months' account, as required by the provision, provided that it could be shown that a loss upon the business for the six months ending July, 1851, had actually been incurred.—OGDEN *v.* BATTAMS (1855), 1 Jur. N. S. 791.

61. ——.]—In 1825, by indentures of lease & release, N. purported to convey his life interest in certain freehold & leasehold estates to C., in consideration of the sum of £4,739; & by another deed of even date it was covenanted by C. that N. should be allowed to repurchase same, if desirous of so doing, for the sum of £4,739, by giving twelve months' notice on Lady Day in any year. N. afterwards became insolvent & the assignee, thirty years after the execution of these deeds & fifteen years after the death of C. filed a bill contending that the transaction was a mtge., & praying that an account might be taken of the rents & profits received by C. or his representatives, & that the estate might be reconveyed to pltf. on payment of the sum of £4,739 with interest:—*Held:* this transaction was not to be treated as a mtge.—ALDERSON *v.* WHITE (1858), 2 De G. & J. 97; 30 L. T. O. S. 297; 4 Jur. N. S. 125; 6 W. R. 242; 44 E. R. 924, L. C.

Annotations:—**Consd.** M. S. & L. Ry. *v.* North Central Wagon Co. (1888), 13 App. Cas. 554. **Reld.** Beckett *v.* Tower Assets Co., [1891] 1 Q. B. 1.

62. ——.]—In circumstances, held upon the construction of certain instruments that, taken together, they did not operate as a mtge., but as an absolute sale, to which was attached a conditional right of repurchase to be exercised on the happening of a given event.—SHAW *v.* JEFFERY (1860), 13 Moo. P. C. C. 432; 3 L. T. 1; 15 E. R. 162, P. C.

63. ——.] — A mtgor. conveyed the mtged. estate to the mtgee., & by a contemporaneous agreement a right of repurchase was reserved, if exercised within six years, on repayment of the purchase-money, together with all expenses & moneys laid out on the property. The right of repurchase was not exercised by the mtgor., but he, seventeen years after the date of the above conveyance, filed a bill, praying that the transaction might be declared to be not a sale, but a mtge., with the right to redeem:—*Held:* the transaction was, what it purported to be, a conveyance by way of sale, with a right of repurchase within six years; the evidence showing that this was the intention of the parties at the time.—GOSSIP *v.* WRIGHT (1869), 21 L. T. 271; 17 W. R. 1137, H. L.

Annotations:—**Reld.** Lisle *v.* Reeve, [1902] 1 Ch. 53; Fairclough *v.* Swan Brewery Co., [1912] A. C. 565.

64. ——.] — *Re* BREWER, *Ex p.* SINGLETON (1891), 7 T. L. R. 614.

65. —— **Sufficiency of agreement for repurchase.**] —ST. JOHN *v.* WAREHAM (1636), cited in 3 Swan. at p. 631; 36 E. R. 1001.

Annotations:—**Consd.** Thornborough *v.* Baker (1675), 3 Swan. 628. **Reld.** Smith *v.* Smoult (1667), 1 Cas. in Ch. 88.

66. —— ——.]—WILLIAMS *v.* OWEN, No. 32, *ante*.

67. —— **Presumption in favour of mortgage.**] —(1) Grant of annuities during life of the grantee, in satisfaction & discharge of a debt, the grantor not to be liable personally, but reserving a power to repurchase & redeem the annuities:—*Held:* part of the personal estate of the grantee, & similar to the case of Welsh mtges.

(2) The ct. leans against a contract for liberty to repurchase where made at the same time as the grant, & endeavours to make it a redemption.

(3) In a Welsh mtge. there is a perpetual power of redemption in mtgor.; & mtgee. cannot compel a redemption or foreclosure.—LONGUET *v.* SCAWEN (1750), 1 Ves. Sen. 402; 27 E. R. 1106, L. C.

Annotation:—*As to* (2) **Apld.** Bulwer *v.* Astley (1844), 1 Ph. 422.

68. —— **Effect of subsequent proposals by purchaser.**]—A., being indebted to B., enters into a written agreement, that B. may at any time while the money due to him remains unpaid, become the purchaser, for £450 of a house belonging to A., & that the money due to B. from the latter shall be part payment of the price; this is a contract of sale, & not a mtge. to secure the debt.

The agreement is not impaired or altered by proposals which the purchaser makes subsequently, with a view to an amicable arrangement.—BUNNING *v.* BUNNING (1822), 1 L. J. O. S. Ch. 56.

69. Conditions of repurchase to be strictly observed.]—ST. JOHN *v.* WAREHAM (1636), cited in 3 Swan. at p. 631; 36 E. R. 1001.

Annotations:—**Consd.** Thornborough *v.* Baker (1675), 3 Swan. 628. **Reld.** Smith *v.* Smoult (1667), 1 Cas. in Ch. 88.

70. ——.]—BARRELL *v.* SABINE (1684), 1 Vern. 268; 23 E. R. 462.

Annotations:—**Apld.** Joy *v.* Birch (1836), 10 Bli. N. S. 201. **Reld.** Williams *v.* Owen (1840), 5 My. & Cr. 303.

71. ——.]—C., by indentures, dated in 1800, for the consideration of two sums of £2,000 & £2,000 granted unto G. two annuities of £300 each, charged on his freehold lands at T.; & the indentures contained powers of repurchase by C., his heirs & assigns, on giving notice in writing under his or their hands, & paying all arrears. In 1812, C. agreed to sell all his lands, including those at T., to B. for £90,528, & to convey free from incumbrances, except certain mtges., & in pursuance of the agreement B. was let into

possession, & paid large sums. The annuities to G. being in arrear, in 1818 C. granted to him all his lands on trust to sell them, & out of the proceeds, to retain costs & pay incumbrances; &, in 1824 C. assigned to G. the unpaid balance of the said purchase-money, subject to prior charges, to apply the same in payment of what was stated in account to be due to G. Nothing was done on these deeds. B. filed a bill in 1825 for specific performance of the agreement with B., & for repurchase of G.'s annuities, alleging that C., at B.'s request, gave G. such notice as was required to enable C., or B. in his place, to repurchase the annuities, & that on the day in the notice mentioned, the agents of C. & B. went to G.'s residence, to pay the principal & arrears with costs, & to tender deeds of transfer for his execution, & G. being from home, they left a notice that the money & deeds would remain for ten days at the office of one of them. The bill prayed for a declaration that the annuities had ceased from that day. G., by his answer, admitted the service of a notice, signed C., by E. & P., his attorneys, but insisted that they had no authority from C., & that the notice was irregular & of no avail, as not being in pursuance of the powers of repurchase:—*Held:* the notice of repurchase was not in strict pursuance of the power in the deeds, & was also defective in not naming a place for payment of the money.—JOY *v.* BIRCH (1836), 10 Bli. N. S. 201; 4 Cl. & Fin. 57; 6 E. R. 77, H. L.

Annotations:—**Consd.** Secretary of State in Council of India *v.* British Empire Mutual Life Assce. (1892), 67 L. T. 434. **Reid.** Hawkins *v.* Hall (1837), Donnelly, 256.

SUB-SECT. 2.—PAWN OR PLEDGE.

See, generally, PAWNS & PLEDGES.

72. Quantum of interest in property conveyed —Pledge or pawn transfers only special interest.]—He [the pawnee] has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt & to compel the pawner to pay him (HOLT, C.J.).—COGGS *v.* BERNARD (1703), as reported in 2 Ld. Raym. 909; Holt, K. B. 528; 92 E. R. 107; *sub nom.* ANON., 2 Salk. 522.

Annotations:—**Consd.** Donald *v.* Suckling (1866), L. R. 1 Q. B. 585. **Reid.** Ryall *v.* Rolle (1749), 1 Atk. 165; Attenborough *v.* Solomon, [1913] A. C. 76. **Mentd.** Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Grand Opinion for Prerogative concerning the Royal Family (1717), Fortes. Rep. 401; Robinson *v.* Green (1723), 1 Stra. 574; Shelton *v.* Osborn (1729), 1 Barn. K. B. 260; Boucher *v.* Lawson (1735), Lee *temp.* Hard. 194; Kettle *v.* Bromsall (1738), Willes, 118; Charitable Corpn. *v.* Sutton (1742), 2 Atk. 400; Hartop *v.* Hoare (1743), 3 Atk. 44; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357; Elsee *v.* Gatward (1793), 5 Term Rep. 143; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Gibson *v.* Inglis (1814), 4 Camp. 72; Pippin *v.* Sheppard (1822), 11 Price, 400; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Whitehead *v.* Greetham (1825), 2 Bing. 464; Corbett *v.* Packington (1827), 6 B. & C. 268; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; *Ex p.* Cording (1832), 4 B. & Ad. 198; M'Kenzie *v.* M'Leod (1834), 10 Bing. 385; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; Boorman *v.* Brown (1842), 3 Q. B. 511; Ross *v.* Hill (1846), 2 C. B. 877; G. N. Ry. *v.* Shepherd (1852), 8 Exch. 30; Micklethwaite *v.* Merrill (1852), 19 L. T. O. S. 61; Balfe *v.* West (1853), 13 C. B. 466; Crouch *v.* L. & N. W. Ry. (1854), 14 C. B. 255; Dansey *v.* Richardson (1854), 3 E. & B. 144; Baxendale *v.* Eastern Counties Ry. (1858), 27 L. J. C. P. 137; Blakemore *v.* Bristol & Exeter Ry. (1858), 8 E. & B. 1035; Syred *v.* Carruthers (1858), E. B. & E. 469; Belfast & Ballymena, etc., Rys. *v.* Keys (1861), 9 H. L. Cas. 556; MacCarthy *v.* Young (1861), 6 H. & N. 329; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177; Martin *v.* Reid (1862), 11 C. B. N. S. 730; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Peninsular & Oriental Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272; R. *v.* Mid. Ry. (1867), 31 J. P. 661; Skelton *v.* L. & N. W. Ry. (1867), L. R. 2 C. P. 631; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317; Readhead *v.* Mid. Ry. (1869), L. R. 4 Q. B. 379; Liver Alkali Co. *v.* Johnson (1874), L. R. 6 Exch. 338; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Nugent *v.* Smith (1875), 1 C. P. D. 19; Harris *v.* G. W. Ry. (1876), 1 Q. B. D. 515; Hoare *v.* G. W. Ry. (1877), De Colyar's County Court Cases, 192; Bergheim *v.* G. E. Ry. (1878), 3 C. P. D. 221; Foulkes *v.* Met. Dist. Ry. (1880), 28 W. R. 526; Cutler *v.* North London Ry. (1887), 56 L. T. 639; The Moorcock (1889), 14 P. D. 64; The Winkfield, [1902] P. 42; Harris *v.* Perry, [1903] 2 K. B. 219; Cheshire *v.* Bailey, [1905] 1 K. B. 237; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; Hatton *v.* Car Maintenance Co. (1914), 110 L. T. 765; Banbury *v.* Bank of Montreal, [1918] A. C. 626; Coldman *v.* Hill, [1919] 1 K. B. 443; The Empress (1923), 92 L. J. P. 42; Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451; Pratt *v.* Patrick, [1924] 1 K. B. 488.

73. —— ——.]—The legal effect of a contract by way of pawn or pledge is that only a special property passes from the borrower to the lender, although coupled with the power of selling the pledge & transferring the whole property in it on default in payment at the stipulated time if there be any or at a reasonable time after demand & nonpayment if no time for repayment be agreed upon (FIELD, J.).—BURDICK *v.* SEWELL (1883), 10 Q. B. D. 363; 52 L. J. Q. B. 428; 48 L. T. 705; 31 W. R. 796; 5 Asp. M. L. C. 79; *on appeal* (1884), 13 Q. B. D. 159, C. A.; *sub nom.* SEWELL *v.* BURDICK, 10 App. Cas. 74, H. L.

Annotations:—**Consd.** Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575. **Reid.** Row *v.* Payne, Douthwaite (1885), 53 L. T. 932; Bristol & West of England Bank *v.* Mid. Ry., [1891] 2 Q. B. 653; Montgomery *v.* Hutchins (1905), 94 L. T. 207; Burgos *v.* Nascimento (1907), 100 L. T. 71; Calcutta S.S. Co. *v.* Weir, [1910] 1 K. B. 759. **Mentd.** Allen *v.* Coltart (1883), 11 Q. B. D. 782; The Rona (1884), 51 L. T. 28; Rodocanachi *v.* Milburn (1886), 18 Q. B. D. 67; Inglis *v.* Robertson, [1898] A. C. 616; Rimmer *v.* Webster, [1902] 2 Ch. 163; Temperley Steam Shipping Co. *v.* Smyth, [1905] 2 K. B. 791; The Odessa, The Woolston, [1916] 1 A. C. 145; Armour *v.* Leopold Walford (London), [1921] 3 K. B. 473.

74. —— —— **Mortgage passes whole legal interest.**]—A holder of script certificates for shares borrowed of deft. a sum of money on his own promissory note, payable on demand, & on the security of the shares, & deposited with deft. the scrip certificates. He afterwards became bankrupt, & deft. without demand & without notice, sold ten of the fifteen shares to repay himself his debt. The creditor's assignee, without making any tender of the amount of the debt, brought an action of trover against deft. to recover the value of the shares:—*Held:* even assuming the sale to be wrongful, the immediate right to the possession of the shares was not by the sale revested in pltf., & he could not therefore maintain trover, either for the whole value of the shares or for nominal damages.

There are three kinds of security; the first, a simple lien; the second a mtge., passing the property out & out; the third, a security intermediate between a lien & a mtge., viz. a pledge, where by contract a deposit of goods is made a security for a debt, & the right to the property rests in the pledgee so far as is necessary to secure the debt (WILLES, J.).—HALLIDAY *v.* HOLGATE (1868), L. R. 3 Exch. 299; 37 L. J. Ex. 174; 18 L. T. 656; 17 W. R. 13.

Annotations:—**Consd.** Yungmann *v.* Briesemann (1892), 67 L. T. 642; Durham *v.* Robertson, [1898] 1 Q. B. 765. **Reid.** Mulliner *v.* Florence (1878), 3 Q. B. D. 484; Hughes *v.* Pump House Hotel Co., [1902] 2 K. B. 190. Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451. **Mentd.** Cox *v.* Liddell (1895), 2 Mans. 212; Whiteley *v.* Hilt, [1918] 2 K. B. 808.

75. —— —— ——.]—The doctrine that an equitable mtgee. by deposit of title deeds so entitled to foreclosure, does not extend to a pledgee of personal chattels.

A. deposited railway bonds with B. as security for a debt, without any written memorandum. B. filed a bill praying for foreclosure or sale:—

Sect. 6.—Mortgage distinguished from other similar transactions: Sub-sects. 2, 3 & 4. Part II. Sects. 1 & 2: Sub-sect. 1.]

Held: as a mere pledgee of chattels B. was not entitled to foreclosure, but only to a sale.

In a regular legal mtge. there has been an actual conveyance of the legal ownership, & then the ct. has interfered to prevent that from having its full effect, & when the ground of interference has gone by the non-payment of the debt the ct. simply removes the stop it has itself put on. Then when there is a deposit of title deeds, the ct. treats that as an agreement to execute a legal mtge., & therefore as carrying with it all the remedies incident to such a mtge. None of this reasoning applies to a pledge of chattels; the pledgee never had the absolute ownership at law, & his equitable rights cannot exceed his legal title (JESSEL, M.R.). —CARTER *v.* WAKE (1877), 4 Ch. D. 605; 46 L. J. Ch. 841.

Annotations:—**Consd.** Sadler *v.* Worley, [1894] 2 Ch. 170. **Refd.** Fraser *v.* Byas (1895), 11 T. L. R. 481; Harrold *v.* Plenty, [1901] 2 Ch. 314. **Mentd.** *Re* Owen, [1894] 3 Ch. 220; London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515.

76. —— —— ——.]—A pledge of personal chattels as a rule is & must be accompanied by delivery of possession. It is not of the possession given him under the contract that the pledgee's rights spring. A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation & enables the pledgee in possession, though he has not the general property in the thing pledged but a special property only, to sell on default in payment & after notice to the pledgor, though the pledgor may redeem at any moment up to sale. A mtge. of personal chattels involves in its essence not the delivery of possession but a conveyance of title as security for the debt. . . . Where there is no express power of sale given by the mtge. he has after default in payment & after he has given the mtgor. a reasonable time to pay, a power to sell & give a good title to the purchaser (COTTON, L.J.).

A mtge. conveys the whole legal interest in the chattels; a pawn conveys only a special property. . . . A pawn involves transfer of the possession from the pawnor to the pawnee. A mtge. may be made without any transfer of possession. In my opinion the two transactions of pawn & mtge. are in their nature distinct (FRY, L.J.).—*Re* MORRITT *Ex p.* OFFICIAL RECEIVER (1886), 18 Q. B. D. 222; 56 L. J. Q. B. 139; 56 L. T. 42; 35 W. R. 277; 3 T. L. R. 266, C. A.; *affg.* S. C. *sub nom. Re* MORRITT, *Ex p.* BENTLEY & CO., 34 W. R. 579, D. C.

Annotations:—**Refd.** Deverges *v.* Sandeman, Clark, [1902] 1 Ch. 579; The Ningchow, [1916] P. 221. **Mentd.** Calvert *v.* Thomas (1887), 19 Q. B. D. 204; *Re* Cleaver, *Ex p.* Rawlings (1887), 18 Q. B. D. 489; Lumley *v.* Simmons (1887), 34 Ch. D. 698; Watkins *v.* Evans (1887), 18 Q. B. D. 386.

77. Transfer of possession—Essential to pawn or pledge.]—If a person advances money upon a conditional sale of goods, & does not insist upon a delivery thereof, he confides in the credit of the vendor, & not on any real or particular security, & ought to come in under a commission of bkpcy. against the vendor, as much as any other person that places a confidence in the bkpt. personally.—RYALL *v.* ROLLE (1749), 1 Atk. 165; 1 Wils. 260; 1 Ves. Sen. 348; 9 Bli. N. S. 377; 26 E. R. 107, L. C.

Annotations:—**Consd.** West *v.* Skip (1749), 1 Ves. Sen. 239. **Apld.** Falkener *v.* Case (1781), 1 Bro. C. C. 125. **Distd.** Atkinson *v.* Maling (1788), 2 Term Rep. 462. **Consd.** Lingham *v.* Biggs (1797), 1 Bos. & P. 82; Dearle *v.* Hall, Loveridge *v.* Cooper (1828), 3 Russ. 1. **Apld.** Belcher *v.* Bellamy (1848), 2 Exch. 303. **Consd.** *Re* Bainbridge, *Ex p.* Fletcher (1878), 8 Ch. D. 218. **Refd.** Ward *v.* Turner (1752), 2 Ves. Sen. 431; *Ex p.* Shank (1754), 1 Atk. 234; Worseley *v.* Demattos & Slader (1758), 1 Burr. 467; Plumb *v.* Fluitt (1791), 2 Anst. 432; Jones *v.* Gibbons (1804), 9 Ves. 407; Horn *v.* Baker (1808), 9 East, 215; Taylor *v.* Plumer (1815), 3 M. & S. 562; *Re* Frazer, *Ex p.* Monro (1819), Buck, 300; Hartley *v.* Smith (1819), Buck, 368; Hubbard *v.* Bagshaw (1831), 4 Sim. 326; *Re* Severn, *Ex p.* Colville (1831), 9 L. J. O. S. Ch. 56; Reeves *v.* Capper (1838), 5 Bing. N. C. 136; *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443; Belcher *v.* Capper (1842), 4 Man. & G. 502; Bartlett *v.* Bartlett (1857), 1 De G. & J. 127; North *v.* Gurney (1861), 1 John. & H. 509; Grainge *v.* Warren, *Re* Grainge (1865), 6 New Rep. 219; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; Ward *v.* Duncombe, [1893] A. C. 369. **Mentd.** Row *v.* Dawson (1749), 1 Ves. Sen. 331; Doddington *v.* Hallet (1750), 1 Ves. Sen. 497; *Ex p.* Dumas (1754), 2 Ves. Sen. 582; Wilson *v.* Day (1759), 2 Burr. 827; Mason *v.* Vere (1779), 2 Wm. Bl. 1309; Gordon *v.* East India Co. (1797), 7 Term Rep. 228; Evans *v.* Bicknell (1801), 6 Ves. 174; Storer *v.* Hunter (1824), 3 B. & C. 368; *Re* Severn, *Ex p.* Tennyson (1832), Mont. & B. 67; Buck *v.* Lee (1834), 1 Ad. & El. 804; *Re* Ogden, *Ex p.* Loyd (1834), 1 Mont. & A. 494; Gardner *v.* Lachlan (1838), 4 My. & Cr. 129; Etty *v.* Bridges (1843), 2 Y. & C. Ch. Cas. 486; Beckham *v.* Drake (1849), 2 H. L. Cas. 579; *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426; *Re* Patrick, Bills *v.* Tatham (1890), 63 L. T. 752; Thomas *v.* Searles, [1891] 2 Q. B. 408; English & Scottish Mercantile Investment Trust *v.* Brunton, [1892] 2 Q. B. 1; *Re* Wyatt, White *v.* Ellis, [1892] 1 Ch. 188; Sharman *v.* Mason, [1899] 2 Q. B. 679; Rose *v.* Buckett, [1901] 2 K. B. 449.

78. —— —— **Not necessary in mortgage.**]—*Re* MORRITT, *Ex p.* OFFICIAL RECEIVER, No. 76, *ante.*

79. —— —— ——.] —A pledge . . . is a case in which money is advanced on goods or chattels which are given into the possession of the person who advances the money on them. A bill of sale . . . is the document which is given where the legal property in goods passes to the person who lends the money on them, but the possession does not pass (LORD ESHER, M.R.).—MILLS *v.* CHARLESWORTH (1890), 25 Q. B. D. 421; 59 L. J. Q. B. 530; 63 L. T. 508; 39 W. R. 1; 6 T. L. R. 452, C. A.; *on appeal, sub nom.* CHARLESWORTH *v.* MILLS, [1892] A. C. 231, H. L.

Annotations:—**Refd.** Grigg *v.* National Guardian Assce., [1891] 3 Ch. 206; Morris *v.* Delobbel-Flipo, [1892] 2 Ch. 352; Ramsay *v.* Margrett, [1894] 2 Q. B. 18; Withers *v.* Berry (1895), 39 Sol. Jo. 559; Clapham *v.* Ives (1904), 91 L. T. 69; G. E. Ry. *v.* Lord's Trustee, [1909] A. C. 109; Dublin City Distillery *v.* Doherty, [1914] A. C. 823; *Re* Lavey, *Ex p.* Trustee, [1918–19] B. & C. R. 116; French *v.* Gething, [1922] 1 K. B. 236.

80. Power of sale.]—BURDICK *v.* SEWELL, No. 73, *ante.*

81. ——.] —*Re* MORRITT, *Ex p.* OFFICIAL RECEIVER, No. 76, *ante.*

82. Option to purchase pledged shares.]—The transaction between pltfs. & defts. . . . cannot be properly regarded as a mtge. . . .

It was in effect the deposit of certain shares on security for a loan, the consideration for the loan being the right to take these shares at the price of £11. In reality the right to call the shares at £11 up till Mar. 31, 1901, was the only consideration for the loan so far as the transaction with defts. recorded in the documents is concerned. . . . Further, in my opinion, it is not correct to say that there is any clog upon any supposed equity of redemption. During the period for which defts. were given the call, that is to say, up to Mar. 31, there was no right to redeem. Any equity of redemption which pltfs. had only arose in the event of defts. not exercising the right of call or to the extent to which they do not exercise it (LORD ALVERSTONE, C.J.).—LONDON & GLOBE FINANCE CORPN., LTD. *v.* MONTGOMERY (1902), 18 T. L. R. 661.

SUB-SECT. 3.—LIEN.

See LIEN, Vol. XXXII., pp. 217, 229, 279, Nos. 22, 23, 136, 573.

SUB-SECT. 4.—RENTCHARGE.

See, generally, RENTCHARGES & ANNUITIES.

83. Owner of rentcharge has no estate in the land.]—The distinction between a mtgee. & the owner of a rentcharge is obvious. At law the mtgee. is absolutely owner. The mtgor. comes into equity to be relieved against the forfeiture. Equity imposes as the condition of relief certain terms, namely that the mtgee. shall be repaid not only the money due on the loan, but also all expenses that the owner might properly have incurred in repairs & permanent improvements. The owner of a rentcharge has no estate. His remedy is by distress & entry & he is entitled to enforce that remedy in a proper manner. The owner of the estate subject to the charge is not like the mtgor. obliged to resort to equity to recover possession. On payment of the arrears of the rentcharge he can recover possession at law. Equity therefore imposes no conditions on him (ROMILLY, M.R.).—HOOPER *v.* COOKE (1855), 20 Beav. 639; 3 Eq. Rep. 988; 25 L. J. Ch. 62; 25 L. T. O. S. 286; 1 Jur. N. S. 949; 3 W. R. 636; 52 E. R. 750; *affd.* (1856), 25 L. J. Ch. 467, L. C.

Part II.—Classification of Mortgages.

SECT. 1.—LEGAL MORTGAGES.

See, now, Law of Property Act, 1925 (c. 20), ss. 39, 85, 86, sched. I., Parts VII., VIII.

84. Definition—First mortgage.]—On a contract in writing by proposed borrower of money to execute a legal mtge. on a ship & pay commission to pltf. on procuring the loan :—*Held:* this *primâ facie* meant a first mtge.

A "legal mtge." means a "first mtge.," for a second mtge. is not, properly speaking, a "legal mtge.," as it conveys no legal interest (COCKBURN, C.J.).—THOMPSON *v.* CLARK (1862), 3 F. & F. 181; 1 New Rep. 19; 7 L. T. 269; 11 W. R. 23; 1 Mar. L. C. 256.

85. Extension by parol—Not permissible.]—A mtge. by deed cannot be extended by parol.—*Re* HOPKINS, *Ex p.* HOOPER (1815), 2 Rose, 328; 19 Ves. 477; 34 E. R. 593; *sub nom. Re* HEWETT, *Ex p.* HOOPER, 1 Mer. 7, L. C.

Of copyholds.]—*See* COPYHOLDS, Vol. XIII., pp. 114 *et seq.*; & *see, now,* Law of Property Act, 1922 (c. 16), s. 128, sched. XII., (1) (*f*), (8) (*b*); Law of Property (Amendment) Act, 1924 (c. 5), sched. II., 4 (2).

SECT. 2.—EQUITABLE MORTGAGES.

SUB-SECT. 1.—NECESSITY FOR MEMORANDUM IN WRITING.

86. General rule.] — LONDON & WESTMINSTER BANK *v.* TURQUAND (1888), 4 T. L. R. 454, C. A.

See, now, Law of Property Act, 1925 (c. 20), s. 40; & *generally,* CONTRACT, Vol. XII., pp. 118 *et seq.*

87. Mortgage of personal property.] — A trader deposits policies of assurance with his bankers to secure the floating balance due from him, & signs a memorandum of the object of the deposit, of which notice is given to the insurance office. Afterwards he takes a partner, & the policies remain, & are treated as a security for the floating balance due from the firm; but of this change in the object of the security, no memorandum is signed, nor is any notice given to the office. On the firm becoming bkpt. :—*Held:* the bankers were entitled to the usual order as in the case of an equitable mtge. without a written memorandum.—*Re* REAY, *Ex p.* BARNETT (1845), De G. 194.

Annotations :—**Mentd.** *Re* Buller, *Ex p.* Wornald (1860), 2 L. T. 544; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; *Re* Goetz, Jonas, *Ex p.* Trustee (1898), 78 L. T. 399.

88. ——.] — Parol authority by a debtor to a creditor to go & take certain goods & sell them, & pay himself a particular debt out of the proceeds :—*Held:* to amount to the creation of an equitable lien upon such goods, & as such to be valid as against a claim by the personal representative of debtor after his death.—GURNELL *v.* GARDNER (1863), 4 Giff. 626; 3 New Rep. 59; 9 L. T. 367; 9 Jur. N. S. 1220; 12 W. R. 67; 66 E. R. 857.

Annotation :—**Refd.** Parish *v.* Poole (1884), 53 L. T. 35.

89. ——.] — De T. being given up to the authorities of a foreign country under an extradition treaty, to be tried on a charge of murder, assigned all his property to P., & executed a general power of attorney in favour of P. & T. The object of these instruments was, as the ct. held, to enable money to be raised for his defence. T. was co-trustee with pltf. of a marriage settlement, & proposed to him that consols belonging to the trust should be sold out, & the proceeds advanced on the security of a charge on De T.'s property. Pltf. assented, & the consols were sold & the proceeds paid to T., who produced to pltf. a document purporting to be a memorandum of deposit of the assignment & power of attorney, & an equitable charge to secure the advance. The ct. held on the evidence that P. knew of the charge, & either actually authorised it, or left T. to do as he liked :—*Held:* the money had been advanced upon the faith of an agreement to charge the property of De T.; such an agreement was within the powers of P. & T.; & if the agreement had not been fully carried out, pltf. was entitled to have the charge carried into effect.—PARISH *v.* POOLE (1884), 53 L. T. 35; *subsequent proceedings, sub nom. Re* PRYNNE (1885), 53 L. T. 465.

90. ——.] — The agreement may be fairly derived from the course of dealing, & where there is a contest as to an oral agreement the court must decide whether there is such an oral agreement or not (CHITTY, J.).—BROWN, SHIPLEY &

PART II. SECT. 1.

b. *Effect—Legal estate passes.*]—The law of British Columbia, with regard to the passing of the legal estate by virtue of a mtge. on real estate, has not been affected by Land Registry Act, 1921 (c. 26), & the legal title still passes to the mtgee. subject to an equity of redemption in the mtgor.—NORTH VANCOUVER *v.* CARLISLE (B. C.), [1922] 3 W. W. R. 811; 70 D. L. R. 527.—**CAN.**

c. *Whether distinguished from equitable mortgages.*]—In India there is no distinction between a legal & an equitable mtge.—IMPERIAL BANK OF INDIA *v.* U. RAI GYAW THU & CO., LTD. (1923), I. L. R. 51 Calc. 86.—**IND.**

Sect. 2.—Equitable mortgages: Sub-sects. 1 & 2, A.]

Co. *v.* KOUGH (1885), as reported in 29 Ch. D. 848; 52 L. T. 878; 5 Asp. M. L. C. 433.

Annotations:—**Mentd.** König *v.* Brandt (1901), 84 L. T. 748; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623.

—— **Compliance with Bills of Sale Acts.**]—*See* BILLS OF SALE, Vol. VII., pp. 5 *et seq.*

91. Mortgage of interest in land.]—A. on an account stated owes B. £400. A. agrees to give bond for £100 & to secure the remaining £300 by mtge. A. delivers a deed of conveyance to C. an attorney, who takes instructions to draw mtge.; but before the bond or mtge. executed A. dies. Though this agreement by parol be proved, yet on a bill brought against the heir of A. the ct. refused to carry them into execution. —BRIZICK *v.* MANNERS (1742), 9 Mod. Rep. 284; 88 E. R. 454, L. C.

Annotation:—**Reld.** Norris *v.* Wilkinson (1806), 12 Ves. 192.

92. ——.] — In a suit to administer a mtgor.'s estate the mtgee., who was not a party, came in & consented to a sale. The produce formed the whole assets, & was less than the mtge.:—*Held:* the mtgee. was entitled to the whole fund, after payment of the costs of sale.

The intestate had no deeds to deposit & he gave the best security he could by giving a memorandum in writing by which he promised the solicitors of his creditors to execute a legal mtge. That is an equitable mtge. (ROMILLY, M.R.).—DIGHTON *v.* WITHERS (1862), 31 Beav. 423; 54 E. R. 1202.

Annotations:—**Reld.** Perry *v.* Oriental Hotels Co., *Re* Oriental Hotels Co. (1871), 40 L. J. Ch. 420; United Realization Co. *v.* I. R. Comrs. (1898), 79 L. T. 556. **Mentd.** Ward *v.* Mackinlay (1864), 10 Jur. N. S. 1063; *Re* Oriental Hotels Co., Perry *v.* Oriental Hotels Co. (1871), L. R. 12 Eq. 126.

93. ——.] — An agreement to advance money on the security of land is an agreement which requires to be in writing, by Stat. Frauds, s. 4.— MOUNSEY *v.* RANKIN (1885), 1 Cab. & El. 496.

94. —— **Insufficient description of mortgagee.**] —In a letter, which was said to contain the terms of an agreement for a loan upon mtge. of land, the proposed mtgee. was not named, & was described only as "the proposing lender" & "the intending lender":—*Held:* there was no sufficient description of the proposed mtgee. to satisfy the requirements of Stat. Frauds, s. 4.— PATTLE *v.* ANSTRUTHER (1893), 69 L. T. 175; 41 W. R. 625; 9 T. L. R. 500; 37 Sol. Jo. 543; 4 R. 470, C. A.

SUB-SECT. 2.—AGREEMENT FOR MORTGAGE.

A. In General.

95. Agreement to execute legal mortgage—Agreement by husband & wife—Binding on survivor.]—Freeholds were conveyed by lease & release, to trustees to the use of a *feme covert* for her separate use for life, or to the use of such person as she should by writing sealed, etc., appoint, & in default of appointment in trust to pay the rents to her for her separate use. The husband & wife by writing not under seal, for valuable consideration, undertook to execute a mtge. of the property when required. The husband died & no mtge. had been executed:—*Held:* the agreement was binding upon the surviving wife.—STEAD *v.* NELSON (1839), 2 Beav. 245; 9 L. J. Ch. 18; 3 Jur. 1046; 48 E. R. 1174.

Annotation:—**Reld.** Crofts *v.* Middleton (1855), 2 K. & J. 194.

96. —— **Explained by other written memoranda.**]—Freehold property at I., which was not subject to any charge, was within the mtgee.'s security; the intention, from other written memoranda, being clearly to give a general charge.— *Re* MEDLEY, *Ex p.* GLYN (1840), 1 Mont. D. & De G. 29; 9 L. J. Bcy. 41; 4 Jur. 395, Ct. of R.

Annotation:—**Mentd.** *Re* Fox & Jacobs, *Ex p.* Discount Banking Co. of England & Wales, [1894] 1 Q. B. 438.

97. —— **Parol evidence of agreement.**] — A mtgee. of leaseholds for £1,150 enters into a parol agreement with the mtgor. to concur in a new mtge. for £750, to be paid to the original mtgee. in reduction of her debt, so that the new mtge. should be the first charge, but upon an express understanding that the mtgee. should execute to her a second mtge. for the balance. The new mtge. was executed accordingly, & it recited that the original mtgee. had agreed to accept £750, & to release the premises from the moneys secured by the original mtge., & to make other arrangements with the mtgor. for payment of the residue of the £1,150; & the deed witnessed that, in pursuance of such agreement, & in consideration of £750 paid to the original mtgee., she & the mtgor. assigned the mtge. premises to the new mtgee. for £750, discharged from the original mtge. Afterwards, the £750 was paid off by another person, to whom the mtgor. applied for that purpose, on an agreement for an assignment; but all parties had notice of the agreement with the original mtgee. On the original mtgee. filing a bill to be declared first incumbrancer, or to redeem:—*Held:* she might adduce parol evidence of the agreement with her, & was entitled to redeem on payment of the £750 & interest, but had not a lien prior to that of the person who had last advanced that sum.—BANKS *v.* WHITTALL (1847), 1 De G. & Sm. 536; 63 E. R. 1182; *sub nom.* BANKS *v.* WHITTALL, LEDSAM *v.* BANKS, 17 L. J. Ch. 14, 352.

Annotations:—**Mentd.** Teevan *v.* Smith (1882), 51 L. J. Ch. 621; Thorne *v.* Cann, [1895] A. C. 11; *Re* Magneta Time Co., Molden *v.* The Co. (1915), 84 L. J. Ch. 814.

98. —— **Assignment by mortgagor to secure advances.**]—John S. entered into an agreement with E. for securing payment of sums of money owing by him to E. In this agreement there was a covenant, amongst others, that John S. would

PART II. SECT. 2, SUB-SECT. 1.

91 i. *Mortgage of interest in land.*]—HOLMES *v.* MATTHEWS (1882), 3 Gr. 379.—**CAN.**

91 ii. ——.]—CHRISTIE *v.* DOWKER (1863), 10 Gr. 199.—**CAN.**

91 iii. ——.]—Pltf., who was mtgee. of certain lands, alleged that L., the holder of the mtge., purchases it from C. with knowledge of the fact that C. had purchased it from the original mtgee. as trustee for pltf., who was to be allowed to redeem on paying whatever C. should pay for the mtge., & a certain additional sum for C.'s services; & sought to redeem on payment of what was due under the agreement with C.:—*Held:* the agreement should be evidenced in writing.— WRIGHT *v.* LEYS (1884), 8 O. R. 88.—**CAN.**

91 iv. ——.] — CLINAN *v.* COOKE (1802), 1 Sch. & Lef. 22.—**IR.**

d. —— *Agreement to stay proceedings.*]—Where a second mtgee., who at the request of a third mtgee., agrees to stay proceedings upon his mtge. for a term of two years, an agreement that the principal shall be paid at the expiration of two years is one which is not to be performed within one year, although the second mtgee. was willing to take his principal money at any time, & must be in writing signed by deft.—HADFIELD *v.* RODGER (1916), 33 W. L. R. 713; 9 W. W. R. 1189.—**CAN.**

PART II. SECT. 2, SUB-SECT. 2.—A.

e. *Agreement to execute legal mortgage—Of interest in land.*]—MILLER *v.* STITT & MCINTYRE (1867), 17 C. P. 559.—**CAN.**

f. —— —— *To secure price of chattels.*]—A written order for chattels, signed by the purchaser, containing an agreement to give a mtge. on land to secure the purchase price, is void; but a mtge. in accordance with the agree-

give to E., as part of the securities, a mtge. on the lots of a particular estate, & James S., the brother of John & therein described as being the owner of lot No. 1, was to join in the mtge. of it. By a subsequent agreement, under seal, to which John S., E., & James S. were parties, after reciting the first agreement, John S. covenanted that he would, before a certain time, convey, or cause to be conveyed, to E., Lot 1, to be held by E. in fee: " & it is hereby agreed by & between the parties hereto," that if John S. shall pay E. the moneys due to him, E. shall retransfer " all securities of whatever nature or kind." Provided, that if payment shall not be made, E. may by " entry, foreclosure, sale, or mtge. of any part or parts of the said lands, etc.," levy the deficiency. " & each of them, John S. & James S., for himself, his exors., etc.," covenanted to pay any deficiency, so that out of the interest or dividends on railway shares, previously deposited, or by cash payments of John S. or James S., there should be received a certain sum every year. All the three parties duly executed this agreement:—*Held:* this amounted to an equitable mtge. binding on the estate of James S.—EYRE *v.* M'DOWELL (1861), 9 H. L. Cas. 619; 11 E. R. 871.

Annotation:—**Mentd.** Badeley *v.* Consolidated Bank (1886), 34 Ch. D. 536.

99. —— Effect of demand for execution—Validity as against trustee in bankruptcy of mortgagor.]—Two traders, brothers, obtained advances amounting to £500 from their father & brother in various sums, & in 1870, on the last advance of £250, they signed an agreement that they would, on demand, assign the lease of their premises & their business, stock-in-trade, & book debts to the creditors, with a proviso that if they should repay the sums advanced the agreement should be void, but if they should fail to do so a valuation should be made, & the balance, if any, should be paid to debtors. At the same time the lease was deposited with same creditors as a security for the due performance of the agreement. In 1873 debtors became embarrassed, & creditors demanded the execution of an assignment in pursuance of the agreement, which was accordingly executed, & the balance of the valuation of the property, amounting to £123, was paid to debtors. The assignment included substantially the whole of debtors' property, & creditors took possession of it forthwith. A few days afterwards debtors filed a petition for liquidation, & the trustee applied to have the deed of assignment of 1873 declared void:—*Held:* the agreement of 1870 became a binding security on demand being made, & the assignment of 1873, being based upon it, was valid.—*Re* COOK, *Ex p.* IZARD (1874), 9 Ch. App. 271; 43 L. J. Bcy. 31; 30 L. T. 7; 22 W. R. 342, L. JJ.

Annotations:—**Consd.** *Re* Barker, *Ex p.* Kilner (1879), 13 Ch. D. 245. **Reld.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626.

100. —— Relationship of mortgagor & mortgagee established.]—A banking co. entered into an agreement dated May 29, 1886, to sell certain paper mills & machinery to L. co. for £20,000 to be paid by instalments. By clause 2 of the agreement it was provided that upon payment of the first two instalments the bank should convey the premises to L. co. upon their executing a mtge. for the balance of the purchase-money, & that the mtge. should contain a clause enabling the bank, in case the business of L. co. should be suspended, to re-enter & take possession of the premises, & of everything which should have been built or placed thereon, & which should not require registration within Bills of Sale Act, 1878 (c. 31), & to hold same for their own use & benefit absolutely, but without prejudice to the liability of L. co. for the unpaid balance of the purchase-money. This agreement was not registered as a bill of sale. The first two instalments of the purchase-money were paid, but no conveyance or mtge. of the property was executed in pursuance of the agreements. L. co. entered into & held possession of the property until a winding-up order was made on Feb. 7, 1887. The bank thereupon re-entered on the property. The official liquidator of L. co. asked by summons for delivery up of a paper making machine & all other trade machinery attached to the mills. The bank claimed possession of the fixtures & trade machinery under their vendors' lien:—*Held:* (1) the position of the parties under the agreement was the same as if a conveyance & mtge. of the property had been actually executed, & the bank had no vendor's lien for unpaid purchase-money, as an express stipulation had been substituted for such lien; (2) the agreement to mortgage did not extend to any property which required registration under Bills of Sale Acts, & the trade machinery was therefore not included in the security, & must be delivered up to the liquidator of L. co., but in other respects the agreement remained valid.—*Re* LONDON & LANCASHIRE PAPER MILLS CO., LTD. (1888), 58 L. T. 798; 4 T. L. R. 312.

101. —— Of interest in land—Property requiring registration under Bills of Sale Acts not included.]—*Re* LONDON & LANCASHIRE PAPER MILLS CO., LTD., No. 100, *ante*.

102. ——.]—DIGHTON *v.* WITHERS, No. 92, *ante*.

103. Agreement that property shall stand charged—Agreement for further charge.]—Mtgee. having advanced to the mtgor. a further sum upon his bond:—*Held:* the bond though obscurely worded, was evidence of an agreement for a further charge upon the mtged. premises.—*Re* HAMLYN, *Ex p.* HEARN (1818), Buck, 165.

104. —— Mistake as to form & reservation of equity of redemption.]—On June 14, 1858, deft. L. being indebted to pltf. signed a memorandum of agreement whereby in consideration of the forbearance of pltf. in not requiring immediate repayment of the moneys he had advanced to or for him, he, L., agreed to give & execute to pltf. a charge on the interest to which he was entitled by right of marriage in the property settled on his wife, or to which she was entitled in respect of her former marriage as a security " for the repayment of the moneys pltf. had advanced to or for him, L. "; & deft. L. further pledged himself not to incumber his interests in such property or any part thereof. On June 18, four days afterwards, deft. L., with the knowledge, but without

ment, executed contemporaneously with it, but not " contained in or indorsed upon or annexed to the order," is not void.—PERRAULT *v.* RUMLEY PRODUCTS CO., LTD. (1913), 25 W. L. R. 180; 4 W. W. R. 1291; 12 D. L. R. 772.—**CAN.**

g. —— —— *To secure bill of exchange.*]—Agreement by A. with C. as follows: " In case I fail to pay you any promissory note or bill of exchange of mine, when due, I agree to execute you a mtge. on all my houses & lands, to secure to you the payment of all sums of money you may advance me on my promissory notes or bills of exchange, with interest, till paid, at such rate as may be provided by such promissory note or bill of exchange ": —*Held:* to create a valid equitable mtge. on lands.—*Re* HURLEY'S ESTATE, [1894] 1 I. R. 488.—**IR.**

102 i. ——.]—In Apr., 1869 C. lent money to N. on an express agreement that it was to be secured by mtge. on certain property; & on July 3 following, the mtge. was given accordingly, & on Aug. 2, the mtgor. became insolvent: —*Held:* the mtge. was valid.—ALLAN *v.* CLARKSON (1870), 17 Gr. 570.—**CAN.**

Sect. 2.—Equitable mortgages: Sub-sect. 2, A., B. & C.; sub-sect. 3.]

the consent of pltf., executed a post nuptial settlement, whereby he conveyed all his interest in right of his wife in the property settled on her on her first marriage to trustees, on trusts for her for life, then for himself for life, & after the decease of the survivor for the children. About a month afterwards on July 13, deft. L. executed a deed purporting to be in pursuance of the agreement of June 14, whereby he charged all the dividends, interest & annual proceeds of the trust funds which were settled at the time of his wife's first marriage, & also his share in the trust funds themselves, with the payment to pltf. of £800, & interest from June 14. He also, by same deed, assigned his said share in the trust funds to pltf. by way of mtge., with a proviso for redemption to L. on repayment by him of the sum of £800 & interest:—*Held:* the deed of July 13, though constituting a mere equitable security, & being entirely mistaken with regard to the form of the mtge., & the reservation of the equity of redemption, yet operated as a recognition of the debt of £800, &, coupled with the memorandum, it gave pltf. a right to an account & payment of what should be found due on both securities; & in default of payment, a right of foreclosure, against L. & his assignee in insolvency.—CAREW *v.* ARUNDEL (1861), 5 L. T. 498; 8 Jur. N. S. 71.

105. ——.]—Pltf. agreed to let to B. premises in H. which B. was to set up forthwith as a luncheon bar & restaurant, such fittings to be of the value of £500 & to pltf.'s satisfaction, & B. was to pay a premium of £1,000, upon payment of which, "the premises being fitted up as aforesaid," pltf. was to grant B., & B. agreed to take a lease for twenty-one years; & pltf. further agreed to lend or obtain for B., "upon security of the said premises as fitted & licensed," £1,000 for two years at 5 per cent. Before any lease was granted or any money paid, B. became bkpt., & his assignee seized & sold the fittings & fixtures under an order of the ct.:—*Held:* until the execution of the proposed lease, the agreement constituted an equitable contract between pltf. & B. that "the premises as fitted & licensed" should stand as a security for the £1,000 premium, & consequently pltf. was entitled to them as equitable mtgee.—TEBB *v.* HODGE (1869), L. R. 5 C. P. 73; 39 L. J. C. P. 56; 21 L. T. 499, Ex. Ch.

Annotation:—**Distd.** Parish *v.* Poole (1884), 53 L. T. 35.

106. ——.]—PARISH *v.* POOLE, No. 89, *ante*.

107. Amounting to specific lien against creditors.] — Agreement for a mtge., a specific lien against creditors.—BURN *v.* BURN (1798), 3 Ves. 573; 30 E. R. 1162.

Annotation:—**Refd.** Ferguson *v.* Gibson (1872), 41 L. J. Ch. 640.

Agreements as bills of sale.]—*See* BILLS OF SALE, Vol. VII., pp. 22, 23, Nos. 102–112.

B. Enforcement of Agreement.

108. Sale — Without taking legal mortgage.] — A. agreed by a written memorandum to deposit with B. as an equitable security for the repayment of £500 & interest, the lease of certain premises which were thereby charged with that amount. A. further agreed to execute a valid legal mtge. of the premises comprised in the lease, with the usual powers & covenants when called upon so to do:—*Held:* the mtgee. had a right in equity to enforce a sale, & was not compelled to take a legal mtge.—MATTHEWS *v.* GOODDAY (1861), 31 L. J. Ch. 282; 5 L. T. 572; 8 Jur. N. S. 90; 10 W. R. 148.

——.]—*See, generally*, Part XIV., sects. 1, 5, *post*.

109. Specific performance.] — A. agrees to lend B. £3,000 on mtge. of leasehold houses, & not to call for the title of the lessor, & advances £600 in part. He then calls for the lessor's title, & files a bill for specific performance, or sale of the property to repay him the £600 & interest:—*Held:* he was not entitled to the title, but only to a specific performance of the contract, as proved.—BASS *v.* CLIVLEY (1829), Taml. 80; 48 E. R. 33.

110. ——.]—PARISH *v.* POOLE, No. 89, *ante*.

111. —— With appointment of receiver.]—SHAKEL *v.* MARLBOROUGH (DUKE) (1819), 4 Madd. 463; 56 E. R. 776.

112. —— Joint owners—Agreement for mortgage not signed by all.]—A number of persons having an interest in an estate which was the subject of litigation, some of them executed an undertaking to the town agent of their country solr. to mortgage the estate, to secure the present & future costs; but it was not signed by the other parties. A bill for specific performance was brought by the town agent against such of the parties as had signed the undertaking. The judge being of opinion that it was part of the agreement that all should sign, dismissed the bill, with costs.—JONES *v.* WILLIAMS (1836), 5 L. J. Ch. 253.

113. —— Only if money advanced.]—A ct. of equity will not decree the specific performance of a contract to borrow a sum of money on mtge.—ROGERS *v.* CHALLIS (1859), 27 Beav. 175; 29 L. J. Ch. 240; 6 Jur. N. S. 334; 7 W. R. 710; 54 E. R. 68.

Annotations:—**Consd.** Western Wagon & Property Co. *v.* West, [1892] 1 Ch. 271. **Refd.** Sichel *v.* Mosenthal (1862), 30 Beav. 371; Larios *v.* Bonany y Gurety (1873), L. R. 5 P. C. 346; Mounsey *v.* Rankin (1885), Cab. & El. 496. **Mentd.** Middleton *v.* Magnay (1864), 2 Hem. & M. 233.

114. —— Mortgage to contain absolute power of sale.]—Where deft. had agreed to execute to pltf. a mtge. of certain leasehold premises in the usual form, containing an absolute power of sale, in consideration of money due, & had, when requested to do so, failed to execute such mtge. The ct. made a decree for specific performance.—ASHTON *v.* CORRIGAN (1871), L. R. 13 Eq. 76; 41 L. J. Ch. 96.

115. —— ——.]—The ct. will decree specific performance of an agreement to execute a mtge. with an immediate power of sale.—HERMANN *v.* HODGES (1873), L. R. 16 Eq. 18; 43 L. J. Ch. 192; *sub nom.* HERRMAN *v.* HODGES, 21 W. R. 571.

C. Provisions to be Inserted in Mortgage.

116. Covenant to pay debt.]—A. being indebted to B. on simple contract, gave a promissory note for the amount, & executed a deed by which after reciting the debt & the note, he, as further security, charged certain property with the payment of it, & agreed to execute such a mtge. of the property, with all powers, covenants, & clauses incidental thereto, as B. should require:—*Held:* the deed converted the debt into a specialty debt.

Such a mtge. would contain a covenant for payment of the debt (ROMILLY, M.R.).—SAUNDERS *v.* MILSOME (1866), L. R. 2 Eq. 573; 14 L. T. 788; 15 W. R. 2.

Annotation:—**Refd.** Jackson *v.* N. E. Ry. (1877), 7 Ch. D. 573.

117. —— & interest.]—By a memorandum, dated Apr. 28, 1874, it was witnessed that deft. deposited with pltf. certain title deeds by way of equitable mtge. for £6,000 & interest. Deft. also agreed to pay to pltf. on demand £6,000 & interest, & to execute a proper mtge. with all the usual powers & authorities usually given to a

mtgee. This memorandum was not under seal. No interest was paid under this agreement, & nothing was done until about eleven years after the date of it, when this action was brought for the specific performance of the agreement. The question was, whether pltf. was entitled to have in the mtge. a covenant for principal & interest :—*Held :* pltf. was entitled to have a covenant for the payment of principal & interest.—FIRTH *v.* SLINGSBY (1888), 58 L. T. 481.

Annotations :—**Mentd.** *Re* Buskin, *Ex p.* Farlow (1894), 15 R. 117 ; Barnes *v.* Glenton, [1899] 1 Q. B. 885.

118. Agreement to postpone calling in principal —Must be conditional on punctual payment of interest—& observance of covenants of lease— Condition inserted by court.]—Where an agreement for a mtge. contains a stipulation that the principal money shall not be called in for a certain time, the ct., in settling the form of the deed, will, although the agreement be silent on the subject, insert a proviso that the postponement shall be conditional on punctual payment of interest, &, if the property be leasehold, on observance of the covenants ; so that, if the mtgor. should make default in either of these respects, the mtgee.'s remedies by sale or foreclosure will immediately arise.—SEATON *v.* TWYFORD (1870), L. R. 11 Eq. 591 ; 40 L. J. Ch. 122 ; 23 L. T. 648 ; 19 W. R. 200.

119. Enlargement of subject-matter of mortgage.]—Where a receiver is appointed at the instance of mtgee. over property on which the mtgor. carries on business, the receiver cannot be directed to manage the business unless the business is in express terms or by implication included in the security.

An hotel keeper who was about to rebuild the hotel, & had an agreement for the grant to him of a lease for eighty years when he had rebuilt it, charged "the said building agreement, & all the premises comprised therein, & the hotel & buildings to be hereafter erected as aforesaid, & the lease so to be granted as aforesaid," with the repayment of a sum borrowed, subject to a prior charge, & agreed to execute to the lender, as soon as the lease was granted, a valid second mtge., which should be in such form & contain such powers, covenants, & provisions as the solr. or counsel of the mtgee. should advise or require. The hotel was built, & the mtgor. carried on business on the property, but did not execute any formal mtge. The mtgee. brought an action for sale or foreclosure :—*Held :* the security did not charge the goodwill or business, & the provision that the mtge. should be in such form & contain such stipulations as the mtgee. should require did not enlarge the subject of the charge, but only provided for perfecting it.—WHITLEY *v.* CHALLIS, [1892] 1 Ch. 64 ; 61 L. J. Ch. 307 ; 65 L. T. 838 ; 40 W. R. 291 ; 36 Sol. Jo. 109, C. A.

Annotations :—**Distd.** County of Gloucester Bank *v.* Rudry Merthyr Colliery Co., [1895] 1 Ch. 629. **Folld.** Farmer *v.* Pitt, [1902] 1 Ch. 954. **Refd.** Baglioni *v.* Cavalli (1900), 83 L. T. 500 ; *Re* Leas Hotel Co., Salter *v.* Leas Hotel Co., [1902] 1 Ch. 332 ; Lency *v.* Callingham & Thompson, [1908] 1 K. B. 79.

120. ——.]—Pltf. mortgaged freeholds by a deed which contained no provision excluding the operation Conveyancing Act, 1881 (c. 41), s. 17, which abolishes consolidation of mtges. She subsequently made an equitable mtge. of other property to same mtgee., & signed a memorandum whereby she agreed at any time during the continuance of the security to execute a legal mtge. with such powers & provisions & in such form as the mtgee. might require for further securing the principal & interest :—*Held :* this covenant was not intended to enlarge the subject-matter of the security &, therefore, the mtgee. was not entitled to have executed by pltf. a legal mtge. containing a clause excluding the operation of sect. 17.—FARMER *v.* PITT, [1902] 1 Ch. 954 ; 71 L. J. Ch. 500 ; 50 W. R. 453 ; 46 Sol. Jo. 379.

121. Exclusion of prohibition against consolidation—Conveyancing Act, 1881 (c. 41), s. 17.]—FARMER *v.* PITT, No. 120, *ante*.

See, now, Law of Property Act, 1925 (c. 20), s. 93.

SUB-SECT. 3.—MORTGAGE OF EQUITY OF REDEMPTION.

As regards mtges. after 1925, *see* Law of Property Act, 1925 (c. 20), ss. 85 (2) (*b*) ; 86 (2) (*b*).

122. Extent of interest comprised in second mortgage—Right of second mortgagee to legal estate—On payment off of first mortgage.]—(1) After a first mtge. has been paid off, the second mtgee. may file a bill to have the legal estate conveyed to him without praying to foreclose the mtge. ; & it seems he may do this, at the peril of costs, until the day of payment under a decree for redemption obtained against him by the mtgor.

(2) Until the mtgee. is actually paid off by his own consent or by decree of the ct., he retains the character of mtgee. with all the rights incident to it, & may therefore file a bill for foreclosure, notwithstanding a notice by the mtgor. to pay off the mtge., & even notwithstanding a decree of redemption.—GRUGEON *v.* GERRARD (1840), 4 Y. & C. Ex. 119.

123. —— Mortgagor's whole interest saving the rights of prior incumbrancers.]—P., being indebted to B., makes a mtge. of an equity of redemption of real estate to B. for the purpose of securing the debt, & by the indenture of mtge. it was falsely recited that the mortgaged estate was subject to an equitable charge for moneys due to J., secured by the deposit of a deed. P. retained the deed in his own possession, & subsequently deposited it with J. as a security for money partly lent to P. by J. before & partly after the mtge. of the estate to B. J. at the time of the deposit had no notice of the prior mtge. to B. :—*Held :* (1) inasmuch as an actual prior charge on the estate, if afterwards paid off by P. or otherwise avoided, would have left B. in the position of the first mtgee. of the equity of redemption, the recital of a charge which had in fact no existence could not have the effect of postponing B. ; (2) the interest acquired by J. by the subsequent mtge. by way of deposit could not be enlarged by the effect of the false recital, & was only an interest in the equity of redemption, subject to the mtge. to B. ; & B., in a suit for that purpose, was entitled, as against J., to the ordinary decree for payment or for foreclosure, & delivery up of the deed on default.

The mtge. as between the mtgor. & the mtgee. is a mtge. of the mtgor.'s entire interest saving only the rights of prior incumbrancers (WIGRAM, V.-C.).—FRAZER *v.* JONES (1846), 5 Hare, 475 ; 67 E. R. 999 ; *on appeal* (1848), 17 L. J. Ch. 353, L. C.

Annotations :—*As to* (1) **Consd.** Stackhouse *v.* Jersey (1861), 1 John. & H. 721. **Refd.** Jones *v.* Thomas (1862), 11 W. R. 50. *As to* (2) **Apld.** Lake *v.* Brutton (1854), 18 Beav. 34. **Refd.** Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139 ; *Re* Tasker, Hoare *v.* Tasker, [1905] 2 Ch. 587 ; *Re* Russian Petroleum & Liquid Fuel Co., London Investment Trust *v.* Russian Petroleum & Liquid Fuel Co., [1907] 2 Ch. 540. *Generally,* **Mentd.** Beck *v.* Kantorowicz, Kantorowicz *v.* Carter, Kalb *v.* Kantorowicz (1857), 3 K. & J. 230.

Sect. 2.—Equitable mortgages: Sub-sects. 3, 4 & 5, A. & B.]

124. Priorities of successive incumbrancers—One getting in legal estate from trustee for all.]—The priorities of successive incumbrancers are not altered by one of them getting in the legal estate from one who is a trustee for them all.—SHARPLES *v.* ADAMS (1863), 32 Beav. 213; 1 New Rep. 460; 8 L. T. 138; 11 W. R. 450; 55 E. R. 84.

Annotations:—**Refd.** Drew *v.* Lockett (1863), 32 Beav. 499; Maxfield *v.* Burton (1873), L. R. 17 Eq. 15; R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231.

125. —— Right of redemption.]—TEEVAN *v.* SMITH, No. 509, *post.*

SUB-SECT. 4.—MORTGAGE OF EQUITABLE INTERESTS IN PERSONAL PROPERTY.

See, generally, CHOSES IN ACTION, Vol. VIII., pp. 418 *et seq.*

What is a chose in action.]—*See* CHOSES IN ACTION, Vol. VIII., pp. 421 *et seq.*

Assignment of choses in action.]—*See* CHOSES IN ACTION, Vol. VIII., pp. 424 *et seq.*

What may be assigned.] — *See* CHOSES IN ACTION, Vol. VIII., pp. 426 *et seq.*

—— **In case of bankruptcy.**]—*See* BANKRUPTCY, Vol. V., pp. 694 *et seq.*

What amounts to an assignment.]—*See* CHOSES IN ACTION, Vol. VIII., pp. 442 *et seq.*

Notice of assignment.]—*See* CHOSES IN ACTION, Vol. VIII., pp. 459 *et seq.*

Assignment subject to equities.] — *See* CHOSES IN ACTION, Vol. VIII., pp. 488 *et seq.*

SUB-SECT. 5.—MORTGAGE BY DEPOSIT OF DEEDS.

A. In General.

126. Deposit amounts to an equitable mortgage.] —A deposit of title deeds as a security is an equitable mtge.—HANKEY *v.* VERNON (1788), 2 Cox, Eq. Cas. 12; 30 E. R. 6.

Annotation:—**Mentd.** Taylor *v.* Sheppard (1835), 1 Y. & C. Ex. 271.

127. ——.]—Deposit is evidence of an agreement for a mtge., & an equitable title to a mtge. is as good here [in a ct. of equity] as a legal title (LORD ELDON, C.).—*Ex p.* WRIGHT (1812), 19 Ves. 255; 1 Rose, 308; 34 E. R. 513.

Annotations:—**Refd.** Parker *v.* Housefield (1834), 2 My. & K. 419. **Mentd.** Collett *v.* Morrison (1851), 9 Hare, 162.

128. —— Right of mortgagor to redeem.]—In the decree upon a bill by an equitable mtgee., the equitable mtgor. will be allowed six months to redeem the deposited deeds.—PARKER *v.* HOUSEFIELD (1834), 2 My. & K. 419; 4 L. J. Ch. 57; 39 E. R. 1004.

Annotations:—**Folld.** Meller *v.* Woods (1836), 1 Keen, 16; Thorpe *v.* Gartside (1837), 7 L. J. Ex. Eq. 30. **Apld.** McKay *v.* McNally (1879), 41 L. T. 230. **Refd.** Ashworth *v.* Mounsey (1853), 9 Exch. 175; *Re* Owen, [1894] 3 Ch. 220.

129. Deposit evidence of agreement to make mortgage.]—The title deeds of an estate were deposited with pltf. as a security for his demand. Deft. fourteen years afterwards, upon the eve of a bkpcy. of the mtgor., took a mtge. antedated; he had notice of the deposit, but avoided inquiring the purpose for which it was made. The ct. decreed for pltf.

The deposit of title deeds as security for a debt is now settled to be evidence of an agreement to make a mtge. & that agreement is to be carried into execution by the ct. against the mtgor., or any who claim under him, with notice, either actual or constructive of such deposit having been made (MACDONALD, C.B.).—BIRCH *v.* ELLAMES & GORST (1794), 2 Anst. 427; 145 E. R. 924.

Annotations:—**Refd.** Parker *v.* Housefield (1834), 2 My. & K. 419; Whitbread *v.* Jordan (1835), 1 Y. & C. Ex. 303; Hewitt *v.* Loosemore (1851), 9 Hare, 449.

130. ——.]—*Ex p.* WRIGHT, No. 127, *ante.*

131. —— Deposit made by way of indemnity.]—Title deeds were deposited by deft. with pltf. as an indemnity against contingent payments, but there was no agreement to execute a formal mtge. Before pltf. had made any payment he filed a bill to have a formal mtge. executed:—*Held:* he was not entitled thereto, but only to a memorandum, signed by deft., specifying the terms of the deposit.—SPORLE *v.* WHAYMAN (1855), 20 Beav. 607; 24 L. J. Ch. 789; 52 E. R. 738.

132. Extent of liability of mortgagor.] — On foreclosure of an equitable mtge. of copyhold, the mtgor. being the person to take the necessary steps for an effectual surrender, must pay the expense of all such steps.

By the deposit the mtgor. contracts that his interest shall be liable to the debt & that he will make such conveyance or assurance as may be necessary to vest his interest in the mtgee. He does not contract that he will make a perfect title but he does bind himself to do all that is necessary to have the effect of vesting in the mtgee. such interest as he, the mtgor., has (KINDERSLEY, V.-C.).—PRYCE *v.* BURY (1853), 2 Drew. 41; 2 Eq. Rep. 8; 23 L. J. Ch. 676; 22 L. T. O. S. 192; 17 Jur. 1173; 2 W. R. 87; 61 E. R. 622; *affd.* (1854), L. R. 16 Eq. 153, n., L. C. & L. JJ.

Annotations:—**Apld.** James *v.* James (1873), L. R. 16 Eq. 153. **Consd.** National Provincial Bank of England *v.* Games (1886), 31 Ch. D. 582. **Refd.** Backhouse *v.* Charlton (1878), 8 Ch. D. 444.

PART II. SECT. 2, SUB-SECT. 5.—A.

126 i. *Deposit amounts to an equitable mortgage.*]—TERRY *v.* OSBORNE (1854), 1 Legge, 806.—**AUS.**

126 ii. ——.]—MCKENNEY *v.* SPENCE (1875), *Temp.* Wood. 11.—**CAN.**

126 iii. ——.]—MASURET *v.* MITCHELL (1879), 26 Gr. 435.—**CAN.**

126 iv. ——.] — Where parties in India agree to create a lien over land, & do not contract with reference to any particular law, a deposit of title deeds will, in the absence of any local law forbidding the creation of the contract in that way, be of itself sufficient to bind the lands.—SAM *v.* LALLAH (1862), 6 L. T. 767, P. C.—**IND.**

126 v. ——.]—DAYAL JAIRAJ *v.* JIVRAJ RATANSI (1875), I. L. R. 1 Bom. 237.—**IND.**

126 vi. ——.]—SIMMONS *v.* MONTAGUE, [1909] 1 I. R. 87.—**IR.**

129 i. *Deposit evidence of agreement to make mortgage.*]—L. deposited title deeds of land with his bank, as security for an amount owing by him to the bank, & he agreed to execute a mtge. to the bank whenever called upon:—*Held:* ineffectual as an equitable mtge. by deposit, but valid, & might be enforced as an agreement to mtge.—*Re* LEGGE, Mac. 1009.—**N.Z.**

h. *Necessity for written memorandum.*]—Stat. Frauds does not apply to an equitable mtge. by deposit of title deeds.—HUDSON'S BAY CO. *v.* KEARNS (1894), 3 B. C. R. 330.—**CAN.**

k. *Bonds held as security by creditor.*] — MINISTER OF RAILWAYS & CANALS *v.* QUEBEC SOUTHERN RY. CO., HANSON BROTHERS' CLAIM (1908), 12 Exch. C. R. 93.—**CAN.**

l. *Deposit to cover future advances.*] —*Held:* pltf. had no equitable mtge. At the time when the deeds were deposited, there was no antecedent or existing debt, nor was any oral agreement made that the title deeds should stand as a security for future advances, nor was any advance, in fact, made until the mtge. deed was about to be executed.—JAITHA BHIMA *v.* HAJI ABDUL VYAD OOSMAN (1886), I. L. R. 10 Bom. 634.—**IND.**

m. *Necessity for registration.*]—The indorsee for value of a negotiable instrument, the amount of which had been secured by a mtge. by deposit of title deeds, cannot claim to enforce the mtge. in the absence of a registered instrument conveying the mtge. right to him.—ELUMALAI CHETTY *v.* BALAKRISHNA MUDALIAR (1921), I. L. R. 44 Mad. 965.—**IND.**

n. *Intention should be clear.*]—Mtges. by deposit of deeds should be clear & without doubt as to the original

B. What Documents may be Deposited.

133. Copy of court rolls.]—Equitable lien on copyhold estate by a deposit of the copy of ct. roll.—*Ex p.* WARNER (1812), 19 Ves. 202; 34 E. R. 493; *sub nom. Re* COOKE, *Ex p.* WARNER, 1 Rose, 286, L. C.

Annotations:—**Apld.** Goodwin *v.* Waghorn (1835), 4 L. J. Ch. 172; Whitbread *v.* Jordan (1835), 1 Y. & C. Ex. 303.

134. ——.]—An equitable mtge. may be created of copyhold by the mere deposit of the copy of ct. roll.—WHITBREAD *v.* JORDAN (1835), 1 Y. & C. Ex. 303; 4 L. J. Ex. Eq. 38; 160 E. R. 123.

Annotations:—**Mentd.** Jones *v.* Smith (1843), 1 Ph. 244; *Re* Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 56 L. T. 622.

See, now, Law of Property Act, 1922 (c. 16), s. 138 (1).

135. Agreement for lease—Lease granted on different terms.]—A. having an agreement for a lease deposits it with B. as a security, & afterwards obtains from the lessor a lease somewhat different in terms from that before agreed upon. Upon the lease being granted A. deposits the lease with the lessor as a security, & shortly afterwards, upon a false pretence, obtains possession of the lease, & hands it over to C. as a security. C. upon receiving from B. the money due to him, gives the lease to B. A. becomes bkpt.:—*Held:* the lessor has the prior charge upon the lease, & B. by means of the deposit of the agreement, had a lien on the lease notwithstanding the variations.—*Re* BUCKLAND, *Ex p.* REID (1848), De G. 600; 17 L. J. Bcy. 19; 11 L. T. O. S. 248; 12 Jur. 533.

Annotation:—**Refd.** Hall *v.* West End Advance Co. (1883), Cab. & El. 161.

136. ——.]—TEBB *v.* HODGE, No. 105, *ante.*

137. ——.]—A co. held land under a building agreement from the Corpn. of London, under which separate leases of the houses were to be granted as they were built. In Apr. 1883, the co. borrowed money from pltfs., & covenanted to mortgage the houses to them by demise when the leases were granted, & that in the meantime the premises comprised in the building agreement should be a security to pltfs. The building agreement was handed over to pltfs., but no notice of their security was given to the Corpn. of London. In Feb. 1886, leases of two of the houses were granted to the co. & immediately afterwards the co. deposited them by way of equitable mtge. with B., J. & Co., who had no notice of pltf.'s security:—*Held:* although the giving notice to the Corpn. would probably have prevented the handing over the leases to the co., still, as notice is not requisite to complete a security on real estate, the omission to give such notice was not a neglect of duty by pltfs. on the ground of which they ought to be postponed to the subsequent equitable incumbrancers.—UNION BANK OF LONDON *v.* KENT (1888), 39 Ch. D. 238; 57 L. J. Ch. 1022; 59 L. T. 714; 37 W. R. 364; 4 T. L. R. 634, C. A.

Annotations:—**Consd.** Taylor *v.* Russell, [1891] 1 Ch. 8. **Refd.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231.

138. Agreement for purchase of freeholds.]—A father purchased a piece of land, & took an agreement that the vendors would convey it to him. He afterwards built a granary, & allowed his sons to occupy the premises for their business. They supplied goods to their father to the amount expended by him in building the granary, & they erected other buildings on the land of greater value. The father, pending these transactions, became surety for his sons to certain brokers for £10,000. The sons afterwards surreptitiously obtained possession of the agreement; & one of them, representing that his father had given the land to them, signed his father's name on the blank leaf of the agreement, & deposited it with pltfs., who were bankers, to secure their cash credit. The sons afterwards became bkpt.; the son depositing the agreement was upon several indictments, convicted of forgery; & the father was required to pay the £10,000 for which he was surety. Upon a bill, by pltfs., to obtain the benefit of the deposit made with them:—*Held:* the sons had a lien on the land to the value of the goods supplied to the father & the money expended by them in building; the deposit of the agreement, though made under the false representations, was good to the extent of that lien.—UNITY JOINT-STOCK MUTUAL BANKING ASSOCN. *v.* KING (1858), 25 Beav. 72; 27 L. J. Ch. 585; 31 L. T. O. S. 128; 4 Jur. N. S. 470; 6 W. R. 264; 53 E. R. 563.

Annotations:—**Mentd.** Millard *v.* Harvey (1864), 11 L. T. 360; Plimmer *v.* Wellington Corpn. (1884), 9 App. Cas. 699.

139. Attested copy of lease.]—Where bkpt. deposited his attested copy of a lease of some coal mines, wherein he was jointly interested with five others, the ct. refused to order a sale, & declare a party an equitable mtgee., until the partnership accounts had been taken.—*Re* BORROW, *Ex p.* BROADBENT (1834), 4 Deac. & Ch. 3; 1 Mont. & A. 635; *sub nom. Re* BARROW, *Ex p.* BROADBENT, 3 L. J. Bcy. 95, Ct. of R.

Annotation:—**Consd.** Dodds *v.* Preston (1888), 59 L. T. 718.

140. Receipt for purchase-money with plan attached.]—A., to enable B. to complete the purchase of some property for which he had contracted, lent him £200 on the security of the premises; the purchase was afterwards completed, & the vendor gave to B. a receipt for the purchase money, in which the property was described, & to this receipt was attached a plan of the property; no conveyance was made to B. & he had no other muniments of title:—*Held:* by the deposit of the receipt & plan as a security for the sum lent, A. obtained an equitable mtge. on the property.—GOODWIN *v.* WAGHORN (1835), 4 L. J. Ch. 172.

141. Share certificates.]—A sharebroker had unknown to pltf., his employer, pledged certain certificates of railway stock belonging to pltf. with deft., as a security for his own private debt. The transaction was *bonâ fide* & without any notice of the ownership of the certificates, on deft.'s part. In an action of detinue by pltf. against deft. for the certificates:—*Held:* certificates of railway-stock are not "goods" within 5 & 6 Vict. c. 39, s. 1.—FREEMAN *v.* APPLEYARD (1862), 1 New Rep. 30; 32 L. J. Ex. 175; 7 L. T. 282.

Annotation:—**Refd.** Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388.

142. ——.]—A. deposited the certificate of certain shares in a co. with B. to secure the repayment of a sum of £150 with interest at 6 per cent. B. applied for foreclosure:—*Held:* he was entitled to a judgment in substantially the form which

intention of the parties.—*Re* REDMOND (1860), 2 L. T. 521.—**IR.**

PART II. SECT. 2, SUB-SECT. 5.—B.

138 i. *Agreement for purchase of freeholds.*]—NEWKIRK *v.* STEES (1910), 13 W. L. R. 181; 3 Sask. L. R. 3.—**CAN.**

o. *Certificate of title.*]—The] deposit of a certificate of title as (security for a loan constitutes an equitable mtge. — FIALOWSKI *v.* FIALOWSKI (1911), 19 W. L. R. 644; 1 W. W. R. 216; 4 Alta. L. R. 10.—**CAN.**

Sect. 2.—Equitable mortgages: Sub-sect. 5, B., C. & D. (a).]

would be given if the document had been a title deed of real estate, or a policy of assurance.—HARROLD *v.* PLENTY, [1901] 2 Ch. 314; 70 L. J. Ch. 562; 85 L. T. 45; 49 W. R. 646; 17 T. L. R. 545; 8 Mans. 304.

Annotations:—**Apld.** Stubbs *v.* Slater, [1910] 1 Ch. 632. **Consd.** London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515; Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451.

C. Deposit of Deeds and Memorandum.

143. Memorandum stating purpose of deposit—Not varied by parol evidence.]—*Ex p.* COOMBE (1810), 17 Ves. 369; 1 Rose, 268; 34 E. R. 142, L. C.

144. —— Deeds not agreeing with memorandum.]—Among the effects of testatrix were found title deeds belonging to a trader, & there was a letter written by testatrix to her agent, directing him to advance a certain sum to the trader, & stating that the advances were made on the security of certain title deeds & documents therein described; & at the foot of this letter the trader signed a receipt for the advances. The title deeds found among testatrix's effects did not answer the description in the letter, but it did not appear whether any others were deposited with her on the occasion of the loan. The trader became bkpt., & the usual petition of an equitable mtgee. was presented by testatrix's personal representative:—*Held:* there was a good lien on the property comprised in the title deeds found in testatrix's possession for the amount of the advances; but there was no sufficient memorandum to entitle petitioner to costs.—*Re* MOORE, *Ex p.* POWELL (1842), 6 Jur. 490, Ct. of R.

145. —— Does not amount to agreement for mortgage.]—Where title deeds are deposited by way of equitable mtge., a memorandum merely stating the purpose for which they are deposited is not an agreement for a mtge., & need not be stamped.—MEEK *v.* BAYLISS (1862), 31 L. J. Ch. 448.

146. —— Conclusive as to exact nature of charge.]—A customer deposited with his bankers a deed of conveyance, including two distinct properties, giving to them at the same time a memorandum, pledging one of the properties, as security for a specific sum advanced, & also for his general balance:—*Held:* as the deposit of the deed of conveyance was for the special purpose of giving a security upon one property only, the bankers could claim no general lien, by the custom of bankers, on the other property.—WYLDE *v.* RADFORD (1863), 33 L. J. Ch. 51; 9 L. T. 471; 9 Jur. N. S. 1169; 12 W. R. 38.

Annotations:—**Apld.** *Re* Bowes, Strathmore *v.* Vane (1886), 33 Ch. D. 586. **Expld.** *Re* London & Globe Finance Corpn., [1902] 2 Ch. 416.

147. —— ——.]—A deposit of title deeds, as security for a debt, will, without more, create in equity a charge upon the property: but where it is accompanied by a written document, the terms of that document must be referred to in order to ascertain the exact nature of the charge (LORD CAIRNS).—SHAW *v.* FOSTER (1872), L. R. 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907, H. L.

Annotations:—**Refd.** London & County Banking Co. *v.* Ratcliffe (1881), 6 App. Cas. 722; United Realisation Co. *v.* I. R. Comrs., [1899] 1 Q. B. 361. **Mentd.** Lysaght *v.* Edwards (1876), 2 Ch. D. 499; Cave *v.* Mackenzie (1877), 46 L. J. Ch. 564; Egmont *v.* Smith, Smith *v.* Egmont (1877), 6 Ch. D. 469; Glyn Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591; Beddinton *v.* Atlee (1887), 35 Ch. D. 317; *Re* Thackwray & Young's Contract (1888), 40 Ch. D. 34; Raffety *v.* Schofield, [1897] 1 Ch. 937; Levy *v.* Stogdon, [1898] 1 Ch. 478; Ridout *v.* Fowler, [1904] 1 Ch. 658; *Re* Stucley, Stucley *v.* Kekewich, [1906] 1 Ch. 67; Golden Bread Co. *v.* Hemmings, [1922] 1 Ch. 162.

148. Memorandum referring to part of deposited deeds.]—Where deeds relating to freehold & leasehold property were deposited with an equitable mtgee. but the memorandum accompanying the deposit merely related to the leasehold property:—*Held:* the mtgee. might nevertheless pray a sale of the freehold, as well as the leasehold property, subject, however, to the payment of the costs of the sale.—*Re* EVANS, *Ex p.* ROBINSON (1832), 1 Deac. & Ch. 119, Ct. of R.

149. Memorandum signed but not dated—Burden of proof on mortgagor.]—M. a stockbroker, having in his possession a deed of conveyance of property belonging to B., one of his customers, a bill was filed by B. for the recovery of the deed. M. claimed to hold the deed as having been deposited with him by B. as a collateral security by way of equitable mtge., for a balance of an account due to him from B. B. asserted that the deed was only left with M. for safe custody, & denied that it was deposited by way of security; he also denied that a balance of account was ever ascertained. M. in support of his case, further produced a memorandum signed by B. but not dated, containing a statement to the effect that B. was agreeable to deposit the deed with M. as security for the amount he owed to him:—*Held:* in the circumstances, the burden of proof lay upon B., who sought to recover the deed, & to treat the custody of M. merely as that of a bailee.—BURGESS *v.* MOXON, MOXON *v.* BURGESS (1856), 28 L. T. O. S. 58; 2 Jur. N. S. 1059.

D. Deposit of Deeds without Memorandum.

(a) In General.

150. As between debtor & creditor—Presumption of mortgage.]—Pledge of a lease carried into effect, against assignees of a bkpt. Evidence of bkpt., he having had his allowance & certificate allowed to be read.—RUSSEL *v.* RUSSEL (1783), 1 Bro. C. C. 269; 28 E. R. 1121.

Annotations:—**Consd.** *Ex p.* Haigh (1805), 11 Ves. 403. **Distd.** Norris *v.* Wilkinson (1806), 12 Ves. 192. **Folld.** *Ex p.* Mountfort (1808), 14 Ves. 606. **Apld.** *Ex p.* Kensington (1813), 2 Ves. & B. 79. **Distd.** *Ex p.* Hooper (1815), 19 Ves. 477. **Consd.** Casberd *v.* A.-G. (1819), Dan. 238; *Re* Foot, *Ex p.* Cawthorne (1822), 1 Gl. & J. 240. **Apld.** *Ex p.* Bignold (1832), 2 Deac. & Ch. 398; Lacon *v.* Allen (1856), 3 Drew. 579. **Refd.** Doe *v.* Hawke (1802), 2 East, 481; *Ex p.* Coming (1803), 9 Ves. 115; *Re* Price, *Ex p.* Pearse & Prothero (1820), Buck, 525; Parker *v.* Housefield (1834), 2 My. & K. 419.

151. —— ——.]—FEATHERSTONE *v.* FENWICK (1784), 1 Bro. C. C. 270, n.; 28 E. R. 1122.

Annotations:—**Refd.** *Ex p.* Mountfort (1808), 14 Ves. 606; Parker *v.* Housefield (1834), 2 My. & K. 419.

152. —— ——.]—HURFORD *v.* CARPENTER (1785), 1 Bro. C. C. 270, n.; 28 E. R. 1122.

Annotations:—**Refd.** *Ex p.* Mountfort (1808), 14 Ves. 606; Parker *v.* Housefield (1834), 2 My. & K. 419.

153. —— ——.]—A man borrows money & pledges the title deed of his estate, & promises to execute a mtge., but does not, & becomes a bkpt., his assignees were ordered to pay what due, & if they did not, to convey the estate to pltf. in fee.—PYE *v.* DAUBUZ (1792), 2 Dick. 759; 3 Bro. C. C. 595; 21 E. R. 465, L. C.

Annotation:—**Refd.** *Re* Brown, *Ex p.* Turpin (1832), Mont. 443.

154. —— ——.]—*Ex p.* HAIGH (1805), 11 Ves. 403; 32 E. R. 1143, L. C.

155. —— ——.]—*Ex p.* MOUNTFORT (1808), 14 Ves. 606; 33 E. R. 653, L. C.

Annotations:—**Distd.** *Ex p.* Skinner (1832), 1 Deac. & Ch. 403. **Folld.** *Re* Burkill, *Ex p.* Nettleship (1841), 5 Jur. 738.

156. —— ——.]—Equitable mtge. by a deposit of deeds; covering subsequent advances upon evidence that they were made upon that security.

It has long been settled that a mere deposit of title deeds upon an advance of money without a word passing gives an equitable lien (LORD ELDON, C.).—*Ex p.* LANGSTON (1810), 17 Ves. 227; 34 E. R. 88; *sub nom. Re* KNIGHT, *Ex p.* LANGSTON, 1 Rose, 26, L. C.

Annotations:—**Consd.** *Re* Hewett, *Ex p.* Hooper (1815), 1 Mer. 7. **Apld.** *Re* Burkill, *Ex p.* Nettleship (1841), 2 Mont. D. & De G. 124. **Folld.** Maughan *v.* Ridley (1863), 2 New Rep. 58. **Apld.** *Re* Trethowan, *Ex p.* Tweedy (1877), 46 L. J. Bcy. 43. **Folld.** *Re* McMahon, McMahon *v.* McMahon (1886), 55 L. T. 763.

157. —— ——.]—(1) A deposit of title deeds by a simple contract debtor of the Crown for securing part of the purchase-money to be paid in consideration of other lands sold to him, is an equitable mtge. & binds the Crown; & that although the purchaser has also given his bond to the vendor for the whole amount.

(2) To constitute such a deposit, for so securing money due, an equitable mtge., it is not necessary that there should be any agreement accompanying the transaction, that the depositor should execute a legal mtge. to the depositee, it is sufficient if it can be shown by satisfactory testimony that the object & intent of the deposit was the security of money. It is, however, obviously advisable that there should be in all such cases a written memorandum of that intention accompanying such deposit.—CASBERD *v.* A.-G. (1819), 6 Price, 411; Dan. 238; 146 E. R. 850, Ex. Ch.

Annotations:—*As to* (1) **Refd.** Whitworth *v.* Gaugain (1846), 1 Ph. 728; Watts *v.* Porter (1854), 3 E. & B. 743; Swanley Coal Co. *v.* Denton (1906), 95 L. T. 659. *Generally*, **Mentd.** Giles *v.* Grover (1832), 6 Bli. N. S. 277.

158. —— ——.]—An agreement in writing, accompanying the deposit of title deeds, to secure a specific sum, may be extended as a security beyond that sum by a subsequent verbal agreement.

It has over & over again been decided, that a mere deposit of deeds, without any note in writing, is enough to create an equitable mtge. (SIR JOHN CROSS).—*Re* BURKILL, *Ex p.* NETTLESHIP (1841), 2 Mont. D. & De G. 124; 5 Jur. 733; *sub nom. Re* BUSKILL, *Ex p.* NETTLESHIP, 10 L. J. Bcy. 67.

Annotation:—**Folld.** James *v.* Rice (1854), 24 L. T. O. S. 57.

159. —— ——.]—A debtor deposited with his creditor a policy of insurance to secure his debt & further advances, but no written agreement was ever signed between the parties. Subsequent pecuniary transactions took place between them: & debtor at length died, owing a considerable sum to creditor, who retained the policy throughout. There being evidence of these dealings:—*Held:* the oath of creditor was sufficient evidence to establish his claim to a lien on the policy for the sums due to him from debtor's estate.—MAUGHAN *v.* RIDLEY (1863), 2 New Rep. 58; 8 L. T. 309.

160. ——.]—SHAW *v.* FOSTER, No. 147, *ante*.

161. —— ——.]—In 1878 A. entered into a contract for the sale to him of two freehold houses at the price of £650. The deposit of £50 was paid by him, & £360, part of the balance, was obtained from his niece B., to whom he gave his I.O.U. On Aug. 31, 1878, the wife of A., by his direction, wrote to B. as follows: "A. bought two houses yesterday & he is going to have them settled & signed in your name & give them to you. I send you the conditions of sale for you to look at, & I should like you to come & see A. . . . Bring your bank book with you, as what you have might as well go into them as for us to pay interest. It is all right I can assure you. I sent the £50 by cheque last night on deposit." On Oct. 25, 1878, the two houses were duly conveyed to A., & he directed his wife to hand over the title deeds to B., & he also said to his wife that the deeds belonged to B., & were of no use to his wife. The deeds were sent to B. by A.'s wife. Subsequently A. died intestate & his eldest brother & heir-at-law commenced an action against B. claiming a declaration that he, pltf., was entitled to the rents & profits of the two houses & the delivery up of the title deeds:—*Held:* there was sufficient evidence of a contract to create an equitable mtge. in favour of B. & upon which the possession of the title deeds by B. originated, & there should be a redemption decree upon that footing, the costs of B. being added to her security.—*Re* MCMAHON, MCMAHON *v.* MCMAHON (1886), 55 L. T. 763.

162. —— ——.]—(1) Where there has been an equitable deposit of deeds to secure repayment of a loan an action of detinue cannot be maintained therefor prior to repayment.

(2) The remedy is by a suit for redemption, or by summary application for the deeds on terms of substituting for the security a sum of money equal to the amount secured with a proper margin.

(3) In cases of legal or equitable mtge., a tender properly made & improperly rejected is not equivalent to payment.

(4) It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit (LORD MACNAGHTEN).—BANK OF NEW SOUTH WALES *v.* O'CONNOR (1889), 14 App. Cas. 273; 58 L. J. P. C. 82; 60 L. T. 467; 38 W. R. 465; 5 T. L. R. 342, P. C.

Annotations:—*Generally*, **Refd.** Edmondson *v.* Copland (1911), 105 L. T. 8; Graham *v.* Seal (1918), 88 L. J. Ch. 31.

163. As against stranger—Possession not otherwise accountable.]—A mere deposit of deeds, even without a word, may constitute an equitable mtge., but it can only occur, as against strangers, in cases where the possession of the title deeds can be accounted for in no other manner, except from their having been deposited by way of equitable mtge., or the holder being otherwise a stranger to the title & to the lands.—BOZON *v.* WILLIAMS (1829), 3 Y. & J 150; 148 E. R. 1131, Ex. Ch.

164. Proof of time of loan & deposit.]—In order to constitute an equitable mtge. by deposit, there must be proof of the time when both the loan & deposit were made.—KEBELL *v.* PHILPOT (1838), 7 L. J. Ch. 237; *sub nom.* KEBELL *v.* PHILPOTT, KEBELL *v.* DANIEL, 2 Jur. 739.

165. Proof how possession acquired.] — The mere production of a bond creditor of the title deeds to the obligor's real estate, without explanation, neither constitutes an equitable mtge., nor a sufficient ground for any inquiry before the Master.

A bond creditor, claiming also an equitable mtge. on real estate, filed his bill for foreclosure, & in aid, for the administration of the personal estate, against the exors. & the parties entitled to the mortgaged estate. He failed in proof of the equitable mtge.:—*Held:* he was not, on such a record, entitled to a decree, as a specialty creditor, for the administration of the real estate.—CHAPMAN *v.* CHAPMAN (1851), 13 Beav. 308; 20 L. J. Ch. 465; 17 L. T. O. S. 70; 15 Jur. 265; 51 E. R. 119.

Annotations:—**Distd.** Burgess *v.* Moxon, Moxon *v.* Burgess (1856), 28 L. T. O. S. 58. **Apld.** *Re* McMahon, McMahon *v.* McMahon (1886), 55 L. T. 763. **Refd.** Maughan *v.* Ridley (1863), 2 New Rep. 58; Dixon *v.* Muckleston (1872), 8 Ch. App. 155.

Sect. 2.—Equitable mortgages: Sub-sect. 5, D. (a), (b) & (c), E., F. & G. (a).]

166. What amounts to a deposit—Verbal authority to person holding deeds in another capacity.]—Bkpt. being indebted to a banking co. made an oral promise to the directors to give them, when required, security for the debt. He was then entitled to a reversionary interest in one-fifth of a farm, to come into possession on the death of his mother, who was tenant for life, & who held the title deeds. The mother afterwards died, & the title deeds came into the possession of resp., who was manager of the bank, & who was also entitled to one-fifth of the property. Resp. told bkpt. that he had possession of the deeds, & that he held his, bkpt.'s, one-fifth for the bank. The bankrupt expressed his assent:—*Held:* the co. had not a valid equitable mtge. of bkpt.'s share in the farm, for there was no memorandum in writing to satisfy Stat. Frauds, & the conversation which took place between bkpt. & resp. as to the custody of the deeds, not being followed by any act which altered the legal position of the parties, was not such a part performance of the oral promise to give security as would exclude the operation of Stat. Frauds.—*Re* BEETHAM, *Ex p.* BRODERICK (1887), 18 Q. B. D. 766; 56 L. J. Q. B. 635; 35 W. R. 613; 3 T. L. R. 489, C. A.

Annotations:—**Distd.** Jared *v.* Clements, [1903] 1 Ch. 428. **Mentd.** Godfrey *v.* Lazarus (1887), 4 T. L. R. 101.

(b) Deposit by Mistake.

167. Does not create mortgage.]—A. by deed mortgaged freeholds to B. At the same time, the title deeds not only of the freeholds but of leaseholds belonging to A. were delivered to B.:—*Held:* in the absence of proof to the contrary, B. had no lien on the leaseholds for the money advanced.

If I accidentally deliver a box of deeds to a creditor of mine that would not constitute him an equitable mtgee. (ROMILLY, M.R.).—WARDLE *v.* OAKLEY (1864), 36 Beav. 27; 55 E. R. 1066.

(c) Deposit for Special Purpose.

168. Delivery to prepare legal mortgage—Whether equitable mortgage created.] — The deposit of title deeds to an attorney to prepare a mtge. deed does not amount to an equitable mtge.; otherwise, if deposited expressly as a security for a debt.—*Ex p.* BULTEEL (1790), 2 Cox, Eq. Cas. 243; 30 E. R. 113, L. C.

Annotation:—**Refd.** De Wolf *v.* Pitcairn (1869), 17 W. R. 914.

169. ——— ———.]—Lien by possession of title deeds disapproved; & not to be extended, with reference to Stat. Frauds. In this instance it failed, the deeds being delivered, not as a present immediate security, but for the purpose of having a mtge. security created.—NORRIS *v.* WILKINSON (1806), 12 Ves. 192; 33 E. R. 73.

Annotations:—**Consd.** Casberd *v.* A.-G. (1819), 6 Price, 411. **Distd.** Lloyd *v.* Attwood (1859), 3 De G. & J. 614. **Mentd.** *Re* Blew, *Ex p.* Jones (1835), 4 L. J. Bcy. 59.

170. —— ——.]—An equitable mtge. held to be created by delivery of deeds for the purpose of preparing a legal mtge.

The principle of equitable mtge. is, that the deposit of the deeds is evidence of the agreement. But if they are deposited for the express purpose of preparing the security of a legal mtge., is not that stronger than an implied intention? (LORD ELDON, C.).—*Ex p.* BRUCE (1813), 1 Rose, 374.

Annotation:—**Mentd.** *Re* Blew, *Ex p.* Jones (1835), 4 L. J. Bcy. 59.

171. —— ——.] — Exors., who are also trustees, agree to give one of the residuary legatees, as a security for his share, a legal mtge. of real estate, part of testator's assets, &, for the purpose of having the mtge. prepared, they deliver the title deeds to his agents; this gives him an equitable lien on the property, as against the exors., though not as against the other residuary legatees.—HOCKLEY *v.* BANTOCK (1826), 1 Russ. 141; 38 E. R. 55.

Annotations:—**Refd.** Turner *v.* Deane (1849), 3 Exch. 836. **Mentd.** Dickonson *v.* Player (1838), Coop. Pr. Cas. 178; Shepherd *v.* Mouls (1845), 4 Hare, 500; Robinson *v.* Robinson (1851), 1 De G. M. & G. 247.

172. —— ——.]—Where, in order to prevent immediate proceedings against a debtor, the title deeds of an estate were deposited by him with his creditor's attorney, for the purpose of preparing a mtge. of the property:—*Held:* this transaction amounted to an equitable mtge. by deposit of title deeds.

Where title deeds are left in the hands of an attorney for the purpose of preparing a mtge. as a security for money previously advanced, this is an equitable mtge. by deposit of title deeds.—KEYS *v.* WILLIAMS (1838), 3 Y. & C. Ex. 55; 7 L. J. Ex. Eq. 59; 2 Jur. 611; 160 E. R. 612; *subsequent proceedings* (1839), 3 Y. & C. Ex. 462.

173. —— ——.]—J. A. voluntarily gave to his sisters, in 1848, a mtge. for a term of two hundred years, to secure an antecedent debt. The sisters allowed him to retain the title deeds, that he might give security on the estate for another debt for which he was then being sued by L. Shortly afterwards, J. A. agreed, in writing, to give L. a mtge. on the estate for the debt, & the deeds, in pursuance of this agreement, were deposited with G. P. & B., the London agents of J. A.'s solr., & who shortly afterwards became his solrs., to be held by them for the purpose of giving effect to the security. J. A., in 1851, made a mtge. in fee to C., who had no notice of the prior incumbrances, & G. P. & B. handed over to C. the title deeds. In 1855, the sisters made a sub-mtge. of the term by assignment:—*Held:* (1) the mtge. of 1848 was void under 27 Eliz. c. 4, as against C., who therefore took the legal fee discharged of the term; C., having no notice, was not affected by the fraud committed by G. P. & B., in parting with the title deeds; & having the title deeds, & having acquired the legal estate for value without notice, he was entitled to priority over the sisters & their assignee, & over the equitable security of L.; (2) the securities of the sisters & their assignee were void as against L.—LLOYD *v.* ATTWOOD, ATTWOOD *v.* LLOYD (1859), 3 De G. & J. 614; 29 L. J. Ch. 97; 33 L. T. O. S. 209; 5 Jur. N. S. 1322; 44 E. R. 1405, L. JJ.

Annotations:—*As to* (1) **Refd.** *Re* Johnson, Golden *v.* Gillam (1881), 20 Ch. D. 389; *Re* Beetham, *Ex p.* Broderick (1886), 18 Q. B. D. 380. *Generally*, **Mentd.** Freeman *v.* Pope (1870), 5 Ch. App. 538.

E. Deposit of Part of Deeds.

174. How far equitable mortgage created.]—Equitable mtge. from a deposit of part of the title deeds; with evidence, not merely parol, but in writing, that the object was to create a security

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PART II. SECT. 2, SUB-SECT. 5.—D. (c).

168 i. *Delivery to prepare legal mortgage—Whether equitable mortgage created.*]—BULFIN *v.* DUNNE (1860), 11 I. Ch. R. 198.—**IR.**

PART II. SECT. 2, SUB-SECT. 5.—E.

174 i. *How far equitable mortgage created.*]—*Re* ROCHE'S ESTATE (1890), 25 L. R. Ir. 58.—**IR.**

upon the whole.—*Ex p.* WETHERELL (1805), 11 Ves. 398; 32 E. R. 1141.

Annotations:—**Apld.** *Re* Daintry & Ryle, *Re* Ravenscroft, *Ex p.* Arkwright (1843), 3 Mont. D. & De G. 129. **Reld.** *Re* New, *Ex p.* Farley, Lavender & Owen (1841), 1 Mont. D. & De G. 683.

175. ——.]—The bkpt. agreed with A. to execute a mtge. of certain premises for the security of a debt, & he sent, in order that A. might prepare the mtge., all the title deeds, except the immediate conveyance to himself. The bkpt. being also indebted to B. took that conveyance, & deposited it with him as a security for his debt, at the same time promising to send him the remainder of the title deeds:—*Held:* A. & B. had not either separately or collectively an equitable mtge. upon the premises.

How far the assignees can get the deeds from them, is another matter. It is enough to say, that it was not the intention of the one, that he should have a mtge. till an actual one was executed to him, & that the other was not to have an equitable mtge. till he got possession (LORD ELDON, C.).—*Re* PRICE, *Ex p.* PEARSE & PROTHERO (1820), Buck, 525.

Annotations:—**Distd.** *Re* Potter, *Ex p.* Chippendale (1835), 1 Deac. 67. **Mentd.** *Re* Foot, *Ex p.* Cawthorne (1822), 1 Gl. & J. 240.

176. ——.]—Bkpts. deposited only one of their title deeds, which however was the principal conveyance of the property, with petitioners as a security for a debt, leasing the other deeds in the hands of their own solrs.:—*Held:* this was a good equitable mtge.—*Re* POTTER, *Ex p.* CHIPPENDALE (1835), 1 Deac. 67; 2 Mont. & A. 299, Ct. of R.

Annotation:—**Distd.** *Re* Ridge & Newland, *Ex p.* Hallifax (1842), 2 Mont. D. & De G. 544.

177. ——.]—*Re* RIDGE, *Ex p.* HALLIFAX, No. 240, *post.*

178. ——.]—A. wrote word to B., that he had "inclosed the particulars of certain title deeds of property, which he had deposited with B. for the security of a debt," & in the schedule inclosed, among other entries, was the following: "£9,000 buildings, houses, etc., at T." A. sent B. a box containing the deeds & other securities, which B. did not examine until after A.'s bkpcy., when he found that the only deed relating to the T. estate was an old paid off mtge.:—*Held:* the letter & the schedule, taken together, created an equitable charge on the T. estate.—*Re* DAINTRY & RYLE, *Re* RAVENSCROFT, *Ex p.* ARKWRIGHT (1843), 3 Mont. D. & De G. 129.

Annotations:—**Distd.** *Re* Carter & Justins, *Ex p.* Sheffield Union Banking Co. (1865), 13 L. T. 477. **Reld.** Thompson *v.* Tomkins (1862), 2 Drew. & Sm. 8. **Mentd.** Thompson *v.* Speirs (1845), 9 Jur. 933; *Re* Plummer, *Ex p.* Plummer's Assignees (1853), 1 Bankr. & Ins. R. 93.

179. ——.]—It is not necessary to create an equitable mtge. that all the title deeds, or even all the material title deeds, should be deposited. It is sufficient if the deeds deposited are material evidences of title, & are proved to have been deposited with the intention of creating a mtge.—LACON *v.* ALLEN (1856), 3 Drew. 579; 26 L. J. Ch. 18; 4 W. R. 693; 61 E. R. 1024.

180. ——.]—To constitute a good equitable mtge. it is not necessary that the deeds deposited should show a good title in the depositor.

A solr. made an equitable deposit of the title deeds of his estate to a client, omitting the conveyance to himself. He afterwards deposited the latter, as a security, with his bankers:—*Held:* the client had priority over the bankers.—ROBERTS *v.* CROFT (1857), 24 Beav. 223; 30 L. T. O. S. 111; 3 Jur. N. S. 1069; 5 W. R. 773; 53 E. R. 343; *affd.*, 2 De G. & J. 1, L. C.

Annotations:—**Reld.** Stackhouse *v.* Jersey (1861), 1 John. & H. 721; Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139; Taylor *v.* Russell, [1891] 1 Ch. 8. **Mentd.** Hunt *v.* Elmes (1860), 2 De G. F. & J. 578; Layard *v.* Maud (1867), L. R. 4 Eq. 397; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482; Manners *v.* Mew (1885), 29 Ch. D. 725.

181. Part of securities mentioned in memorandum—Additional securities found appropriated.]—The secretary of a banking co. had a credit account with the bank to the extent of £3,000, secured by a memorandum, specifying certain securities deposited by way of equitable mtge. On his dying a debtor to the bank in £4,000 there was found in his office in the banking house the securities mentioned in the memorandum, with others tied in a bundle, & indorsed & labelled as securities. There was evidence that he had stated that the bank was secured in £5,000:—*Held:* the bank was equitable mtgee. of all the securities.—FERRIS *v.* MULLINS (1854), 2 Sm. & G. 378; 2 Eq. Rep. 809; 24 L. T. O. S. 32; 18 Jur. 718; 2 W. R. 649; 65 E. R. 444.

F. Duty of Mortgagee to Examine Deeds.

182. Deeds accepted in good faith—Mortgagee not bound by constructive notice of deficiencies.]—When the ct. is satisfied of the good faith of the person who has got a prior equitable charge & 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 & is not bound by constructive notice of their actual contracts or of any deficiencies which by examination he might have discovered in them (LORD SELBORNE, C.).—DIXON *v.* MUCKLESTON (1872), 8 Ch. App. 155; 42 L. J. Ch. 210; 27 L. T. 804; 21 W. R. 178, L. C.

Annotations:—**Apld.** *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589. **Consd.** Taylor *v.* Russell, [1891] 1 Ch. 8. **Reld.** Garnham *v.* Skipper (1885), 53 L. T. 940; *Re* McMahon, McMahon *v.* McMahon (1886), 55 L. T. 763. **Mentd.** R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420.

G. Extent of Security Created.

(a) Past Advances.

183. Deeds deposited to obtain credit—Mortgage does not extend to past advances.]—Where deeds are deposited for the purpose of obtaining credit, the person with whom they are deposited has no lien upon them for what is due to him in respect of moneys previously advanced.—MOUNTFORD *v.* SCOTT (1823), Turn. & R. 274; 37 E. R. 1105, L. C.

Annotations:—**Mentd.** Perkins *v.* Bradley (1842), 1 Hare, 219; Fuller *v.* Benett (1843), 2 Hare, 394.

184. —— —— **Unless intention apparent.**]—Deeds relating to a trust estate were deposited for safe custody with a banking firm, a partner in which was one of the trustees. The firm made advances to one of the *cestuis que trust*, on a parol agreement for a lien on his share. The *cestui que trust* promised by letter, that as soon as a partition of the property could be effected he would give the firm a security for the full amount of the account. Some time afterwards, the partition having taken place, he signed a memorandum, stating that he had deposited the deeds therein described as a collateral security for any advance which the firm may make on his account. The partition deed, however, was not deposited:—*Held:* the firm were equitable mtgees. of the estates taken in partition, & the security extended to past, as well as future,

Sect. 2.—Equitable mortgages: Sub-sect. 5, G. (a) & (b), & H.]

advances.—*Re* NEW, *Ex p.* FARLEY, LAVENDER & OWEN (1841), 1 Mont. D. & De G. 683; 10 L. J. Bcy. 55; 5 Jur. 512, Ct. of R.

185. —— —— ——.]—(1) To create an equitable sub-mtge. by redeposit of deeds originally deposited by way of equitable mtge., it is not necessary that the written memorandum accompanying the first transaction should be deposited upon the second.

(2) The expression "may advance," in the written memorandum accompanying an equitable mtge., does not necessarily prevent the deposit from being a security for past advances.—*Re* HILDYARD, *Ex p.* SMITH (1842), 2 Mont. D. & De G. 587; 11 L. J. Bcy. 16; 6 Jur. 610, Ct. of R.

Annotations:—As to (1) **Apld.** *Re* Carter & Justins, *Ex p.* Sheffield Union Banking Co. (1865), 13 L. T. 477. *Generally,* **Mentd.** Fawcett *v.* Fearne (1844), 13 L. J. Q. B. 300.

186. —— ——.]—A solr. took a deposit of a policy of assurance from a client to secure costs, but without a memorandum to that effect. Subsequently an equitable mtge. was executed, assigning the policy as a security for sums already advanced & thereafter to be advanced, but it made no mention of costs:—*Held:* the deposit for costs merged in the subsequent mtge., & after payment of the sums advanced by way of loan the solr. had no further lien on the proceeds of the policy.—VAUGHAN *v.* VANDERSTEGEN, *Re* ANNESLEY (1854), 2 Drew. 289; 2 Eq. Rep. 1257; 23 L. T. O. S. 328; 61 E. R. 730.

187. Intention to secure past advances must be clearly proved.]—Where the bkpt. denies that a deposit of deeds was to secure prior advances, & there is not any memorandum, it will be necessary for the mtgee. to supply evidence.—*Re* COWDEROY, *Ex p.* MARTIN (1835), 4 Deac. & Ch. 457; 2 Mont. & A. 243; 4 L. J. Bcy. 85, Ct. of R.

(b) Future Advances.

188. Necessity for evidence of intention—Parol agreement.]—*Ex p.* LANGSTON, No. 156, *ante.*

189. —— —— **Extending written memorandum.**]—Equitable mtge. by deposit of deeds extended beyond the original purpose, to advances after alteration of the firm by implication or parol.

Where the deposit [of deeds by way of equitable mtge.] was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; & this distinction appeared to me too thin, that you should not have the benefit of such an agreement unless you added to the terms of that agreement the fact, that the deeds were put back into the hands of the owner, & a redelivery of them required (LORD ELDON, C.).—*Ex p.* KENSINGTON (1813), 2 Ves. & B. 79; 2 Rose, 138; 35 E. R. 249, L. C.

*Annotations:—***Apld.** *Re* Ablett, *Ex p.* Lloyd (1824), 1 Gl. & J. 389. **Folld.** *Re* Burkill, *Ex p.* Nettleship (1841), 2 Mont. D. & De G. 124. **Apld.** James *v.* Rice (1854), 5 De G. M. & G. 461. **Reid.** Goodwin *v.* Waghorn (1835), 4 L. J. Ch. 172. **Mentd.** West *v.* Reid (1843), 2 Hare, 249.

190. —— —— ——.]—*Re* BURKILL, *Ex p.* NETTLESHIP, No. 158, *ante.*

191. —— —— ——.]—(1) Equitable mtge. established by means of written documents, coupled with parol evidence, against a prior voluntary settlement.

(2) Parol evidence of subsequent advances made on the security of a prior equitable mtge. by deposit of deeds & memorandum in writing not under seal.—EDE *v.* KNOWLES (1843), 2 Y. & C. Ch. Cas. 172; 63 E. R. 76.

192. —— —— **Extending parol agreement.**]—Where title deeds are deposited by way of security with a firm upon a verbal agreement, the deposit may be extended by a subsequent verbal agreement for the security of a new sum upon a change of partners.—*Re* ABLETT, *Ex p.* LLOYD (1824), 1 Gl. & J. 389; 2 L. J. O. S. Ch. 162.

*Annotations:—***Folld.** *Re* Burkill, *Ex p.* Nettleship (1841), 2 Mont. D. & De G. 124. **Apld.** James *v.* Rice (1854), 24 L. T. O. S. 57.

193. —— —— ——.]—Money was advanced before the passing of Usury Laws Repeal Act, 1854 (c. 90), at £6 per cent. on a promissory note, & a deposit of title deeds of freehold property as a collateral security. Afterwards it was agreed by parol that a legal mtge. should be executed by the borrower to secure the amount advanced with interest at £5 per cent. *per annum,* but no mtge. was executed:—*Held:* the parol agreement was sufficient to change the contract to a legal one, & a return & fresh deposit of the deeds was not necessary to take the second contract out of Stat. Frauds.—JAMES *v.* RICE (1854), 5 De G. M. & G. 461; 2 Eq. Rep. 746; 23 L. J. Ch. 819; 24 L. T. O. S. 57; 18 Jur. 818; 2 W. R. 542; 43 E. R. 949, L. JJ.

*Annotations:—***Reid.** Bond *v.* Bell (1857), 4 Drew. 157. **Mentd.** Fussell *v.* Daniel (1854), 10 Exch. 581; Hughes *v.* Lumley (1854), 4 E. & B. 274.

194. ——.]—Equitable mtge. by a deposit of title deeds established, but disapproved; extended to a subsequent advance by the same person only upon clear proof, that it was upon security of the deposit: not to an advance by a third person, unless connected with some dealing with the estate, & the person holding the deposit a mere trustee, having made no advance.—*Ex p.* WHITBREAD (1812), 19 Ves. 209; 34 E. R. 496; *sub nom. Re* SHAW, *Ex p.* WHITBREAD, 1 Rose, 299, L. C.

195. ——.]—Deposit of title deeds for an equitable mtge. will cover subsequent advances made, where evidence can be gathered, either from written memoranda, or other circumstances, as to the intention of the parties at the time of making the advances.—*Re* MORGAN, *Ex p.* SANDERS (1834), 3 L. J. Bcy. 92.

196. ——.]—A letter noticing that certain deeds have been deposited to secure a particular debt, together with a subsequent letter requesting further accommodation on the ground that the depositary holds ample security for the amount of the depositor's account, held to constitute a sufficiently definite memorandum in writing of an equitable mtge. for the whole amount due, so as to entitle the depositary to his costs.—*Re* EDWARDS, *Ex p.* CORLETT (1841), 1 Mont. D. & De G. 689; 10 L. J. Bcy. 65; 5 Jur. 555, Ct. of R.

197. Advances by third parties—Not connected with estate.]—*Ex p.* WHITBREAD, No. 194, *ante.*

198. —— **Change of partnership.**]—*Ex p.* KENSINGTON, No. 189, *ante.*

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186 i. —— ——.]—SMITH *v.* HARRINGTON (1881), 29 Gr. 502.—**CAN.**

p. *Security for "advances"—Includes past advances.*]—Securities held by a bank "as collateral & continuing security for my advances from them";—*Held:* this memorandum included in it, & formed security for, past as well as future advances by the bank.—HIBERNIAN BANK *v.* GILBERT (1890), 23 L. R. Ir. 321.—**IR.**

PART II. SECT. 2, SUB-SECT. 5.—G. (b).

194 i. *Necessity for evidence of intention.*]—ROYAL CANADIAN BANK *v.* CUMMER (1869), 15 Gr. 627.—**CAN.**

194 ii. ——.]—GIRENDRO COOMAR DUTT *v.* KUMUD KUMARI DASI (1898), I. L. R. 25 Calc. 611; 2 C. W. N. 356.—**IND.**

198 i. *Advances by third parties—Change of partnership.*]—Several changes occurred in the composition of a firm of brewers, deeds deposited by way of equitable mtge. being trans-

199. —— ——.]—*Re* ABLETT, *Ex p.* LLOYD, No. 192, *ante*.

200. —— ——.] — Where bkpt. deposited title deeds with his bankers to secure future advances, &, after a change in the partnership, continued for six years the same mode of dealing with them, & the same running account:—*Held:* this was a tacit recognition of the deposit of the deeds with the new firm upon the same terms as with the old.

The facts taken together seem to me to be stronger evidence of a recognition of the deposit, than mere words would have been (SIR JOHN CROSS).—*Re* WORTERS, *Ex p.* OAKES (1841), 2 Mont. D. & De G. 234; 10 L. J. Bcy. 69; 5 Jur. 757, Ct. of R.

201. Subsequent advance after legal mortgage.] —Mtge. held no security for subsequent advances made on the strength of a parol engagement.—*Re* HEWETT, *Ex p.* HOOPER (1815), 1 Mer. 7; 35 E. R. 580; *sub nom. Re* HOPKINS, *Ex p.* HOOPER, 2 Rose, 328; 19 Ves. 477, L. C.

H. With Whom Deeds Deposited.

202. Not with wife of debtor.] — No equitable mtge. by a deposit of deeds, with the wife of the debtor.—*Ex p.* COMING (1803), 9 Ves. 115; 32 E. R. 545, L. C.

Annotations:—**Refd.** Norris *v.* Wilkinson (1806), 12 Ves. 192. **Mentd.** Green *v.* Bicknell (1838), 8 Ad. & El. 701.

203. Solicitor of debtor—Constituted trustee for creditor.]—LLOYD *v.* ATTWOOD, ATTWOOD *v.* LLOYD, No. 173, *ante*.

Solicitor of creditor.]—*See* Sub-sect. 5, D. (*c*), *ante*.

204. Banker of debtor.]—B., a trustee, laid out the trust money, together with other money in his hands, upon mtge. in his own name, & executed a declaration of trust as to so much of the mtge. debt as represented the trust money. He afterwards deposited the mtge. deed with his bankers as security for money advanced to him, & absconded:—*Held:* in the absence of negligence on the part of the *cestui que trust*, the deposit of the deed passed no interest in the trust fund to the bankers.—STACKHOUSE *v.* JERSEY (COUNTESS) (1861), 1 John. & H. 721; 30 L. J. Ch. 421; 4 L. T. 204; 7 Jur. N. S. 359; 9 W. R. 453; 70 E. R. 933.

Annotations:—**Folld.** Newton *v.* Newton (1868), L. R. 6 Eq. 135. **Apld.** Isaac *v.* Worstencroft (1892), 67 L. T. 351. **Refd.** Newton *v.* Newton (1868), 4 Ch. App. 143; Tabor *v.* Cunningham (1875), 24 W. R. 153. **Mentd.** Layard *v.* Maud (1867), L. R. 4 Eq. 397; Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139; Perrin *v.* Burbey, [1869] W. N. 160; *Re* Castell & Brown, Roper *v.* Castell & Brown, [1898] 1 Ch. 315.

205. Appropriation by debtor in fiduciary position—Solicitor.]—A. & B., a solr., were exors. B. deposited some of his deeds in the trust box, to secure some money due to testator's estate. The box remained in B.'s possession, & on his death the deeds were found to have been abstracted from it, & they could not be identified. The legal personal representative of B. then deposited certain specific deeds, selected by A., as a security for the debt:—*Held:* (1) assuming that A. had, in consequence of B.'s wrongful act, obtained a general lien on all B.'s deeds for the money, still he had waived it by taking the particular security from the legal personal representative; (2) the creditors of B. were bound by the arrangement between his legal personal representative & A.—MASON *v.* MORLEY (No. 1) (1865), 34 Beav. 471; 55 E. R. 717.

206. *S. P.* MASON *v.* MORLEY (No. 2) (1865), 34 Beav. 475; 34 L. J. Ch. 422; 12 L. T. 414; 11 Jur. N. S. 459; 13 W. R. 669; 55 E. R. 719.

207. —— ——.]—The creditor of an insolvent debtor, who dies without having been adjudicated bkpt., is entitled to the benefit of any payment or security made or given by debtor, although such payment or security would in case of bkpcy. have been set aside as a fraudulent preference. E. placed in the hands of her solr. a sum of money for investment. He died insolvent without investing the money, & after his death there was found in the safe at his office a memorandum dated a fortnight before his death, the contents of which had not been communicated to E. By this memorandum, the solr. declared himself trustee of certain leaseholds then in mtge. to himself, & of a bill which he had indorsed to E., to secure the repayment of the sum placed in his hands. In a creditor's suit for the administration of the solr.'s estate:—*Held:* even if the solr. executed the memorandum with the knowledge of his insolvency, still E. was entitled to the benefit of the security as against the other creditors; for, as the solr. retained no benefit for himself, the gift was *bonâ fide* within 13 Eliz. c. 5.—MIDDLETON *v.* POLLOCK, *Ex p.* ELLIOTT (1876), 2 Ch. D. 104; 45 L. J. Ch. 293.

Annotations:—**Folld.** New, Prance & Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Apld.** *Re* Pidcock, Penny *v.* Pidcock (1907), 51 Sol. Jo. 514. **Consd.** Wigan *v.* English & Scottish Law Life Assco. Assocn., [1909] 1 Ch. 291; Glegg *v.* Bromley (1911), 81 L. J. K. B. 334. **Expld.** *Re* Cozens, Green *v.* Brisley, [1913] 2 Ch. 478. **Folld.** Radcliffe *v.* Abbey Road & St. John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557. **Refd.** *Re* Lloyd's Furniture Palace, Evans *v.* The Co., [1925] Ch. 853.

208. —— ——.]—Where a client deposited a sum of money for investment with a firm of solrs., who appropriated certain securities belonging to one of the partners, as exor. of a late member of the firm as security for the debt in circumstances which were not disclosed to the client until after the bkpcy. of the firm:—*Held:* a good equitable charge had been created & the client was not prevented from claiming his security although he had proved as an unsecured creditor in the bkpcy., the proof having been made before he became aware of his rights.—*Re* PIDCOCK, PENNY *v.* PIDCOCK (1907), 51 Sol. Jo. 514.

209. —— **Trustee.**]—Bkpt., a few weeks before the receiving order was made against him, deposited in a box certain share certificates with memoranda that the certificates were there deposited as security for money due by him to certain trust estates. The box remained in bkpt.'s control, & the fact of the deposit was not communicated to the *cestuis que trust*:—*Held:* there was a valid appropriation of the certificates for the purposes mentioned in the memoranda.—NEW, PRANCE & GARRARD'S TRUSTEE *v.* HUNTING, [1897] 2 Q. B. 19; 66 L. J. Q. B. 554; 76 L. T. 742; 45 W. R. 577; 13 T. L. R. 397; 41 Sol. Jo. 511; 4 Mans.

ferred to new partners. Porter was continuously supplied to the mtgor. on the security, & payments were made by him on account:—*Held:* the benefit of the equitable mtge. passed to the persons for the time being constituting the firm.—*Re* O'BRIEN (1883), 11 L. R. Ir. 213.—**IR.**

PART II. SECT. 2, SUB-SECT. 5.—H.

q. Mortgagee.]—A trader executed a mtge. of real estate with a borrowing clause, & deposited the title deeds with the mtgee. He subsequently accepted a bill drawn by third parties, & being unable to pay the bill, when at maturity, wrote to the drawer, to say it should be paid out of the produce of the mtged. premises, & that he would not take his title deeds out of the mtgee.'s hands until the bill was paid. The mtgees. communicated to the drawers their assent to the arrangement:—*Held:* the drawers entitled to the equitable mtge.—*Re* HENRY, *Ex p.* CROSSFIELD (1840), 3 I. Eq. R. 67.—**IR.**

Sect. 2.—Equitable mortgages: Sub-sect. 5, H., I., J., K. & L.]

103, C. A.; *affd. on appeal, sub nom.* SHARP *v.* JACKSON, [1899] A. C. 419, H. L.

Annotations:—**Apld.** Hermoux *v.* Harbord (1898), 14 T. L. R. 243. **Folld.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Apld.** *Re* Pidcock, Penny *v.* Pidcock (1907), 51 Sol. Jo. 514. **Consd.** Wigan *v.* English & Scottish Law Life Assce. Assocn., [1909]1 Ch. 291; *Re* Cozens, Green *v.* Brisley, [1913] 2 Ch. 478; Radcliffe *v.* Abbey Road & St. John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557. **Refd.** *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710. **Mentd.** *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725; *Re* Vautin, *Ex p.* Saffery, [1900] 2 Q. B. 325; *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77; *Re* Cohen, *Ex p.* Trustee, [1924] 2 Ch. 515; *Re* Hoyle, *Ex p.* Trustee, [1924] B. & C. R. 22; *Re* Drago, Palmer & Roberts *v.* Knight (1926), 134 L. T. 765.

I. Extent of Property Charged.

210. All property comprised in deeds.] — Where deeds respecting real property have been deposited as a security for an annuity, *e.g.* it implies an intention in the party depositing them to charge the real property, & gives the party with whom they are deposited a lien on them.—RICHARDS *v.* BORRETT (1800), 3 Esp. 102; 170 E. R. 553, N. P.

211. ——.] — A deposit of title deeds *primâ facie* creates an equitable mtge. upon the whole property comprised in them. A debtor deposited his title deeds with his creditor until such time as his account should not exceed £100, at which time they were to be restored to him. Debtor died indebted to creditor in £274:—*Held:* creditor's lien extended to the whole £274.—ASHTON *v.* DALTON (1846), 2 Coll. 565; 7 L. T. O. S. 109; 10 Jur. 450; 63 E. R. 863.

Annotation:—**Mentd.** Mellersh *v.* Brown (1890), 45 Ch. D. 225.

212. Every interest of debtor—Existing & after acquired.]—(1) The purchaser of an equity of redemption in premises, subject to a mtge. term, deposited the purchase deed as security. He afterwards paid off the mtge. & took a surrender of the term, retaining the deed of surrender in his own possession & became bkpt.:—*Held:* the lien created by the deposit extended to the whole estate freed from the incumbrance.

(2) Other deeds deposited at the same time, & forming part of the same security, related to an undivided share belonging to bkpt. in other property. Between the times of the deposit & bkpcy., the entirety of a certain portion of the property was conveyed to bkpt. in lieu of his undivided share, he paying £100 for equality of partition:—*Held:* the lien affected the portion conveyed to bkpt. & the assignees had no claim in respect of the £100.—*Re* BAKER, *Ex p.* BISDEE (1840), 1 Mont. D. & De G. 333; 10 L. J. Bcy. 9; 4 Jur. 1019, Ct. of R.

213. —— ——.]—BANK OF NEW SOUTH WALES *v.* O'CONNOR, No. 162, *ante*.

214. All incidental rights — Goodwill.] — The unexpired term in a house, & the goodwill of a business [upholstering] established in it, were sold in a creditor's suit, with the consent of a person with whom the lease had been deposited as a security, & brought a price less than the amount of his debt:—*Held:* the equitable mtgee. was entitled to the whole of the purchase-money, whether arising from the value of the goodwill, or from the value of the lease independently of the goodwill.—CHISSUM *v.* DEWES (1828), 5 Russ. 29; 38 E. R. 938.

Annotations:—**Apld.** King *v.* Mid. Ry. (1868), 17 W. R. 113; Pile *v.* Pile, *Ex p.* Lambton (1876), 3 Ch. D. 36. **Mentd.** Tipping *v.* Power (1842), 1 Hare, 405; Ward *v.* Mackinlay (1864), 10 Jur. N. S. 1063; Richmond *v.* White (1879), 48 L. J. Ch. 798; *Re* Rhoades, *Ex p.* Rhoades, [1899] 1 Q. B. 905.

215. To extent of valuable consideration.]—A. voluntarily assigned to trustees bonds & promissory notes amounting to £600, in trust for himself & his wife & children, & he handed over the securities. The trustees gave no notice to the debtors. A. received £200, part of the £600, the securities having been returned to him by the trustees, & the remainder was lost by the insolvency of the debtors. A. invested the £200 with other moneys of his own on freeholds, & by writing acknowledged the £200 to be trust property. He afterwards deposited the title deeds with the trustees as a security for the whole £600:—*Held:* the equitable mtge. was valid to the extent of £200 but no further.—JAMES *v.* BYDDER (1841), 4 Beav. 600; 5 Jur. 1076; 49 E. R. 472.

Annotation:—**Mentd.** Kekewich *v.* Manning (1851), 1 De G. M. & G. 176.

216. Deposit by limited owner — How far inheritance charged—Tenant for life.]—A. & B. being seised of a freehold estate of inheritance subject to a mtge. term for £300 for the life of A., remainder to trustees to support, etc., remainder to the survivor in fee. C. agrees to advance them £800 for the purpose of enabling them to pay off the mtge., & stock the farm of A. on an agreement that the estate shall be mortgaged to him C. for £1,000 to secure the £800 & £200 owing to him, as exor. of his father, from B. The £800 beir advanced by C. out of which the mtge. is paid off by A. who thereupon receives the title deeds from the mtgee., he having assigned to attend, etc., & delivers them up to G. A. & B. direct a mtge. deed to be prepared to C. which is engrossed & executed by A., B. refusing to execute or to have anything to do with it; & afterwards A. dies; & then B. dies; both having paid the interest on the £1,000 up to the death of each:—*Held:* the delivery over of the deeds by the tenant for life, did not, under the circumstances, create such a lien on the estate in the way of equitable incumbrance, as to have the effect of charging the inheritance with any part of the £1,000, the proof of B.'s assent to the deeds being deposited for the security of the money, or any part of it, not being sufficiently direct & positive to establish the fact of his intention that the deeds should be delivered to C. for that purpose. Pltf., however, decreed to be entitled to the benefit of the term, & to stand in the place of the mtge. *quoad* the mtge. money paid off out of the money advanced.—WILLIAMS *v.* MEDLICOT (1819), 6 Price, 495; 146 E. R. 878.

217. —— —— Tenant in common in tail — Consent of remainderman.]—A. & B. brothers were tenants in common in tail of copyhold property, with cross remainders between them. B. obtained a loan for A. from C., for which A. gave his promissory note, & deposited the title deeds with C. as a collateral security, & gave a written memorandum, by which he engaged "to make a formal surrender of my interest in the estate to which the said deeds relate, by way of further security, whenever thereunto required"; & B. wrote at the foot, "I join in the deposit." A. died unmarried, & without having surrendered to C. or barred the remainders. Upon a bill by C. against B., seeking to foreclosure the entirety:—*Held:* (1) this was a good equitable charge, not merely upon A.'s "Interest" in his moiety, but also upon B.'s estate in remainder, & B. must bear the expense of surrendering that moiety; (2) the charge extended only to the moiety of the estate which originally belonged to A.—PRYCE *v.* BURY (1854), as reported in 23 L. J. Ch. 676; 22 L. T.

O. S. 324; 18 Jur. 967; 2 W. R. 216, L. C. & L. JJ.

Annotations:—Generally, **Mentd.** James *v.* James (1873), L. R. 16 Eq. 153; Backhouse *v.* Charlton (1878), 8 Ch. D. 444; National Provincial Bank of England *v.* Games (1886), 31 Ch. D. 582.

218. Whether charge created — On property to which deeds do not relate—Mistake of creditor.]—OAKES *v.* BEAR (1845), 5 L. T. O. S. 345.

219. —— —— ——.] — JONES *v.* WILLIAMS, No. 232, *post.*

J. Parting with or Loss of Deeds.

220. Deeds parted with for purpose of sale.]—Assignee in bkpcy. having purchased an estate of bkpt. under the commission, held a trustee of the profit upon a resale; in the first instance for an equitable mtgee. by possession of the deeds; who, having delivered them up on receiving the produce of the first sale, was held under the circumstances not to have lost his lien for the deficiency.—*Ex p.* MORGAN (1806), 12 Ves. 6; 33 E. R. 3, L. C.

*Annotation:—***Mentd.** *Re* Tyrie, *Ex p.* Morris (1866), 14 L. T. 606.

221. Loss of deeds — Right to prove deposit by secondary evidence.]—An equitable mtgee. by deposit of deeds is not deprived of his right to recover his debt by his inability to produce either the deeds deposited or any memorandum of the deposit, when the ct. believes that there was such deposit, & that the deeds have been really lost.—BASKETT *v.* SKEEL (1863), 2 New Rep. 547; 9 L. T. 52; 11 W. R. 1019.

222. —— **Unauthorised removal by solicitor debtor.**]—MASON *v.* MORLEY (No. 1), No. 205, *ante.*

K. Sub-Mortgage by Deposit.

223. Sub-mortgage of equitable mortgage — No necessity to deposit original memorandum.]—*Re* HILDYARD, *Ex p.* SMITH, No. 185, *ante.*

224. Effect of payment off of original deposit—Necessity to return deeds to original mortgagor.]—(1) Assignment of a mtge. without the privity of the mtgor.: the assignee takes subject to the account between the mtgor. & mtgee. As between the mtgee. & persons claiming under him without the privity of the mtgor. they cannot add to what is due, settle the account or turn interest into principal.

(2) No conveyancer of established practice would recommend it as a good title to take an assignment of a mtge. without making the mtgor. a party, & being satisfied that the money was really due (LORD ELDON, C.).—MATTHEWS *v.* WALLWYN (1798), 4 Ves. 118; 31 E. R. 62, L. C.

Annotations:—As to (1) **Distd.** Withington *v.* Tate (1869), 17 W. R. 559; Bickerton *v.* Walker (1885), 34 W. R. 141. **Consd.** Dixon *v.* Winch, [1900] 1 Ch. 736. **Reid.** Jones *v.* Gibbons (1804), 9 Ves. 407; Mangles *v.* Dixon (1852), 19 L. T. O. S. 260; Wheatley *v.* Bastow (1855), 7 De G. M. & G. 261; *Re* Richards, Humber *v.* Richards (1890), 59 L. J. Ch. 728; Turner *v.* Smith, [1901] 1 Ch. 213; De Lisle *v.* Union Bank of Scotland, [1914] 1 Ch. 22. *As to* (2) **Consd.** *Re* Daintry & Ryle, *Re* Ravenscroft, *Ex p.* Arkwright (1843), 3 Mont. D. & De G. 129. *Generally,* **Reid.** Cheese *v.* Keen, [1908] 1 Ch. 245.

225. —— ——.] — In 1886, a mtge. debt for £1,500 was duly transferred & the mtged. property was conveyed, by way of security, to F., pltf., the mtgor. being a party. Several subsequent transfers, to which pltf. was not a party, were made, & in Feb. 1896, the mtge. debt & the security were vested in A. In 1892 pltf. gave B., her solr., the money to pay off the mtge., which he did not do, though he continued to pay interest on the mtge. as it became due to the transferee for the time being. Pltf. made no inquiry in 1892 for the reconveyance nor for the title deeds, but left the whole matter in the hands of her solr. In Oct. 1897, A. transferred the mtge. debt & the property to B., & the next day B. transferred the same to deft., to whom the deeds were handed. The cheque for £1,500 from deft. was paid by B. into his private account, & the cheque to A. was drawn by B. on his firm's account, which was then in funds, at another bank. In Dec. 1899, application was made by deft. to pltf. for arrears of interest, & the fraud was discovered. On an action by pltf. to establish her priority over deft., & for a reconveyance of the mtged. property:—*Held:* (1) on the transfer to B. the mtge. debt became discharged, & he held the property as trustee for pltf.; (2) deft., having taken the transfer from B. without the privity of mtgor., could only hold it against mtgor. subject to the state of account between B. & mtgor., & as between them the debt was non-existent; (3) pltf. had never lost the right to redeem, & directly the agent, who had received the amount to pay off the mtge., became himself the transferee, the debt was extinguished, & no transferee from him could treat the debt as a subsisting charge upon the property, & pltf. was therefore entitled to priority & to have a reconveyance from deft.—TURNER *v.* SMITH, [1901] 1 Ch. 213; 70 L. J. Ch. 144; 83 L. T. 704; 49 W. R. 186; 17 T. L. R. 143; 45 Sol. Jo. 118.

Annotations:—As to (2) **Reid.** Powell *v.* Browne (1907), 97 L. T. 854; De Lisle *v.* Union Bank of Scotland, [1914] 1 Ch. 22.

L. Right of Mortgagee.

Remedies of mtgee. generally, *see* Part X., *post.*

226. Memorandum containing agreement to execute legal mortgage—Right to sale.]—Where the memorandum of deposit of title deeds contains an agreement to grant a legal mtge., with an unqualified power of sale, the ct., on the failure of mtgor. to redeem, has power to direct a sale.—LISTER *v.* TURNER (1846), 5 Hare, 281; 15 L. J. Ch. 336; 7 L. T. O. S. 3; 10 Jur. 751; 67 E. R. 919.

227. —— ——.]—MATTHEWS *v.* GOODDAY, No. 108, *ante.*

228. —— **Right to foreclosure.**] — Where a deposit of title deeds was accompanied by a memorandum containing an express stipulation that the depositor would, if required, execute a mtge., upon a claim to obtain the benefit of the security:—*Held:* the depositee was entitled to a decree for foreclosure.—MOORE *v.* PERRY (1855), 1 Jur. N. S. 126.

229. No memorandum executed — Deposit of share certificates — Right to sale.] — CARTER *v.* WAKE, No. 75, *ante.*

230. —— —— **Right to foreclosure.**] — HARROLD *v.* PLENTY, No. 142, *ante.*

231. Priorities—Over purchaser with notice.]—Equitable mtge. by deposit of title deeds preferred to a purchase with notice.—HIERN *v.* MILL (1806), 13 Ves. 114; 33 E. R. 237, L. C.

*Annotations:—***Reid.** Kennedy *v.* Green (1834), 3 My. & K. 699; Dryden *v.* Frost (1838), 3 My. & Cr. 670; Jones *v.* Jones (1838), 8 Sim. 633; Jones *v.* Smith (1841), 1 Hare, 43; Fuller *v.* Benett (1843), 2 Hare, 394; West *v.* Reid (1843), 2 Hare, 249; Hewitt *v.* Loosemore (1851), 9

PART II. SECT. 2, SUB-SECT. 5.—L.

r. Right to foreclosure or sale.]—A mtgee. by deposit of title deeds has the right to sue for foreclosure or sale.—MANEKJI FRAMJI *v.* RUSTOMJI NASERWANJI MISTRY (1889), I. L. R. 14 Bom. 269.—**IND.**

t. Depositor not entitled to deeds.]—A person who advances money *bonâ fide* on the deposit of title deeds, made by one who has no right to them, or to the estate to which they relate, will be protected in equity as a purchaser for value without notice; & may retain the deeds, though the

Sect. 2.—Equitable mortgages: Sub-sect. 5, L.; sub-sects. 6 & 7, A. & B. (a).]

Hare, 449. **Mentd.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1; Cockerell *v.* Dickens (1840), 2 Moo. Ind. App. 353; Lang *v.* Purves (1862), 15 Moo. P. C. C. 389; Dresser *v.* Norwood (1863), 32 L. J. C. P. 201.

232. —— ——.] —A person who advances money on the security of property, with notice that there are charges affecting it, cannot claim as purchaser without notice of those charges, because he believed that two charges of which he was cognisant & which were sufficient to satisfy the words were all the charges upon it. He is bound to inquire whether these are all the charges affecting the property.

The title deeds of plot A. were deposited with pltfs. as a security for advances. A parcel of deeds relating to plots B. & C. which adjoined A. was afterwards deposited with defts. with the representation that they related to plots A. B. & C. A legal mtge. was subsequently executed to defts., in which the general words were large enough to comprise the whole of the plots. Defts. paid off a charge affecting plots A. & B., & got in the legal estate:—*Held:* defts. could not be treated as purchasers of plot A. without notice of pltfs.' incumbrances so as to entitle them to priority over pltfs.—JONES *v.* WILLIAMS (1857), 24 Beav. 47; 30 L. T. O. S. 110; 3 Jur. N. S. 1066; 5 W. R. 775; 53 E. R. 274.

Annotations:—**Apld.** *Re* Alms Corn Charity, Charity Comrs. *v.* Bode, [1901] 2 Ch. 750. **Refd.** Roberts *v.* Croft (1857), 24 Beav. 223; Oliver *v.* Hinton, [1899] 2 Ch. 264. **Mentd.** Underwood *v.* Bank of Liverpool, Same *v.* Barclays Bank (1924), 93 L. J. K. B. 690.

233. —— **Against assignee in bankruptcy of mortgagor.**]—RUSSEL *v.* RUSSEL, No. 150, *ante*.

SUB-SECT. 6.—MEMORANDUM OR AGREEMENT WITHOUT DEPOSIT OF DEEDS.

234. Written memorandum — No title deeds deposited.]—Where freehold title deeds were intended to be deposited with an equitable mtgee., together with deeds relating to leasehold property, & were accordingly specified in the memorandum of deposit, the freehold property was included in the order for sale.—*Re* LEATHES, *Ex p.* LEATHES (1833), 3 Deac. & Ch. 112, Ct. of R.

Annotation:—**Refd.** *Re* Carter & Justins, *Ex p.* Sheffield Union Banking Co. (1865), 13 L. T. 477.

235. —— ——.] —Usual order for sale of equitable mtge. made, notwithstanding agreement that there being no deposit of deeds, the agreement was a mere executory agreement for a mtge., & gave no lien on the property.—*Re* BLEW, *Ex p.* JONES (1835), 4 Deac. & Ch. 750; 4 L. J. Bcy. 59, Ct. of R.

Annotation:—**Refd.** *Re* Carter & Justins, *Ex p.* Sheffield Union Banking Co. (1865), 13 L. T. 477.

236. —— ——.] —An equitable mtge. may be created on deeds in the hands of a third party, & by a memorandum on the part of the mtgor. to assign his interest in the property comprised in the deeds, & that such assignment, when made, & the agreement in the meantime should be a security for the amount due on an account current.—*Re* OGBOURNE, *Ex p.* HEATHCOATE (1842), 2 Mont. D. & De G. 711; 6 Jur. 1001, Ct. of R.

Annotation:—**Refd.** *Re* Carter & Justins, *Ex p.* Sheffield Union Banking Co. (1865), 13 L. T. 477.

237. —— ——.] —*Re* DAINTRY & RYLE, *Re* RAVENSCROFT, *Ex p.* ARKWRIGHT, No. 178, *ante*.

238. —— ——.] —A memorandum or agreement showing an intention to deposit title-deeds by way of equitable mtge., or to charge the property comprised in those deeds with the payment of the debt, is sufficient to create an equitable charge without actual deposit.—*Re* CARTER & JUSTINS, *Ex p.* SHEFFIELD UNION BANKING CO. (1865), 13 L. T. 477.

239. —— **Three leases specified—Two only deposited.**]—Bkpt. deposited the leases of two houses with petitioner for securing £600, accompanied with an agreement in writing; & on the same day he signed another agreement, engaging to pay £85, *per annum*, being the improved rental of the premises, "the leases of which are deposited" with petitioner, viz. £45 being the improved rental of a house in the occupation of T. H.; £20 being the improved rental of the adjoining premises, let to J. H., as tenant at will, & £20 being the improved rental of premises in the occupation of A. B., "the said £85 to be collected by me, & paid over" to petitioner. The lease of the premises let to T. H., as tenant at will, had not been, in fact, deposited with petitioner; but only the lease of the other premises in the occupation of T. H., & the lease to A. B.:—*Held:* petitioner had a lien, as equitable mtgee., upon the premises comprised in all three leases.—*Re* MOORE, *Ex p.* EDWARDS (1836), 1 Deac. 611, Ct. of R.

Annotation:—**Refd.** *Re* Carter & Justins, *Ex p.* Sheffield Union Banking Co. (1865), 13 L. T. 477.

240. —— **Policy & bond specified — Policy not deposited.**]—(1) One of three partners deposits with a joint creditor a bond belonging to himself, to secure the partnership debt:—*Held:* on the bkpcy. of the partners, creditor could prove the amount of his debt against the joint estate, without giving up the bond.

(2) The memorandum of deposit stated that a policy of assurance on the life of the obligor was also deposited with the bond; but this was not the fact, & the policy was found in bkpts.' chest at the time of their bkpcy.:—*Held:* the policy passed to the assignees.—*Re* RIDGE, *Ex p.* HALLIFAX (1842), 2 Mont. D. & De G. 544; *sub nom. Re* RIDGE, *Ex p.* GLYN (1842), 6 Jur. 839, Ct. of R.

241. —— **Deeds not executed at time of memorandum.**]—An agreement to deposit a lease when granted, & which is subsequently granted, creates an equitable mtge.—*Re* PYE, *Ex p.* ORRETT (1837), 3 Mont. & A. 153, Ct. of R.

242. —— ——.] —T., being possessed of a plot of land for a certain term of years, by indenture of Apr. 24, 1845, assigned it by way of mtge. to S. as a security for £300 & interest with a power of sale on default in payment on a certain day. By a memorandum of the same date, T. undertook to deposit with S. a lease, when the same was executed, of another plot of land, as a further & collateral security for the £300 & interest. A mill & other buildings stood partly on one plot of land & partly on the other. On Dec. 18, 1845, the lease

person making the deposit was not in possession of the property, if it be an incorporeal hereditament.—JOYCE *v.* DE MOLEYNS (1845), 8 I. Eq. R. 215; 2 Jo. & Lat. 374.—**IR.**

PART II. SECT. 2, SUB-SECT. 6.

a. *Instrument under seal — Necessity for special words.*]—In an instrument under seal, the words "& for securing, etc., the said P. doth hereby specially bind, oblige, mortgage & hypothecate the said piece or parcel of land," etc. pass no interest; they only show an intention to create a charge or lien.—DOE d. ROSS *v.* PAPST (1853), 8 U. C. R. 574.—**CAN.**

b. *Registration unnecessary.*]—HARRISON *v.* ARMOUR (1865), 11 Gr. 303.

c. *Agreement before issue of patent certificate—Void.*]—WATEROUS ENGINE WORKS CO. *v.* WEAVER (1908), 8 W. L. R. 432; 1 Sask. L. R. 103.—**CAN.**

mentioned in the memorandum was granted & deposited with S. By indenture of Mar. 2, 1847, T. assigned a moiety of the entire premises to A.; & on Sept. 20, 1847, executed an assignment of all his estate & effects for the benefit of his creditors. By indenture of Aug. 31, 1848, S. assigned both plots of land, mill, & buildings to deft., subject to the equity of redemption, and with such power of sale as S. possessed. In Apr. 1852, deft. offered the premises for sale by auction; & the conditions stated (*inter alia*) that he sold as mtgee.; & that, as he had only an equitable interest in the second plot, the purchaser should accept such title as he was able to deduce & convey. Pltf. became the purchaser of both plots, but refused to complete the purchase, on the ground that the legal estate in the second plot was outstanding, & might be used adversely to him; & having brought an action to recover back the deposit:—*Held:* there was no failure of consideration, inasmuch as the assignment by T. of the legal estate in the one plot, & memorandum of deposit of future lease of the other plot, were one & the same transaction & security, & the lease, when deposited, was subject to the same conditions, including the power of sale, as were contained in the assignment, &, consequently, T. would not be entitled in a ct. of equity to redeem the second plot.—ASHWORTH *v.* MOUNSEY (1853), 9 Exch. 175; 2 C. L. R. 418; 23 L. J. Ex. 73; 22 L. T. O. S. 121; 2 W. R. 41; 156 E. R. 75.

243. —— Directing deeds to be held as security.]—One of two exors. & trustees who had in their possession title deeds of an estate of which their testator & a debtor to his estate had been tenants in common, requested debtor to allow the exor. to retain the title deeds as a security for the debt. Debtor wrote an answer, saying that exor. might retain the deeds till debtor got the whole of his affairs settled with the exors., & that he was endeavouring to arrange so as to buy or sell the property:—*Held:* a good equitable mtge. for the debt.—FENWICK *v.* POTTS (1856), 8 De G. M. & G. 506; 44 E. R. 485, L. JJ.

Annotations:—**Distd.** *Re* Beetham, *Ex p.* Broderick (1886), 18 Q. B. D. 380. **Refd.** Swanley Coal Co. *v.* Denton (1906), 95 L. T. 659.

244. —— Directing prior incumbrancer to hand over deeds when satisfied.]—B., being entitled to three properties, the title deeds of one of which were held by his bankers as a security, deposited the title deeds of the other two with C. as a security for a debt, & he gave him an order to the bankers, written by himself, but not signed, to deliver over the deeds of the third property when their lien had been satisfied:—*Held:* this gave C. a valid equitable mtge. on the property mortgaged to the bankers.—DAW *v.* TERRELL (1863), 33 Beav. 218; 3 New Rep. 285; 55 E. R. 351.

Annotation:—**Distd.** *Re* Beetham, *Ex p.* Broderick (1887), 18 Q. B. D. 766.

245. Parol agreement—With subsequent delivery of title deeds—Relation back to time of agreement.]—An agreement to mtge. with a subsequent delivery of the title deeds will amount in equity to a mtge. & will be effectual from the time of the agreement.—EDGE *v.* WORTHINGTON (1786), 1 Cox, Eq. Cas. 211; 29 E. R. 1133.

246. —— To deposit lease when granted.]—A parol agreement to deposit a lease when granted, as security for a sum advanced, does not constitute an equitable mtge.—*Re* BEAVAN, *Ex p.* COOMBE (1819), 4 Madd. 249; 56 E. R. 698.

Annotations:—**Expld.** Tebb *v.* Hodge (1869), L. R. 5 C. P. 73. **Distd.** Parish *v.* Poole (1884), 53 L. T. 35.

247. —— ——.]—There must be some actual deposit, to constitute an equitable mtge. An order on a third party to deposit a lease, when executed, is not sufficient.—*Re* COLLINS, *Ex p.* PERRY (1843), 3 Mont. D. & De G. 252, Ct. of R.

SUB-SECT. 7.—EQUITABLE CHARGES.

A. In General.

Equitable lien.]—*See* LIEN, Vol. XXXII., pp. 254 *et seq.*

248. No special words necessary to create.]—To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used, but it is sufficient if the ct. can gather from the instrument an intention by the parties that the property referred to should constitute a security.—CRADOCK *v.* SCOTTISH PROVIDENT INSTITUTION (1894), 70 L. T. 718, C. A.

Annotation:—**Refd.** United Realization Co. *v.* I. R. Comrs., [1899] 1 Q. B. 361.

249. ——.]—Where land is made security for a debt by any instrument which gives to the person entitled to the charge an equitable interest in the land, such instrument creates an equitable charge within 40 & 41 Vict. c. 34.—*Re* SHARLAND, KEMP *v.* ROZEY (No. 2) (1896), 74 L. T. 664; 40 Sol. Jo. 514, C. A.

Floating charges.]—*See* COMPANIES, Vol. X., pp. 750 *et seq.*

B. Agreement to Charge.

(*a*) *Voluntary Charge.*

250. Valid charge not created in favour of volunteer.]—An annuity was granted by deed in consideration of love & affection to C. charged on certain hereditaments & upon the moneys, securities for money, & other effects of the grantor. At the date of the deed the grantor was entitled to a reversionary interest in stock standing in the name of trustees. The annuity was regularly paid for more than twenty years by the grantor, but on his death his personal estate proved insufficient to pay his debts, & the real estate was not enough to provide for the annuity:—*Held:* (1) so far as the charge on the reversionary interest in the stock was concerned, the deed depended only upon contract, & did not create a perfect & complete equitable charge in favour of C.; (2) as there could be no specific performance of a contract in favour of a volunteer C. had no priority over the creditors of the grantor.—*Re* LUCAN (EARL), HARDINGE *v.* COBDEN (1890), 45 Ch. D. 470; 60 L. J. Ch. 40; 63 L. T. 538; 39 W. R. 90.

PART II. SECT. 2, SUB-SECT. 7.—A.

d. *Crown bonds.*]—Testator had joined in certain Crown bonds, which remained undischarged:—*Held:* they formed a charge upon lands, which the purchaser was entitled to have removed.—*Re* CHARLES (1872), 4 Ch. Ch. 19.—**CAN.**

e. *Charge void at law—May be valid in equity.*]—A., the equitable owner of property, had it conveyed to his son, a minor, in trust for A. himself. A. afterwards signed the son's name to a mtge. of the property to a creditor, & added his own name as witness:—*Held:* the instrument, though void at law, created a valid charge in equity.—DENNISTOUN *v.* FYFE (1865), 11 Gr. 372.—**CAN.**

f. *Mortgage of homestead before issue of patent.*]—AMERICAN-ABELL ENGINE & THRESHER CO. *v.* MCMILLAN & DOIG (1909), 19 Man. L. R. 97; 10 W. L. R. 239; *affd.*, 42 S. C. R. 377.—**CAN.**

g. ——.]—A mtge. executed by a homestead entrant on the land before issue of patent is, under Dominion Lands Act, 1908 (c. 20), s. 31, null & void & ineffective as a charge against the land.—CANADIAN LUMBER YARDS, LTD. *v.* DUNHAM, [1921] 2 W. W. R. 844; 14 Sask. L. R. 325.—**CAN.**

Sect. 2.—Equitable mortgages: Sub-sect. 7, B. (b), (c) & (d).]

(b) All Existing Property.

251. Validity of charge.]—A general charge for value on all the existing property of the mtgor. is not void for uncertainty if the property to which it attaches can be ascertained at the time of enforcement. Such a charge is not contrary to public policy.—*Re* KELCEY, TYSON *v.* KELCEY, [1899] 2 Ch. 530; 68 L. J. Ch. 742; 48 W. R. 59; 43 Sol. Jo. 720; *sub nom. Re* FINN-KELCEY, TYSON *v.* KELCEY, 81 L. T. 354.

252. —— Promise by beneficiaries to pay out of deceased's estate.]—A written instrument, promising to pay a sum of money with interest, out of the estate of deceased H. & signed by all the persons interested in his estate real or personal:—*Held:* to constitute, the personalty being exhausted, an equitable mtge. of the real estate.—SUART *v.* TOULMIN (1822), 1 L. J. O. S. Ch. 12.

253. —— Property sold before charge—Charge attaches to proceeds of sale.]—A mortgaged estate was sold with the concurrence of the mtgees., free from the mtge.; & a part of the purchase-money was invested as an indemnity to the purchaser against some possible charges, & subject thereto in trust to secure a portion of the debt which had been secured by the mtge. Afterwards the mtgees., who were solrs., borrowed money of a client, giving her a memorandum purporting to charge the mtge. debt, which they described as still secured on the property, with the money thus borrowed. On the solrs. becoming bkpt.:—*Held:* the memorandum created a charge upon the solrs.' interest in the indemnity fund.—*Re* SELBY, *Ex p.* ROGERS (1856), 8 De G. M. & G. 271; 25 L. J. Bcy. 41; 2 Jur. N. S. 480; 44 E. R. 394, L. JJ.

Annotation:—**Mentd.** Lloyd's Bank *v.* Pearson, [1901] 1 Ch. 865.

Floating charges by limited companies.]—*See* COMPANIES, Vol. X., pp. 750 *et seq.*

(c) Property Ascertained or Ascertainable.

254. Lands ascertained—Comprised in deposited deeds.]—M. & co. deposit with S. & co. the mtge. deeds of certain colonial property, for securing a floating balance due from M. & co. to S. & co. & afterwards executed an assignment of the mtge. debt, "in addition to the securities then already held by S. & co.," but without making any actual assignment of the mtge. itself, or the mortgaged property:—*Held:* S. & co. continued nevertheless the equitable mtgees. of the mortgaged property.

There was an intention, certainly to add the assignment of the debt to the other securities held by petitioners (SIR JOHN CROSS).—*Re* MANNINGS & ANDERDON, *Ex p.* SMITH (1832), 2 Deac. & Ch. 271, Ct. of R.

Annotation:—**Reld.** *Re* Beachey, Heaton *v.* Beachey, [1904] 1 Ch. 67.

255. —— ——.]—In 1912 deft., as security for a present or future overdraft, deposited with pltf. bank the title deeds of certain houses, which came within the description of "small dwelling-houses," in Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), & he executed a deed in which he stated that he undertook to pay on demand the moneys that should for the time being be due from him to the bank, & he thereby charged his interest in the property comprised in the deeds with payment of the said moneys on demand; he declared that the bank should be deemed mtgees. under the deed of all the premises thereby charged; he undertook on request to execute a further legal or other mtge. of the premises; he gave the bank a power of sale on default in payment; he declared that during the continuance of the security he would hold the property charged in trust for the bank, with power to the bank to remove him from being trustee & to appoint themselves or any persons to be trustees & to make a declaration vesting all his said estate & interest in such new trustees; & he irrevocably appointed certain officials of the bank to be his attorneys for executing certain documents, including a conveyance of his estate & interest in the premises. In 1917 pltfs. sued to recover the amount then due on the overdraft. Deft. pleaded that the deed was a "mtge." within Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (4), & that the action was not maintainable:—*Held:* this was an "equitable charge" within Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 2 (4) (*b*), & the action was maintainable.—LONDON COUNTY & WESTMINSTER BANK, LTD. *v.* TOMPKINS, [1918] 1 K. B. 515; 87 L. J. K. B. 662; 118 L. T. 610; 34 T. L. R. 259; 62 Sol. Jo. 330, C. A.

Annotation:—**Consd.** National Provincial Bank of England *v.* Charnley (1923), 93 L. J. K. B. 241.

256. —— Described in document of charge.]—A signed & dated document, stating as follows: "I, A. B., hereby charge in favour of C. D. all my estate & interest in X., Y., & Z. to secure all moneys due & to become due from me to him & I agree to give him proper & formal charges thereon in such form as he may approve within a fortnight or as near thereto as may be." An action was commenced for a declaration, & for accounts, foreclosure, or sale. On an application by defts. to stay the action on the ground that pltf. had not complied with the provisions of Courts (Emergency Powers) Act, 1917 (c. 25), & Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97):—*Held:* this document created an equitable charge not created by the deposit of deeds.—JONES *v.* WOODWARD (1917), 116 L. T. 378; 61 Sol. Jo. 283.

Annotation:—**Consd.** London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515.

257. Lands ascertainable — By reference to existing facts.]—A. granted an annuity to B., & covenanted to charge it upon all such property as, in the event of C. dying before him, he might become possessed of at C.'s death, either by will or otherwise. A. afterwards became bkpt., & obtained his certificate; & then C. died, having bequeathed an annuity in trust for A.:—*Held:* B. was entitled to a decree specifically charging his annuity upon the annuity bequeathed in trust for A.—LYDE *v.* MYNN (1833), 1 My. & K. 683; Coop. *temp.* Brough. 123; 39 E. R. 839, L. C.

Annotations:—**Consd.** Wellesley *v.* Wellesley (1839), 4 My. & Cr. 561. **Distd.** Mornington *v.* Keane (1858), 2 De G. & J. 292. **Reld.** Montagu *v.* Sandwich (1886), 32 Ch. D. 525; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345. **Mentd.** Parker *v.* Downing (1833), Coop. *temp.* Brough. 148; *Re* North, *Ex p.* McTurk (1836), 2 Deac. 58; Thompson *v.* Cohen (1872), L. R. 7 Q. B. 527; Collyer *v.* Isaacs (1881), 19 Ch. D. 342; Robinson *v.* Ommanney (1882), 21 Ch. D. 780.

PART II. SECT. 2, SUB-SECT. 7.—B. (b).

h. *After-acquired property must be specifically included.*]—*Re* WOOD-TURNING PRODUCTS, LTD., *Ex p.* DENNISON (Ont.), [1923] 4 D. L. R. 415; 3 C. B. R. 871.—**CAN.**

PART II. SECT. 2, SUB-SECT. 7.—B. (c).

257 i. *Lands ascertainable—By reference to existing facts.*]—WATSON *v.* SADLEIR (1829), 1 Mol. 585.—**IR.**

258. —— ——.]—A father on the marriage of his second son, by deed of settlement covenanted to pay him an annuity of £1,000 a year for life, & to charge the annuity on a sufficient part of the real estate he might die seised of; provided that nothing in the settlement should prevent his dealing with his real estate during his life, or, so only that sufficient real estate were left charged with the annuity, by will. The father subsequently made his will by which he devised his real estate, subject to the charges & incumbrances thereon, in strict settlement on his first & other sons in tail male; he bequeathed the greater part of his personal estate among his children, giving his second son legacies, the income of which when invested would be considerably more than £1,000 a year. He died leaving three sons:—*Held:* the settlement operated not only as a covenant by the father, but also as a charge upon all the real estate of which he should die seised.

If there is a covenant to charge all the real estate which a man 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, or which would be sufficient to secure £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 (COTTON, L.J.).—MONTAGU *v.* SANDWICH (EARL) (1886), 32 Ch. D. 525; 55 L. J. Ch. 925; 54 L. T. 502; 2 T. L. R. 392, C. A.

259. —— **Binds lands when ascertained.**]—A father being seised of estates in tail & in fee, on his daughter's marriage covenanted with two trustees, one of whom was his son, to pay an annuity to his daughter out of the rents & income of his real & personal estates, & by deed or will to settle an estate of £200 a year, or, at his own election, £4,000 in lieu of it, on certain trusts for the benefit of his daughter & her husband & their issue. By a subsequent deed the father & son, no other person being a party, agreed to suffer a recovery of the entailed estates & to sell them & also the fee simple estates, & that out of the proceeds the father's debts, for some of which the son was surety, should be paid, & that certain sums should be taken by the father & son for their own use, & that £4,000 should be paid & provision made for the annuity, pursuant to the covenant on the daughter's marriage. A recovery was accordingly suffered, & the estates were limited to the father & son in fee. The father & son afterwards agreed to abandon the last-mentioned agreement, & in consideration of the son covenanting to pay the father's debts, the estates were conveyed by them to the son in fee. The son afterwards mortgaged the estates comprised in the recovery:—*Held:* the covenant for payment of the annuity created a charge on the estates, & the mtgee. having had notice of that covenant, the premises were subject to the annuity; but the covenant to settle the estate or £4,000 in lieu of it, created no lien or charge on any of the father's estates, & the subsequent agreement between the father & son was merely voluntary & was fairly abandoned by them.—RAVENSHAW *v.* HOLLIER (1834), 7 Sim. 3; 58 E. R. 738; *on appeal* (1835), 4 L. J. Ch. 119, L. C.

260. —— ——.]—A clergyman, whilst 13 Eliz. c. 20, was not in force, granted an annuity, which he charged upon his living in London, & covenanted, that if he exchanged for any other benefice, he would charge it with the said annuity. Prior to 57 Geo. 3, c. 99, he exchanged it for a living in Yorkshire, but did not execute any deed, charging this new living with the annuity, until after the passing of 57 Geo. 3, c. 99.

The covenant was held to create a good equitable charge on the new living from the time of the exchange; & in a suit instituted by the annuitant against the clergyman, & subsequent sequestrators who had had notice of the annuity, the ct. at the hearing, continued a receiver of the rents & profits of the living, who had been appointed by an interlocutory order.—METCALFE *v.* YORK (ARCHBP.) (1836), 1 My. & Cr. 547; 6 L. J. Ch. 65; 40 E. R. 485, L. C.

Annotations:—**Consd.** Wellesley *v.* Wellesley (1839), 4 My. & Cr. 561. **Distd.** Mornington *v.* Keane (1858), 2 De G. & J. 292. **Consd.** Tailby *v.* Official Receiver (1888), 13 App. Cas. 523; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345. **Refd.** Holroyd *v.* Marshall (1862), 10 H. L. Cas. 191; Montagu *v.* Sandwich (1886), 32 Ch. D. 525; Western Wagon & Property Co. *v.* West, [1892] 1 Ch. 271. **Mentd.** Long *v.* Storie (1849), 3 De G. & Sm. 308; Ludgate *v.* Channell (1851), 16 L. T. O. S. 337; Tuckley *v.* Thompson (1860), 1 John. & H. 126; *Re* Mirams, [1891] 1 Q. B. 594.

(d) Properly Not Ascertained.

261. Covenant to settle lands of certain value—No charge created.]—One covenants before marriage to settle certain lands on his wife for life, & afterwards devises these lands for payment of debts; the covenant is a specific lien on the lands. But a covenant to settle lands of the value of £60 *per annum*, without mentioning any lands in certain this is no specific lien, but the wife must come in as a creditor in general, & the master to value her estate for life, & the wife to come in for that valuation. But the wife to have the arrears before incurred, as well as the valuation of her estate for life.—FREEMOULT *v.* DEDIRE (1718), 1 P. Wms. 429; 24 E. R. 458.

Annotations:—**Folld.** Williams *v.* Lucas (1789), 2 Cox, Eq. Cas. 160. **Apld.** Mornington *v.* Keane (1858), 2 De G. & J. 292. **Refd.** Plunket *v.* Penson (1742), 2 Atk. 290; Ravenshaw *v.* Hollier (1835), 4 L. J. Ch. 119; Wellesley *v.* Wellesley (1839), 4 My. & Cr. 561; Montagu *v.* Sandwich (1886), 32 Ch. D. 525. **Mentd.** Omychund *v.* Barker (1745), 1 Atk. 21; Lashley *v.* Hog (1804), 2 Coop. *temp.* Cott. 449; Powdrell *v.* Jones (1854), 2 W. R. 513; Central Trust & Safe Deposit Co. *v.* Snider, [1916] 1 A. C. 266.

262. Covenant to charge lands with annuity—Personal covenant.]—The Earl of M., by articles of separation between himself & his wife, covenanted that he would, on or before Feb. 1, 1835, either by a charge on freehold estates in England or Wales, or by an investment of money, secure the payment of an annuity to a trustee for his wife:—*Held:* this was only a personal covenant, & created no actual charge, but only bound the covenantor to create a charge upon his lands on or before a certain day.—MORNINGTON *v.* KEANE (1858), 2 De G. & J. 292; 27 L. J. Ch. 791; 32 L. T. O. S. 97; 4 Jur. N. S. 981; 6 W. R. 434; 44 E. R. 1001, L. C. & L. JJ.

Annotations:—**Consd.** Tailby *v.* Official Receiver (1888), 13 App. Cas. 523. **Refd.** Montagu *v.* Sandwich (1886), 32 Ch. D. 525.

Covenants to settle generally.] — *See* SETTLEMENTS.

263. Acceptance of personal security—Agreement to give real security on demand.]—A. borrowed £300 & by his note of hand promised to pay the same on demand, & gave a security by mtge. of lands for the same when required. A. died in the month following. At the time of giving this note, & at the time of his death he had a small

k. *Machinery acquired after mortgage.*]—LONDON & CANADIAN LOAN CO. *v.* PULFORD (1879), 8 P. R. 150.—CAN.

Sect. 2.—*Equitable mortgages: Sub-sect.* 7, *B.* (*d*) & (*e*). *Sect.* 3: *Sub-sect.* 1, *A., B., C., D., E., F. & G.*]

real estate. The debt is not a charge on the land. —WILLIAMS *v.* LUCAS (1789), 2 Cox, Eq. Cas. 160; 30 E. R. 73.

Annotation:—**Refd.** Berrington *v.* Evans (1839), 3 Y. & C. Ex. 384.

264. Covenant to pay debts with interest—Or to sell such real estate as should be necessary.]—By an indenture executed by a debtor of the one part, & certain scheduled creditors of the other part, debtor covenanted that he would pay the respective debts, with interest, on a given day, & in the event of non-payment by that time, "he hereby engages to sell so much of his estates as shall be found necessary for that purpose":—*Held:* (1) this was a mere personal undertaking on the part of the covenantor; (2) even if it were not, it would give creditors no specific lien on his lands, so as to enable them in a suit for the administration of his assets to receive payment *pari passu* with the judgment creditors.—BERRINGTON *v.* EVANS (1839), 3 Y. & C. Ex. 384; 160 E. R. 751.

(*e*) *Effect of Mistake.*

Agreement to issue debenture—Defective execution of intention.]—*See* COMPANIES, Vol. X., pp. 763, 764, NOS. 4778, 4779, 4782, 4784.

SECT. 3.—**REGISTERED CHARGES ON LAND.**

SUB-SECT. 1.—UNDER REGISTRATION ACTS.

A. Registration of Charge.

See, now, Land Registration Act, 1925 (c. 21), ss. 25 (2), 26.

265. What charges may be registered—Not personal covenant.]—Where an owner of land, who sought to have it registered with an indefeasible title, had by deed entered into a personal covenant with the owner of adjoining lands to make & repair a certain road, & in the same deed there followed a proviso that the costs of the road should be considered a charge in equity, &, as far as circumstances would admit, at law also, upon the owners of the land sought to be registered:—*Held:* this did not constitute such a charge as would be entered on the register of title.—*Re* DREW'S ESTATE, *Ex p.* MASON (1866), L. R. 2 Eq. 206; 35 Beav. 443; 35 L. J. Ch. 845; 14 L. T. 278; 12 Jur. N. S. 425; 55 E. R. 968.

B. Provisions Implied in Registered Charge.

See, now, Land Registration Act, 1925 (c. 21), ss. 27, 28,

C. Form of Charge.

See, now, Land Registration Act, 1925 (c. 21), s. 25.

PART II. SECT. 2, SUB-SECT. 7.—B. (e).

l. *By corporation.*]—Where a mtge. on a land was executed to a municipal corpn., for the purpose of securing a debt due to the corpn. by its treasurer, & by a mistake of both parties the mtge. did not cover a part of the land which it was intended to mtge.:—*Held:* the corpn. was not entitled to a decree rectifying the mtge., though a private person under the circumstances would have been so entitled.—BROWN *v.* MCNAB (1873), 20 Gr. 179.—**CAN.**

m. *Necessity for strict proof of mistake.*]—In an action to strike out of a mtge. a clause as to property "after acquired":—*Held:* if it could be shown that the agreement in writing to give such a mtge. did not contemplate such a clause it must be deleted, but that the irrefragable evidence necessary had not been adduced.—COTTONWOOD TIMBER CO. *v.* MOLSONS BANK (1916), 34 W. L. R. 909.—**CAN.**

PART II. SECT. 3, SUB-SECT. 1.—A.

n. *What charges may be registered.*]—*Held:* as the document showed on its face that its object was to secure a debt, it was a mtge., & could be registered only when it complied with form 1 in the schedule to Land Titles Act.—*Re* RUMELY CO. & SASKATOON LAND REGISTRATION DISTRICT REGISTRAR (1911), 17 W. L. R. 160; 4 Sask. L. R. 466.—**CAN.**

o. *Mortgagee registering in name of purchaser.*]—Under Real Property Act, 1861, s. 14, a mtgee. of land, under the old system, having exercised his power of sale, may apply to bring the land under the Act in the name of the purchaser.—*Re* DAVIS (1867), 1 S. A. L. R. 67.—**AUS.**

p. *Necessity for proper execution.*]—Under Real Property Act, 1861, a mtge. cannot be registered which has not been executed in duplicate.—*Re* SKERRETT (1868), 2 S. A. L. R. 21.—**AUS.**

q. ——.]—ROOKER *v.* HOOFSTETTER (1896), 26 S. C. R. 41.—**CAN.**

r. ——.]—BURCHELL *v.* BIGELOW (1904), 40 N. S. R. 493.—**CAN.**

t. *Mortgagees holding severally.*]—DRAKE *v.* TEMPLETON (1913), 16 C. L. R. 153.—**AUS.**

s. *Where mortgagee agent.*]—The fact that the debt is not due to the mtgee. himself for his own benefit, does not prevent the mtge. from being registered under the statute.—BRODIE *v.* RUTTAN (1858), 16 U. C. R. 207.—**CAN.**

b. *Certificate of discharge.*]—Under 31 Vict. c. 20 (O), a registrar cannot be required to register a certificate of discharge of mtge., applying to more than one instrument. Each mtge. to be discharged should have a separate certificate.—*Re* SMITH & SHENSTON (1871), 31 U. C. R. 305.—**CAN.**

c. *Effect of mistake.*]—A mtge. & memorial were executed on Feb. 26, 1855, but by a clerical error the date in the mtge. was written as 1851. The memorial stated the date of the mtge. as 1855:—*Held:* the error did not vitiate the registration.—HARTY *v.* APPLEBY (1872), 19 Gr. 205.—**CAN.**

d. ——.]—BROWN *v.* MCLEAN (1889), 18 O. R. 533.—**CAN.**

e. ——.]—A judge of the Supreme Ct. has power to order a registrar to correct an error in the date of registration of an instrument.—*Re* BANK OF HAMILTON & MCALLISTER (1912), 22 W. L. R. 849; 5 Alta. L. R. 385.—**CAN.**

f. *Evidence of execution.*]—Under R. S. O. 1877, c. 111, s. 56, the production of the registered duplicate original of a mtge., with the registrar's certificate indorsed thereon, is *primâ facie* evidence of the due execution of such instrument.—CANADA PERMANENT LOAN & SAVINGS CO. *v.* PAGE (1879), 30 C. P. 1.—**CAN.**

g. *Necessity for registration by proper officer.*]—*Held:* as pltf. had no notice of the mtge., his title was good unless the mtge. was registered prior to the registration of the deed, & in order to prove such registration, it was necessary to show that the certificate had been signed by the proper officer.—GOULD *v.* MCGREGOR (1880), 13 N. S. R. (1 R. & G.) 339.—**CAN.**

h. *Necessity for specific description of contents.*]—*Re* NORTH WEST TELEPHONE CO. (1909), 12 W. L. R. 300.—**CAN.**

k. ——.]—ROGERS LUMBER CO. *v.* SMITH (1913), 23 W. L. R. 946; 11 D. L. R. 172; 4 W. W. R. 441; 6 Sask. L. R. 187.—**CAN.**

aa. ——.]—THORP *v.* BROWNE (1867) L. R. 2 H. L. 220.—**IR.**

bb. *Valuation of mortgage.*]—On an application under Land Registry Act, s. 176, to register a mtge., the mtge. shall be valued at its true value.—*Re* ROYAL TRUST CO., LTD. (1912), 17 B. C. R. 329.—**CAN.**

cc. *Necessity for map.*]—The map or sketch required on the registration of a mtge. of a portion of a lot is governed by Land Registry Act, s. 100. —*Ex p.* WILLIAMS (1913), 18 B. C. R. 248.—**CAN.**

dd. *Necessity for registration.*]—The covenant for payment contained in a mtge. in the statutory form, equally with the charge upon the lands created by such mtge., only becomes operative by the registration of the instrument. —R. *v.* TORONTO GENERAL TRUSTS CORPN., [1917] 1 W. W. R. 823; 11 Alta. L. R. 138.—**CAN.**

ee. ——.]—To ascertain whether an unregistered document creates an equitable mtge., the test is whether it constitutes the bargain between the parties, *i.e.*, whether it records a contemporaneous loan & deposit of title deeds, or whether it merely records an already completed transaction of loan & deposit. It is only in the former case that the document is inadmissible for want of registration.—KRISHNAIYA *v.* PONNUSWANCE AIYAR (1923), I. L. R. 47 Mad. 398.—**IND.**

ff. ——.]—Where an instrument which should be registered was deprived of its value as a security by one party's refusal to register it:—*Held:* it was no longer a sufficient consideration to bind the other party to an agreement to receive a payment by instalments.—CODNER *v.* WADE (1829), 2 Nfld. L. R. 1.—**NFLD.**

gg. *Effect of seizure by sheriff.*]—Where a sheriff has, under a writ of execution against goods seized a registered mtge. upon lands by delivering to the registrar the notice provided for, the registrar is justified in treating the sheriff as the registered owner of the mtge. to the extent at least of refusing to allow any registered dealings with the mtge. by the mtgee. by way of transfer or discharge, until the seizure is withdrawn.—*Re* LAND TITLES ACT, [1921] 3 W. W. R. 427.—**CAN.**

hh. *Effect of registration.*]—A mtge. deed is, when registered, valid without possession.—BALAJI NARAYAN KOLATKAR *v.* RAMCHANDRA GANESH KELKAR (1874), 11 Bom. 37.—**IND.**

D. Alteration of Terms of Charge.

See, now, Land Registration Act, 1925 (c. 21), s. 31; Land Registration Rules, 1925, r. 150, sched., Form 51.

E. Effect of Registered Charge.

See, now, Land Registration Act, 1925 (c. 21), ss. 27 (1), 69–81.

266. Conveyance of legal estate—May be added to registration of charge.]—In 1871 a lease was granted of a public-house for a term of ninety-nine years at a rent of £100 *per annum.* The lease contained a proviso for re-entry on default for twenty-one days in payment of the rent. This lease was assigned to deft. R. In May, 1897, R., as beneficial owner, demised the house by way of mtge. to F. & Sons for the residue of the term, less the last day thereof. No rent was reserved by this deed, & R. covenanted to indemnify F. & Sons against the original rent. The deed contained provisions making R. in effect a trustee of the last day of the term for the mtgees. or a purchaser from then. By a deed dated July 27, 1899, the house was conveyed to R. in fee at the price of £3,650, "subject to but with the benefit of," the lease. To enable him to complete the purchase he arranged to borrow £3,000 from pltf. bank on the security of the house; & on July 27, 1899, a mtge. to the bank was executed immediately after the conveyance to R. the £3,000 being paid by the bank directly to the vendors. The property had been described to the bank as a "freehold ground rent of £100 a year" secured on the house. By the mtge. deed R. conveyed to the bank by way of mtge. the hereditaments comprised in the documents specified in a schedule, as to such of them as were freehold in fee simple, & as to such of them as he was entitled to for any term of years for the residue of such term, except the last day thereof. The schedule comprised the conveyance of July 27 & the other title deeds relating to the freehold & the counterpart of the lease of 1871, but no other document relating to any leasehold interest. At this time registration of title to land under the Land Transfer Acts had been made compulsory on sale in the parish in which the house was situate.

On Aug. 28, 1899, R. applied for the registration of himself as proprietor of the house, with a possessory title.

On the same day he executed an instrument charging the house with the payment to the bank of the £3,000 & interest.

The charge was in the form No. 39 in the schedule to the Land Transfer Rules, 1898, but there was added to it a grant of the house to the bank in fee, subject to redemption. This charge was also taken in for registration, & on Sept. 18, 1899, the registrar issued a certificate that R. was registered as proprietor of the house with a possessory title, & another certificate that the bank were registered as proprietors of the charge.

In Apr. 1901, R. executed a deed of arrangement with his creditors to which the bank were not parties. F. & Sons took possession of the house, & the bank demanded payment of the rent of £100 from them, as well as from the trustees of the deed of Apr. 1901, but it was not paid.

The bank then brought an action against R., F. & Sons, & the trustee of the deed of arrangement, claiming to enforce their security by foreclosure or sale. They claimed also a declaration that the term had not merged in the fee, & that they were entitled to re-enter for non-payment of the rent:—*Held:* (1) the term was still in existence, & the bank, if the legal estate in the fee was vested in them, were entitled to enter for default in payment of the rent; (2) by virtue of the registered charge with the added words the legal estate in the fee had passed to the bank.—CAPITAL & COUNTIES BANK, LTD. *v.* RHODES, [1903] 1 Ch. 631; 72 L. J. Ch. 336; 88 L. T. 255; 51 W. R. 470; 19 T. L. R. 280; 47 Sol. Jo. 334, C. A.

Annotations:—As to (2) **Refd.** A.-G. *v.* Odell, [1906] 2 Ch. 47. *Generally,* **Refd.** *Re* De Leeuw, Jakens *v.* Central Advance & Discount Corpn., [1922] 2 Ch. 540. **Mentd.** Lea *v.* Thursby, [1904] 2 Ch. 57; Manks *v.* Whiteley, [1912] 1 Ch. 735; *Re* Fletcher, Reading *v.* Fletcher, [1917] 1 Ch. 339.

267. Mortgagee selling under power of sale—Not bound to register charge before completion.]—Where the owner of leaseholds in London, subject to a mtge. by sub-demise executed before registration of title under the Land Transfer Acts became compulsory, is registered under the Acts as the proprietor with a possessory title, & afterwards the mtgee. sells under his power of sale, the mtgee. is not the vendor of "registered land" within the Land Transfer Act, 1897 (c. 65), s. 16 (2), & the purchaser cannot require him to register his charge before completion or to procure a transfer from the registered proprietor.—*Re* VOSS & SAUNDERS' CONTRACT, [1911] 1 Ch. 42; 80 L. J. Ch. 33; 103 L. T. 493; 55 Sol. Jo. 12.

F. Priorities of Charges.

See, now, Land Registration Act, 1925 (c. 21), s. 29; Part XII., *post.*

G. Transfer of Charges.

See, now, Land Registration Act, 1925 (c. 21), ss. 33, 36; Land Registration Rules 1925, rr. 163–166.

268. Duties of registrar.]—In 1901 C. was registered under the Land Transfer Acts as proprietor of a charge on certain property in London for £350. In 1903 her solr., T., produced to O. what purported to be a transfer of the charge, upon which £300 was then owing, from C. to O., together with an authority, also purporting to be signed by C., to pay the money to T. O. paid the £300 to T., & took the transfer to the Land Registry & was registered as proprietor of the charge. The transfer & the authority were both forged. There was no negligence on the part of C., & O. was quite honest in the transaction & had acted with reasonable care. At the instance of C. the ct. ordered the register of charges to be rectified by removing the name of O. therefrom & restoring the name of C., & that was done. O. claimed to be entitled to indemnity under Land Transfer Act, 1897 (c. 65), s. 7 (4):—*Held:* the act of the registrar in putting O. on the register was a mere ministerial act, & not a judicial act as on the registration of a person first registered as proprietor of land, & it conferred on him no estate or right which he had not before registration, & he could not show that he had a transfer from some one previously on the register, & in that sense relied on the register; he, therefore, could not claim any beneficial interest in the charge, & had not suffered any loss by the rectification, & was not entitled to any indemnity.—A.-G. *v.* ODELL, [1906] 2 Ch. 47; 75 L. J. Ch.

a. *Priority over voluntary conveyance.*]—ABELL *v.* MIDDLETON (1901), 2 O. L. R. 209.—CAN.

b. *Indorsement on certificate of title.*]—MORRIS *v.* BENTLEY (1895), 2 Terr. L. R. 253.—CAN.

Sect. 3.—*Registered charges on land: Sub-sect.* 1, *G., H., I. & J.; sub-sects.* 2 & 3. *Sects.* 4 & 5: *Sub-sect.* 1.]

425; 94 L. T. 659; 54 W. R. 566; 22 T. L. R. 466; 50 Sol. Jo. 404, C. A.

Annotations:—**Refd.** Bank of England *v.* Cutler, [1908] 2 K. B. 208. **Mentd.** Moel Tryvan Ship Co. *v.* Krüger (1906), 75 L. J. K. B. 878.

269. Transferee registering forged transfer—Right of indemnity.]—A.-G. *v.* ODELL, No. 268, *ante*.

See, now, Land Registration Act, 1925 (c. 21), s. 83.

H. Land Excepted from Local Registration.

See, now, Land Registration Act, 1925 (c. 21), s. 135.

I. Registration in Middlesex.

See Middlesex Registry Act, 1708 (c. 20), s. 1; & Land Registry (Middlesex Deeds) Act, 1891 (c. 64).

See, now, Land Charges Act, 1925 (c. 22), s. 18.

270. What charges must be registered—Deposit of deeds without memorandum.] — Middlesex Registry Act, 1708 (c. 20), does not apply to a mere equitable mtge., created by the deposit of the title deeds.—SUMPTER *v.* COOPER (1831), 2 B. & Ad. 223; 9 L. J. O. S. K. B. 226; 109 E. R. 1126.

Annotations:—**Consd.** Neve *v.* Pennell, Hunt *v.* Neve (1863), 2 Hem. & M. 170. **Apld.** Kettlewell *v.* Watson (1884), 26 Ch. D. 501. **Refd.** *Re* Wight's Mortgage Trusts (1873), 43 L. J. Ch. 66; Battison *v.* Hobson, [1896] 2 Ch. 403. **Mentd.** *Re* Norman, *Ex p.* Burrell (1838), 3 Deac. 76; *Re* Freeman, *Ex p.* Williams (1865), 12 L. T. 180; Finck *v.* Tranter, [1905] 1 K. B. 427.

Priority of registered deed.]—*See* Part XII., Sect. 1, sub-sect. 4, A., *post*.

271. —— Deposit of deeds with memorandum.] —An equitable mtge. being in the nature of an agreement to execute a mtge., & as such enforceable in equity, is within Middlesex Registry Act, 1708 (c. 20), & therefore a memorandum not under seal accompanying an equitable deposit is capable of registration. In the absence of express evidence to the contrary, the deed, or memorial, etc., entered as first in number upon the register, is entitled to priority over a deed, etc., entered subsequently upon the same day.—NEVE *v.* PENNELL, HUNT *v.* NEVE (1863), 2 Hem. & M. 170; 2 New Rep. 508; 33 L. J. Ch. 19; 9 L. T. 285; 11 W. R. 986; 71 E. R. 427.

Annotations:—**Consd.** *Re* Wight's Mortgage Trust (1873), L. R. 16 Eq. 41. **Mentd.** Cummins *v.* Fletcher (1879), 28 W. R. 272; Pledge *v.* White (1896), 65 L. J. Ch. 449.

J. Registration in Yorkshire.

See Yorkshire Registries Act, 1884 (c. 54); Yorkshire Registries (Amendment) Act, 1885 (c. 26).

Vendor's lien generally, *see* LIEN, Vol. XXXII., pp. 275 *et seq*.

272. What charges must be registered—Vendor's lien.]—A vendor of land in a register county, part of whose purchase-money remains unpaid, is under no obligation to register a memorial of the vendor's lien, but is entitled to rely on his equitable lien against sub-purchasers who have notice of it, actual or constructive.—KETTLEWELL *v.* WATSON (1884), 26 Ch. D. 501; 53 L. J. Ch. 717; 51 L. T. 155; 32 W. R. 865, C. A.

Annotations:—**Mentd.** National Provincial Bank of England *v.* Jackson (1886), 33 Ch. D. 1; Farrand *v.* Yorkshire Banking Co. (1888), 40 Ch. D. 182; *Re* Payne, Young *v.* Payne, [1904] 2 Ch. 608; Berwick *v.* Price, [1905] 1 Ch. 632; Manks *v.* Whiteley, [1912] 1 Ch. 735; Barker *v.* Stickney, [1919] 1 K. B. 121.

273. —— Agreement to purchase land with part payment.]—Pltf., by an agreement in writing, agreed to purchase certain land from N., & paid part of the purchase money in advance as appeared in the agreement. N. had previously by deed mortgaged the same land to defts. Pltf. registered the agreement before defts. registered their mtge., & claimed priority:—*Held:* the agreement was not a conveyance or a memorandum of charge, & therefore was not an assurance entitled to be registered within Yorkshire Registries Act, 1884 (c. 54).—RODGER *v.* HARRISON, [1893] 1 Q. B. 161; 62 L. J. Q. B. 213; 68 L. T. 66; 41 W. R. 291; 9 T. L. R. 120; 37 Sol. Jo. 99; 4 R. 171, C. A.

Annotation:—**Mentd.** Whitbread *v.* Watt, [1901] 1 Ch. 911.

274. —— Deposit of deeds without memorandum.]—(1) The Yorkshire Registries Act, 1884 (c. 54), applies to a charge by deposit of deeds unaccompanied by a memorandum of deposit.

(2) The priorities given by the Yorkshire Registries Act, 1884 (c. 54), are not to be altered except in cases of actual fraud, which means fraud importing grave moral blame.

In 1889 certain beneficiaries under a will deposited with a bank the title deeds of an estate in Yorkshire to secure an overdraft by the trustees in order that the trustees might be guaranteed against loss in carrying on testator's business. This was done with the knowledge & approval of J., a solr., who represented one of the trustees in this matter. The charge was never registered. J. subsequently took a mtge. of the same property & registered it, & he claimed priority over the bank. The bank, being satisfied with the personal security of the trustees, did not contest the claim:—*Held:* J. was guilty of actual fraud in taking advantage of a defect in the bank's security to defeat the interests of his client, & he was not entitled to the protection of the Yorkshire Registries Act, 1884 (c. 54).—BATTISON *v.* HOBSON, [1896] 2 Ch. 403; 65 L. J. Ch. 695; 74 L. T. 689; *sub nom. Re* HOBSON, BALLISON *v.* HOBSON, 44 W. R. 615.

Annotation:—*As to* (2) **Refd.** Manks *v.* Whiteley, [1912] 1 Ch. 735.

Priority of registered charge.]—*See* Part XII., Sect. 1, sub-sect. 4, B., *post*.

SUB-SECT. 2.—UNDER LAND CHARGES ACTS.

See, now, Land Charges Act, 1925 (c. 22), ss. 10–14.

SUB-SECT. 3.—UNDER COMPANIES ACTS.

See COMPANIES, Vol. X., pp. 787 *et seq*.

SECT. 4.—WELSH MORTGAGES.

275. Nature of mortgage—Necessity for covenant for repayment of money.]—(1) The ct. of opinion pltf. was in this case entitled to a redemption; & that the annuity he granted ought to be reconveyed on his payment of £1,050, with legal interest, to be

PART II. SECT. 4.

c. *Nature of mortgage.*]—A Welsh mtge. 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 & 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 (1890), 24 L. R. Ir. 577.—IR.

d. ——.]—BALFE *v.* LORD (1842), 2 Dr. & War. 480; 4 I. Eq. R. 648; 1 Con. & Law. 519.—IR.

computed from June 1, 1737, the date of the deed, but directed, if any sums were advanced for the insurance of the pltf.'s life, they should be added to the £1,050, & carry 5 per cent. interest from the respective times of paying the same.

(2) It is objected that this is not to be considered as a mtge., because there is no covenant in the deed to repay the money; but that objection is not well founded, for it is not necessary; all Welsh mtges. are without this covenant & so are most copyhold mtges. (LORD HARDWICKE, C.).—LAWLEY *v.* HOOPER (1745), 3 Atk. 278; 26 E. R. 962, L. C.

Annotations:—*As to* (1) **Consd.** Preston *v.* Neele (1879), 12 Ch. D. 760; Secretary of State in Council of India *v.* British Empire Mutual Life Assce. (1892), 67 L. T. 434. **Refd.** Searle *v.* Carpenter (1754), Amb. 242; Murray *v.* Harding (1773), 2 Wm. Bl. 859; Bulwer *v.* Astley (1843), 1 Ph. 422.

276. —— ——.]—A. being entitled in fee to a freehold estate in remainder expectant on the decease of B., demised his interest to C. for a term of five hundred years, subject to a proviso for redemption on payment of the sum of £1,000 & interest, without any time being fixed by the proviso for payment of the money; the deed contained a covenant by A. for payment of the money on demand, & also a covenant that it should be lawful for B. to enter into the property, & to hold & enjoy the same until the payment of the principal money & interest:—*Held:* the mtge. was in the nature of a Welsh mtge.; & a bill of foreclosure filed by B. against a person to whom A. had conveyed his reversionary interest, was dismissed, but without costs.—TEULON *v.* CURTIS (1832), 1 You. 610; 2 L. J. Ex. Eq. 17; 159 E. R. 1135.

277. Rights of parties — Rights of mortgagor to redeem at any time.]—A. in 1657 conveys to B., subject to redemption on payment of £380 in 1688, & possession is immediately delivered. Redemption decreed, & an account of profits, before the day of payment in the proviso.—TALBOT *v.* BRADDIL (1683), 1 Vern. 394; 23 E. R. 539, L. C.

Annotation:—**Refd.** Cowdry *v.* Day (1859), 1 L. T. 88.

278. —— ——.]—If a mtgor. agrees the mtgee. shall enter, & hold till he is satisfied; length of time is no objection to a redemption.—ORDE *v.* HEMING (1686), 1 Vern. 418; 1 Eq. Cas. Abr. 314; 23 E. R. 559, L. C.

279. —— ——.] — Two houses devised under the will are a redeemable interest, & no bar arises from the length of time. In common Welsh mtges. on tendering principal & interest, the person entitled may come into this ct. for a redemption at any time.—YATES *v.* HAMBLY (1742), 2 Atk. 360; 26 E. R. 618, L. C.

Annotations:—**Refd.** Webber *v.* Hunt (1815), 1 Madd. 13. **Mentd.** Walters *v.* Webb (1870), 5 Ch. App. 531.

280. —— —— **No right of foreclosure in mortgagee.**]—LONGUET *v.* SCAWEN, No. 67, *ante*.

281. —— —— ——.]—TEULON *v.* CURTIS, No. 276, *ante*.

282. —— —— ——.]—Though a Welsh mtge. cannot be foreclosed by the mtgee., yet the mtgor. may redeem at any time. If, however, the mtgor. obtains a decree for redemption, he will be bound to redeem, or in default, he will be foreclosed.—CURTIS *v.* HOLCOMBE (1837), 6 L. J. Ch. 156.

283. —— **Whether mortgagee entitled to all profits—Profits largely in excess of interest.**]—A. conveys land to B. who is put into possession, but under an agreement that if A. pays the money in ten years B. shall reconvey. The profits appearing to be much more than the interest, upon a bill by the heir to redeem, B. decreed to account for the profits, & not permitted to set the profits against the interest.—FULTHROPE *v.* FOSTER (1687), 1 Vern. 476; 23 E. R. 602.

Annotations:—**Distd.** Alderson *v.* White (1858), 2 De G. & J. 97. **Refd.** Donovan *v.* Fricker (1821), Jac. 165.

284. —— **When time begins to run against mortgagor—From time principal & interest paid off.**]—Time no bar to redemption in case of a Welsh mtge., unless twenty years after principal & interest paid by perception of rents & profits. Length of possession, as a ground for presuming a release, depends on the nature of the possession, whether adverse or not.—FENWICK *v.* REED (1816), 1 Mer. 114; 35 E. R. 618, L. C.

Annotations:—**Distd.** Price *v.* Carter (1837), 1 Jur. 233. **Mentd.** Adams *v.* Fisher (1838), 3 My. & Cr. 526; A.-G. *v.* Chesterfield (1854), 18 Beav. 596.

SECT. 5.—MORTGAGES BY WAY OF ANNUITY DEED.

SUB-SECT. 1.—GRANT OF ANNUITY WITH PROVISO FOR REPURCHASE OR REDEMPTION.

Annuities generally, *see* RENTCHARGES & ANNUITIES.

285. Purchase of annuity distinguished from loan on security.]—Pltf. has confused the purchase of a redeemable annuity with an advance as a loan—two things quite different, not in form merely, but in substance, for in the latter case the person who receives the money remains a debtor, in the former he does not (LORD HATHERLEY, C.).—KNOX *v.* TURNER (1870), 5 Ch. App. 515; 39 L. J. Ch. 750; 23 L. T. 227; 18 W. R. 873, L. C.

Annotation:—**Apld.** Preston *v.* Neele (1879), 12 Ch. D. 760.

286. Redeemable annuity—Treated as security for loan.]—A rentcharge of £20 granted in consideration of £240, redeemable on repayment of the consideration to the grantee's heirs, within a year after notice of the death of his wife, ceases on repayment of the sum stipulated to his exors., the conveyance being considered as a security for money.—STOKES *v.* VERRIER (1677), 3 Swan. 634; 36 E. R. 1003; *sub nom.* STOAKES *v.* VERRIER, Cas. *temp.* Finch, 292, L. C.

Annotation:—**Refd.** Tabor *v.* Tabor (1679), 3 Swan. 636.

287. —— ——.]—An annuity redeemable is a loan for money.—FLOYER *v.* SHERARD (1743), Amb. 18; 27 E. R. 10, L. C.

Annotations:—**Refd.** Searle *v.* Carpenter (1754), Amb. 242; Bulwer *v.* Astley (1844), 1 Ph. 422.

288. —— ——.]—A., by several deeds of the same date, granted, for valuable considerations, several annuities or rentcharges for lives, to be issuing & payable out of certain real estates, of which he was the owner, reserving to himself & his heirs, in each case, a power to repurchase the annuity, on payment, at three months' notice, of the original price, together with a half-yearly payment of it in advance. Each annuity was secured by the personal covenant of the grantor by clauses of distress & entry in case it should be a certain number of days in arrear, & by a warrant of attorney to confess judgment against the grantor for double the original price; & by

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280 *f. Rights of parties—Right of mortgagor to redeem at any time—No right of foreclosure in mortgagee.*]—*Re* CRONIN, [1914] 1 I. R. 23.—**IR.**

g. —— *Mortgagor entitled to fair rent.*]—MOUAT *v.* MACKENZIE (1875), 1 V. L. R. (Eq.) 73.—**AUS.**

f. Necessity for registration.]—*Held:* such an agreement was a charge in the nature of a Welsh mtge., which, by Irish Land Act, 1903, s. 54 (4), ought to be registered within three months, & as it had not been so registered it was void.—HENDERSON *v.* BURNS (1920), 54 I. L. T. 149.—**IR.**

Sect. 5.—Mortgages by way of annuity deed: Sub-sects. 1 & 2. Sect. 6: Sub-sects. 1, 2 & 3.]

another deed of even date which recited the annuities as being respectively subject to "a proviso for redemption or repurchase," the real estates on which they were charged, were conveyed to trustees for a term of years, with a power of sale to secure the regular payment of them, & subject thereto on trust for the grantor. The grantor by his will charged his real estates in aid of his personal estate with the payment of his debts, other than mtge. debts, & subject thereto, devised them in strict settlement:—*Held:* the annuities were to be treated as securities for the repayment of loans, & consequently the value of them, there being no personal assets for their payment, was, by virtue of the will, a charge upon the corpus of the real estates, & the tenant for life of the real estates, as between him & the remainderman, was only liable to keep down the interest on such value.—BULWER *v.* ASTLEY (1844), 1 Ph. 422; 13 L. J. Ch. 329; 3 L. T. O. S. 70; 8 Jur. 523; 41 E. R. 692, L. C.

Annotations:—**Distd.** Preston *v.* Neele (1879), 12 Ch. D. 760. **Consd.** *Re* Grant, Walker *v.* Martineau (1883), 52 L. J. Ch. 552; *Re* Muffett, Jones *v.* Mason (1888), 39 Ch. D. 534. **Mentd.** *Re* Dawson, Arathoon *v.* Dawson, [1906] 2 Ch. 211.

289. Proof that annuity redeemable — Parol evidence not admitted.]—Parol evidence that it was part of the agreement for an annuity, that it should be redeemable, although not made part of the contract in writing, refused to be admitted.—PORTMORE (LORD) *v.* MORRIS (1787), 2 Bro. C. C. 219; 29 E. R. 122.

Annotations:—**Consd.** Haynes *v.* Hare (1791), 1 Hy. Bl. 659. **Reld.** Townshend *v.* Stangroom (1801), 6 Ves. 328.

290. —— ——.]—Parol evidence to prove that an annuity was intended to be redeemable, no such covenant being in the deed, is inadmissible.—HARE *v.* SHEARWOOD (1790), 3 Bro. C. C. 168; 1 Ves. 241; 29 E. R. 470.

Annotation:—**Reld.** Townshend *v.* Stangroom (1801), 6 Ves. 328.

291. Right of repurchase — Assignable.]—By an indenture, dated Mar. 12, 1888, A., in consideration of £2,000 paid to him by a life assurance co., covenanted, if he should survive his father, to pay to the co. an annuity of £1,400 during his life; & A., as beneficial owner, conveyed to the co. all the dividends, interest, & annual income of the proceeds of the sale of certain freehold, copyhold, & leasehold property, or of the property itself until sale, to have & to hold the same unto & to the use of the co. & their assigns "by way of security for the said annuity of £1,400." Under clause 4 of the deed A. might, upon giving to the co. or their assigns one calendar month's notice of his intention to do so, & upon paying to the co. or their assigns, on or before Mar. 12, 1890, the sum of £3,000, together with the amount of any additional premiums payable as thereinafter mentioned, & all costs & expenses, & all arrears, if any, of the annuity of £1,400, up to the day of repurchase, repurchase the annuity, & the premises thereinbefore conveyed by him should upon such repurchase be reconveyed on his request & at his expense. By clause 8 it was provided that the deed should "be deemed to be a mtge. within Conveyancing & Law of Property Act, 1881 (c. 41), ss. 19–24," & that the powers thereby conferred on mtgees. should be incorporated therein. By an indenture, dated Dec. 31, 1889, in consideration of £8,500, A., as beneficial owner, assigned to B. all his reversionary interest in the hereditaments before-mentioned subject to the deed of Mar. 12, 1888. On Mar. 11, 1890, B., in pursuance of the 4th clause of the deed of Mar. 12, 1888, gave notice to the co. of his intention to redeem the securities & repurchase the annuity. The money was tendered to the co. first on behalf of B., then on behalf of A. The co. refused the tender. An action was accordingly brought against the co. by A. & B. claiming that they were entitled to redeem the property comprised in the deed of Mar. 12, 1888, & to have a reconveyance thereof:—*Held:* the deed was a mtge., & the right of repurchase under clause 4 thereof was not a personal privilege, but one capable of assignment; &, therefore B. had the right to redeem the property.—SECRETARY OF STATE IN COUNCIL OF INDIA *v.* BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO. (1892), 67 L. T. 434, C. A.

Policy to secure annuity—Annuity redeemed by grantor.]—*See* INSURANCE, Vol. XXIX., p. 381, Nos. 3051, 3052.

SUB-SECT. 2.—REGISTRATION OF ANNUITY DEEDS.

See, now, Law of Property Act, 1925 (c. 20), s. 121; Land Charges Act, 1925 (c. 22), ss. 4 (1), 5, 10 (1).

292. Necessity for registration — Except against subsequent incumbrancers with notice.]—A landowner by deed in Feb. 1872, charged his land with two life annuities. He subsequently made several mtges. of the property by deeds, some of which recited the annuity deed. The annuity deed had not been registered as required by Judgments Act, 1854 (c. 15), s. 12:—*Held:* as Judgments Act, 1854 (c. 15), s. 12, was in similar terms to the claims in the Registry Acts which had been decided not to make an unregistered conveyance void as against a subsequent purchaser who had notice of it the legislature must be taken to have used the words in Judgments Act, 1854 (c. 15), in the sense given to them by those decisions & the annuities therefore were valid as against all the subsequent incumbrancers who took with notice of them, & against the trustee in bkpcy. of the grantor.—GREAVES *v.* TOFIELD (1880), 14 Ch. D. 563; 50 L. J. Ch. 118; 43 L. T. 100; 28 W. R. 840, C. A.

Annotations:—**Consd. & Expld.** *Re* Monolithic Building Co., Tacon *v.* The Co., [1915] 1 Ch. 643. **Mentd.** Jay *v.* Johnstone, [1893] 1 Q. B. 25; Foster *v.* G. E. Ry., [1920] 2 K. B. 574.

SECT. 6.—COLLATERAL TRANSACTIONS ACCOMPANYING MORTGAGES.

SUB-SECT. 1.—SURETYSHIP.

Rights of surety—To indemnity.]—*See* GUARANTEE, Vol. XXVI., pp. 122–125, Nos. 867–888.

Liability of surety.]—*See, generally,* GUARANTEE, Vol. XXVI., pp. 62 *et seq.*

PART II. SECT. 6, SUB-SECT. 1.

g. *Liability of surety.*]—MONSELL *v.* MITCHELL (1863), 23 U. C. R. 116.—**CAN.**

h. *Rights of surety.*]—PURDOM *v.* NICHOLS (1888), 15 S. C. R. 610.—**CAN.**

k. *Release of surety.*]—*Held:* the giving a mtge. by M., one of the two sureties, did not of itself discharge S., the other surety.—KERR *v.* HEREFORD (1859), 17 U. C. R. 158.—**CAN.**

l. *Mortgage by surety—Release of principal.*]—H. had leased to deft. certain premises, pltf. becoming his surety for the rent. Deft. being in arrear, the three met, & it was agreed that the lease should be given up; that pltf. should secure H. by mtge. for the amount due; & that H. should release deft. The mtge. was executed, & H. gave a receipt to pltf. for the sum secured. Before the mtge. fell due or had been satisfied, pltf. sued deft. as for money paid, & the jury found that the mtge. was received in satisfaction of deft.'s debt, with his assent:—*Held:* the action would lie.—MCVICAR *v.* ROYCE (1859), 17 U. C. R. 529.—**CAN.**

—— **To mortgagor's security.**]—*See* GUARANTEE, Vol. XXVI., pp. 112–121, Nos. 782–853.

Release of surety.]—*See, generally,* GUARANTEE, Vol. XXVI., pp. 151 *et seq.*

SUB-SECT. 2.—WARRANT OF ATTORNEY.

NOTE.—*As warrants of attorney are in practice obsolete, cases dealing therewith have been excluded.*

For formalities of execution of warrants of attorney.]—*See* DEEDS, Vol. XVII., pp. 217–220.

SUB-SECT. 3.—BOND.

Bonds, generally, *see* Vol. VII., pp. 164 *et seq.*

293. Validity.]—It is not usury to take a bond for the payment of the legal interest of a sum of money on mtge., although made payable half-yearly.—GRYSILL *v.* WHICHCOTT (1632), Cro. Car. 283; 79 E. R. 848.

294. ——.] — A party having applied to deft. for the loan of a sum of £6,700 for twelve months, on the security of a mtge. of freehold property, deft. refused to advance the money unless the borrower would give him a promissory note for the amount, to be discounted by him at £5 per cent. This the borrower agreed to, & a bond & mtge. were given for £6,700, & the sum of £6,365, the amount of the note minus the discount & charge of preparing the securities, was paid to the borrower. An ejectment having been brought to recover possession of the premises, on the ground that the mtge. was invalid as being given for an usurious consideration, the jury found that the primary object of the transaction was the discounting of the note, the mtge. being only a collateral security in the event of the note not being paid:—*Held:* the transaction was not usurious, & the mtge. was valid independently of 7 Will. 4 & 1 Vict. c. 80, & 2 & 3 Vict. c. 27.—DOE d. HAUGHTON *v.* KING (1843), 11 M. & W. 333; 12 L. J. Ex. 320; 1 L. T. O. S. 81; 7 Jur. 517; 152 E. R. 831.

Annotations:—**Apld.** Bell *v.* Coleman (1845), 2 C. B. 268. **Expld.** James *v.* Rice (1854), Kay, 231. **Refd.** Follett *v.* Moore (1849), 4 Exch. 410; Nixon *v.* Phillips (1852), 7 Exch. 188; Lane *v.* Horlock (1856), 5 H. L. Cas. 580.

295. ——.]—Where a bond & mtge. are contained in one instrument, the power to create the one security cannot have any influence in determining the validity of the power to create the other.

L., one of the exors. of M., & of the devisees in trust of M.'s estate, gave a bond to O. for £7,000, describing himself as sole exor. of M. but the condition was for payment by L., his exors. & administrators:—*Held:* in an action on the bond, L. could not plead the debt was not due from himself personally but from him in his character of exor.—LINDSAY *v.* ORIENTAL BANK AT COLUMBO (1860), 13 Moo. P. C. C. 401; 3 L. T. 98; 15 E. R. 151, P. C.

Annotations:—**Refd.** Gavin *v.* Hadden (1871), L. R. 3 P. C. 707. **Mentd.** Lindsay *v.* Duff (1862), 15 Moo. P. C. C. 452.

296. Formalities.] — A bond conditioned for payment of a sum of money to the obligee, on a day named, according to a proviso contained in a conditional surrender of even date, whereby A., not the obligor in the bond, surrendered to the obligee certain copyhold lands, for securing payment of the same sum:—*Held:* to require only a £1 stamp, although it bore no stamp denoting the payment of the *ad valorem* duty on the surrender, & the latter was not produced.—QUIN *v.* KING (1836), 1 M. & W. 42; 4 Dowl. 736; 1 Gale, 407; Tyr. & Gr. 407; 5 L. J. Ex. 140; 150 E. R. 338.

Annotations:—**Refd.** Walmesley *v.* Brierly (1836), 1 Mood. & R. 529; Toovey *v.* Simons (1839), 3 Jur. 1173. **Mentd.** Scott *v.* Staley (1838), 4 Bing. N. C. 724.

297. ——.]—Documents of title were deposited, with a written memorandum expressing that they were deposited to secure an annuity, also secured by bond. The bond was enrolled but not the memorandum. The ct. declined to direct a sale of the property comprised in the security.—*Re* SWANN, *Ex p.* MILLER (1849), 3 De G. & Sm. 553; 18 L. J. Bcy. 9; 12 L. T. O. S. 455; 13 Jur. 146; 64 E. R. 602.

298. Rights of obligor.]—Where a mtgee. lends more money upon bond to the mtgor. he shall not redeem unless he pay the principal & interest due on the bond as well as on the mtge. But if he mtge. the equity of redemption to another, the second mtgee. shall not be affected by the bond since it is but a personal charge upon the mtgor.—GOREY'S CASE (1697), 3 Salk. 240; 91 E. R. 800, L. C.

299. ——.] — To debt on bond conditioned for the payment of a sum of money, which the condition stated to have been taken up, borrowed, & received by defts. of pltfs. at *respondentia* interest, secured by a cargo of goods shipped from Calcutta to Ostend: it is competent to deft. to plead that the bond was given to secure the price of goods sold by pltfs. to defts. in the East Indies, & illegally prepared by pltfs. for shipment from thence to beyond the Cape of Good Hope, without the licence of the East India co.; without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, & to negative that the bond was given for money taken up, borrowed, & received, etc. For the statement in the plea is rather explanatory of, than absolutely, inconsistent with, the transaction stated in the condition of the bond; but if it were inconsistent with it, the plea would still be good in this form.—PAXTON *v.* POPHAM (1808), 9 East, 408; 103 E. R. 628.

Annotations:—**Refd.** Hill *v.* Manchester & Salford Waterworks Co. (1831), 2 B. & Ad. 544; Fisher *v.* Bridges (1854), 3 E. & B. 642; Royal British Bank *v.* Turquand (1855), 5 E. & B. 248. **Mentd.** Greville *v.* Atkins (1829), 4 Man. & Ry. K. B. 372; Gas Light & Coke Co. *v.* Turner (1839), 5 Bing. N. C. 666.

300. ——.]—A. authorised his solr. to borrow £700 from B. to pay off a mtge., & for that purpose executed a bond & a transfer of the mtge. The solr. who had in his hands £700 belonging to B., handed over to him the bond, in which it is stated that it was intended as a collateral security. The solr. retained the transfer, which was never executed by the mtgee., & afterwards absconded without having paid off the mtge. The ct. relieved A. from the bond.

A party recovered payment at law, but, on equitable grounds, repayment was decreed:—*Held:* pltf. was also entitled to interest on the amount recovered from the time of its payment.—YOUNG *v.* GUY (1844), 8 Beav. 147; 3 L. T. O. S. 260; 50 E. R. 58.

PART II. SECT. 6, SUB-SECT. 3.

298 i. *Rights of obligor.*]—A., having purchased land, & paid several instalments, but received no deed, assigned his right to B. taking a bond from him that if he should obtain the deed, on the payment by A. to him of £100, in two years, he would convey to A.:—*Held:* on ejectment by B. the two years having expired, A. could not treat the bond as a mtge. & redeem under the Act.—DOE d. SHANNON *v.* ROE (1837), 5 O. S. 484.—**CAN.**

298 ii. ——.]—MOLESKY *v.* CANADA LIFE ASSURANCE CO. (Sask.), [1924] 1 D. L. R. 901.—**CAN.**

Sect. 6.—Collateral transactions accompanying mortgages: Sub-sect. 3. Part III. Sect. 1: Sub-sects. 1, 2, 3, 4, 5, 6, 7 & 8.]

301. Remedies of obligee.]—DARBY *v.* WILKINS (1733), 2 Stra. 957; 93 E. R. 966.

Annotations:—**Refd.** Wheelhouse *v.* Ladbrooke (1858), 3 H. & N. 291. **Mentd.** Preston *v.* Dania (1872), L. R. 8 Exch. 19.

302. ——.] — On bond to pay interest half-yearly, & the principal in three years, judgment shall be entered on failure of paying interest, but with stay of execution on discharging it.—MASFEN *v.* TOUCHET (1770), 2 Wm. Bl. 706 96 E. R. 416.

Annotations:—**Refd.** Howel *v.* Hanforth (1772), 2 Wm. Bl. 843; James *v.* Thomas (1833), 5 B. & Ad. 40; Hodgkinson *v.* Wyatt (1843), 13 L. J. Q. B. 73.

303. ——.] — A mtgee. may sue at law on the bond, after a decree of foreclosure.—AYLET *v.* HILL (1779), 2 Dick. 551; 21 E. R. 384.

304. ——.] — When a mtge. debt is secured by a collateral bond the remedy on the bond is, under Real Property Limitation Act, 1874 (c. 57), s. 8, barred by the lapse of twelve years since the last payment of interest or acknowledgment of the debt, equally with the remedy against the land comprised in the mtge.—FEARNSIDE *v.* FLINT (1883), 22 Ch. D. 579; 52 L. J. Ch. 479; 48 L. T. 154; 31 W. R. 318.

Annotations:—**Distd.** *Re* Powers, Lindsell *v.* Phillips (1883), 30 Ch. D. 291. **Refd.** *Re* Frisby, Allison *v.* Frisby (1889), 43 Ch. D. 106; *Re* Lacey, Howard *v.* Lightfoot, [1907] 1 Ch. 330.

305. ——.]—In 1867 T. P. mortgaged an estate to L. & A. for £1,000, & at the same time E. P. & C. P. gave to L. & A. a joint & several bond in the penal sum of £400, reciting that the £1,000 had been advanced at the request of E. P. & C. P., & that they had agreed to give as a better security for part thereof a bond conditioned for payment of £200 & interest. The bond was conditioned to be void if the mtgor. paid the mtge. money & interest according to his covenant. T. P. paid the interest till Dec. 1877, after which it fell into arrear, & in 1880 the mtgees. entered into possession. E. P. died in 1883 without having made any payment or given any acknowledgment. L. & A., as creditors under the bond, took out a summons for administration of his estate. E. P.'s representatives disputed the claim on the ground that this was a proceeding to recover money secured on land, & was barred by the lapse of twelve years under Real Property Limitation Act, 1874 (c. 57):—*Held:* (1) this was not a proceeding to recover money secured on land, but to recover damages because another person failed to pay money secured on land & it did not come within the scope of Real Property Limitation Act, 1874 (c. 57), s. 8; (2) if remedy on the bond had been barrable by the lapse of twelve years under that sect., the payments of interest by the mtgor. would have prevented the bar.—*Re* POWERS, LINDSELL *v.* PHILLIPS (1885), 30 Ch. D. 291; 53 L. T. 647, C. A.

Annotations:—**Consd.** *Re* Frisby, Allison *v.* Frisby (1889), 43 Ch. D. 106. **Mentd.** Nutter *v.* Holland, [1894] 3 Ch. 408.

Part III.—Parties to Mortgages.

SECT. 1.—ABSOLUTE OWNERS OF PROPERTY.

SUB-SECT. 1.—IN GENERAL.

306. Allottee under Inclosure Act—Under unsigned award.]—By a local Inclosure Act, comrs. were empowered to allot the lands to be inclosed among the proprietors interested; & by section 46, it was enacted, that the several lands so to be allotted & awarded, & the new allotments should, immediately after such allotment should have been made, remain & enure to the persons to whom they should be allotted, who should thenceforth be seised & possessed thereof to the same uses, etc. as the lands, in lieu of which they were allotted, were subject to:—*Held:* the legal estate in the allotment vested in the allottee immediately upon its being made, & did not require to be completed by the award. Consequently, a proprietor, to whom an allotment was made & possession delivered, was empowered to convey the same to a mtgee., though the award was not signed by the comrs. for many years afterwards.—DOE d. HARRIS *v.* SAUNDER (1836), 5 Ad. & El. 664; 2 Har. & W. 350; 1 Nev. & P. K. B. 119; 6 L. J. K. B. 53; 111 E. R. 1316.

Annotation:—**Mentd.** Doe d. Beaufort *v.* Neeld (1841), 3 Man. & G. 271.

307. Apparent absolute owner—Son allowed by father to act as absolute owner—Father in possession.]—A mtge. effected by the son upon the property, the father, though in possession, allowing the son to act as if absolute owner, upheld.—HUGHES *v.* SEANOR (1870), 18 W. R. 1122, L. C.

By legatee—Absence of assent to legacy by executor.]—*See* EXECUTORS, Vol. XXIII., p. 389, Nos. 4596, 4597.

Mortgage by order of court—Refusal of mortgagor to execute.] — *See* DEEDS, Vol. XVII., p. 217, No. 291.

SUB-SECT. 2.—BANKRUPTS.

NOTE.—*The following references are to pages or numbers in the title* BANKRUPTCY, Vols. IV. & V.

Mortgage deed as act of bankruptcy.]—*See* p. 57, No. 489.

Effect of unregistered adjudication order.]—*See* p. 176, No. 1640.

Duty of official receiver not to incumber estate.]—*See* p. 197, No. 1815.

Mortgage by partners—Act of bankruptcy by one partner.]—*See* p. 457, No. 4130.

Powers of bankrupt over surplus.]—*See* p. 500, Nos. 4502–4504.

301 i. *Remedies of obligee.*]—Where bonds were given to pay a certain sum & interest in twenty years, & also mtgee. of lands, redeemable in ten years, as security for the payment of the principal money of the bonds:—*Held:* a breach of the covenant to pay interest on the bonds did not accelerate the right of the mtgees. to proceed upon the mtges.; but they were entitled to a decree for sale of other bonds given as collateral security.—GREAT WESTERN RY. CO. *v.* GALT & GUELPH RY. CO. (1860), 8 Gr. 283. —**CAN.**

PART III. SECT. 1, SUB-SECT. 1.

m. *By devisee—Absence of assent to devise by executors.*]—*Re* MCMILLAN, MCMILLAN *v.* MCMILLAN (1893), 24 O. R. 181.—**CAN.**

n. *Homesteader in possession of own property.*]—*Re* SMITH (1896), 3 Terr. L. R. 376.—**CAN.**

o. —— *Necessity for wife's signature.*]—CARYK *v.* KIEFER, HOFFMAN & KURTENBACH, [1922] 1 W. W. R. 281; 62 D. L. R. 701; 15 Sask. L. R. 64.—**CAN.**

Property available for distribution—Nature of property passing.]—*See* pp. 634, 635, Nos. 5710–5712.

Estate tail.]—*See* p. 689, No. 6094.

—— **Property acquired during bankruptcy.**]—*See* pp. 729, 730, 731, 732, 733, 735, 736, 737, Nos. 6320, 6329, 6338–6340, 6343, 6354, 6360–6363, 6366–6368, 6375.

—— **Property in reputed ownership of bankrupt.**]—*See* pp. 773, 781, Nos. 6644, 6645, 6648, 6701–6703.

—— **Protection of bonâ fide transactions.**]—*See* p. 915, No. 7487.

SUB-SECT. 3.—CONVICTS.

See Forfeiture Act, 1870 (c. 23), s. 12; Trustee Act, 1925 (c. 19), s. 65.

308. Mortgage by prisoner—Validity—Effect of subsequent conviction.]—(1) Assignment of funds by a prisoner on a charge of felony, to secure payment of an antecedent debt, & costs to be incurred in his defence, established, notwithstanding his subsequent conviction.

(2) Bank of England ought not to be made a party to a suit for the purpose of giving effect to a charge upon stock standing in the name of a felon convict.—PERKINS *v.* BRADLEY (1842), 1 Hare, 219; 6 Jur. 254; 66 E. R. 1013.

Annotations:—Generally, **Mentd.** Cash *v.* Belcher (1842), 1 Hare, 310; Fuller *v.* Benett (1843), 2 Hare, 394; Esquimalt & Nanaimo Ry. *v.* Wilson, [1920] A. C. 358.

309. —— Enforcement—Bank of England as party.]—PERKINS *v.* BRADLEY, No. 308, *ante*.

Administration of convict's property.]—*See* CRIMINAL LAW, Vol. XIV., pp. 495, 496, Nos. 5459–5461.

SUB-SECT. 4.—INFANTS.

See Infants Relief Act, 1874 (c. 62), s. 1; Law of Property Act, 1925 (c. 20), s. 19 (6).

Ratification by infants.]—*See* INFANTS, Vol. XXVIII., p. 161, Nos. 196, 197.

Loans for purchase of necessaries.]—*See* INFANTS, Vol. XXVIII., pp. 171–173, Nos. 316–331.

Misrepresentation as to age.]—*See* INFANTS, Vol. XXVIII., p. 177, No. 375.

False assertion of title inducing loan.]—*See* INFANTS, Vol. XXVIII., p. 180, No. 400.

Sale of mortgaged property.]—*See* INFANTS, Vol. XXVIII., pp. 184, 185, Nos. 429–435.

Power of guardian.]—*See* INFANTS, Vol. XXVIII., p. 189, No. 459.

Charge for maintenance.]—*See* INFANTS, Vol. XXVIII., pp. 234, 235, Nos. 910–915.

Raising costs of litigation.]—*See* INFANTS, Vol. XXVIII., p. 316, No. 1805.

Execution under undue influence.]—*See* CONTRACT, Vol. XII., p. 104, No. 638.

Copyhold fine.]—*See* COPYHOLDS, Vol. XIII., p. 93, No. 1156.

Infant member of building society.]—*See* BUILDING SOCIETIES, Vol. VII., p. 471, No. 108.

SUB-SECT. 5.—JOINT TENANTS.

See Law of Property Act, 1925 (c. 20), ss. 36, 102.

310. Joint tenancy severed by mortgage.]—A mtge. severs the joint tenancy of the trust of a term.—YORK *v.* STONE (1709), 1 Salk. 158; 91 E. R. 146, L. C.

311. ——.]—*Re* POLLARD'S ESTATE (1863), 3 De G. J. & Sm. 541; 2 New Rep. 404; 32 L. J. Ch. 657; 8 L. T. 710; 11 W. R. 1083; 46 E. R. 746, L. JJ.

Annotations:—**Mentd.** Yarrow *v.* Knightly (1877), 36 L. T. 907; *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246.

312. Mortgage by joint tenants—Joint account clause—Right to mortgage money.]—Mtges. in fee were taken in the names of three sisters as joint tenants, each of the deeds containing a clause by which it was declared that the mtge. money belonged to the mtgees. on a joint account in equity as well as at law. The money advanced on the security of the mtges. formed part of the proceeds of the estate of a brother, to which the three sisters were, under his will, entitled as tenants in common. Having regard to this fact & the other facts in evidence:—*Held:* notwithstanding the insertion of the joint account clause the mtgees. were entitled to the mtge. money as tenants in common.—*Re* JACKSON, SMITH *v.* SIBTHORPE (1887), 34 Ch. D. 732; 56 L. J. Ch. 593; 56 L. T. 562; 35 W. R. 646.

SUB-SECT. 6.—LUNATICS AND PERSONS OF UNSOUND MIND.

Capacity of lunatic.]—*See* LUNATICS, Vol. XXXIII., pp. 129, 132, 133, Nos. 51, 92–96.

Judicial powers over lunatic's estate.]—*See* LUNATICS, Vol. XXXIII., pp. 190, 205, 221, 222, 224, Nos. 871, 1095–1098, 1303–1321, 1346.

SUB-SECT. 7.—MARRIED WOMEN.

See, now, Law of Property Act, 1925 (c. 20), s. 37.

Property restrained from anticipation.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 108, 115, 116, 127, Nos. 845, 921–933, 1032–1035.

Property accruing to wife during separation—Resumption of cohabitation.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 101, No. 789.

Liability of appointed funds to satisfy debt.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 144, No. 1176.

Money advanced on joint account.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 165, Nos. 1340–1343.

Loans from wife to husband—Priority of debts.]—*See* BANKRUPTCY, Vol. IV., pp. 481, 482, Nos. 4335–4342.

Mortgage executed under duress.]—*See* CONTRACT, Vol. XII., p. 97, No. 598.

Mortgage in pursuance of exercise of power—Election by wife to confirm marriage settlement.]—*See* EQUITY, Vol. XX., p. 447, No. 1728.

Mortgage for benefit of husband—Equity of exoneration.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 153, Nos. 1236 *et seq.*

—— **Effect of decree absolute for dissolution.**]—*See* HUSBAND & WIFE, Vol. XXVII., p. 553, No. 6069.

Joint mortgage of husband & wife.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 158, Nos. 1279–1282.

SUB-SECT. 8.—PARTNERS.

See PARTNERSHIP.

PART III. SECT. 1, SUB-SECT. 6.

p. *Judicial powers over lun tic's estate.*]—*Re* GIBSON (1912), 22 O. W. R. 8; 3 O. W. N. 1183; 3 D. L. R. 448. —**CAN.**

PART III. SECT. 1, SUB-SECT. 7.

q. *Power of husband to mortgage wife's property—Necessity for wife's signature.*]—A mtge. signed & sealed by the husband, but in which the wife was the only granting party:—*Held:* wholly inoperative.—FOSTER *v.* BEALL (1869), 15 Gr. 244.—**CAN.**

r. ——.]—RUSS *v.* MUTUAL FIRE INSURANCE CO. OF CLINTON (1869), 29 U. C. R. 73.—**CAN.**

SECT. 2.—LIMITED OWNERS OF PROPERTY.

SUB-SECT. 1.—TENANTS IN TAIL.

See Fines & Recoveries Act, 1833 (c. 74), ss. 18–21, 34, 35, 39, 40, 47, &, *now*, Law of Property Act, 1925 (c. 20), ss. 1, 133; Settled Land Act, 1925 (c. 18), ss. 4, 5, 13, 20, Sched. II.; Law of Property (Amendment) Act, 1924 (c. 5), s. 10, Sched. X.

313. Mortgage with covenant for further assurance—Subsequent bankruptcy—Liability of assignee in bankruptcy.]—PYE *v.* DAUBUZ, No. 153, *ante*.

314. —— Subsequent act of bankruptcy — Second mortgage pursuant to covenant.]—Tenant in tail in remainder, assuming to be tenant in fee in remainder, made a mtge. in fee with a covenant for further assurance. He became tenant in tail in possession, & afterwards, pursuant to his covenant, suffered a recovery & made a new mtge. In the meantime, however, he had notoriously committed an act of bkpcy, on which, subsequently, a commission issued:—*Held:* the second mtge. was good as to principal, interest, & costs to the date of the act of bkpcy.—WHITE *v.* HAYWARD (1831), 1 L. J. Ch. 120.

315. Estate of mortgagee—Mortgage after vesting in possession—Entail barred in subsequent bankruptcy.]—Insolvent, who was tenant in tail of one fourth of an estate, expectant on the decease of his father, in his schedule filed under the insolvent Act, stated that he was possessed of no real estate. He obtained his discharge in 1825. He subsequently became entitled to one third of another fourth of the same estate, as tenant in tail. After the decease of his father, he mortgaged his interest in the estate, & in 1831, became a bkpt., & under his bkpcy., a disentailing deed was executed, & a partition made. The assignee in insolvency discovered, in 1853, the interest of the insolvent in the estate, &, upon a bill filed by him against the assignee in bkpcy. & the mtgee., he was declared entitled to the estate; but upon further consideration:—*Held:* (1) under 1 Geo. 4, c. 119, the assignee of the insolvent took no interest in one twelfth of the estate beyond the life of the tenant in tail; also, (2) the ct. was not precluded, by the decree made, from making a new declaration, & giving consequential relief, & the mtgee. was entitled to so much of the estate as belonged to the insolvent; & neither the bkpcy. nor the disentailing assurance affected the question in dispute, nor did the statute confer upon the assignee any right as against the issue in tail, or on the person entitled in remainder expectant on the death of the insolvent without issue.—STURGIS *v.* MORSE (1860), 2 De G. F. & J. 223; 29 L. J. Ch. 766; 2 L. T. 647; 6 Jur. N. S. 766; 8 W. R. 737; 45 E. R. 607, L. JJ.

Annotations:—*As to* (2) **Distd.** Hankey *v.* Martin (1883), 49 L. T. 560. *Generally*, **Mentd.** *Re* Gaskell & Walter's Contract, [1906] 1 Ch. 440.

316. —— Base fee—Disentailing assurance subsequent to bankruptcy of mortgagor.]—In 1841 Lord H., being entitled in remainder, subject to the existing life estate of Lord D. as tenant in tail to two undivided third parts of certain hereditaments, mortgaged his interest in the property to M.D. In 1842 Lord H. became bkpt. At the date of his bkpcy. the statute in force was 6 Geo. 4, c. 16 as amended by Fines & Recoveries Act, 1833 (c. 74). No disentailing deed was executed by the comrs. in bkpcy. pursuant to sect. 64 of that statute; but in 1872 Lord H. executed a disentailing deed. In 1878 Lord D. the tenant for life, died. Pltf. was a sub-mtgee. from M.D., & brought this action to realise his security:—*Held:* the mtge. by Lord H., the tenant in tail in remainder, conferred upon the grantee, not merely an estate for the life of the grantor, but a base fee, voidable by the entry of the issue in tail; notwithstanding the intervening bkpcy., the subsequent disentailing deed by the tenant in tail operated to confirm the base fee; & therefore, pltf. was entitled, under his security to a base fee, to continue so long as there should be issue of Lord H. who would have succeeded under the entail.—HANKEY *v.* MARTIN (1883), 49 L. T. 560.

317. Disentailing deed by mortgagor — Whether execution ordered by court.]—In a mtge. suit by a judgment creditor of a tenant in tail in possession, the latter was ordered to execute a disentailing deed, in order to give full effect to pltf.'s charge.—LEWIS *v.* DUNCOMBE (1855), 20 Beav. 398; 52 E. R. 656; *subsequent proceedings* (1861), 29 Beav. 175.

Annotations:—**Consd.** *Re* Anthony, Anthony *v.* Anthony, [1893] 3 Ch. 498. **Refd.** Bankes *v.* Small (1887), 36 Ch. D. 716.

318. —— ——.]—Deft., being tenant in tail in remainder of certain freehold estates in the county of Surrey, & of certain copyholds, mortgaged certain specified freeholds, & also all the freehold manors, messuages, hereditaments & premises whatsoever & wheresoever, of which he was seised & entitled in possession, reversion, remainder, or expectancy or otherwise, to pltf & his heirs, during the life of deft., for securing two sums of money & interest. The deed contained a general covenant for further assurance. Deft. afterwards became bkpt. Pltf. having prepared a disentailing deed, tendered it to deft. for his execution, but deft. refused to execute it. Thereupon pltf. filed a bill, praying that deft. might be decreed, pursuant to his covenant for further assurance, to execute & deliver to pltf. a disentailing deed of all the estates to which he was entitled in tail male, in remainder or otherwise:—*Held:* he was not entitled to such a decree, & the bill was therefore dismissed.—DAVIS *v.* TOLLEMACHE (1856), 28 L. T. O. S. 188; 2 Jur. N. S. 1181.

Annotations:—**Refd.** Dering *v.* Kynaston (1868), 16 W. R. 819; Bankes *v.* Small (1887), 36 Ch. D. 716.

319. —— Proviso for redemption as revivor of uses of settlement.]—Under a settlement of real estates made in 1831, A., in 1884, was tenant for life in possession, B. first tenant in tail, & C. second tenant in tail in reversion. B., being a lunatic, C., with the consent of A., disentailed his interest & resettled the estates, with a power to charge the same, which was exercised. In 1893, B., who was then tenant in tail in possession, acting by C. as his committee, mortgaged the estates with a proviso that on redemption they should be "reconveyed by the mtgees. to the uses, upon the trusts & with & subject to the powers & provisions in & by the settlement of 1831 declared & contained":—*Held:* notwithstanding that the estate tail was barred by Fines & Recoveries Act, 1833 (c. 74), s. 21, the proviso for redemption in the mtge. of 1893 was valid & operative, so that the uses created by the settlement of 1831 were revived subject to the resettlement of 1884.—*Re* OXENDEN'S SETTLED ESTATES, OXENDEN *v.* CHAPMAN (1904), 74 L. J. Ch. 234.

Infant tenant in tail—Sanction of court to charge on property—For costs of action.]—*See* INFANTS, Vol. XXVIII., p. 181, No. 411.

SUB-SECT. 2.—LIMITED OWNERS OF SETTLED LAND UNDER STATUTORY POWERS.

A. Who are Limited Owners.

See, now, Settled Land Act, 1925 (c. 18), ss. 19–29; &, *generally,* SETTLEMENTS.

B. Formalities Precedent to Mortgage.

See, now, Settled Land Act, 1925 (c. 18), s. 101.

320. Notice to trustees—Trustees for purposes of Settled Land Acts—Compound settlement.]—Testator by his will dated in 1870 devised a residential estate in settlement. In the midst of & surrounded by the estate & near to the mansion house there was a smaller property which belonged to other persons. The tenant for life under the will purchased the property for £7,800, &, having mortgaged it for £7,000, himself providing the balance, he by deed in 1904 settled it on the subsisting uses of the will, but subject to the mtge. & to repayment to himself of his costs, charges, & expenses arising out of the transaction. It was proved that the acquisition of this additional property was most desirable & beneficial. Neither in the will nor in the deed of 1904 was any general power of sale conferred on the trustees of those instruments, but the deed contained a proviso that the trustees thereof should have power, by sale or mtge. of the property thereby assured, to raise the amount of the costs, charges & expenses above referred to. The tenant for life applied to the ct. for its sanction to his raising the amount of the incumbrance & costs, charges, & expenses by a mtge. of the entirety of the estate, & that the trustees of the deed of 1904 might be appointed trustees for the purposes of the Settled Land Act, of the settlement created by the will & the deed of 1904:—*Held:* (1) the trustees of the deed of 1904 ought to be appointed trustees of the compound settlement for the purposes of the Settled Land Acts, as otherwise there would be no one to whom notice could be properly & adequately given under Settled Land Act, 1882 (c. 38), s. 45 (1); (2) the proviso contained in the deed of 1904 had not the effect of making the trustees of that instrument trustees for the purposes of the Settled Land Acts, as those Acts contemplated trustees having a general & not a limited power, that is, a power exercisable at any time & for any purpose, & not a power exercisable in a contingency & for a particular purpose. The application was therefore granted.—*Re* COULL'S SETTLED ESTATES, [1905] 1 Ch. 712; 74 L. J. Ch. 378; 92 L. T. 616; 53 W. R. 504.

321. Request by mortgagee in writing—Owner having general power of appointment.]—Where the estate owner of a settled estate having a general power of appointment over the settled hereditament requires to raise money for his own use & benefit, he is entitled, under Settled Land Act, 1925 (c. 18), s. 16, to demise the settled land by way of legal mtge. to a mtgee., at such mtgee.'s request in writing, in order to secure the moneys advanced; such mtge. being expressed to take effect subject to any prior equitable charges subsisting under the settlement.—*Re* EGERTON SETTLED ESTATES, [1926] Ch. 574; 95 L. J. Ch. 153; 135 L. T. 105.

C. Purposes for Which Settled Land may be Mortgaged.

See, now, Settled Land Act, 1925 (c. 18), ss. 63, 71, 114.

322. Discharge of incumbrances on settled land—Mortgages—Discretion of court to refuse—Prejudice to annuitants.]—The tenant for life of settled land, part of which was mortgaged & part was not, & the whole of which was charged with the payment of certain life annuities, proposed to raise a sum of money by mortgaging the settled land, including the part of it not then subject to any mtge., in order to pay off the existing mtges. & certain pecuniary legacies given by the settlement. The proposed mtge. would, by virtue of Settled Land Act, 1882 (c. 38), ss. 20, 21, take priority over the annuities & all other charges & estates created by the settlement. It was not proposed to pay off the annuitants out of the money to be raised, nor could they be so paid off; &, having regard to the estimated probable sum which would be produced by a sale of the land under the powers given by the Settled Land Acts, it appeared that such a sale would preserve, whilst the proposed mtge. would unjustly prejudice, their interests. It was assumed that the tenant for life in deciding to effect the proposed mtge. was acting honestly, & with the desire, *bonâ fide,* to preserve his family estates for those intended by the settlor to enjoy them:—*Held:* Settled Land Act, 1890 (c. 69), s. 11, gave the tenant for life power to mortgage the unmortgaged part of the settled land in order to pay off the incumbrances on the other part; but having regard to Settled Land Act 1882 (c. 38), s. 53, & to the circumstances, the ct. had power to interfere, to restrain him from effecting the proposed mtge.—HAMPDEN *v.* BUCKINGHAMSHIRE (EARL), [1893] 2 Ch. 531; 62 L. J. Ch. 643; 41 W. R. 516; 37 Sol. Jo. 455; 2 R. 419; *sub nom.* HOBART-HAMPDEN *v.* BUCKINGHAMSHIRE (EARL), 68 L. T. 695, C. A.

Annotations:—**Consd.** *Re* Richardson, Richardson *v.* Richardson, [1900] 2 Ch. 778. **Reid.** *Re* Monson's S. E., [1898] 1 Ch. 427; *Re* Hunt's S. E., Bulteel *v.* Lawdeshayne, [1905] 2 Ch. 418; *Re* Stamford & Warrington, Payne *v.* Grey, [1916] 1 Ch. 404; *Re* Gladwin's Trust, [1919] 1 Ch. 232. **Mentd.** *Re* Charteris, Charteris *v.* Biddulph, [1917] 2 Ch. 379.

323. —— —— Tenant for life under compound settlement—Charge on whole property in relief of charge on one.]—Where an estate A. has been settled, & afterwards by a separate instrument the equity of redemption in an estate B. is settled on like trusts, the two settlements form one compound settlement within Settled Land Act, 1882 (c. 38), s. 2 (1); & when the mtge. on estate B. has to be paid off, the moneys required for that purpose may be raised by a mtge. upon both estates A. & B. by the tenant for life under Settled Land Act, 1890 (c. 69), s. 11.—*Re* MONSON'S (LORD) SETTLED ESTATES, [1898] 1 Ch. 427; 67 L. J. Ch. 176; 78 L. T. 225; 46 W. R. 330; 14 T. L. R. 247; 42 Sol. Jo. 289.

Annotation:—**Consd.** *Re* Coull's S. E., [1905] 1 Ch. 712.

324. —— —— —— ——.]—*Re* COULL'S SETTLED ESTATES, No. 320, *ante.*

325. —— Legacies—Discretion of court to refuse—Prejudice to annuitants.]—HAMPDEN *v.* BUCKINGHAMSHIRE (EARL), No. 322, *ante.*

326. —— Costs & expenses—Of attempted sale.]—Where a tenant for life, acting honestly & with due diligence in the exercise of the powers conferred on him by Settled Land Act, 1882 (c. 38), attempts to sell the settled land, but the sale is unsuccessful, the costs or expenses properly incurred by him in respect of such attempted sale are payable out of capital money under sect. 21, clause x., of the Act. Upon an application by the tenant for life in such a case in reference to costs or expenses so incurred, the ct., under sects. 46 (6), 47, & 55 (3) of the Act, has power to order that such costs or expenses be paid out of the property subject to the settlement, & raised by a charge on

Sect. 2.—Limited owners of property: Sub-sect. 2, C., D. & E.; sub-sects. 3 & 4, A., B., C., D., E. & F. Sect. 3: Sub-sect. 1.]

the settled land.—*Re* SMITH'S SETTLED ESTATES, [1891] 3 Ch. 65; 60 L. J. Ch. 613; 64 L. T. 821; 39 W. R. 590; 7 T. L. R. 517.

327. —— —— Of purchase & settlement of additional land.]—*Re* COULL'S SETTLED ESTATES, No. 320, *ante*.

328. —— Expenses incurred by local authorities —Public Health Act, 1875 (c. 55).]—The tenant for life of an estate paid expenses which had been incurred by a local authority & made a charge upon the estate by above Act, s. 257:—*Held:* this was a charge on the inheritance, & he was entitled to keep it alive as an incumbrance on the settled land, & to raise money under Settled Land Act, 1890 (c. 69), s. 11, by mtge. of the estate for the purpose of discharging it.—*Re* SMITH'S SETTLED ESTATES, [1901] 1 Ch. 689; 70 L. J. Ch. 273.

Annotation:—**Apld.** *Re* Pizzi, Scrivener v. Aldridge, [1907] 1 Ch. 67.

329. —— —— Private Streets Work Act, 1892 (c. 57).]—A person entitled to the interest of a tenant for life in certain property paid the expenses incurred by a local authority in paving a private street, & charged upon the property under above Act, s. 13:—*Held:* he was entitled to a charge for the capital moneys so paid under s. 13, which gives an absolute charge on the fee simple, notwithstanding the fact that s. 17 of same Act gives limited owners a power to raise moneys so paid by mtge. on the terms that the capital shall be repaid by instalments within twenty years.—*Re* PIZZI, SCRIVENER *v.* ALDRIDGE, [1907] 1 Ch. 67; 76 L. J. Ch. 87; 95 L. T. 722; 71 J. P. 58; 5 L. G. R. 86.

330. —— Interest on estate duty—Finance Act, 1894 (c. 30).]—Above Act, sect. 9 (5), does not empower a tenant for life to raise by mtge. of the inheritance the interest on the instalments of duty payable by the tenant for life.—*Re* HOWE'S (EARL) SETTLED ESTATES, HOWE (EARL) *v.* KINGSCOTE, [1903] 2 Ch. 69; 72 L. J. Ch. 461; 88 L. T. 438; 51 W. R. 468; 19 T. L. R. 386; 47 Sol. Jo. 434, C. A.

Annotation:—**Mentd.** *Re* Egmont's S. E., Lefroy v. Egmont, [1912] 1 Ch. 251.

331. —— Where money is required therefor—Meaning of "required"—Not restricted to where mortgagee calls in money.]—*Re* PARE'S SETTLED ESTATES (1897), cited, [1902] 1 Ch. 91.

Annotation:—**Follid.** *Re* Clifford, Scott v. Clifford, [1902] 1 Ch. 87.

332. —— —— —— ——.] — The word "required" in Settled Land Act, 1890 (c. 69), s. 11, is not confined to cases where a mtgee. has given notice to call in his money; the sect. must be read as if "required" meant "where money is reasonably required having regard to the circumstances of the settled land."—*Re* CLIFFORD, SCOTT *v.* CLIFFORD, [1902] 1 Ch. 87; 71 L. J. Ch. 10; 85 L. T. 410; 50 W. R. 58; 46 Sol. Jo. 30.

333. Enfranchisement — Purchase of freehold reversion of leasehold.]—The purchase by the trustees of settled property of a freehold reversion of leaseholds comes within the meaning of the word "enfranchisement" in Settled Land Act, 1882 (c. 38), s. 18, the raising of money upon mtge. of the settled property in order to make such purchase may be authorised.—*Re* BRUCE, HALSEY *v.* BRUCE, [1905] 2 Ch. 372; 74 L. J. Ch. 578; 93 L. T. 119; 54 W. R. 60.

334. Use & benefit of owner—Owner having general power of appointment.] — *Re* EGERTON SETTLED ESTATES, No. 321, *ante*.

D. Shifting Incumbrances.

See, now, Settled Land Act, 1925 (c. 18), ss. 69, 70.

335. Land sold subject to rentcharge—Exoneration with consent of incumbrancer—Incumbrance shifted to remainder of land—Consent of Board of Agriculture.]—"Incumbrance" in Settled Land Act, 1882 (c. 38), s. 5, includes a rentcharge created under Improvement of Land Act, 1864 (c. 114); & therefore where settled land is subject to such a rentcharge, the tenant for life can, on a sale of part of the land, effectually exonerate the part sold by obtaining the consent of the owner of the rentcharge to charging the whole of it upon the land under Act of 1882, s. 5, & the intervention of the Board of Agriculture under Act of 1864, ss. 68 & 69, is unnecessary.—*Re* STRAFFORD (EARL) & MAPLES, [1896] 1 Ch. 235; 65 L. J. Ch. 124; 73 L. T. 586; 44 W. R. 259; 40 Sol. Jo. 130, C. A.

Annotation:—**Reid.** *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648.

E. Effect of Mortgage by Limited Owner.

See, now, Settled Land Act, 1925 (c. 18), s. 72.

336. Tenant for life with power to charge portions—Mortgage with covenant not to exercise power.]—A tenant for life, having a power to charge the estate with portions for younger children, mortgaged his life estate, & covenanted not to exercise the power:—*Held:* he could not, afterwards, charge the estate with portions, to the prejudice of his mtgees.—HURST *v.* HURST (1852), 16 Beav. 372; 22 L. J. Ch. 538; 1 W. R. 105; 51 E. R. 822.

Annotation:—**Reid.** *Re* Bedingfelds & Herrings Contract, [1893] 2 Ch. 332.

337. Order under private Act prohibiting alienation — Mortgage subsequent to order.] — By a private Act lands & stock were vested in trustees, upon trust, after satisfaction of certain charges, to pay the yearly income to C., or for his benefit, as by the Act provided; & it enacted that the Ct. of Ch., on the application of C. or the trustees, might, in accordance with the Act, & so far as the rules of law & equity & the jurisdiction of the ct. would admit, make orders & give directions so as to ensure that the life estate of C. should be inalienable, & be applied solely for his exclusive personal enjoyment. An order in conformity with this last provision was made by the judge, subsequently to which C. became indebted for money lent to pltf., to whom he mortgaged his life estate, as a security for the loan, in respect of which he further gave a judgment. Pltf. applied to the trustees who resisted payment on the ground of the said Act & order, & this bill was filed by pltf. to enforce his security against C.'s life estate.—GREEN *v.* MORTIMER (1861), 3 L. T. 642, L. C. & L. JJ.

SUB-SECT. 3.—LIMITED OWNERS WITH EXPRESS POWER.

See, now, Settled Land Act, 1925 (c. 18), ss. 108, 109.

338. Power to mortgage implied from other express powers—Express power of leasing—Demise by way of mortgage.]—(1) Testator devised his real estates in strict settlement, making M. first tenant for life, without impeachment of waste, &, after giving to male tenants for life powers to jointure their wives & provide portions for younger children, proceeded to authorise the tenant for life when in possession & the guardians of infant tenants for life in possession to demise any parts of the estates, except the mansion house, for any

term not exceeding twenty-one years, at the best rent, without fine or premium. He then empowered such tenants for life & guardians to grant any lease or leases of any mines or collieries, or of any parcels of land, for the purpose of digging for, winning, or gaining minerals or coal in any part of his estates " for such terms or number of years, & under & subject to such rents or reservations & agreements, as to such tenant for life or guardians or guardian shall seem reasonable & proper," & also to grant building or repairing leases for any term not exceeding ninety-nine years without any fine or premium. In 1843, M. the tenant for life, by a deed reciting the leasing power, in consideration of £6,000 paid to him by C., demised the mines included in a mining lease made by testator to E. in 1829, which would expire in 1848, to C. for ninety-nine years at a peppercorn rent, subject to redemption on payment of £6,000 & interest. The deed contained an appointment of a receiver of the rents & royalties payable by the present & future tenants, & did not oblige C. to work the mines; but the tenant for life covenanted to grant, or concur in granting, such further leases as C. should require:—*Held:* this deed was a valid exercise of the power of leasing mines, & created a good legal mtge. for an absolute term of ninety-nine years.

(2) By a deed of April, 1850, reciting the will & the power of leasing mines, & that M. was indebted to S. P. & B. in £60,000 & that it had been agreed that S. P. & B. should pay what was due on the mtge. of 1843, & take a transfer of that security, & that for securing to S. P. & B. the payment of the debt due to them from M. & any other moneys they might advance to him, it had been agreed that such further mtge. as thereinafter contained should be made; the mtge. debt of £6,000 was assigned to S. P. & B., & the term was also assigned to them subject to the existing equity of redemption, & M. granted his life estate to J. C. as a trustee for S. P. & B. It was declared that the collieries & property assigned to S. P. & B. should be subject to the proviso for redemption thereinafter contained. There followed a proviso for redemption of all the mtged. property on payment of £67,000, being the aggregate of the £60,000, & the moneys secured by the mtge. of 1843:—*Held:* the £60,000 was effectually charged on the ninety-nine years term as well as on the life interest, for this deed was a good exercise of the leasing power by varying the proviso for redemption in the deed of 1843, & that even if it were a defective exercise of that power, the defect was one which a ct. of equity would make good.—MOSTYN *v.* LANCASTER, TAYLOR *v.* MOSTYN (1883), 23 Ch. D. 583; 52 L. J. Ch. 848; 48 L. T. 715; 31 W. R. 686, C. A.; *subsequent proceedings*, 25 Ch. D. 48, C. A.

SUB-SECT. 4.—LIMITED OWNERS WITH SPECIAL STATUTORY POWERS.

A. Enfranchisement of Copyholds.

See, now, Law of Property Act, 1922 (c. 16), ss. 128–144; Settled Land Act, 1925 (c. 18), s. 71; &, *generally*, COPYHOLDS, Vol. XIII., pp. 114 *et seq.*, 155 *et seq.*

B. Ecclesiastical Expenses.

See ECCLESIASTICAL LAW, Vol. XIX., pp. 500–502, Nos. 3571–3583.

C. Inclosure Expenses.

See Inclosure Act, 1845 (c. 118), s. 133, &, *generally*, COMMONS, Vol. XI., pp. 57 *et seq.*

339. Extent of power to mortgage — Expenses incurred in exchange of lands—Between husband & wife.]—A., a married woman, being tenant for life of lands allotted & exchanged under an inclosure Act, in 1810 mortgaged them for one thousand years to B. to secure £105 advanced by him to pay her share of the expenses of the inclosure. B. died in 1812, & the husband of A. was his exor. & one of his residuary legatees. The term passed to A.'s husband as exor., & he died in 1824. After the death of B. no interest was paid, & upon the death of A. the remainderman took possession. A.s husband bequeathed all his property to A. & made her one of his exors., but she did not prove. In ejectment upon demises by the exor. of A. & also by the exors. of A.'s husband:—*Held:* the mtge. deed was not invalidated by the fact that the expenses were partly incurred in exchanging lands allotted to A. with the lands of her husband.—DOE d. FRANCIS *v.* HARE (1850), 15 L. T. O. S. 203.

340. —— Limited to specific sum per acre—Personal liability of owner for excess.]—By the General Inclosure Act, 1845 (c. 118), a tenant for life is empowered to charge the allotments by way of mtge., with the inclosure expenses, not exceeding £5 per acre, &, by the Amendment Act, 1848 (c. 99), the money so to be raised to be paid to the Inclosure Comrs. The trustees of a settlement, with the usual powers of sale & exchange, were to apply the moneys to arise from any sale or exchange in the payment off of existing incumbrances upon the settled estates, or in the purchase of other lands. The trustees sold a part of the estates, & paid the money over to the tenant for life, who applied it in paying the expenses of inclosure, & in improving the allotments. The tenant for life died without having executed any mtge. in pursuance of the Act:—*Held:* the moneys so expended by him were, to the extent of £5 an acre, a charge on the settled estates, & his estate was liable to make good the balance.—VERNON *v.* MANVERS (EARL) (1862), 31 Beav. 617; 1 New Rep. 117; 32 L. J. Ch. 244; 7 L. T. 553; 9 Jur. N. S. 9; 11 W. R. 135; 54 E. R. 1278.

D. Land Improvement.

See LAND IMPROVEMENT, Vol. XXX., pp. 293, 294, 295, 296, Nos. 196–205, 215–220.

E. Land Tax.

See LAND TAX, Vol. XXX., pp. 311, 312, Nos. 112–122.

F. Tithe Redemption.

See Tithe Acts, 1836 (c. 71), ss. 77, 78; 1839 (c. 62), ss. 16, 17; 1840 (c. 15), s. 23; 1842 (c. 54), s. 8; 1846 (c. 73), s. 11; Extraordinary Tithe Redemption Act, 1886 (c. 54), s. 6 (2); &, *generally*, ECCLESIASTICAL LAW, Vol. XIX., pp. 476 *et seq.*

SECT. 3.—FIDUCIARY OWNERS.

SUB-SECT. 1.—PERSONAL REPRESENTATIVES.

341. Mortgage of estate of deceased—Realty—Mortgage for debts of ancestor of infant—Power of court to authorise.]—Debts Recovery Act, 1830

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341 i. *Mortgage of estate of deceased—Realty—Mortgage for debts of ancestor of infant—Power of court to authorise.*]—NATIONAL BANK *v.* GOURLEY (1886), 17 L. R. Ir. 357.—IR.

t. —— ——.]—*Re* MATERI (1912), 21 W. L. R. 283; 4 D. L. R. 6.—CAN.

Sect. 3.—Fiduciary owners: Sub-sects. 1 & 2, A. (a) i. & ii.]

(c. 47), does not empower the ct., even for the benefit of the infant heir, to direct a mtge. of his real estates for payment of the ancestor's debts to which it is liable.—SMETHURST *v.* LONGWORTH (1837), 2 Keen, 603; 7 L. J. Ch. 18; 48 E. R. 760.

Annotation:—**Reld.** Clarke *v.* Royal Panopticon (1857), 5 W. R. 332.

342. —— —— —— ——.]—In a creditor's suit, the ct. has no jurisdiction, under Debts Recovery Act, 1830 (c. 47), or 2 & 3 Vict. c. 60, to extend the sum to be raised by way of mtge. by an infant, for payment of the debts of his ancestor or devisor, so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mtge., & where a mtge. is much more beneficial for the infant than a sale would be.—HILL *v.* MAURICE (1847), 1 De G. & Sm. 214; 16 L. J. Ch. 280; 9 L. T. O. S. 71; 11 Jur. 795; 63 E. R. 1038.

—.]—*See* EXECUTORS, Vol. XXIV., pp. 557, 579, 580, 582, Nos. 5975, 6141–6150, 6161–6165.

Personalty.]—*See* EXECUTORS, Vol. XXIV., pp. 565, 568–571, 573, Nos. 6033, 6065–6085, 6098, 6099.

Investment on mortgage of estate of deceased.]—*See* EXECUTORS, Vol. XXIII., pp. 328, 329, Nos. 3940–3948.

Administration obtained by suppression of will appointing executor—Validity of dispositions by supposed administrator.]—*See* EXECUTORS, Vol. XXIII., p. 237, Nos. 2881–2885.

SUB-SECT. 2.—TRUSTEES.

A. Mortgage of Trust Property.

(a) Power to Mortgage.

i. *Express Power.*

343. Whether mortgagee concerned with application of money—Lands vested in trustees by statute.]—Where lands were vested in trustees by Act of Parliament, to be mortgaged for a particular purpose, it was incumbent on the mtgee. to see the money applied accordingly.—COTTEREL *v.* HAMPSON (1686), 2 Vern. 5; 23 E. R. 616, L. C.

344. —— **Assignee of mortgagee.**]—Testator devised certain freehold estates to trustees, for five hundred years, upon trust that they should, by sale, demise or mtge. of all or any part of the estates, for all or any part of the term, or by other lawful means, levy & raise £2,400, &, when so raised, upon trust that they should put & place out same at interest, upon Govt. or real security, & call in & replace same from time to time as they should think proper; &, upon trust, to pay the proceeds to the testator's daughter, for her life; & should, after her decease, call in the £2,400, & pay same to the daughter's appointees; &, in default of appointment, among her children. The trustees borrowed the £2,400, & executed a mtge. for same, on which they indorsed a receipt for the amount. The tenant for life died; the mtgee. transferred the mtge. to pltf. On a bill to foreclose the mtge. one of defts. entitled to the £2,400 under the trusts of the will, suggested that the trustees never received the mtge. money; & that the mtgee. was, under the trusts of the will, liable for its misapplication:—*Held:* the trust implied an authority to receive the £4,200, & the trustees having given a receipt, it was not necessary for the mtgee. to show that the money reached the hands of the trustees. &, further, pltf. being a transferree for value, having the legal estate, he was not bound to inquire, & the ct. made a decree for a foreclosure.—LOCKE *v.* LOMAS (1852), 5 De G. & Sm. 326; 21 L. J. Ch. 503; 18 L. T. O. S. 326; 16 Jur. 813; 64 E. R. 1137.

345. Trustees under private Act—Execution of specific works—Mortgage of materials requisite for execution—Whether trust property within provisions of Act.]—By a local Act certain persons were incorporated as Comrs., for the purpose of "constructing tidal basins, a dock, & other works at Birkenhead": & by a further local Act, certain trustees were submitted for these Comrs.; & the property which was vested in the Comrs. by virtue of the former Act, was, by the subsequent Act, vested in the trustees. By sect. 39 of the former Act, the Comrs. were empowered to borrow at interest, on the credit of the several rates & tolls by that Act granted, & of any property which might be vested in the Comrs. by virtue of that Act, any sums of money, so that the amount owing by them did not at any one time exceed a certain specified sum; & for securing the repayment of the moneys so borrowed, the Comrs. might assign over the said rates, tolls, & property to the person who should advance or lend such money, as a security for the money so borrowed. By sect. 40, such mtge. was to be by deed duly stamped, etc., & might be according to the form given in the schedule to the Act. By sect. 41, such mtgees. were to be creditors on the rates or tolls & property equally. By sect. 43, a register of such mtges. was to be kept, & to be open to inspection. By sect. 57, the Comrs. were empowered to purchase certain lands, & to agree with the parties interested in such lands for the purchase for a consideration in money, etc. After a portion of the works had been completed, the trustees, who were indebted to their contractor for the execution of a part of the works, by two several indentures assigned to him by way of mtge. all the plant, goods, machinery, & working materials, in use in & about the docks. These deeds were not in the form given by the Act, nor were they registered:—*Held:* as the property assigned by these deeds was not such property as that contemplated by sect. 39 of the first Act, but was property to which the trustees were entitled independently of the Act; & therefore the trustees had an absolute control over it, & the mtges. in question were valid.—M'CORMICK *v.* PARRY (1852), 7 Exch. 355; 21 L. J. Ex. 143; 18 L. T. O. S. 291; 155 E. R. 984.

346. Extent of power—Costs of mortgage included.]—A power in trustees to raise by mtge. a fixed sum implies a power to raise also the incidental costs of the mtge.—ARMSTRONG *v.* ARMSTRONG (1874), L. R. 18 Eq. 541; 43 L. J. Ch. 719.

Annotations:—**Folld.** Nightingale *v.* Reynolds, [1902] 2 Ch. 117. **Reld.** Sewell *v.* Bishopp (1893), 63 L. J. Ch. 615.

347. Power given to sole executrix—With power to appoint another to assist in execution of trusts—Joint mortgage.]—R. by his will appointed his wife sole extrix., with power to appoint another person to assist her in carrying out the trusts of the will, & gave her certain leasehold houses during her widowhood, with power to sell, mortgage, or lease any part thereof, & to apply the money to her own use, & subject thereto he gave the same on certain trusts in favour of his children. R. died in 1883. By indenture of Oct. 31, 1887, between the widow & other beneficiaries under the will, it was agreed that the widow should appoint another person to act with her in the trusts of the

will, & that she should, prior to such appointment, sell the leaseholds & apply the money as therein mentioned. The leaseholds were not sold according to this agreement, but the widow, by indenture of Dec. 8, 1887, appointed W. to act with her as co-trustee, & vested the leaseholds in themselves jointly, & by indenture dated May 19, 1888, they mortgaged the leaseholds to deft. He afterwards contracted as mtgee. to sell a part of the leaseholds to pltf., who refused to complete the purchase, & sued deft. for the return of his deposit:—*Held:* the widow & W. had power to mortgage the leaseholds, & deft. could make a good title to them.—SAXBY *v.* THOMAS (1890), 64 L. T. 65, C. A.

348. Power to charge for valuable consideration—Mortgage for past & future advances.]—A. died in 1866, appointing his two sons, his partners, trustees & exors. He gave £5,000 in trust for his daughters & their children charged on all his estate. He empowered his trustees to retain the £5,000 in their business as long as they might reasonably require or wish, & subject to that option, & as soon as they conveniently could, they were to invest it otherwise. He gave all his residue to his sons, & declared, if they should sell or charge any part of the real estate for a "full or valuable consideration," it should not be liable, in the hands of the purchaser, to the legacy. Certain freehold business premises belonged to A. & his sons in common, subject to a mtge. for £2,000. In 1878 the sons mortgaged these premises to R. to secure past & future advances. No fresh advance was made at the time. Out of previous advances the sons had, without any stipulation to that effect by R., paid off the £2,000 mtge. & taken a reconveyance to themselves. Other part of such advance they had applied in extending their business:—*Held:* the mtge. to R. was a charge for a valuable consideration within the terms of the will; the testator had made his sons the sole judges of the length of time during which it was reasonable to keep the amount of the legacies in the business; & in the absence of *mala fides* the mtge. to R. had priority for the whole amount due on it to the charge of the £5,000.—REDMAN *v.* RYMER (1891), 65 L. T. 270; 7 T. L. R. 425, C. A.

Mortgage by trustees of dissenting chapel.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 544, Nos. 4039, 4040.

Powers of personal representatives.]—*See* Subsect. 1, *ante*.

ii. *Implied Power.*

See, now, Administrations of Estates Act, 1925 (c. 23), s. 56; sched. II.

349. Under trust for sale—Whether intention of testator to effect absolute conversion.]—A trust, "to make sale & dispose of" testator's real estates, by private sale or public auction:—*Held:* not to authorise a mtge.; there appearing an intention on the part of testator, that his whole real estate should be converted.—HALDENBY *v.* SPOFFORTH (1839), 1 Beav. 390; 8 L. J. Ch. 238; 3 Jur. 241; 48 E. R. 991.

Annotations:—**Consd.** Stroughill *v.* Anstey (1852), 1 De G. M. & G. 635. **Mentd.** Gurney *v.* Gurney (1883), 48 L. T. 529; *Re* Griffiths, Griffiths *v.* Lewis (1884), 26 Ch. D. 465.

350. —— ——.]—(1) Testator, by his will, after appointing three persons his exors., gave to them the residue of his personal estate & directed them or other the trustees to be appointed under the provisions contained in his will to stand possessed of his residuary personal estate, upon trust, at such time or times as to them should seem meet, to sell & convert into money all such part thereof as should not consist of money & invest the produce in securities, & to stand possessed of same, upon trust thereout to pay his funeral expenses & debts & certain large legacies which he specified, & to stand possessed of the residue for his two sons equally, & the will contained a clause which, according to the construction put on it by the ct., empowered the trustees to give receipts. Sixteen years after the death of testator, the then acting trustees of the will, who were not the exors., raised money upon a deposit of the title-deeds of two leasehold houses, part of testator's residuary estate:—*Held:* dismissing a claim filed by the mtgees. to enforce their securities, inasmuch as the trusts of the will showed a conversion out & out of testator's property to be absolutely necessary, the trustees were not authorised in raising money by mtge.

(2) A power of sale out & out, & having an object beyond the raising of a particular charge, does not authorise a mtge.; but where the power is for raising a particular charge, & the estate is settled or devised subject to that charge, it may be proper to raise the money by mtge., & such a mtge. will be supported as a conditional sale.

(3) Where a trust is created by will for the payment of debts & legacies, a purchaser or mtgee. is not bound to see to the application of the money raised, the principle referable to such a case being that testator has shown his intention to be to entrust the trustees with the power of receiving & applying the money. Persons, however, who deal with trustees raising money at a considerable distance of time & without apparent reason for so doing, are under an obligation to inquire & see that no breach of trust is being committed.

(4) They [the trustees] covenant, most unusually to pay the money themselves (LORD ST. LEONARDS, C.).—STROUGHILL *v.* ANSTEY (1852), 1 De G. M. & G. 635; 22 L. J. Ch. 130; 19 L. T. O. S. 367; 16 Jur. 671; 42 E. R. 700, L. C.

Annotations:—*As to* (1) **Apld.** Page *v.* Cooper (1853), 20 L. T. O. S. 287. **Folld.** Devaynes *v.* Robinson (1857), 24 Beav. 86. *As to* (2) **Apld.** *Re* Dimmock, Dimmock *v.* Dimmock (1885), 52 L. T. 494. *As to* (3) **Consd.** *Re* Henson, Chester *v.* Henson, [1908] 2 Ch. 356. —— M'Neillie *v.* Acton (1853), 4 De G. M. & G. 744; Sabin *v.* Heape (1859), 29 L. J. Ch. 79; *Re* Tanqueray-Willaume & Landau (1882), 20 Ch. D. 465; *Re* Venn & Furze's Contract, [1894] 2 Ch. 101. *Generally,* **Mentd.** Wrigley *v.* Sykes (1856), 21 Beav. 337; Darke *v.* Williamson (1858), 22 J. P. 705.

351. —— ——.]—A trust for sale of real estate held not to authorise a mtge. Real estate was conveyed to trustees upon trust to "sell & dispose" thereof, &, out of the money to arise, "levy, raise & pay" two sums of £150 & £1,000, & invest the residue of the moneys to arise, for the husband & wife for their lives, & afterwards for their children, &, in default, as the wife should appoint by will:—*Held:* the trustees were not justified in raising these two sums by mtge., inasmuch as a conversion of the estate into money, out & out, was intended.—PAGE *v.* COOPER (1853), 16 Beav. 396; 20 L. T. O. S. 287; 1 W. R. 136; 51 E. R. 831.

352. —— ——.]—J. W. by will devised real property upon trust for sale when & as the trustees should think necessary for the purposes of his will. The purposes of the will required under certain circumstances the raising of money. J. W., the trustee of the will, executed mtges. of the trust estate, received the mtge. moneys, & applied them to his own use. Subsequently some of the beneficiaries under the will brought an action against the trustees to recover certain moneys which they alleged had been received by W. as trustee

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of the said will. The moneys so claimed included the sums raised by the disputed mtges. Judgment was recovered in the said action for the whole sum claimed. Execution was levied, & produced £1,300, which was not enough to pay the whole of the moneys claimed other than the mtge. moneys. New trustees of the will had been appointed, & the new trustees & beneficiaries brought this action against the mtgees. to set aside the mtges. A foreclosure action by the mtgees. was heard at the same time:—*Held:* the will contained no implied power to mortgage, & the mtges. must be set aside, but only on the terms of pltfs. paying to the mtgees. a due proportion of the £1,300 recovered from J. W.—WALKER *v.* SOUTHALL, SOUTHALL *v.* WALKER (1887), 56 L. T. 882.

353. —— Power to postpone sale — Mortgagee with notice.]—Testator, who died in 1841, directed his trustees to sell his real estate, & giving them some discretion therein. Instead of selling, they mortgaged, & retained the estate:—*Held:* (1) they had committed a breach of trust, & the estate having become depreciated they were liable for the loss; (2) the mtge. was void as against the mtgee. with notice, but he was entitled to stand as a creditor on the produce of the estate, to the extent to which the mtge. money had been properly applied.—DEVAYNES *v.* ROBINSON (1857), 24 Beav. 86; 27 L. J. Ch. 157; 29 L. T. O. S. 244; 3 Jur. N. S. 707; 5 W. R. 509; 53 E. R. 289.

Annotations:—Generally, **Mentd.** Darke *v.* Williamson (1858), 22 J. P. 705; Grayburn *v.* Clarkson (1868), 3 Ch. App. 605; Smurthwaite *v.* Hannay (1894), 6 R. 299.

354. —— —— Power to manage during postponement.]—Testator gave his real & residuary personal estate to trustees in trust for sale, with a power of postponement in the usual form followed by a power, also in common form, during such postponement to manage & let the real estate & to make out of the income or capital of his real & personal estate any outlay they might consider necessary for renewals of leases, improvements, repairs, premiums on policies or otherwise for the benefit or in respect of his real or personal estate. The will contained no express power to raise money by mtge. or charge:—*Held:* the trustees had power to raise money by mtge. or charge of the real estate for the purpose of repairing houses forming part of the real estate.—*Re* BELLINGER, DURELL *v.* BELLINGER, [1898] 2 Ch. 534; 67 L. J. Ch. 580; 79 L. T. 54.

355. —— Power to settle accounts & wind up affairs.]—Testator appointed H. & J. exors. & trustees of his will & directed that the trustees or trustee for the time being of his will should have full power to settle his accounts & wind up his affairs as they or he should think fit, & in so doing "to make any sales & arrangements they or he shall judge expedient," & testator decreed all his real estate unto & to the use of his trustees upon the trusts therein declared. After testator's death J., H. having renounced probate & disclaimed the trusts of the will, in order to meet some pressing claims against the estate borrowed a sum of £500 upon the security of a mtge. of a portion of the real estate:—*Held:* under the terms of the will J. being both exor. & trustee had power to mortgage testator's real estate.—*Re* JONES, DUTTON *v.* BROOKFIELD (1889), 59 L. J. Ch. 31; 61 L. T. 661; 38 W. R. 90.

356. Under trust to raise money — Portions for children.]—The trust of a term is, to raise daughters' portions by rents, issues, & profits; or by making leases for three lives at the ancient rent; or by granting copyholds on fines; the money to be paid to the daughters at their age of eighteen or marriage, or as soon after as same can be raised out of the premises as aforesaid; the portions, as it seems, may not be raised by sale or mtge.—MILLS *v.* BANKS (1724), 3 P. Wms. 1; 24 E. R. 943, L. C.

Annotations:—**Consd.** Haldenby *v.* Spofforth (1839), 1 Beav. 390; Stroughill *v.* Anstey (1852), 1 De G. M. & G. 635. **Refd.** Allan *v.* Backhouse (1813), 2 Ves. & B. 65; Ball *v.* Harris (1839), 4 My. & Cr. 264.

357. —— Testamentary charge for payment of debts & legacies.]—A testamentary charge of real estates with the payment of debts, generally, authorises a trustee, to whom, after imposing the charge, testator has devised the estates upon trust for other persons, to sell or mortgage the estates charged, & exempts the purchaser or mtgee. from liability to see to the application of the purchase or mtge. money.—BALL *v.* HARRIS (1839), 4 My. & Cr. 264; 8 L. J. Ch. 114; 3 Jur. 140; 41 E. R. 103, L. C.

Annotations:—**Consd.** Stroughill *v.* Anstey (1852), 1 De G. M. & G. 635. **Apld.** *Re* Jones, Dutton *v.* Brookfield (1889), 59 L. J. Ch. 31. **Refd.** Gosling *v.* Carter (1845), 1 Coll. 644; Robinson *v.* Lowater (1854), 17 Beav. 592; Barrow *v.* Griffith (1864), 5 New Rep. 6.

358. —— ——.]—STROUGHILL *v.* ANSTEY, No. 350, *ante.*

359. —— —— Costs of transfer of mortgage.]—Testator devised freehold estates to a trustee for a terms of two thousand years upon trust to raise money in aid of his personal estate for the purpose of satisfying his debts, funeral & testamentary expenses & legacies, & subject thereto he devised his real estates in strict settlement. The trustee raised £10,000 under the term, by a mtge. of the estates; & on the mtgee. requiring payment he obtained a transferee, & the mtge. was transferred except as to a small portion of the estates, which was mortgaged by the trustee to secure the costs of the transfer. There still remained a sum of £1,600 raisable under the term in certain contingencies:—*Held:* it was the duty of the trustee to protect the term for the sake of the beneficiaries, & he was entitled to charge the costs of the transfer upon the estates.—SEWELL *v.* BISHOPP (1893), 62 L. J. Ch. 985; 69 L. T. 68, C. A.

360. Under powers of management.]—A devise by will to trustees, of leaseholds for lives, in trust, during the life of A., by & out of the rents & profits, or otherwise, to keep the premises in repair & full lived, & to pay the fines & expenses attending any renewals & repairs thereof, authorises a mtge., but not a sale of the whole lease. The mtgee. may procure a sale.—GARMSTONE *v.* GAUNT (1845), 1 Coll. 577; 14 L. J. Ch. 162; 4 L. T. O. S. 310; 9 Jur. 78; 63 E. R. 550.

361. ——.]—Trustees having power, during the minorities of tenants for life or in tail, to superintend the management of an estate, cut timber, erect, pull down, & repair houses, & do various other things of a more or less similar character, "& generally to deal with the premises as they or he might do if they or he were the absolute beneficial owners or owner thereof, without being answerable for any loss or damage which might happen thereby," deposited with a bank the title deeds of the estate to secure an advance of money to be employed in the erection of buildings under the power:—*Held:* the bank had no valid title under the power.—BROOM *v.* SHEFFIELD & ROTHERHAM BANK (1876), 24 W. R. 948.

— Management of business — Mortgage of property not forming assets of business—Mortgage for purposes of business.]—Testator, who

died in 1866, devised & bequeathed all his real & personal estate upon trust for sale & conversion, & empowered his trustees to carry on his business for such time as they should see fit, & to employ in the business all the capital which might be invested therein at the time of his decease, & the profits thereof, & to increase or abridge, the business & his capital therein, & generally to transact all matters & concerns respecting the business, & to do all acts relative thereto, in the same manner as if they were absolutely entitled to the same. The personal estate of testator comprised nearly the whole of the capital of the business. His real estate consisted of the manufactory & buildings upon which the business was carried on, & for which he received a rent. The trustees carried on the business after testator's death in partnership with other persons; but the firm ultimately became bkpt. In 1869 one of the trustees advanced to his co-trustees £2,000, & the title deeds relating to the manufactory & premises were deposited with him for securing the repayment of the advance with interest. The money was applied for the purposes of the business. This transaction had not been disclosed. In Jan. 1882, an action was commenced for the administration of testator's estate. In pursuance of an order made in that action, the business was sold in 1883. In Sept. 1882, certain of the beneficiaries mortgaged all their respective shares under the will to secure the repayment to a banking co. of £4,600. The banking co. applied by petition for leave to intervene in the action, & obtain payment of their debt. The question raised was, whether the trustees had power to make an equitable mtge. of real estate, which did not form part of the assets employed in the business, for the purposes of the business:—*Held:* power to employ other assets in the business was conferred upon the trustees by the authority to increase the capital of the business; as they could have sold the real estate & used the proceeds in the business, they were not wrong in using the property itself to assist in carrying on the business; & that the mtge. of 1869 had priority over the mtge. of 1882.—*Re* DIMMOCK, DIMMOCK *v.* DIMMOCK (1885), 52 L. T. 494.

363. —— —— Mortgage in prejudice to prior annuitant.]—Testator bequeathed a pecuniary legacy & a life annuity to his widow, & gave all his real & personal estate to trustees, upon trust, subject to the payment of the legacy & annuity, to pay the rents & income to his daughter for life, & he directed that, after her death, the estate should be held in trust for his grandchild. He empowered his trustees to continue his business of a brick manufacturer, & to increase or diminish the real or personal estate employed therein at his death:—*Held:* the annuity was a first charge upon the corpus of the real & personal estate; & further, the trustees could not create a paramount charge by mortgaging the real estate to raise moneys for the discharge of debts incurred by them in carrying on testator's business.—*Re* WEBB, LEEDHAM *v.* PATCHETT (1890), 63 L. T. 545.

364. Duty of mortgagee to inquire into application of money.]—BALL *v.* HARRIS, No. 357, *ante*.

365. ——.]—STROUGHILL *v.* ANSTEY, No. 350, *ante*.

——.]—*See* EXECUTORS, Vol. XXIV., pp. 575, 576, 583–585, Nos. 6119, 6120, 6169–6188.

Power of personal representative.]—*See* Subsect. 1, *ante*.

iii. *Under Order of Court.*

366. Costs of petition under Trustee Acts.]—The costs of a petition under the Trustee Act, 1850 (c. 60), ordered to be a charge on the real estate, with interest at 4 per cent.—*Re* DAVIES (1852), 18 L. T. O. S. 253.

367. Costs of rebuilding mansion house—Of settled estate.]—A residential estate of small extent was settled in strict settlement upon the settlor, his wife & family, & power was given to certain trustees, during the minority of any person entitled to the rents & profits, to rebuild or repair the mansion house, & to pay for the cost out of the rents & profits; & they also had power, with the consent of the tenant for life, to lease the property for ninety-nine years. The value of the estate to the settlor & his family depended chiefly upon the residence. Since the death of the settlor, his widow being tenant for life in possession, the house had become ruinous from the foundation having given way & could only be rendered habitable by rebuilding on a new site. The ct., on bill filed by the widow, authorised the trustees to raise by mtge. of the settled property £5,000 to be spent in rebuilding the residence, on being satisfied that the value of the estate, with the house, & subject to the mtge., would not be less than if the house had been removed & the materials sold.—FRITH *v.* CAMERON (1871), L. R. 12 Eq. 169; 40 L. J. Ch. 778; 24 L. T. 791; 19 W. R. 886.

Annotations:—**Distd.** *Re* Montagu, Derbishire *v.* Montagu, [1897] 2 Ch. 8. **Mentd.** Conway *v.* Fenton (1888), 40 Ch. D. 512.

368. Costs of pulling down & rebuilding houses—Work not necessary for salvage of property.]—The ct. has no jurisdiction to authorise trustees of a settlement to raise money by mtge. of the settled property for the purpose of pulling down & rebuilding houses forming part of such property in a case where the rebuilding though beneficial to the persons interested, is not necessary for the salvage of the property in question.—*Re* MONTAGU, DERBISHIRE *v.* MONTAGU, [1897] 2 Ch. 8; 66 L. J. Ch. 541; 76 L. T. 485; 45 W. R. 594; 13 T. L. R. 397; 41 Sol. Jo. 490, C. A.

Costs of street improvement—Liability of trustees of school.]—*See* EDUCATION, Vol. XIX., p. 597, Nos. 261, 262.

iv. *Charity Trustees.*

See CHARITIES, Vol. VIII., pp. 363, 364, Nos. 1658–1665.

(*b*) *Form of Mortgage.*

See, now, Law of Property Act, 1925 (c. 20), ss. 101, 182.

369. Covenant to pay—Personal covenant—Whether usual.]—STROUGHILL *v.* ANSTEY, No. 350, *ante*.

370. —— Covenant to pay as trustees but not so as to create personal liability.]—P. & H. formerly carried on business in partnership & as such were entitled as part of their partnership property to certain freehold property which was subject to a mtge. created by them to secure £2,000, & interest. After the deaths of P. & H. disputes arose between their respective trustees as to P.'s share in the partnership property, & ultimately a compromise was made in pursuance of one of the terms of which a deed was entered into between pltf., the present trustee of P.'s will, & defts., the present trustees of H.'s will. By that deed pltf. as trustee granted & released unto defts. P.'s share in the mtged. premises subject to the mtge., & defts. " as such trustees, but not so as to create any personal liability on the part of them

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or either of them," thereby jointly & severally covenanted with pltf. that they or one of them, their or one of their heirs, exors., administrators, or assigns, would pay the principal sum of £2,000 then due in respect of the mtge. & all interest thenceforth to become due thereon, & would keep indemnified pltf. & his estate & effects & the estate & effects of P. from all claims & demands on account thereof:—*Held:* the effect of the proviso in the covenant, if valid, would be not merely to limit but to destroy the personal liability on the part of defts.: inasmuch as there was a covenant to pay & indemnify, the proviso was repugnant to the covenant & had no effect, & defts. were therefore liable under the covenant as if the proviso had not been inserted in it.—WATLING *v.* LEWIS, [1911] 1 Ch. 414; 80 L. J. Ch. 242; 104 L. T. 132.

Annotations:—**Reld.** *Re* Robinson's Settlmt., Gant *v.* Hobbs (1911), 28 T. L. R. 121. **Mentd.** *Re* Tewkesbury Gas Co., Tysoe *v.* The Co., [1911] 2 Ch. 279.

371. —— ——.] — (1) Where the person invoking the aid of the ct. is himself implicated in the illegality, the ct. will not allow itself to be made an instrument to enforce an illegal agreement, whether deft. has pleaded the illegality or not.

Pltf. lent money to trustees upon the security of a mtge. of their trust property. The ct., having come to the conclusion on the evidence that pltf. was a money-lender who had lent the money at a time when he was not registered as a money-lender under the Money-lenders Act, 1900 (c. 51), held the mtge. to be void, & refused to enforce it even against one of defts., who had failed to plead the Act by way of defence.

(2) A covenant by trustees "as such trustees but not otherwise" to repay a loan is merely a covenant to repay the money out of any trust funds coming into their hands, & does not impose any personal liability upon them.—*Re* ROBINSON'S SETTLEMENT, GANT *v.* HOBBS, [1912] 1 Ch. 717; 81 L. J. Ch. 393; 106 L. T. 443; 28 T. L. R. 298, C. A.

Annotations:—*Generally*, **Mentd.** Edgelow *v.* MacElwee, [1918] 1 K. B. 205; Lipton *v.* Powell, [1921] 2 K. B. 51; Pirie *v.* Richardson (1926), 70 Sol. Jo. 1023.

372. Whether power of sale included.] — A power to raise money by sale or mtge., held to authorise a mtge. with a power of sale.—BRIDGES *v.* LONGMAN (1857), 24 Beav. 27; 53 E. R. 267.

Annotations:—**Folld.** *Re* Chawner's Trusts (1869), 38 L. J. Ch. 726. **Mentd.** A.-G. of Victoria *v.* Ettershank (1875), L. R. 6 P. C. 354.

373. ——.] — The charter & deed of a co. gave to a general meeting power to authorise the council to sell or mtge. The council, in pursuance of a direction of a general meeting, received authority to mtge. They made a mtge. with a power of sale:—*Held:* they had no authority to give a power of sale.—CLARKE *v.* ROYAL PANOPTICON (1857), 4 Drew. 26; 27 L. J. Ch. 207; 28 L. T. O. S. 335; 3 Jur. N. S. 178; 5 W. R. 332; 62 E. R. 10.

Annotation:—**Reld.** Stevens *v.* Theatres, [1903] 1 Ch. 857.

374. ——.] — A power to mtge. includes a power to give to a mtgee. all such remedies as are proper to be given to him . . . & authorises giving to the mtgee. a power of sale (ROMILLY, M.R.).—COOK *v.* DAWSON (1861), 29 Beav. 123; 30 L. J. Ch. 311; 3 L. T. 801; 7 Jur. N. S. 130; 9 W. R. 305; 54 E. R. 573; *affd.*, 3 De G. F. & J. 127, L. JJ.

Annotations:—**Folld.** *Re* Chawner's Will (1869), L. R. 8 Eq. 569. **Mentd.** *Re* Bailey, Bailey *v.* Bailey (1879), 12 Ch. D. 268.

375. ——.] — Under a direction in a will to trustees to raise a sum of money by mtge. of a trust estate, in such manner as they should think fit:—*Held:* the trustees could create a mtge. with a power of sale.—*Re* CHAWNER'S WILL (1869), L. R. 8 Eq. 569; 38 L. J. Ch. 726; 22 L. T. 262.

Annotation:—**Consd.** Cruikshank *v.* Duffin (1872), L. R. 13 Eq. 555.

376. ——.] — An exor. effected a mtge. of leasehold property, for executorship purposes, with a power of sale, to a building society, to secure the repayment of the money advanced as well as all fines, premiums, & interest on certain advanced shares in the society, taken by the exor. for the purpose of obtaining the loan. Upon bill filed by the society against a purchaser under the power of sale, for specific performance:—*Held:* the exor. might legally effect a mtge. with power of sale & with the incidents of a building society mtge. on advanced shares.—CRUIKSHANK *v.* DUFFIN (1872), L. R. 13 Eq. 555; 41 L. J. Ch. 317; 26 L. T. 121; 36 J. P. 708; 20 W. R. 354.

Annotation:—**Apld.** Thorne *v.* Thorne, [1893] 3 Ch. 196.

(*c*) *Effect of Improper Mortgage.*

Breach of trust generally.] — *See* TRUSTS & TRUSTEES.

377. Title of assignee for value without notice—Validity—Mortgagee also without notice.]—DIGBY (LORD) *v.* MORGAN (1664), 1 Rep. Ch. 244; 21 E. R. 562.

378. Title of mortgagee—Mortgage by agents of trustees for sale—After purchase by agents from trustees.]—Solrs. for trustees for sale, purchased part of the trust property & mortgaged it to A. & B. The purchase was set aside:—*Held:* A. & B., who had notice of the relation in which their mtgors. stood to the vendors, could claim no better title than their mtgors.—COOKSON *v.* LEE (1853), 23 L. J. Ch. 473; 21 L. T. O. S. 258, L. C. & L. JJ.

379. —— **As against cestui que trust.**] — A solr. received advances from a banking firm on loan, & as a security lodged with them a mtge. deed, being a security in which more than one person's money had been invested. No notice of the deposit had been given to one of the parties to whom the money belonged. The solr. annually paid the interest out of his own resources, & subsequently became bkpt. No case of negligence was made out against the party whose security had been improperly dealt with:—*Held:* she was entitled to priority over the bankers, who had advanced the money to her solr. & trustee.—STACKHOUSE *v.* JERSEY (COUNTESS) (1861), 1 John. & H. 721; 30 L. J. Ch. 421; 4 L. T. 204; 7 Jur. N. S. 359; 9 W. R. 453; 70 E. R. 933.

Annotations:—**Distd.** Layard *v.* Maud (1867), L. R. 4 Eq. 397. **Consd.** Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139. **Distd.** Perrin *v.* Burbey, [1869] W. N. 160. **Apld.** Isaac *v.* Worstencroft (1892), 67 L. T. 351. **Reld.** Newton *v.* Newton (1868), 4 Ch. App. 143; Tabor *v.* Cunningham (1875), 24 W. R. 153; *Re* Castell & Brown, Roper *v.* Castell & Brown, [1898] 1 Ch. 315.

380. —— **Mortgage by committee of lunatic.**]—An order was made that the brother of a lunatic, who was committee of his estate, should be allowed to retain the family mansion & grounds & the heirlooms therein for his own occupation & use, & that of his unmarried sisters, & that £4,000 a year should be allowed him for his expenses in reference thereto. The committee with his sisters occupied the mansion accordingly, & incurred heavy &, as it was alleged, unreasonable expenses about the establishment. The income being insufficient to pay the allowance, it fell into arrear, & the committee mortgaged the arrears. He

subsequently was removed from being committee & became bkpt., & a large amount of bills incurred in keeping up the establishment remained unpaid. A surplus having arisen applicable to payment of the arrears, the new committee presented a petition for direction as to its application:—*Held:* although the allowance was made to the former committee without any obligation to account, & with an intention indirectly to confer a benefit on him & his sisters, still it was an allowance made to a person in a fiduciary position for a particular purpose, & which he had no right to mortgage, & the mtgee. could stand in no better position than the committee himself.—*Re* WELD (1882), 20 Ch. D. 451; 51 L. J. Ch. 913; 46 L. T. 397; 30 W. R. 385.

Annotation:—**Mentd.** *Re* Brown, Llewellin v. Brown (1900), 82 L. T. 83.

381. Liability of trustee to account — Mortgage of trust & private estate—Extent of accountability.]—Where a trustee wrongfully raises money on the security of the trust estate jointly with his own property in proportion to their respective values, he must account to the trust estate for the sum received in the same proportion.—ROCHEFOUCAULD *v.* BOUSTEAD, [1898] 1 Ch. 550; 67 L. J. Ch. 427; 75 L. T. 502; 45 W. R. 272; 13 T. L. R. 118, C. A.; *affg.* [1897] 1 Ch. 196.

Annotations:—**Refd.** Brooks v. Muckleston, [1909] 2 Ch. 519. **Mentd.** *Re* Gallard, *Ex p.* Gallard, [1897] 2 Q. B. 8; Isaacs v. Evans (1899), 16 T. L. R. 113; Taylor v. Davies, [1920] A. C. 636.

B. Investment of Trust Funds on Mortgage.

(a) Power to Invest.

See, now, Trustee Act, 1925 (c. 19), ss. 1, 5, 8, 68; Settled Land Act, 1925 (c. 18), s. 75.

382. Leaseholds security — Under power to invest on real security—In Ireland.]—MACLEOD v. ANNESLEY, No. 437, *post.*

383. —— —— Leaseholds for long term — At peppercorn rent & onerous covenants.]—Mtgee. of a share of the proceeds of a real estate devised in trust to sell & to invest the proceeds in Govt. or real securities commenced an action against the mtgor. & the trustee of the will alleging that the money had been invested upon improper securities. An order was made directing accounts & inquiries, & reserving further consideration. Shortly afterwards the trustee paid into ct. the amount of the mtged. share, & paid to the other beneficiaries their shares. The certificate found these payments, & as to the mode of investment stated simply that the money had been invested on mtge. of leaseholds. On further consideration pltf. did not give notice to read the evidence taken in chambers. HALL, V.C., declined to hear the evidence taken in Chambers, held that on the finding in the certificate the investment was not shown to be improper, & that the action was unnecessary, & made an order giving the trustee his costs, & costs, charges, & expenses out of the fund in ct. On appeal:—*Held:* Under a trust to invest in real securities an investment on mtge. of leaseholds is improper, unless the leaseholds are for a long term of years at a peppercorn rent without onerous covenants.—*Re* CHENNELL, JONES v. CHENNELL (1878), 8 Ch. D. 492; 47 L. J. Ch. 583; 26 W. R. 595; *sub nom. Re* CHANNELL, JONES *v.* CHANNELL, 38 L. T. 494, C. A.

Annotations:—**Mentd.** Butcher v. Pooler (1883), 52 L. J. Ch. 930; *Re* Beddoe, Downes v. Cottam, [1893] 1 Ch. 547; Pain v. Bowden, [1896] 2 Q. B. 301; Bew v. Bew, [1899] 2 Ch. 467.

384. —— —— —— To raise portions.] — Trustees empowered to invest on "real securities" cannot invest on mtge. of long terms of years created in real estate for the purpose of raising portions.—LEIGH *v.* LEIGH (1886), 56 L. J. Ch. 125; 55 L. T. 634, 35 W. R. 121; 3 T. L. R. 123.

385. —— Property let on weekly tenancies.]—*Re* SOLOMON, NORE *v.* MEYER, No. 471, *post.*

386. Stock mortgage.] — A mtge. was made for securing the retransfer of a sum of stock to the trustees of a will. The third share of a *cestui que trust* in the stock was afterwards by his marriage settlement vested in trustees, who had power to give receipts, to invest in govt. or real security, & to vary investments. Part of the mtged. estate was afterwards sold for less than the value of the stock lent, & one third of the price was paid in cash to the trustees of the marriage settlement:—*Held:* the estate was not discharged, there being no evidence that the cash had been duly invested, or that the trustees received cash instead of stock, in order to invest on real security. *Semble:* if the purchase deed had contained a recital that the trustees of the settlement had determined to invest the money on real security, they need not have received it in stock, but their receipt for it in cash would have been a good discharge.—PELL *v.* DE WINTON (1857), 2 De G. & J. 13; 27 L. J. Ch. 230; 30 L. T. O. S. 252; 4 Jur. N. S. 225; 6 W. R. 179; 44 E. R. 890, L. C.

Annotation:—**Mentd.** *Re* Norris, Allen v. Norris (1884), 27 Ch. D. 333.

387. ——.] — A trustee sold out a sum of Consols forming part of the trust estate & invested the proceeds in a stock mtge.:—*Held:* this was an improper investment.—WHITNEY *v.* SMITH (1869), 4 Ch. App. 513; 20 L. T. 468; 17 W. R. 579, L. JJ.

Annotations:—**Refd.** Bromley v. Kelly (1870), 39 L. J. Ch. 274; *Re* Corsellis, Lawton v. Elwes (1887), 34 Ch. D. 675.

388. ——.] — A *cestui que trust* who has an interest in remainder after the determination of other subsisting trusts is not entitled, as a matter of right, to have the trust funds transferred into ct.; nor will the ct. order this to be done when the only charge against the trustees is that they once invested some funds on a stock mtge.—BROMLEY *v.* KELLY (1870), 39 L. J. Ch. 274; 18 W. R. 374.

389. Railway mortgages & debenture stock — Under power to invest in freehold, copyhold or leasehold security.] — An investment in railway mtges. & railway debenture stock:—*Held:* not to be authorised by a power to invest "upon the security by way of mtge. of any freehold, copyhold or leasehold hereditaments."—MORTIMORE *v.* MORTIMORE (1859), 4 De G. & J. 472; 28 L. J. Ch. 558; 33 L. T. O. S. 311; 7 W. R. 601; 45 E. R. 183, L. C. & L. JJ.

390. Sub-mortgage.] — SMETHURST *v.* HASTINGS, No. 401, *post.*

391. Settled land—Mortgage without consent of tenant for life.]—The trustees of a settlement had power to invest the trust funds "in their names" in Govt. or real securities, & to vary investments with the consent in writing of the tenant for life. In 1875 they sold a sum of Consols & other stock forming parts of the trust fund, & with the consent of the tenant for life invested the proceeds of sale in a contributory mtge. of real estate, which was effected in the names of themselves & the persons advancing the remainder of the money. In 1879 a mtge. in the names of the trustees only was substituted for the contributory mtge., but

a. *Real security—Whether includes security of a judgment.*]—JOHNSTON *v.* LLOYD (1844), 7 I. Eq. R. 252. —IR.

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the consent in writing of the tenant for life was not previously obtained, although upon hearing of the change of investment he did not make any objection thereto. Upon the death of the tenant for life the money on mtge. was called in. The whole of the principal invested was forthcoming, but the remaindermen, who were entitled to the capital, claimed that the trustees ought to replace the sums of stock sold in 1875, which at that time stood at a lower price than in 1887 when the proceedings were commenced:—*Held:* the sale in 1875 was improper, as having been made for the purpose of effecting another investment which was a breach of trust as not being in the names of the trustees solely, & the investment of 1879 was also a breach of trust, as the previous consent of the tenant for life after the facts were fully laid before him was not obtained, & consequently the trustees were liable either to replace the stock sold, or to pay the difference in price of the stock sold in 1875 & of the same amount of stock at the time of the commencement of the proceedings.—*Re* MASSINGBERD'S SETTLEMENT, CLARK *v.* TRELAWNEY (1890), 63 L. T. 296, C. A.

Annotations:—**Refd.** Stokes *v.* Prance, [1898] 1 Ch. 212; Dive, Dive *v.* Roebuck, [1909] 1 Ch. 328.

392. Necessity for consent of court—After decree in administration suit.]—WADESON *v.* DUKE (1817), 1 Coop. *temp.* Cott. 158, n.; 47 E. R. 794, L. C.

Investment on equitable mortgage.]—*See* Nos. 416–427, *post.*

Investment on contributory mortgage.] — *See* Nos. 428–432, *post.*

(*b*) *Duties of Trustees.*

i. *Personal Control of Funds and Securities.*

393. Money entrusted to solicitor for investment —Liability of trustees for loss.]—Trustees of stock sold it out & committed the proceeds to their solr. for investment by whom it was misapplied & lost:—*Held:* the trustees were liable for a breach of trust, & the *cestuis que trust* were entitled to relief against both the trustees & the solr., & they might sue either the trustees alone, or the trustees jointly with the solr.—ROWLAND *v.* WITHERDEN (1851), 3 Mac. & G. 568; 21 L. J. Ch. 480; 42 E. R. 379, L. C.

Annotations:—**Refd.** Speight *v.* Gaunt (1883), 9 App. Cas. 1; Robinson *v.* Harkin, [1896] 2 Ch. 415. **Mentd.** Ford *v.* White (1852), 16 Beav. 120; Harford *v.* Rees (1853), 9 Hare, App. II. lxx.; Robinson *v.* Briggs (1853), 22 L. J. Ch. 1056; Stokes *v.* Trumper (1855), 3 W. R. 503.

394. —— ——.] — Trustees are not justified in allowing trust money to get into the hands of a solr., or in allowing him to hold the securities upon which the trust fund is invested; & the law is the same where the estate is being administered by the ct. Trustees of an estate which was being administered by the ct. employed a solr. to manage the trust estate, & allowed him to receive the trust moneys for the purpose of investment. The solr. represented that he had duly made investments, & he rendered periodical accounts to the trustees purporting to show such investments, & paid the interest upon them. He had, in fact, never made any investments, but had misappropriated the money, & ultimately he filed a liquidation petition, & a part of the trust fund was thus lost:—*Held:* the trustees were liable to make good the loss to the trust estate.—*Re* DEWAR, DEWAR *v.* BROOKE (1885), 54 L. J. Ch. 830; 52 L. T. 489; 33 W. R. 497; 1 T. L. R. 263.

395. Permission to solicitor to retain securities.]—*Re* DEWAR, DEWAR *v.* BROOKE, No. 394, *ante.*

ii. *Investigation of Title.*

396. Acceptance of abstract without inquiry.]—HOPGOOD *v.* PARKIN, No. 466, *post.*

397. On direction by tenant for life to invest.]—Upon a direction under Settled Land Act, 1882 (c. 38), s. 22 (2), given by the tenant for life to the trustees for the purposes of the Settled Land Act to invest capital moneys in their hands upon a specified mtge. of real estate, the ct. declared that the trustees were not bound to invest upon the mtge. unless & until they were satisfied that the direction had been given upon a proper investigation as to title, & upon a proper report as to the value of the proposed security, & upon proper advice as to the form of the mtge., & that on being so satisfied the trustees were bound to make the investment.—*Re* HOTHAM, HOTHAM *v.* DOUGHTY, [1902] 2 Ch. 575; 71 L. J. Ch. 789; 87 L. T. 112; 50 W. R. 692; 46 Sol. Jo. 685, C. A.

Annotations:—**Consd.** *Re* Cleveland's S. E., [1902] 2 Ch. 350; *Re* Hunt's S. E., Bulteel *v.* Lawdeshayne, [1905] 2 Ch. 418. **Refd.** *Re* Theobald (1903), 19 T. L. R. 536; *Re* Keck's Settlmt., [1904] 2 Ch. 22; *Re* Peel's S. E., [1910] 1 Ch. 389.

398. Duty to make periodic investigation — No suspicion that title in jeopardy.]—I do not believe that there is any obligation or duty on the part of trustees to make periodical or further investigations as to either the title of the security or the solvency or the sufficiency of the mtgor. I must not be taken, in saying that, for a moment to question that if there are circumstances which suggest to a reasonable man that the security is in jeopardy the duty may not arise; but the liability of a trustee in dealing with an authorised security must really proceed on the footing of wilful default & not upon not making inquiries when he ought to do so (COZENS-HARDY, M.R.).—RAWSTHORNE *v.* ROWLEY (1907), [1909] 1 Ch. 409, n.; 78 L. J. Ch. 235, n.; 100 L. T. 154, n.; 24 T. L. R. 51, C. A.

Annotations:—**Distd.** *Re* Brookes, Brookes *v.* Taylor, [1914] 1 Ch. 558. **Refd.** Shaw *v.* Cates, [1909] 1 Ch. 389.

399. Mortgage of leasehold by sub-demise — No inquiry as to consent of lessor—Proviso for forfeiture.]—Property held under a lease which contained a covenant against underletting without the consent of the lessor, & a clause of forfeiture in case of any breach of covenant, was mortgaged by sub-demise to the trustees of a co.'s debenture stock deed. The deed comprised a number of other properties. The trustees made no inquiry as to whether the lessor's consent was necessary to the sub-demise:—*Held:* the trustees had been guilty of negligence, & the ct. was precluded from giving them, under Conveyancing & Law of Property Act, 1892 (c. 13), s. 4, relief against the forfeiture.—MATTHEWS *v.* SMALLWOOD, [1910] 1 Ch. 777; 79 L. J. Ch. 322; *sub nom.* MATTHEWS *v.*

PART III. SECT. 3, SUB-SECT. 2.—B. (b) i.

b. *Employment of same solicitor for mortgagor & mortgagee—Necessity for additional precaution.*]—WARING *v.* WARING (1852), 3 I. Ch. R. 331.—**IR.**

c. —— ——.]—When the same solr. is employed to act both for mtgor. & mtgee., there is imposed on the parties concerned in such transactions the *onus* of proving, & upon the ct. which has to investigate them, the duty of ascertaining with closer scrutiny that the transaction has been a fair one, & that no advantage has been taken of one party by the other. —CRAMPTON *v.* WALKER (1893), 31 L. R. Ir. 437.—**IR.**

PART III. SECT. 3, SUB-SECT. 2.—B. (b) ii.

d. *Responsibility of trustee for propriety of investment.*]—JONES *v.* JULIAN (1890), 25 L. R. Ir. 45.—**IR.**

SMALLWOOD, SMALLWOOD *v.* MATTHEWS, 102 L. T. 228.

Annotations :—**Mentd.** Hurd *v.* Whaley, [1918] 1 K. B. 448; Davenport *v.* Smith, [1921] 2 Ch. 270; Atkin *v.* Rose, [1923] 1 Ch. 522; Fuller's Theatre & Vaudeville Co. *v.* Rofe, [1923] A. C. 435; Samuel *v.* Dumas, [1924] A. C. 431.

Employment of agents by trustees—Liability for acts of agents.]—*See* Sub-sect. 2, B. (*d*), *post*.

iii. *Valuation of Proposed Security.*

400. No statutory obligation to take valuation.]—There is no fixed rule that in all cases where a portion of the premises upon which mtge. money is lent is utilised for business purposes, trustees would be guilty of a breach of trust in advancing more than a moiety of the value of the property; but if the mtged. premises & the business are so inseparable that the discontinuance of the business may result in depreciation of the premises, trustees ought not to advance more than one half. Sect. 8 of Trustee Act, 1893 (c. 53), is a relieving sect., & does not impose a statutory obligation upon trustees to take a valuation, & the neglect to do so does not exclude them from the benevolent operation of Judicial Trustees Act, 1896 (c. 35), s. 3. In Apr. 1899, the trustees of a settled legacy of £3,500, invested this trust money upon mtge. of two blocks of freehold house property in Norwich, a portion of the premises being used for the purposes of a butcher's business of forty years' standing. A bank had previously allowed an overdraft of £6,000 upon the security of a deposit of the title deeds of same property. No independent valuation was made on behalf of the trustees at the time of making the advance. They relied upon a valuation made in Sept. 1896, for a different purpose, by a highly skilled valuer at Norwich, who valued the whole of the premises at £6,550. The butcher's business subsequently failed, & the premises became much depreciated in value & wholly insufficient to pay the settled legacy.

In an action by the beneficiaries under the settlement seeking to make the trustees liable for a breach of trust in investing upon an insufficient security:—*Held:* the value of the property at the time of the advance in 1899 was £5,500, & having regard to all the circumstances which the trustees were entitled to take into consideration, they were justified in lending more than one half the value upon the portion used for business purposes, in order to make up the full loan of £3,500, & were not liable for a breach of trust; even assuming that they had advanced a larger sum than was justifiable, they had acted reasonably within Judicial Trustees Act, 1896 (c. 35), s. 3, & should be relieved from liability.—PALMER *v.* EMERSON, [1911] 1 Ch. 758; 80 L. J. Ch. 418; 104 L. T. 557; 27 T. L. R. 320; 55 Sol. Jo. 365.

401. No independent valuation.] — Under a settlement S. was tenant for life with an ultimate trust, in default of children, which happened, for her testamentary appointees. The trustees, having power to invest on leasehold securities, invested the trust funds, with S.'s consent, on separate sub-mtges. of leasehold houses, unfinished & unlet, on a building estate of which the roads & drainage were in a defective condition. The investment was made without an independent or reliable valuation, & more than half of the value of the house was lent on each sub-mtge. S. died, having by will disposed of the trust-funds & appointed exors. The exors., with the sanction of the Chief Clerk, in an action establishing S.'s testamentary appointment, had the sub-mtges. transferred to them by the trustees, & subsequently, finding them an insufficient security, brought an action against the trustees to make them personally liable for the deficiency:—*Held:* although the sub-mtges. were not improper investments in point of form, the trustees, having invested the trust funds on insufficient security of a speculative character, & without proper precautions, must make good the loss; & the exors. having taken the transfers in ignorance of the circumstances attending the investment, were not bound by adoption or acquiescence.—SMETHURST *v.* HASTINGS (1885), 30 Ch. D. 490; 55 L. J. Ch. 173; 52 L. T. 567; 33 W. R. 496; 1 T. L. R. 335.

Annotation:—**Refd.** Mara *v.* Browne, [1895] 2 Ch. 69.

402. ——.]—(1) Pltfs. brought an action for a declaration that an investment of £4,440, trust moneys on mtge. of freehold house property was a breach of trust, & that the mode in which the property was subsequently neglected was a further breach of trust, on the ground that the property was not a proper security for any part of the trust funds; that the trustees did not have a valuation made by a properly instructed & independent valuer; that the valuation which was in fact made was unsatisfactory; that the mtgor. ought to have covenanted to keep the property in repair, & ought not to have been empowered to grant leases. The property depreciated in value, & two of the mtged. houses ceased to be let & fell into disrepair, & the beneficiaries contended that the trustees ought to have taken steps from time to time to ascertain the condition of the property:—*Held:* it was not proved that the property was of such a nature as to be wholly improper for the investment of trust moneys but the valuation obtained by the trustees was not such a valuation as is contemplated by Trustee Act, 1893 (c. 53), s. 8.

(2) In applying Trustee Act, 1893 (c. 53), s. 9, the ct. will be guided by the principles which obtained before the passing of Trustee Act, 1888 (c. 59), as to the margin of value to be required. Applying these principles, the ct. held that the property was a good security for at most £3,400, & that the trustees must make good the balance:—*Held:* the trustees were not liable under the circumstances of this case for not insisting on a covenant to repair, or a clause precluding the mtgor. from granting occupation leases or for neglect to inspect the mtged. property from time to time.

(3) The maximum sum which a prudent man can be advised to lend on mtge. depends on the nature of the property & upon all the circumstances of the case. If the property is liable to deteriorate or is specially subject to fluctuations, a prudent man will require a larger margin for his protection than he would in the case of property attended by no such disadvantages. It is not the law when once a valuer has ascertained the value of a property, whatever its nature & whatever method of valuation the valuer has adopted, a trustee is *primâ facie* justified in making an advance of two-thirds of its value.—SHAW *v.* CATES, [1909] 1 Ch. 389; 78 L. J. Ch. 226; 100 L. T. 146.

Annotations:—*As to* (3) **Apld.** *Re* Solomon, Nore *v.* Meyer, [1912] 1 Ch. 261. *Generally*, **Mentd.** *Re* Brookes, Brookes *v.* Taylor (1914), 58 Sol. Jo. 286.

403. —— **Valuation on behalf of mtgor.**]—Trustees lent trust money on mtge., upon a valuation made on behalf of the mtgor. The security

]—There is no hard & fast rule laid down as to procuring a new & special valuation in every particular transaction in order to protect trustees. —CRAMPTON *v.* WALKER (1893), 31 L. R. Ir. 437.—**IR.**

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proved greatly deficient:—*Held:* the trustees were personally liable for the loss.—INGLE *v.* PARTRIDGE (No. 2) (1865), 34 Beav. 411; 55 E. R. 694.

404. —— ——.]—In 1873 trustees advanced £3,800 trust moneys to B. upon the security of a freehold house & appurtenances in the occupation of B., & carried on by him as a school in partnership with S. By the deed of partnership, B., as owner of the freehold, was to receive £300 a year out of the profits of the school, & in the event of his death, S. was to take a lease at the same rental. The advance was made in reliance upon the report of a surveyor, instructed by one of the trustees in his capacity of solr. to B., such report being made for the purposes of a previous mtge. negotiation with other trustees, which fell through. By this report the property was estimated at £5,800 on the assumption that a responsible tenant was willing to take a lease of the property at a rental of £400 a year. The security having proved insufficient:—*Held:* the trustees had not acted as prudent men in making such an advance upon a valuation made on behalf of the borrower, & must restore the trust funds.—WALCOTT *v.* LYONS (1886), 54 L. T. 786.

405. —— ——.]—Defender, M., was trustee under a marriage contract, by which the wife's property was settled on herself for life, excluding the *jus mariti;* &, in case she survived her husband, to her in fee; but, should she predecease her husband, to him for life or until his second marriage; & lastly, in the event of her predeceasing her husband, to her children in fee, after her husband's decease or second marriage. Defender, M., & the husband & wife, who were also trustees, lent this trust fund on the security of unfinished houses in course of erection under a building speculation. The only valuation the trustees had before them was one by an architect, which had been obtained by the borrower, but they consulted defender H., who was their law agent, & were informed by him that there was no objection to the investment. The deed contained an immunity clause exonerating the trustees from "omissions or neglect of diligence, or the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." Pursuers, the children of the marriage, while both spouses were alive, brought an action for a declaration that defender, M., & the law agent were jointly & severally liable to restore the fund, which had been lost by the failure of the speculation:—*Held:* (1) there had been a positive breach of duty on the part of defender M., & he was liable, pursuers' rights being contingent, & the husband & wife being barred from any relief against him, to restore the trust fund by paying it to a judicial factor appointed by the ct. to abide the event, if & when pursuers became entitled; (2) the law agent was not liable, for there was no evidence to prove that he had been employed by the pursuers or any person on their behalf.—RAE *v.* MEEK (1889), 14 App. Cas. 558, H. L.

Annotations:—As to (1) **Retd.** Wyman v. Paterson, [1900] A. C. 271; Eaton v. Buchanan, [1911] A. C. 253. *As to* (2) **Consd.** Brinsden v. Williams, [1894] 3 Ch. 185. **Retd.** Mara v. Browne, [1896] 1 Ch. 199.

406. —— **Valuation on behalf of vendors to mortgagor.**]—In May, 1870, F. & G. the trustees of a will, one of whom, F., was an experienced farmer, & the other, G., a solr., advanced a sum of £2,400, part of the trust estate, along with another sum of £2,600 not part of the estate, making together £5,000, at £4 per cent., on the security of a freehold farm, which in 1868 had been sold to the mtgor., who was farming that & neighbouring land on a peculiar system of husbandry. The trustees had power to advance on contributory mtges. In 1868, the farm had been valued on behalf of the vendors, of whom G. was one, & also the solr., at £6,895. This valuation was communicated to F. at the time of the mtge.; & no other valuation was made. Interest was paid in full, but irregularly, down to Nov. 1877, since which time the farm, which was situated on clay soil, in a wet situation, had become unsaleable & unlettable, owing to unfavourable seasons, & had yielded no income. The mtgor. became insolvent. Upon claim by the *cestui que trust* against F. & the exors. of G., to be declared entitled to payment of the £2,400 & interest since Nov. 1877:—*Held:* (1) notwithstanding that no valuation was used at the date of the mtge. other than the valuation made on behalf of the vendors at the time of the sale to the mtgor.; that G. the trustee, was himself one, & solr. of the others, of the vendors to the mtgor.; & that the sum advanced was more than two thirds of the estimated value of the farm; the trustees were not liable to make good the deficient security; the test of liability always is, whether or not the trustees have acted as prudent men would have acted in dealing with their own property.

(2) The "two thirds" rule is not enforceable with exact strictness.—*Re* GODFREY, GODFREY *v.* FAULKNER (1883), 23 Ch. D. 483; 52 L. J. Ch. 821; 48 L. T. 853; 47 J. P. 676; 32 W. R. 23.

Annotation:—As to (1) **Apld.** *Re* Pearson, Oxley v. Scarth (1884), 51 L. T. 692.

407. —— **Value deduced from price paid by mortgagor.**]—The trustees of a settlement invested the sum of £45,000 forming part of the funds subject to the settlement, by way of mtge. When the mtge. was taken no actual valuation of the property comprised in the security was made; but the greater part of the property, which was adjacent to the remainder, had been bought at public auction in the previous year by the mtgor. at a rate which would have given to the property comprised in the security the value of £7,167. The true value of the property at the time of the mtge. was, however, £6,394, so that the sum actually advanced by the trustees exceeded the two thirds value by £237 6*s.* 8*d.* The trustees acted under the advice of the solrs. to the trust. In an action against the surviving trustee for the payment of this sum of £237 6*s.* 8*d.* & the interest thereon, the trustee sought relief under Judicial Trustees Act, 1896 (c. 35), s. 3. The ct. found that the trustee acted honestly & not unreasonably, but refused to excuse him altogether; & directed him to make good the sum of £237 6*s.* 8*d.*, no order being made as to the costs of the action.—WAITE *v.* PARKINSON (1901), 85 L. T. 456.

408. —— **Valuator agent of mortgagor — Pecuniary interest in mortgage.**]—FRY *v.* TAPSON, No. 467, *post.*

409. —— **Valuation for different purpose— Previous mortgage.**]—HOPGOOD *v.* PARKIN, No. 466, *post.*

410. —— —— **By skilled valuer.**]—PALMER *v.* EMERSON, No. 400, *ante.*

411. Valuation by stranger to locality.]—Trustees were charged with the loss occasioned by an investment of the trust funds on insufficient security. The property was a hotel in the country, & the trustees had sent down a London surveyor who valued the hotel, including therein the licence, at nearly double the sum to be advanced. The

hotel turned out to be worth much less than the sum advanced. The trustees gave no further account of the circumstances under which the advance was made:—*Held:* the trustees were chargeable with the sum so advanced.—BUDGE *v.* GUMMOW (1872), 7 Ch. App. 719; 42 L. J. Ch. 22; 27 L. T. 666; 20 W. R. 1022, L. JJ.

Annotations:—**Refd.** Fry *v.* Tapson (1884), 28 Ch. D. 268; Brinsden *v.* Williams, [1894] 3 Ch. 185.

412. ——.]—FRY *v.* TAPSON, No. 467, *post.*

413. Trustees acting with care & diligence.]—*Re* GODFREY, GODFREY *v.* FAULKNER, No. 406, *ante.*

414. ——.]—A trustee advanced trust moneys to a brickbuilding firm upon the security of a first mtge. of their premises, freehold & leasehold, & some of the plant. In so doing he acted upon the advice of his solr. & upon a favourable report & valuation made by a respectable firm of architects & surveyors. A bank of good standing, moreover, consented to postpone a charge of theirs to his mtge. The mtgors. failed three years afterwards, whereby their lease of that part of the property upon which was most of the clay & shale necessary for the carrying on of the business, became forfeited. The remainder of the property proved unsaleable, & rapidly went to ruin. An action was subsequently brought by the *cestuis que trust* to make the trustee liable for the loss sustained by them, & it appeared that the report & valuation proceeded, *ex facie*, in some respects upon faulty principles:—*Held:* nevertheless the trustee had acted as a prudent man would have acted in dealing with his own property, & was therefore not liable.—*Re* PEARSON, OXLEY *v.* SCARTH (1884), 51 L. T. 692.

Annotation:—**Refd.** *Re* Whiteley, Whiteley *v.* Learoyd (1886), 32 Ch. D. 196.

415. ——.]—SHAW *v.* CATES, No. 402, *ante.*

iv. *Control of Legal Estate.*

416. Propriety of investment on equitable mortgage—Deposit of title deed.]—An exor. & trustee, who had lent trust money on unsurrendered copyholds, a deposit of a lease, & a bond, ordered, on motion, to pay the amount into ct.—WYATT *v.* SHARRATT (1840), 3 Beav. 498; 49 E. R. 196.

417. —— —— **Power to invest in real security.**]—Trustees with a power to sell & to invest the proceeds in govt. or real securities, sold the estate, & received only part of the purchase-money, but executed a conveyance to the purchaser, on the back of which was indorsed a receipt for the whole sum, which was signed by them all. This deed, & the other title deeds, they retained as a security for the unpaid purchase-money with interest, & they entered into a written agreement with the purchaser that the deeds should remain with them as such security, & that he should, if required, execute a proper mtge. This agreement was signed by the purchaser, & by the trustee in whose custody the deeds were placed. Eight years afterwards the purchaser paid the principal & interest of his debt to this trustee, & received from him the deeds, including the conveyance with the receipt indorsed:—*Held:* by such payment the purchaser did not discharge himself of his liability incurred by participation in the breach of trust, & the trustee who received the money having misapplied it & absconded, the purchaser was made to pay it over again.—WEBB *v.* LEDSAM (1855), 1 K. & J. 385; 1 Jur. N. S. 775; 69 E. R. 508.

Annotations:—**Consd.** *Re* Bellamy & Metropolitan Board of Works (1883), 24 Ch. D. 387. **Refd.** *Re* Flower & Metropolitan Board of Works, *Re* Flower & Same (1884), 27 Ch. D. 592.

418. —— —— ——.]—SWAFFIELD *v.* NELSON, [1876] W. N. 255.

Annotations:—**Apld.** Want *v.* Campain (1893), 9 T. L. R. 254. **Refd.** Chapman *v.* Browne (1902), 71 L. J. Ch. 465.

419. —— **No written security — Covenant by mortgagor to surrender property.**]—By an antenuptial settlement, a sum of stock was settled upon certain trusts for the benefit of the wife & children of the marriage. The settlement contained powers for the trustees to sell the trust fund & re-invest the proceeds in Govt. or real securities. By a contemporaneous memorandum, which was executed by the father, the wife, & the intended husband, & indorsed upon the deed of settlement, the trustees were empowered to advance any portion of the trust fund to the owners or lessees of Vauxhall Gardens, upon mtge. either as first, second or third mtgees., for such time & at such rate of interest as the trustees might think fit. The trustees lent the whole of the trust to three persons, who, afterwards became the joint proprietors of & partners in Vauxhall Gardens, but no written security was then taken by the trustees. One of the three proprietors of Vauxhall Gardens subsequently retired from the partnership. Some time afterwards, the trustees obtained a covenant from the two remaining partners to surrender the Vauxhall Gardens by way of mtge., subject to two prior charges. This mtge. eventually proving a wholly inadequate security for the trust fund, a suit was instituted to compel the trustees to reinstate the stock:—*Held:* under the circumstances, the trustees must be considered, in having made the advance without security, & in having afterwards accepted the covenant of two only of the three joint debtors, to have misapplied the trust fund, & they had subjected themselves to the liability of replacing it.—FOWLER *v.* REYNAL (1851), 3 Mac. & G. 500; 21 L. J. Ch. 121; 18 L. T. O. S. 113; 15 Jur. 1019; 42 E. R. 353, L. C.

Annotation:—**Distd.** Lockhart *v.* Reilly, Reilly *v.* Lockhart (1856), 25 L. J. Ch. 697.

420. —— **Second or subsequent mortgage.**]—An estate of the value of £80,000 was subject to a first mtge. of £40,000 & to two others, for £11,000 & £6,800, & between the second & third there was a dispute as to priority. A trustee advanced £1,908 trust money on the security of an assignment of an equal amount of the £6,800:—*Held:* this was a breach of trust.—NORRIS *v.* WRIGHT (1851), 14 Beav. 291; 51 E. R. 298.

Annotations:—**Refd.** Macleod *v.* Annesley (1853), 17 Jur. 698; Smithwick *v.* Smithwick (1861), 5 L. T. 23.

421. —— ——.]—Mr. James Lockhart, the younger, & Mr. Ellis were trustees, who had been parties to what the ct. has held to be a breach of trust in lending trust moneys upon improper securities, improper in these respects, that the value of the property which was the subject of the securities was insufficient & that they were second mtges., the legal estate being outstanding (LORD CRANWORTH, C.).—LOCKHART *v.* REILLY, REILLY *v.* LOCKHART (1857), 1 De G. & J. 464; 27 L. J. Ch. 54; 44 E. R. 803, L. C.

Annotations:—**Mentd.** *Re* Cochran's Estate, De Wolf *v.* Lindsell (1868), L. R. 5 Eq. 209; Robinson *v.* Harkin, [1896] 2 Ch. 415.

422. —— ——.]—*Re* ROBERSON, CAMPKIN *v.* BARTON, [1883] W. N. 110.

423. —— ——.]—SMETHURST *v.* HASTINGS, No. 401, *ante.*

424. —— ——.]—The trustees of a marriage settlement were thereby directed to invest the trust funds in, among other alternative modes of investment, govt. securities of India, or on freehold, copyhold, leasehold, or chattel real securities in

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England, Wales, or Ireland, & were empowered to vary investments with the consent of the husband & wife during their joint lives. Lands in Ireland, which were already subject to mtges. for £4,700 & £2,460, were further mortgaged for a sum of £17,900, which was by subsequent payments reduced to £12,150. There were three sub-mtges. of the last-mentioned mtge. for the sums of £4,000, £2,153, & £5,000 respectively. The trustees of the marriage settlement, without the consent of the wife, sold out India stock forming part of the trust funds, & invested the proceeds thereof on a transfer of the third sub-mtge. for £5,000. They took no legal advice as to the propriety of this investment before making it. In an action against the surviving trustee of the settlement for breach of trust:—*Held:* without deciding whether a puisne mtge. on land in Ireland is of necessity & in all cases an improper investment for trust funds, an investment of such a nature as the trustees had made in the case before the ct. was a breach of trust, & in the circumstances, deft. ought not to be relieved from liability in respect thereof under Judicial Trustees Act, 1896 (c. 35), s. 3.—CHAPMAN *v.* BROWNE, [1902] 1 Ch. 785; 71 L. J. Ch. 465; 86 L. T. 744; 18 T. L. R. 482, C. A.

Annotations:—**Refd.** *Re* Dive, Dive *v.* Roebuck, [1909] 1 Ch. 328; Palmer *v.* Emerson (1911), 104 L. T. 557.

425. —— —— Effect of trustee indemnity clause.]—Trustees lent trust moneys on a second mtge. of house property greatly out of repair, & the principal part was lost:—*Held:* they were liable as for a breach of trust, notwithstanding a trustee indemnity clause declaring they should not be liable for the insufficiency or deficiency in value of any securities, except through their wilful default.—DROSIER *v.* BRERETON (1851), 15 Beav. 221; 51 E. R. 521.

426. —— —— ——.]—Trustees sold a tenement, the property of the trust to one of seven beneficiaries under the trust deed, the price in terms of the contract being payable, in May, 1874. In Nov. 1874, the purchaser being unable to pay £12,000 of the price, was allowed to retain it on loan. As security for the loan, he conveyed to the trustees three houses, including his purchase from the trust, upon each of which there were prior incumbrances to an amount exceeding two thirds of the estimated value as stated by the borrower. Besides these securities the trustees held the personal obligation of the borrower & his father in law; both of whom were engaged in trade. Some of the other beneficiaries remonstrated in 1874, & again in 1880; but the money was allowed to remain on these securities until 1884, when the borrower & his father in law became bkpt., & about £10,000 was lost to the trust. The trust deed contained a clause empowering the trustees to lend out the proceeds & other funds of the trust on "such securities heritable or personal" as they might think proper; & an immunity clause declaring that the trustees should not be liable for "omissions, errors, or neglect of management." The same law agent acted for the trustees & the borrower:—*Held:* the trustees had not acted with perfect impartiality between the beneficiaries, nor had they brought to the management the same care & diligence which a man of ordinary prudence would have exercised in his own concerns; in these circumstances neither the immunity clause nor the authority to lend on personal security were sufficient to protect them, & they were personally liable to make good the deficiency in the trust funds.—KNOX *v.* MACKINNON (1888), 13 App. Cas. 753, H. L.

Annotations:—**Apld.** Rae *v.* Meek (1889), 14 App. Cas. 558; Wyman *v.* Paterson, [1900] A. C. 271.

427. —— —— Onus of proof on trustee.]—There is no inflexible rule that a trustee must not invest on the security of a second mtge., but if he does so the *onus* is on him to show that it was a proper investment.—WANT *v.* CAMPAIN (1893), 9 T. L. R. 254.

Annotation:—**Folld.** *Re* Somerset, Somerset *v.* Poulett, [1894] 1 Ch. 231.

428. Propriety of investment on contributory mortgage—Express power so to invest.]—*Re* GODFREY, GODFREY *v.* FAULKNER, No. 406, *ante.*

429. —— ——.]—In the absence of an express power it is a breach of trust for trustees, having an ordinary power to invest on "real securities," to invest on a contributory mtge. of freeholds.—WEBB *v.* JONAS (1888), 39 Ch. D. 660; 57 L. J. Ch. 671; 58 L. T. 882; 36 W. R. 666; 4 T. L. R. 508.

Annotations:—**Folld.** *Re* Dive, Dive *v.* Roebuck, [1909] 1 Ch. 328. **Refd.** *Re* Walker, Walker *v.* Walker (1890), 59 L. J. Ch. 386; Field *v.* Field, [1894] 1 Ch. 425.

430. —— Different sets of trustees—Claiming under different instruments.]—There is not so strong an objection to a contributory investment where there is the same set of trustees for different children or grandchildren as there is when there is a contributory mtge. in the names of two different sets of trustees claiming under two different instruments (KEKEWICH, J.).—*Re* WALKER, WALKER *v.* WALKER (1890), 59 L. J. Ch. 386; 62 L. T. 449.

Annotation:—**Refd.** *Re* Somerset, Somerset *v.* Poulett, [1894] 1 Ch. 231.

431. —— Leaseholds—Speculative character of property.]—The trustee of a will was directed to invest the trust funds "in his own name or under his legal control" in, amongst other modes of investment, freehold, copyhold, leasehold, or chattel real securities. He invested a sum of £2,000, part of the trust funds, on a contributory mtge. of certain leasehold flats held under leases at substantial rents. The security was introduced by a surveyor to the trustee's solr., who recommended it to the trustee & suggested same surveyor as a suitable person to value the property on the trustee's behalf. The trustee appointed the surveyor & it was arranged that he should be paid a fee only in the event of the mtge. going through. The surveyor made his report, from which it appeared that the property was of a speculative character, but the surveyor nevertheless advised that it formed a good security for the sum proposed to be advanced by the trustee & his co-mtgee. The trustee, relying on the advice of his solr. & on the report, advanced the £2,000. The mtgor. subsequently became insolvent, & the trustee & his co-mtgee. were compelled to sell the property under their power of sale, with the result that the greater part of the £2,000 advanced by the trustee was lost. In an action against the trustee for breach of trust:—*Held:* the investment was improper & a breach of trust; in making it the trustee, although he had acted honestly, had not acted "reasonably," & he was therefore not entitled to be relieved or excused from personal liability under Judicial Trustees Act, 1896 (c. 35), s. 3.—*Re* DIVE, DIVE *v.* ROEBUCK, [1909] 1 Ch. 328; 78 L. J. Ch. 248; 100 L. T. 190.

432. ——.]—*Re* MASSINGBERD'S SETTLEMENT, CLARK *v.* TRELAWNEY, No. 391, *ante.*

433. Propriety of investment in undivided share.]—It is perfectly true that there is no absolute rule that you may not invest on an

undivided share (BYRNE, J.).—*Re* TURNER, BARKER *v.* IVIMEY, as reported in [1897] 1 Ch. 536.

Annotations :—**Mentd.** *Re* Roberts, Knight *v.* Roberts (1897), 76 L. T. 479; *Re* Stuart, Smith *v.* Stuart, [1897] 2 Ch. 583; *Re* Barker, Ravenshaw *v.* Barker (1898), 46 W. R. 296; Head *v.* Gould, [1898] 2 Ch. 250; *Re* Linsley, Cattley *v.* West, [1904] 2 Ch. 785; *Re* Mackay, Griessemann *v.* Carr, [1911] 1 Ch. 300.

v. *Proportion of Valuation Allowed for Investment.*

See, now, Trustee Act, 1925 (c. 19), s. 8.

434. General rule.] — SHAW *v.* CATES, No. 402, *ante*.

435. Two thirds rule — Proposed security freehold—Freehold land.]—*Semble*: so much as two thirds of the value should only be advanced upon property of a permanent value, as freehold land, & not upon houses or buildings; still less upon buildings used in a trade, & whose value depends upon the absence of competition in that trade.—STICKNEY *v.* SEWELL (1835), 1 My. & Cr. 8; 40 E. R. 280.

Annotations :—**Consd.** Phillipson *v.* Gatty, Gatty *v.* Phillipson (1848), 7 Hare, 516; Farrar *v.* Barraclough (1854), 2 Sm. & G. 231; *Re* Olive, Olive *v.* Westerman (1886), 34 Ch. D. 70. **Refd.** Budge *v.* Gummow (1872), 7 Ch. App. 719; Brinsden *v.* Williams, [1894] 3 Ch. 185.

436. —— —— **Freehold houses.**] — Trustees were directed by a will to place the trust moneys in the public funds, or on some good & approved freehold or leasehold securities, at interest. The trustees, acting *bonâ fide*, had, in 1828, upon the report of a surveyor, who had valued the property at £3,500, & the annual rental at £175, lent £2,600, part of the trust moneys, upon a mtge., with powers of sale of the valued property, & which consisted of four freehold messuages, at the time in an unfinished state, the actual yearly rent of which being only £105. The mtgor. having become insolvent, the trustees sold the property in 1836, which then realised less than the amount lent by £353 4*s*. 2*d*., & that sum was lost to the estate. In a suit by a *cestui que trust*, the ct. declined to charge the trustees with the loss, & allowed them their costs of suit, & their costs, charges & expenses.—JONES *v.* LEWIS (1849), 3 De G. & Sm. 471; 18 L. J. Ch. 430; 14 L. T. O. S. 3; 13 Jur. 877; 64 E. R. 566.

Annotation :—**Refd.** *Re* Olive, Olive *v.* Westerman (1886), 34 Ch. D. 70.

437. —— —— **Agricultural freehold.**] — (1) A power to invest trust moneys on real security in Ireland authorises a loan on leaseholds for lives, perpetually renewable at a head rent.

(2) The general understanding is, that a trustee should only lend to the extent of two thirds of the value on agricultural freeholds, & to the extent of one half on freehold houses. *Semble*: also, one half is the limit in the case of a leasehold renewable for ever at a large head rent.

(3) Trustee made liable for a loss on a mtge. investment, he not having taken due precautions to ascertain the value of the property mortgaged.

(4) Incumbrancer *pendente lite* held not an indispensable party to a suit to recover the fund.—MACLEOD *v.* ANNESLEY (1853), 16 Beav. 600; 22 L. J. Ch. 633; 21 L. T. O. S. 40; 17 Jur. 608; 1 W. R. 250; 51 E. R. 912.

Annotation :—*As to* (2) **Refd.** *Re* Olive, Olive *v.* Westerman (1886), 34 Ch. D. 70.

438. —— —— ——.]—(1) Trustees invested trust money on the security of a 5 per cent. mtge. of a freehold brickfield, with buildings, machinery & plant affixed to the soil, being advised by competent valuers that the property was a good security for the amount invested. The valuers' report was in fact based upon a valuation of more than double the amount invested, & upon the supposition that the concern was going, but the report did not state this, nor distinguish between the value of the land & that of the buildings, machinery, etc. The trustees acted *bonâ fide* but acted upon the report without making any further inquiries. The security having failed :—*Held*: the trustees had not acted with ordinary prudence, & were liable to make good the money, with interest at 4 per cent. from the date of the last payment; & the tenant for life was not liable to return to the trustees 1 per cent., which was claimed on the ground that the higher interest was due to its being a hazardous security.

(2) Upon the general law applicable to this case I have only to observe further that whilst trustees cannot delegate the execution of the trust, they may, as was held by this House in *Speight* v. *Gaunt* (1883), 9 App. Cas. 1, avail themselves of the service of others wherever such employment is according to the usual course of business (LORD WATSON).

(3) The cts. of equity in England have indicated & given effect to certain general principles for the guidance of trustees in lending money upon the security of real estate. Thus it has been laid down that in the case of ordinary agricultural land the margin ought not to be less than one third of its value; whereas in cases where the subject of the security derives its value from buildings erected upon the land or its use for trade purposes, the margin ought not to be less than one half (LORD WATSON).—LEAROYD *v.* WHITELEY (1887), 12 App. Cas. 727; 57 L. J. Ch. 390; 58 L. T. 93; 36 W. R. 721; 3 T. L. R. 813, H. L.; *affg.* S. C. *sub nom. Re* WHITELEY, WHITELEY *v.* LEAROYD (1886), 33 Ch. D. 347, C. A.

Annotations :—*As to* (1) **Consd.** *Re* Partington, Partington *v.* Allen (1887), 57 L. T. 654; *Re* Salmon, Priest *v.* Uppleby (1889), 42 Ch. D. 351; Sheffield & South Yorkshire Permanent Bldg. Soc. *v.* Aizlewood (1889), 44 Ch. D. 412. **Apld.** Rae *v.* Meek (1889), 14 App. Cas. 558. **Refd.** Knox *v.* Macklinnon (1888), 13 App. Cas. 753; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337; Brinsden *v.* Williams, [1894] 3 Ch. 185; Mara *v.* Browne, [1895] 2 Ch. 69; *Re* Hunt's S. E., Bulteel *v.* Lawdeshayne, [1905] 2 Ch. 418; Eaton *v.* Buchanan, [1911] A. C. 253. *As to* (2) **Consd.** *Re* Partington, Partington *v.* Allen (1887), 57 L. T. 654. *As to* (3) **Apld.** *Re* Salmon, Priest *v.* Uppleby (1889), 42 Ch. D. 351. **Refd.** Webb *v.* Jones (1888), 36 W. R. 666. *Generally*. **Refd.** *Re* Somerset, Somerset *v.* Poulett, [1894] 1 Ch. 231; *Re* Chapman, Cocks *v.* Chapman, [1896] 2 Ch. 763; *Re* Turner, Barker *v.* Ivimey, [1897] 1 Ch. 536. **Mentd.** *Re* Brogden, Billing *v.* Brogden (1888), 38 Ch. D. 546.

439. —— **Houses or buildings — Buildings used in trade—Value dependent on absence of trade competition.**] — STICKNEY *v.* SEWELL, No. 435, *ante*.

440. —— **Not enforceable with exactness.**] — *Re* GODFREY, GODFREY *v.* FAULKNER, No. 406, *ante*.

441. —— **Depreciation of security—Duty to call in part of mortgage.**]—(1) Trustees who retain mtges. on real property created by their testator & authorised as investments by the terms of his will, will not be held liable for loss occasioned by the depreciation in value of land where they have acted with reasonable care, prudence, & circumspection.

(2) It is not the absolute duty of trustees to have their mtge. securities valued by a professional valuer, & then to call upon the mtgees. to reduce the amount secured so as to bring it within

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the two-thirds limit.—*Re* CHAPMAN, COCKS *v.* CHAPMAN, [1896] 2 Ch. 763; 65 L. J. Ch. 892; 75 L. T. 196; 45 W. R. 67; 12 T. L. R. 625; 40 Sol. Jo. 715, C. A.

Annotations:—As to (1) **Consd.** Rawsthorne *v.* Rowley (1907), 78 L. J. Ch. 235, n. *As to* (2) **Consd.** Shaw *v.* Cates, [1909] 1 Ch. 389. *Generally,* **Refd.** Jackson *v.* Dickinson, [1903] 1 Ch. 947. **Mentd.** *Re* Roberts, Knight *v.* Roberts (1897), 76 L. T. 479.

442. —— Not justifiable in all cases—Once value ascertained.]—SHAW *v.* CATES, No. 402, *ante.*

443. One-half rule—Freehold houses.]—MACLEOD *v.* ANNESLEY, No. 437, *ante.*

444. —— Leasehold—Perpetually renewable.]—MACLEOD *v.* ANNESLEY, No. 437, *ante.*

445. —— ——.]—Trustees having power to make investments of trust moneys upon securities in E. & W., including leaseholds for terms of years, invested trust moneys upon mtge. of a leasehold property which consisted of cottages. The evidence showed that a proper valuation of the property was not obtained by the trustees, & that the sum advanced by them was about two thirds of the real value of the property, which subsequently became depreciated:—*Held:* the investment was not fit & proper for the trustees to make; the trust moneys were advanced upon an insufficient security, & the trustees must make good the loss which had been occasioned to the trust estate.

No one ever said that the rule as to lending not more than one half the value of house property was a hard & fast rule. When applying that rule all the circumstances must be looked at (KAY, J.).

Trustees when they are lending trust money upon house property should tell their valuers that they are lending trust moneys & that they do not desire to lend more than one half the actual value of the property. They should ask for a valuation which would enable them to judge whether they are justified in lending the amount they propose to lend (KAY, J.).—*Re* OLIVE, OLIVE *v.* WESTERMAN (1886), 34 Ch. D. 70; 56 L. J. Ch. 75; 55 L. T. 83; 51 J. P. 38.

Annotation: **Consd.** *Re* Partington, Partington *v.* Allen (1887), 57 L. T. 654.

—— —— Sub-mortgage.]—*See* No. 401, *ante.*

446. —— Buildings—Trade buildings.]—Trustees had power to invest upon such securities as they should approve:—*Held:* they were bound nevertheless to exercise a careful discretion in selecting a security, as to value; & an investment in trade buildings, not having ascertained that they were at least worth twice the money invested, was a breach of trust.—STRETTON *v.* ASHMALL (1854), 3 Drew. 9; 24 L. J. Ch. 277; 3 W. R. 4; 61 E. R. 804.

Annotation: **Refd.** *Re* Olive, Olive *v.* Westerman (1886), 34 Ch. D. 70.

447. —— —— ——.]—LEAROYD *v.* WHITELEY, No. 438, *ante.*

448. —— —— ——.]—PALMER *v.* EMERSON, No. 400, *ante.*

449. —— ——.]—HOEY *v.* GREEN (1884), 1 T. L. R. 116.

450. —— —— ——.]—FRY *v.* TAPSON, No. 467, *post.*

451. —— Not enforceable with exactness.]—*Re* OLIVE, OLIVE *v.* WESTERMAN, No. 445, *ante.*

452. —— ——.]—PALMER *v.* EMERSON, No. 400, *ante.*

(c) Form of Mortgage to Trustees.

453. Proviso that money shall not be called in—For stated period of years.]—Under a power to invest trust money "on real securities," a trustee lent it to a railway co., on the usual assignment of the "undertaking," tolls, etc., the principal not payable till seven years:—*Held:* whether real security or not, the investment was improper.—MANT *v.* LEITH (1852), 15 Beav. 524; 21 L. J. Ch. 719; 16 Jur. 302; 51 E. R. 641.

454. Exclusion of power of sale.]—A widow, a tenant for life, desiring an increase of income, induced a trustee to invest, out of a trust fund, a sum exceeding two thirds of its value on mtge. of copyhold house property at interest at £5 per cent. After the rents had become insufficient to pay the interest, her daughter, on her marriage, became entitled to one fourth of the trust fund. The trustee having stated to the husband & wife the deficiency in the widow's income & its cause, they accepted a small sum of money in hand in lieu of their one fourth, & made no objection for ten years, when the widow died. Becoming then entitled to the remaining three fourths parts of the fund, they sought by suit to charge the trustee with the deficiency:—*Held:* they had so far acquiesced in the investment & could not complain of it; it was not a breach of trust for a trustee to take a mtge. not containing a power of sale.—FARRAR *v.* BARRACLOUGH (1854), 2 Sm. & G. 231; 2 W. R. 244; 65 E. R. 378.

455. —— Retention of personal covenant to pay by mortgagor.]—The trustees of a settlement invested part of the settled funds on a mtge. security which turned out insufficient, & it not appearing that they took due precaution to ascertain the sufficiency of the security. In such a case, the personal covenant of the mtgor. to pay the principal money should not be dispensed with.—LOCKHART *v.* REILLY, REILLY *v.* LOCKHART (1855), 24 L. T. O. S. 316; 3 W. R. 227, L. C.

456. Joint account clause—Power of sale exercisable by survivor.]—Mortgage in fee to A. & B. with power "to them, their heirs or assigns," to sell & give receipts for the purchase-money, & to reimburse "themselves & himself" out of the proceeds; & it was declared that the money advanced belonged to them on a joint account, & that the receipt "of the survivor" should be a sufficient discharge for the principal, etc., remaining due at the death of either:—*Held:* the survivor of A. & B. could make a good title to a purchaser under the power of sale.—HIND *v.* POOLE (1855), 1 K. & J. 383; 3 Eq. Rep. 449; 1 Jur. N. S. 371; 3 W. R. 331; 69 E. R. 507.

457. —— Whether court will go behind clause.]—In 1840 property was mortgaged to W. in fee, there being nothing in the mtge. deed to show that he was not the beneficial owner of the mtge. money. He died in 1842, having by his will devised & bequeathed his real & personal estate to three trustees, of whom his wife was one, on trusts for the benefit of his wife & children, & having appointed the same three persons exors. He also devised & bequeathed his trust & mtge. estates to the same three persons, subject to the trusts & equities affecting the same respectively. The widow alone proved the will, & alone acted as trustee. The other two trustees disclaimed the trusts. In 1854 the widow obtained a decree absolute foreclosing the mtge. In 1865, she, by a deed indorsed on the mtge. deed, conveyed the property, without receiving any pecuniary consideration for it, to K., C. & B., in fee, as joint tenants at law & in equity. The conveyance contained a recital that testator held the mtge. money on an account under which K., C. & B. were then solely entitled thereto as was thereby acknowledged, whereby the widow, as trustee under testator's will, was trustee only of the property of K., C. & B., & they had requested her to

convey it to them. On a subsequent sale of the property by persons who had purchased it from K., C. & B., the purchasers required evidence of the truth of the recital in the deed of 1865 that K., C. & B., were entitled to the mtge. money, &, assuming that testator was a trustee of the mtge. money, the purchasers required the vendors to show that the property sold was comprised in the trust; that K., C. & B. were duly appointed to succeed testator in the trust; & that they had an effectual power of sale & of giving a receipt for the purchase-money:—*Held:* it would be contrary to the practice of the ct. to go behind a recital evidently framed for the purpose of keeping notice of trusts off the conveyance; & a good title had been shown by the vendors.—*Re* HARMAN & UXBRIDGE & RICKMANSWORTH RY. CO. (1883), 24 Ch. D. 720; 52 L. J. Ch. 808; 49 L. T. 130; 31 W. R. 857.

Annotations:—**Distd.** *Re* Blaiberg & Abrahams, [1899] 2 Ch. 340. **Consd.** *Re* West & Hardy's Contract, [1904] 1 Ch. 145. **Apprvd.** *Re* Chafer & Randall's Contract, [1916] 2 Ch. 8. **Distd.** *Re* Balen & Shepherd's Contract, [1924] 2 Ch. 365. **Refd.** *Re* Soden & Alexander's Contract, [1918] 2 Ch. 258.

458. —— ——.] — If trustees are lending money on mtge. the trustees do not disclose the trust on the face of the deed. . . . The recital runs or the deed in substance shows that the money is the money of the trustees belonging to them on a joint account & so it is in law, & they may be trustees simply for the equitable owner or for several (CHITTY, J.).—CARRITT *v.* REAL & PERSONAL ADVANCE CO. (1889), 42 Ch. D. 263; 58 L. J. Ch. 688; 61 L. T. 163; 37 W. R. 677; 5 T. L. R. 559.

Annotations:—**Consd.** *Re* West & Hardy's Contract, [1904] 1 Ch. 145. **Apld.** Hill *v.* Peters, [1918] 2 Ch. 273. **Refd.** *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231; Rimmer *v.* Webster, [1902] 2 Ch. 163; Walker *v.* Linom, [1907] 2 Ch. 104.

459. —— ——.] — A firm of solrs. advanced on mtge. of certain freeholds a sum of money which was expressed in the mtge. deed to belong to the mtgees., one of whom was a member of the firm, on a joint account. The money was in fact advanced as to one moiety by trustees out of the trust funds, & as to the other moiety by the firm out of their partnership assets. The security contemplated advances on the footing of equality, & contained no unusual provisions. The firm acted on the occasion of the mtge. as the solrs. of the trustees, & advised the investment, & subsequently became bkpt. The mtged. property was not at any time a sufficient security for the money advanced:—*Held:* the firm were involved in a breach of trust, on the ground that the security was inadequate, & it ought to have been taken in the names of the trustees, & for omitting to advise the trustees that the investment was a breach of trust the firm might be answerable in damages, but the benefit acquired by the firm under the security was one which was in the contemplation of the parties at the time of the advance, & was not a sufficient ground for declaring the firm to be trustees in the whole or in part of their moiety of the mtge. debt & security, & consequently the trustees were not entitled to be paid out of the security in priority to the persons claiming under the firm.—STOKES *v.* PRANCE, [1898] 1 Ch. 212; 67 L. J. Ch. 69; 77 L. T. 595; 46 W. R. 183; 42 Sol. Jo. 68.

460. —— ——.] — A contract was entered into for the sale of property which was subject to a mtge. to two persons. The mtge. deed contained the usual statement that the money belonged to the mtgees. on a joint account. By inadvertence it was disclosed to the purchasers that the mtge. money was held on the trusts of a settlement of which the mtgees. were not the original trustees:—*Held:* the purchasers were entitled to require that it should be shown that the mtgees. were the duly appointed trustees of the settlement.—*Re* BLAIBERG & ABRAHAMS, [1899] 2 Ch. 340; 68 L. J. Ch. 578; 81 L. T. 75; 47 W. R. 634; 43 Sol. Jo. 625.

Annotations:—**Refd.** *Re* Arran & Knowlsden & Creer's Contract (1912), 81 L. J. Ch. 547; *Re* Chafer & Randall's Contract, [1916] 2 Ch. 8.

See Law of Property Act, 1925 (c. 20), s. 113.

461. Proviso for reduction of interest on punctual payment—Payment punctual but no reduction—Liability of trustee for money had & received.]—Deft., as trustee of a certain marriage settlement, invested money on a mtge. of pltf.'s land. The mtge. deed provided for interest at the rate of 5 per cent., but contained a proviso for the reduction of the rate to 4 per cent. on punctual payments. All the payments of interest except the first had been punctual, but, through pltf.'s ignorance of the proviso for reduction of the interest, they had been made at the rate of 5 per cent. In an action by pltf. to recover from deft., the trustee, the extra 1 per cent. paid under this mistake:—*Held:* the action was rightly brought against the trustee; the only contract was between pltf. as mtgor. & deft. as mtgee.; money had been received under that contract by the mtgee.; & he alone could be asked or required to repay it.—KING *v.* STEWART (1892), 66 L. T. 339.

462. Proviso against grant of occupation leases—By mortgagor.]—SHAW *v.* CATES, No. 402, *ante*.

463. Covenant by mortgagor to keep premises in repair.]—SHAW *v.* CATES, No. 402, *ante*.

(*d*) *Employment of Agents.*

See Trustee Act, 1925 (c. 19), s. 23; TRUSTS & TRUSTEES; *& compare* EXECUTORS, Vol. XXIV., pp. 664, 665, Nos. 6910–6922.

464. Power to employ agents—General rule.]—LEAROYD *v.* WHITELEY, No. 438, *ante*.

465. —— ——.] — Funds, subject to the trusts of a settlement, were invested in Exchequer bills, on the sale of which the proceeds were paid to the account of a firm of solrs., F., S., & F., at their bankers. The funds were afterwards advanced on a mtge. of house property in a new neighbourhood, & of inadequate value. At that date there were no trustees of the settlement, & the mtge. was taken in the names of S. & two other persons who were then proposed, & shortly afterwards appointed new trustees, & never repudiated the transaction. S. was the member of his firm who acted for them in all the matters, & for the work which he did the firm, by arrangement, received, at the time when the money was advanced, payment for their bill of costs out of the funds. The mtge. proved to be an insufficient security, & in an action against the trustees it was held that they were jointly & severally liable to make good the loss sustained. The property not having been sold, or the trust funds replaced, beneficiaries sought to make the firm of solrs. liable for the loss of the funds on the ground of negligence, though S.'s partners had not had any personal knowledge of the property at the time when the mtge. transaction was completed:—*Held:* (1) in all that S. had done in the matter of the mtge. he acted within the scope of his authority as a partner, his firm must be taken to have had knowledge that the security was, for trustees, improper, & consequently, they were implicated in & jointly &

Sect. 3.—Fiduciary owners: Sub-sect. 2, B. (d) & (e).]

severally liable for the breach of the trust; &, further, the judgment which had been recovered against S., as one of the trustees, had not discharged his partners from liability; (2) though there had not been an express retainer, the relation of solr. & client might be inferred from the acts of the parties; it subsisted between the firm & the trustees, & the firm were liable in discharge of the duty which had been undertaken to the clients; (3) the liability extended to the estate of a member of the firm since deceased.

A trustee cannot delegate the execution of the trust; all that he is entitled to do is to avail himself of the services of others wherever such employment is, according to the usual course of business (STIRLING, J.).—BLYTH *v.* FLADGATE, MORGAN *v.* BLYTH, SMITH *v.* BLYTH, [1891] 1 Ch. 337; 60 L. J. Ch. 66; 63 L. T. 546; 39 W. R. 422; 7 T. L. R. 29.

Annotations:—As to (1) **Consd.** Mara *v.* Browne, [1895] 2 Ch. 69. **Reld.** *Re* Turner, Barker *v.* Ivimey, [1897] 1 Ch. 536.

466. Agents must be competent.]—Trustees are bound to employ competent solrs. & agents; & therefore, where trustees lent trust funds upon mtge., & their solr. accepted without inquiry an abstract & a valuation made for the purpose of a previous mtge., & it afterwards turned out that the solr. for the mtgor. had concealed the fact that since the date of the mtge. & valuation two other mtges. had been effected, & loss resulted to the trust estate in consequence:—*Held:* the trustees were liable to make good the loss to their *cestuis que trust.*—HOPGOOD *v.* PARKIN (1870), L. R. 11 Eq. 74; 22 L. T. 772; 18 W. R. 908.

Annotations:—**Consd.** *Re* Speight, Speight *v.* Gaunt (1883), 22 Ch. D. 727; *Re* Partington, Partington *v.* Allen (1887), 57 L. T. 654.

467. Agent must be employed within scope of his business.]—The rule that trustees, acting according to the ordinary course of business, & employing agents as prudent men of business would do on their own behalf, are not liable for the default of the agent so employed, is subject to the limitation that the agent must not be employed out of the ordinary scope of his business. Trustees empowered to invest on mtge. lent under the advice of their solrs. a sum of £5,000 upon mtge. of a freehold house & grounds at Liverpool, valued to them at from £7,000 to £8,000. The trustees did not exercise their own judgment as to the choice of a valuer, but accepted the suggestion of their solrs. that a London surveyor who had introduced the security to them, & was in fact the agent of the mtgor. with a pecuniary interest in the completion of the mtge. should, value the property for the trustees, & they acted upon the report of this valuer, which was of an inflated character. The mtgor. afterwards became bkpt., & the property would not realise the sum advanced:—*Held:* the trustees were jointly & severally liable to replace the sum advanced, with interest at 4 per cent. from the date of the loan.

In investing trust money upon mtge. of house property trustees ought not to lend more than half the value.—FRY *v.* TAPSON (1884), 28 Ch. D. 268; 54 L. J. Ch. 224; 51 L. T. 326; 33 W. R. 113.

Annotations:—**Consd.** *Re* Whiteley, Whiteley *v.* Learoyd (1886), 33 Ch. D. 347. **Reld.** Dewar *v.* Brooke (1885), 52 L. T. 489; *Re* Partington, Partington *v.* Allen (1887), 57 L. T. 654; *Re* Somerset, Somerset *v.* Poulett, [1894] 1 Ch. 231. **Mentd.** Sheffield & South Yorkshire Permanent Bldg. Soc. *v.* Aizlewood (1889), 44 Ch. D. 412.

468. Solicitor — Fraud — Liability of trustee.]—*Semble:* a trustee is liable for the loss of a trust fund caused by his solr. having committed a fraud on the occasion of the investment of the fund on mtge. Upon the occasion of the investment of a trust fund on mtge., the trustee employed the same solr. as the mtgor. Subsequently he had reason to suspect the sufficiency of the security, but took no steps to inquire into the matter. It afterwards turned out that the solr. had practised a fraud on the trustee, & that the security was insufficient:—*Held:* the trustee was liable for the loss occasioned to the trust estate.—SUTTON *v.* WILDERS (1871), L. R. 12 Eq. 373; 41 L. J. Ch. 30; 25 L. T. 292; 19 W. R. 1021.

—— Money entrusted for investment.]—*See* Nos. 393, 394, *ante.*

—— Permission to retain securities.]—*See* No. 394, *ante.*

469. Valuator — Information & instructions to be given by trustees.]—*Re* OLIVE, OLIVE *v.* WESTERMAN, No. 445, *ante.*

470. —— ——.] — Trustees advanced trust money upon mtge. of properties consisting of an hotel & stables, & cottages & houses which were principally let out at weekly rents. Valuers were employed, & the particulars of the several properties as furnished by the mtgors. were submitted to them, but the trustees did not make inquiries for the purpose of verifying the statements made by the mtgors. as to the value or nature of the properties, or whether they were all let, or what was the amount of the outgoings payable. In their instructions to the valuers, they told them that the mtgees. were trustees, but they did not tell them, according to the rule laid down for trustees in lending on the security of house property that they did not desire to lend more than one half of the value. Neither did they call the attention of the valuers to circumstances which might affect the value. They also omitted to instruct the valuers to ascertain whether the particulars were correct, or what were the outgoings or average amount of repairs. In each case the valuers gave it as their opinion that a sum more than one half of the value might be advanced on the security, & such a sum was in each case advanced. Shortly afterwards the mtgors. became insolvent. The several properties were put up for sale, but failed to realise the amounts advanced: —*Held:* (1) the investments were improper; the trustees had been guilty of negligence in not making inquiries as to the particulars & in not giving proper instructions to the valuers, & in acting upon valuations which under the circumstances they ought not to have acted upon, & they were jointly & severally liable for the money lost.

(2) Trustees ought not to introduce the valuer, who is valuing property with a view to mtge. by the trustees, to the mtgor., or the mtgor.'s agent, for the purpose of negotiating the amount of the fee for the valuation.—*Re* PARTINGTON, PARTINGTON *v.* ALLEN (1887), 57 L. T. 654; 4 T. L. R. 4.

Annotation:—As to (2) **Reld.** Shaw *v* Cates, [1909] 1 Ch. 389.

471. —— —— Reliance on ascertainment by valuator of relevant facts.]—By the Trustee Act, 1893 (c. 53), trustees lending trust moneys on the security of property on which they can lawfully lend are relieved from the burden formerly cast upon them by the ct. of investigating for themselves the nature & circumstances connected with the security & the financial position of the borrower, & are justified in assuming that the surveyor or valuer employed by them under s. 8 (1) of the Act of 1893 to report as to the value of the property & to advise them as to lending money on it will ascertain for himself all the facts necessary to enable him to make a proper report. Trustees who by their trust are authorised to lend

trust moneys on the security of leasehold property are entitled to lend it on the security of leasehold cottage property let on weekly tenancies, but the amount which they may safely lend on such property must depend upon the circumstances of each particular case. The words "instructed & employed independently of any owner of the property" in s. 8 (1) mean the relation of employer & employee must exist between the trustees & the surveyor or valuer, & between them alone. The surveyor or valuer must be entitled to look for payment of his remuneration to the trustees alone, & must be responsible to them alone for the due performance of his duty. He must be instructed & employed by the trustees in the particular matter independently of the mtgor., but it is not incumbent on the trustees before employing him to inquire into his previous business transactions with a view of ascertaining whether at any time near or remote he has acted for or advised the mtgor.

It is the duty of surveyors & valuers in advising trustees as to lending trust moneys to state in their report not only what they consider to be the actual value of the property offered as security, but also what proportion of that value the trustee may safely advance upon the security quite irrespective of any supposed rule as to the two thirds limit, subject only to this, that if they are so satisfied as to the importance of the security as to advise them to advance more than two thirds of the value, the trustees would not be justified in acting on that advice, inasmuch as if they did so they would exceed the limit prescribed by s. 8 (1). Where a surveyor or valuer is employed by trustees to value & report upon property it is not essential for him, in order to comply with s. 8 (1), in so many words to state in his report that he advises the trustees to advance a specified sum of money; it is sufficient if he states what he considers to be the value of the property & that it forms a sufficient security for the sum named by him.—*Re* SOLOMON, NORE *v.* MEYER, [1912] 1 Ch. 261; 81 L. J. Ch. 169; 105 L. T. 951; 28 T. L. R. 84; 56 Sol. Jo. 109; *on appeal*, [1913] 1 Ch. 200, C. A.

472. —— Introduction to mortgagor or his agent—Negotiation for valuation fee.]—*Re* PARTINGTON, PARTINGTON *v.* ALLEN, No. 470, *ante*.

473. —— Employment must be independent of owner of property.]—An investment of trust funds on mtge. of property of insufficient value was made by trustees at the instigation & request & with the consent in writing of the tenant for life; but it did not appear that he intended to be a party to any breach of trust, or to an investment on the property without inquiry, & in effect he left it to the trustees to determine whether the investment was a proper one for the moneys proposed to be advanced:—*Held:* (1) the trustees were not entitled under Trustee Act of 1888 (c. 59), s. 6, to have the life interest of the tenant for life impounded by way of indemnity to them against their liability for the loss to the estate by reason of the improper investment; (2) during the life of the tenant for life he was entitled to receive the income of so much of the trust fund as was not lost, & the trustees were entitled to retain for their own use the interest of the money paid by them to make good to the trust fund the amount of the loss.

The words "believed to be" in Trustee Act, 1888 (c. 59), s. 4, do not govern the words "instructed & employed independently of any owner of the property"; &, therefore, in order to entitle a trustee lending money on the security of property to the protection of the section, he must be able to show that the surveyor or valuer on whose report he acted was in fact so instructed & employed.—*Re* SOMERSET, SOMERSET *v.* POULETT (EARL), [1894] 1 Ch. 231; 63 L. J. Ch. 41; 69 L. T. 744; 42 W. R. 145; 10 T. L. R. 46; 38 Sol. Jo. 39; 7 R. 34, C. A.

Annotations:—*As to* (1) **Consd.** Mara *v.* Browne, [1895] 2 Ch. 69. *As to* (2) **Consd.** Fletcher *v.* Collis, [1905] 2 Ch. 24. **Reld.** *Re* Dive, Dive *v.* Roebuck, [1909] 1 Ch. 328. *Generally*, **Mentd.** *Re* Fountaine, *Re* Dowler, Fountaine *v.* Amherst, [1909] 2 Ch. 382.

474. —— —— Inquiry as to previous transactions with mortgagor.]—*Re* SOLOMON, NORE *v.* MEYER, No. 471, *ante*.

475. —— Relationship to trustees—Employer & employed.]—*Re* SOLOMON, NORE *v.* MEYER, No. 471, *ante*.

476. —— —— Remuneration by trustees only—Responsibility to trustees only.]—*Re* SOLOMON, NORE *v.* MEYER, No. 471, *ante*.

477. —— Nature of report & advice to be given to trustees—Whether advance of specified sum to be recommended.]—*Re* SOLOMON, NORE *v.* MEYER, No. 471, *ante*.

See, also, Sub-sect. 2, B. (*b*) iii., *ante*.

(*c*) *Liability for Inadequacy of Security.*

Breach of trust by improper investment generally.]—*See* TRUSTS & TRUSTEES.

478. Acquiescence by beneficiaries — Bar to relief.]—FARRAR *v.* BARRACLOUGH, No. 454, *ante*.

479. Investment at request of tenant for life—Particular securities not selected by tenant for life—Indemnity to trustees.]—Testator bequeathed a fund to trustees upon trust for his sons for life, & then for their children, without giving any directions as to investment. The trustees were about to invest in the funds, but were prevailed upon by the tenants for life to invest on mtge. for the sake of obtaining an increased income, & they invested on insufficient mtges. It was not shown that the tenants for life concurred in the selection of those particular securities. The trustees being decreed to make good the loss arising from the deficiency of the securities:—*Held:* the tenants for life respectively, & their respective life interests in the trust funds, were respectively liable to make good to the trustees the amount paid by the trustees towards replacing such loss, to the extent of the income received by the tenants for life respectively from the improper investments, & of certain sums improperly received by the tenants for life respectively out of the capital. *Semble:* trustees to whom no direction as to investment is given cannot safely invest on mtge.—RABY *v.* RIDEHALGH (1855), 7 De G. M. & G. 104; 3 Eq. Rep. 901; 24 L. J. Ch. 528; 25 L. T. O. S. 19; 1 Jur. N. S. 363; 3 W. R. 344; 44 E. R. 41, L. JJ.

Annotations:—**Distd.** Griffiths *v.* Porter (1858), 25 Beav. 236; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337; *Re* Somerset, Somerset *v.* Poulett, [1894] 1 Ch. 231. **Expld.** Chillingworth *v.* Chambers, [1896] 1 Ch. 685. **Reld.** Butler *v.* Butler (1877), 5 Ch. D. 554; Sawyer *v.* Sawyer (1885), 28 Ch. D. 595; Bolton *v.* Curre (1894), 70 L. T. 759; **Mara** *v.* Browne, [1895] 2 Ch. 69. **Mentd.** Baud *v.* Fardell (1855), 26 L. T. O. S. 83; *Re* Alexandra Palace Co. (1883), 23 Ch. D. 297; Moxham *v.* Grant, [1899] 1 Q. B. 480.

480. —— —— ——.]—*Re* SOMERSET, SOMERSET *v.* POULETT (EARL), No. 473, *ante*.

481. Depreciation of investment.]—M., who died in Dec. 1872, by his will gave all his property to his wife, his son L. M. & E., a solr., upon trust to set apart securities of the nominal value of £10,000 to be selected by his wife, & to pay the income to his wife for life, & after her death he directed that the said sum of £10,000 should fall into his residuary estate, which he gave to his said son & a daughter in equal shares. Testator's widow selected securities to the amount of £10,000, including three mtges. on agricultural

Sect. 3.—*Fiduciary owners: Sub-sect.* 2, *B.* (*e*). *Sect.* 4: *Sub-sect.* 1, *A.* & *B.*; *sub-sects.* 2, 3, 4, 5, 6 & 7. *Sect.* 5. *Part IV. Sect.* 1: *Sub-sects.* 1, 2, 3 & 4.]

lands (*a*) for £2,000, (*b*) for £1,550, (*c*) for £2,400. The will contained no investment clause or express power to vary investments. By a deed poll, dated May 31, 1875, the widow, son, & daughter, with the consent of her then intended husband, empowered the trustees either to retain the existing investments or call them in, & gave them a wide power of investment. The daughter soon afterwards married, & her reversionary share in the £10,000 was settled. The three mtge. securities were left undisturbed until Oct. 1888, when, on the suggestion of E., the trustees had them valued. The valuer reported that (*a*) the land mortgaged for £2,000 was worth £1,840, & a good security for £1,350; that (*b*) the land mortgaged for £1,550 was worth £1,650, & a good security for £1,400; that (*c*) the land mortgaged for £2,400 was worth £2,340, & a good security for £1,800. A long correspondence ensued between the trustees, E. insisting that notices should be given to call in the mtge. money, & the mtgors. compelled to reduce the amounts in each case due, to two thirds of the valuation. L. M. & his mother urged that this course would cause the land to be thrown on the trustees' hands, &. while willing to have the mtges. reduced, insisted that it would be sufficient to reduce the sums due in each case to the amounts for which the valuer considered the land good security. This was an originating summons taken out by E., to which the two other trustees were made only defts., asking for the determination of the ct. whether the trustees ought to take any & what steps to call in, or otherwise with respect to, the mtge. securities (*a*), (*b*), & (*c*):—*Held:* as directions what should be done could be given in an administration action, they could now be given on an originating summons; it is not the duty of trustees who hold mtges. which were originally proper investments, but have depreciated in value, to call them in immediately that the value has fallen so far as to leave less margin than is required by the ct. for a fresh investment. But it is their duty, when they find the security becoming insufficient, to consider & decide as practical men what is best to be done, having regard to all the circumstances, including the risk of having the property thrown on their hands. When, owing to a difference of opinion between trustees, they cannot exercise their discretion, the ct. will assist them. In this case, the ct. not having evidence before it to decide the question, an inquiry was directed in the terms of the summons.—*Re* MEDLAND, ELAND *v.* MEDLAND (1889), 41 Ch. D. 476; 60 L. T. 781; 5 T. L. R. 354; *on appeal*, 41 Ch. D. p. 483, C. A.

Annotation:—**Refd.** *Re* Chapman, Cocks *v.* Chapman, [1896] 2 Ch. 763.

482. ——.]—*Re* CHAPMAN, COCKS *v.* CHAPMAN, No. 441, *ante*.

——.]—*See, also*, TRUSTS & TRUSTEES.

See, also, Sub-sect. 2, B. (*a*) & (*b*).

SECT. 4.—CORPORATE OR UNINCORPORATE BODIES.

SUB-SECT. 1.—CORPORATIONS AND COMPANIES.

A. Corporations created by Statute.

Borrowing powers of statutory companies.]—*See* COMPANIES, Vol. X., pp. 1178 *et seq.*, 1221.

Mortgage of superfluous land.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 289, Nos. 2177–2179.

B. Joint Stock Companies.

Borrowing by companies.]—*See* COMPANIES, Vol. X., pp. 730 *et seq.*

Power of directors to mortgage.]—*See* COMPANIES, Vol. IX., pp. 477–479, Nos. 3131–3141.

SUB-SECT. 2.—CHARITIES.

Charities generally, *see* CHARITIES, Vol. VIII., pp. 241 *et seq.*

Mortgages of trust property.]—*See* CHARITIES, Vol. VIII., pp. 363, 364, Nos. 1658–1665.

SUB-SECT. 3.—ECCLESIASTICAL CORPORATIONS.

Ecclesiastical law generally, *see* ECCLESIASTICAL LAW, Vol. XIX., pp. 223 *et seq.*

Charges on benefices.]—*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 413–417, Nos. 2487–2517.

Disposition by way of mortgage.]—*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 500–502, Nos. 3571–3583.

SUB-SECT. 4.—BUILDING SOCIETIES.

Building societies generally, *see* BUILDING SOCIETIES, Vol. VII., pp. 454 *et seq.*

As mortgagor.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 485 *et seq.*

As mortgagees.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 471–483, Nos. 105–174.

SUB-SECT. 5.—FRIENDLY SOCIETIES.

See FRIENDLY SOCIETIES, Vol. XXV., pp. 318, 320, Nos. 209, 210, 219.

SUB-SECT. 6.—LITERARY AND SCIENTIFIC INSTITUTIONS.

See LITERARY & SCIENTIFIC INSTITUTIONS, Vol. XXXII., p. 552, No. 9.

SUB-SECT. 7.—LOCAL AUTHORITIES.

Borrowing by local authority.]—*See* LOCAL GOVERNMENT, Vol. XXXIII., pp. 87–89.

Securities of municipal funds & property—Whether within Mortmain Acts.]—*See* CHARITIES, Vol. VIII., p. 269, Nos. 327–332.

Debts incurred before Municipal Corporations Act, 1882 (c. 50).]—*See* LOCAL GOVERNMENT, Vol. XXXIII., pp. 90, 91, Nos. 606–608.

SECT. 5.—PRINCIPAL AND AGENT.

See AGENCY, Vol. I., pp. 302, 303, 690, Nos. 275–282, 2987.

Part IV.—Form and Contents of Mortgage.

SECT. 1.—COVENANT FOR PAYMENT OF PRINCIPAL.

SUB-SECT. 1.—WHETHER EXPRESS COVENANT NECESSARY.

See, now, Law of Property Act, 1925 (c. 20), s. 117 (2).

483. Covenant to pay implied.]—KING *v.* KING, No. 8, *ante*.

484. —— In absence of express proviso to contrary.]—In every loan transaction in some shape or other, unless a contract has been come to the other way, there must be implied a right to be repaid. . . . Where a person lends his money, if he is not ever to have his principal paid back, you must have something very definite & clear, showing that that is a condition of the contract (GIFFARD, V.-C.).—HOPKINS *v.* WORCESTER & BIRMINGHAM CANAL PROPRIETORS (1868), L. R. 6 Eq. 437; 37 L. J. Ch. 729.

Annotations:—**Refd.** Postlethwaite *v.* Maryport Harbour Trustees (1869), 20 L. T. 138. **Mentd.** Preston *v.* Great Yarmouth Corpn. (1872), 7 Ch. App. 657, n.

—— From recital of debt.]—*See* DEEDS, Vol. XVII., pp. 394, 395, Nos. 2036–2047.

Securities containing no express promise to pay.]—*See* CONTRACT, Vol. XII., p. 517, Nos. 4289–4298.

SUB-SECT. 2.—PAYMENT ON DEMAND.

See BILLS OF SALE, Vol. VII., pp. 135–137, Nos. 765–773.

SUB-SECT. 3.—PAYMENT BY INSTALMENTS.

Proviso for payment of whole sum on failure to pay instalment—Whether a penalty.]—*See* BONDS, Vol. VII., p. 220, Nos. 628, 629; EQUITY, Vol. XX., p. 516, No. 2436.

—— Implied from covenant to pay instalments.]—*See* BUILDING SOCIETIES, Vol. VII., p. 473, No. 117.

SUB-SECT. 4.—AGREEMENT NOT TO CALL IN PRINCIPAL.

485. Covenant subject to stipulation—For punctual payment of interest.]—Deed of mtge. at 5 per cent. contained a proviso that as often as the interest should be paid half-yearly on the days appointed, or within three months next after each, so much should be deducted as would make the interest 3¼ per cent. By a separate agreement, mtgee. covenanted not to call in the money within five years, unless the interest should be in arrear. The first half-year's interest not having been tendered till after the three months, but the second half-year's interest before:—*Held*: (1) mtgee. was only entitled to interest at 5 per cent. for the half-year which had been tendered after the time; & (2) in consequence of the default, he was entitled to call in his money.—STANHOPE *v.* MANNERS (1763), 2 Eden, 197; 28 E. R. 873.

Annotation:—*As to* (2) **Refd.** Williams *v.* Morgan, [1906] 1 Ch. 804.

486. —— ——.]—HICKS *v.* GARDNER (1837), 1 Jur. 541.

Annotation:—**Consd.** Leeds & Hanley Theatre of Varieties *v.* Broadbent, [1898] 1 Ch. 343.

487. —— ——.]—A mtgee. agreed with the mtgor. that if the interest was duly & punctually paid the principal should remain for two years. Six months' interest became due & was demanded but was not paid; & the mtgee. then demanded payment of principal & interest. Three days afterwards the mtgor. paid the six months' interest, which was received by the mtgee:—*Held*: the mtgee. had not thereby, nor by a subsequent unaccepted offer to receive an instalment, waived his right to call in the principal.—KEENE *v.* BISCOE (1878), 8 Ch. D. 201; 47 L. J. Ch. 644; 38 L. T. 286; 26 W. R. 552.

Annotation:—**Refd.** Williams *v.* Morgan (1906), 94 L. T. 473.

488. —— ——.]—A mtge. deed contained an agreement that the payment of the principal money thereby secured should not be required by the mtgees. until the expiration of three years from the date of the deed "if in the meantime every half-yearly payment of interest shall be punctually paid":—*Held*: payment "punctually" meant "payment on the day fixed for payment," & payment nine days after such fixed day was not good payment.—LEEDS & HANLEY THEATRE OF VARIETIES *v.* BROADBENT, [1898] 1 Ch. 343; 67 L. J. Ch. 135; 77 L. T. 665; 46 W. R. 230; 14 T. L. R. 157; 42 Sol. Jo. 183, C. A.

Annotations:—**Apprvd.** Maclaine *v.* Gatty, [1921] 1 A. C. 376. **Refd.** Williams *v.* Morgan (1906), 94 L. T. 473.

489. —— —— Failure to pay one instalment punctually—Receipt of subsequent instalments.]—A mtgee. agreed with a mtgor. that if the mtgor. punctually performed the covenants contained in the mtge. deed he would not call in the mtge. money for five years. The mtgor. during the first year committed several breaches of covenant. About one year & a half after the last of these breaches, & before the expiration of the five years, the mtgee. gave notice calling in the mtge. money, alleging the breaches aforesaid. During this period of a year & a half the mtgee. had duly received the interest on the mtge. money on each quarter day as it accrued due:—*Held*: the

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PART IV. SECT. 1, SUB-SECT. 1.

483 i. *Covenant to pay implied.*]—HENNESSY *v.* ROURKE (1893), 15 N. S. W. L. R. (L.) 33.—**AUS.**

483 ii. ——.]—Where there is evidence of a loan or debt of course a proviso to repay it will be implied.—HALL *v.* MORLEY (1853), 8 U. C. R. 584.—**CAN.**

483 iii. ——.]—ABELL ENGINE & MACHINE WORKS CO. *v.* HARMS (1907), 16 Man. L. R. 546; 4 W. L. R. 565.—**CAN.**

PART IV. SECT. 1, SUB-SECT. 3.

e. *Proviso for payment of whole sum on failure to pay instalment.*]—TRUST & LOAN CO. *v.* DRENNAN (1866), 16 C. P. 321.—**CAN.**

f. ——.]—A provision in a mtge. that, upon default in payment of an instalment of principal or interest, the whole should become due is not one against which equity will relieve as being in the nature of a penalty.—NATIONAL TRUST CO. *v.* CAMPBELL (1908), 17 Man. L. R. 587.—**CAN.**

g. ——.]—WILSON *v.* THOMSON (1915), 51 S. C. R. 307.—**CAN.**

PART IV. SECT. 1, SUB-SECT. 4.

485 i. *Covenant subject to stipulation—For punctual payment of interest.*]—HUNT *v.* HEARN (1911), 30 N. Z. L. R. 501.—**N.Z.**

485 ii. —— ——.]—GATTY *v.* MACLAINE, [1921] S. C. (H. L.) 1; 58 Sc. L. R. 63.—**SCOT.**

h. *Acceleration clause.*]—A mtge., payable in ten years, contained a proviso that if the mtgor. mtged. or otherwise incumbered the premises, or suffered them to become liable to sale for taxes, the mtge. money should become immediately payable:—*Held*: an assignment in insolvency, though voluntary, was not such an incumbering of the estate as entitled the mtgee.

Sect. 1.—*Covenant for payment of principal: Sub-sects.* 4 & 5. *Sect.* 2: *Sub-sects.* 1, 2, 3, 4 & 5. *Sect.* 3.]

receipt of interest was one of the facts receivable in evidence in determining whether pltf. had waived his right to call in the money before the expiration of the five years accruing to him on the commission of the breaches of covenant by the mtgor.—SEAL *v.* GIMSON (1914), 110 L. T. 583.

490. —— ——.]—By a bond & disposition in security dated Nov. 9, 1910, a loan was effected on the security of a Scottish estate, the loan to be repaid on the following Whit Sunday with interest during non-payment at the rate of 5 per cent. *per annum*, payable on Feb. 1, May 1, Aug. 1, & Nov. 1 in each year, & by a minute of agreement of even date with the bond it was agreed that on the punctual payment of interest as thereafter modified the loan should not be called in for fourteen years, & that the 5 per cent. interest stipulated for in the bond should be modified to 4 per cent. so long as the interest at said lower rate was punctually paid. By a letter of Apr. 29, 1918, the lenders demanded payment of the instalments of interest due on Feb. 1, & May 1, 1918, respectively, & stated that unless the interest were in future regularly & punctually paid interest at the rate stipulated for in the bond would be exacted. On May 13 payment of interest for the two quarters at the lower rate was made & was accepted without demur. On Aug. 7 the borrower sent a cheque for the interest due on Aug. 1, but it was returned as being neither timeous nor sufficient:—*Held:* (1) default had been made in the punctual payment of interest; (2) the lenders were not estopped by their conduct from insisting on their strict rights under the bond.—MACLAINE *v.* GATTY, [1921] 1 A. C. 376; 90 L. J. P. C. 73; 124 L. T. 385; 37 T. L. R. 139; 26 Com. Cas. 148, H. L.

491. Unqualified covenant not to call in—Implied condition of payment of interest.]—In a mtge. of leaseholds there was a proviso for redemption in case the principal should be paid at the expiration of five years, with interest half-yearly in the meantime at £5 per cent. Default having been made in payment of the interest, a bill of foreclosure was filed, although the period for payment of the principal had not arrived:—*Held:* the condition having been broken, the mtgee. was entitled to a decree of foreclosure, notwithstanding he had taken possession of the property, & had realised by sale of a portion of it more than enough to cover the interest due.—EDWARDS *v.* MARTIN (1856), 25 L. J. Ch. 284; 27 L. T. O. S. 164; 4 W. R. 219; *subsequent proceedings* (1858), 28 L. J. Ch. 49.

Distd. Williams *v.* Morgan, [1906] 1 Ch. 804. **Reld.** Seaton *v.* Twyford (1870), 40 L. J. Ch. 122.

492. —— ——.]—SEATON *v.* TWYFORD, No. 118, *ante*.

SUB-SECT. 5.—REDUCTION OF DEBT ON PROMPT PAYMENT.

Whether amounting to penalty.]—*See* EQUITY, Vol. XX., p. 515, Nos. 2432, 2433.

SECT. 2.—COVENANT FOR PAYMENT OF INTEREST.

SUB-SECT. 1.—WHETHER EXPRESS COVENANT NECESSARY.

493. Whether covenant for interest implied.]—Interest given on affirmance of a judgment on a promise to give a mtge.—ANON. (1813), 4 Taunt. 876; 128 E. R. 577.

494. —— **No mention of interest.**]—In pursuance of an arrangement between trustees & their *cestuis que trust*, an equitable mtge. was given to the latter for sums due by the trustees, & the trustees paid interest on the sums up to the time of their bkpcy. The ct. allowed interest at the same rate to be continued from the date of the bkpcy., although no mention of interest was made in the memorandum given by the trustees upon the equitable mtge. being made.—*Re* SOLLY, *Ex p.* MEYER (1845), 4 L. T. O. S. 399, Ct. of R.

495. —— —— **Express covenant to reconvey upon payment of principal.**]—A mtge. deed made no provision for interest, & the mtgee. thereby agreed, upon payment of the principal sum, to reconvey:—*Held:* the mtge. carried no interest.—THOMPSON *v.* DREW (1855), 20 Beav. 49; 52 E. R. 521.

Annotations:—**Expld.** *Re* Drax, Saville *v.* Drax, [1903] 1 Ch. 781. **Reld.** Mellersh *v.* Brown (1890), 45 Ch. D. 225.

496. —— —— **Mortgage by deposit of title deeds.**]—Where a simple contract debt has been secured by deposit of title deeds, unaccompanied by any stipulation as to interest, or by any memorandum from the terms of which the exclusion of a right to recover interest can be inferred:—*Held:* the mtgee. is entitled to interest on the debt, but at the rate of £4 per cent. only.—*Re* KERR'S POLICY (1869), L. R. 8 Eq. 331; 38 L. J. Ch. 539; 17 W. R. 989.

Annotations:—**Apld.** Lippard *v.* Ricketts (1872), L. R. 14 Eq. 291. **Consd.** *Re* Drax, Saville *v.* Drax, [1903] 1 Ch. 781. **Mentd.** Sadler *v.* Worley, [1894] 2 Ch. 170.

497. —— ——.]—In Apr. 1879, A. deposited title deeds with B. to secure repayment of an advance of £1,000, & an agreement was at the same time executed that the deeds should be held as an equitable security for payment, on July 15, 1879, of the £1,000 & interest at 7½ per cent. *per annum*, & also that A. should execute to B. a legal mtge. of the property, with power of sale & such other powers as B. might require for further securing payment of the money which should then be owing on the security of the agreement, "with interest for the same after the rate aforesaid." In Jan. 1881, B. took out a debtor's summons for £150, on the footing that interest continued to be paid at the rate of 7½ per cent. down to the date of demand, & not merely until July 15, 1879, in which case the debt would have been under £50:—*Held:* the agreement amounted to a contract that if the £1,000 was not repaid in July, 1879, interest at 7½ per cent. should continue to be paid, & accordingly that there was a liquidated demand of sufficient amount within Bkpcy. Act, 1869 (c. 71). s. 6, to support the debtor's summons.

Every case that has been cited involves the principle, & the cases have established that where no interest has been stipulated, nevertheless the depositee or mtgee. has a right to interest (BACON,

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to call for the mtge. money.—MCKAY *v.* MCFARLANE (1872), 19 Gr. 345.—**CAN.**

k. ——.]—CANADA TRUST CO. *v.* LAYTON (1916), 34 W. L. R. 429; 10 W. W. R. 580.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 1.

493 i. *Whether covenant for interest implied.*]—Where no rate of interest is fixed by a mtge. to be paid after maturity, the rate of interest mentioned in the mtge. is chargeable *primâ facie*.—SIMONTON *v.* GRAHAM (1881), 8 P. R. 495.—**CAN.**

493 ii. ——.]—Trustee, transferee of land subject to a mtge., cannot be held to covenant impliedly with the mtgee. that he will pay the principal money & interest secured by the mtge., notwithstanding Land Titles Act, s. 52.—EVANS, JOHNSTONE & NAISMITH *v.* ASHCROFT & BRITISH CANADIAN TRUST CO. (1915), 8 W. W. R. 899.—**CAN.**

493 iii. ——.]—CAREY *v.* DOYNE (1856), 5 I. Ch. R. 104.—**IR.**

V.-C.).—*Re* KING, *Ex p.* FURBER (1881), 17 Ch. D. 191; 44 L. T. 319; 29 W. R. 524.

498. —— —— Circumstances negativing implication.]—Where any settlement or contract contains a provision that a certain fixed sum of money is to be charged on land & to be paid at a fixed time, then, as between the owner of the land & the person entitled to the money, the money, in the eye of a ct. of equity, bears interest from the date fixed for payment of the money, although nothing is said as to interest in the settlement or contract, unless there are circumstances negativing the presumption that interest is payable.

In 1823 an order was made in a lunacy giving the lunatic's committees power to purchase on his behalf a freehold estate, & to pay the purchase-money out of the rents & profits of his real estate; & the order went on to declare that the rents & profits so to be applied "shall form a lien on the purchased estate in trust for the lunatic, his exors. & administrators"; but the order was silent as to interest. The committees accordingly paid the purchase-money out of the rents & profits of the lunatic's real estate, & in 1824, in consideration of the purchase-money, a conveyance was executed to trustees for the lunatic. The conveyance contained a declaration of lien corresponding to the terms of the order, but again without mentioning interest. In 1828 the lunatic died intestate, leaving a married sister his heiress-at-law & sole next of kin, who thereupon took out administration to his estate. In 1853 she died, when her husband, D., became tenant by the curtesy of the purchased property, & continued in enjoyment as such until his death in 1887. After this wife's death he had taken out administration to her estate, & also to the estate of the lunatic. No steps had ever been taken for raising the amount of the lien or charge, & no interest had ever been paid upon it. In an action by D.'s legal personal representatives against the persons who had become entitled to the purchased estate to enforce the lien:—*Held:* although interest was not mentioned either in the order in lunacy or in the conveyance, the ct. would, in accordance with its well-settled practice in other cases of equitable charges on land where interest is not mentioned, such as loans on deposit of title deeds, portions & legacies charged on land, & having regard to the circumstances of the case, treat the lien as an interest bearing debt, that is to say, as bearing interest at 4 per cent. as from the death of the lunatic; & inasmuch as, in the events which had happened, such interest must be regarded as having been virtually paid down to D.'s death in 1887, the lien was not statute-barred at that date.—*Re* DRAX, SAVILE *v.* DRAX, [1903] 1 Ch. 781; 72 L. J. Ch. 505; 88 L. T. 510; 51 W. R. 612; 47 Sol. Jo. 405, C. A.

499. Right to sue for principal without suing for interest.]—A principal sum secured by deed, & the interest stipulated to be payable thereon are two distinct sums, & not one entire sum, & either may be sued for, independently of the other. Interest is not a part of the debt secured by mtge., but rather sounds in damages, although, *semble*, it may be sued for in debt.

Declaration in debt for £800 on a covenant, in a mtge. deed for securing payment on a future day certain, of that sum & interest, that deft. would pay the said sum of £800 with interest on etc., with breach that he did not, nor would pay the said sum of £800 on, etc.:—*Held:* good, although there was no averment that the interest had been satisfied or that pltf. abandoned his claim thereto.—DICKENSON *v.* HARRISON (1817), 4 Price, 282; 146 E. R. 465.

Annotations:—**Reld.** Price *v.* G. W. Ry. (1847), 16 M. & W. 244. **Mentd.** Trix *v.* Thorne (1846), 9 Q. B. 282.

SUB-SECT. 2.—REDUCTION ON PUNCTUAL PAYMENT.

See Part XVII., Sect. 6, *post*.

SUB-SECT. 3.—INCREASE ON FAILURE TO PAY PUNCTUALLY.

See Part XVII., Sect. 7, *post*.

SUB-SECT. 4.—CAPITALISATION OF INTEREST IN ARREAR.

500. Mortgagee in possession — Rents sufficient to keep down interest—Right to capitalise.]—A mtge. of leaseholds contained a proviso that, if & so often as any interest due under the mtgor.'s covenant should be in arrear for twenty-one days, after the day appointed for the payment thereof, that interest should be treated as an accession to the capital secured by the deed as on the day on which the same ought to have been paid, & should thenceforth bear interest at the rate & on the days provided by the deed. The mtgee. entered into possession of the property & received the rents. On the taking of the accounts in a redemption action:—*Held:* if on the expiration of twenty-one days after any interest became due, the mtgor. not having paid the interest, there was in the hands of the mtgee., after deducting ground rent & other proper outgoings, an amount arising from the rents received by him sufficient for the payment of the interest, though it had not been actually appropriated to that purpose, the interest could not be said, within the meaning of the proviso, to be in arrear, & the mtgee. therefore was not entitled to have it capitalised.—WRIGLEY *v.* GILL, [1906] 1 Ch. 165; 75 L. J. Ch. 210; 94 L. T. 179; 54 W. R. 274; 50 Sol. Jo. 12, C. A.; *affg.*, [1905] 1 Ch. 241.

Annotation: **Reld.** Ainsworth *v.* Wilding, [1905] 1 Ch. 435.

SUB-SECT. 5.—INTEREST BY WAY OF DAMAGES.

See Part XVII., Sect. 8, *post*.

SECT 3.—**PROVISO FOR REDEMPTION.**

See, now, Law of Property Act, 1925 (c. 20), ss. 115, 117, sched. V., Form No. 1.

501. Mortgage by limited owners — How far mortgagor's estate charged by virtue of redemption.]—Where an estate is mortgaged, the equity

PART IV. SECT. 2, SUB-SECT. 4.

l. *Construction of covenant.*]—A mtge. stipulated in general terms that interest was to run upon the principal sums advanced, without any limitation as to the period of its currency; & also stipulated that in default of punctual payment at the end of each year, the mtgees. were to be at liberty to treat unpaid interest as principal, & to recover it from the mtged. property. According to the tenor of the mtge. when all its provisions & conditions were considered, it was not the true construction that the capital sum was to cease to bear interest at the contract rate upon the arrival of the time stipulated for payment.—BINDESRI NAIK *v.* GANGA SARAN SAHU (1897), I. L. R. 20 All. 171; L. R. 25 Ind. App. 9; 2 O. W. N. 129.—**IND.**

m. *When entitled — Transferee of mortgage.*]—AGNEW *v.* KING, [1902] 1 I. R. 471.—**IR.**

Sect. 3.—Proviso for redemption.]

of redemption, unless there appears a clear intention of making a new settlement, remains subject to the old uses, or to the trusts of the original settlement.

By a marriage settlement, a rentcharge of £200 a year was secured to the wife for life, payable quarterly, with powers of distress, etc. To enable the husband to mortgage, the wife released her rentcharge to the mtgee. The equity of redemption was reserved to the husband, who covenanted to convey other lands on the trusts of the settlement. The husband, by his will, gave his real & personal estate to his brother, on condition that he would allow his wife £300 a year for life:—*Held:* the £200 a year remained a valid charge on the equity of redemption; &, it was not satisfied by the £300 a year.—WOOD *v.* WOOD (1844), 7 Beav. 183; 49 E. R. 1034.

Annotation:—**Apld.** *Re* Betton's Trust Estates (1871), L. R. 12 Eq. 553.

502. —— ——.]—Lands were limited to a father for life, with remainder as the father & his son should appoint, with remainder to the son in tail, with remainder to the father & son, in fee. The father & son appointed in fee, by way of mtge., with a proviso that, on repayment of the mtge. money, the mtgees. should convey the hereditaments to the father & son, their heirs or assigns, or as they should direct; & it was declared, as between the father & son, that the father should, during his life, keep down the interest on the mtge. debt:—*Held:* the course of limitation of the estate was not changed by this proviso.—HIPKIN *v.* WILSON (1850), 3 De G. & Sm. 738; 19 L. J. Ch. 305; 15 L. T. O. S. 559; 14 Jur. 1126; 64 E. R. 684.

503. —— ——.]—Where an estate stood limited to the ordinary uses to bar dower, & the owner mortgaged it in fee, with a proviso for redemption, that on payment the estate should be conveyed to the mtgor., his heirs, appointees, or assigns or to such uses as he or they should direct, & he then made his will, devising all his real estate upon trust for sale, & afterwards the mtgee. reconveyed to the mtgor. to the ordinary uses to bar dower:—*Held:* the reconveyance was not a revocation of the will as to this estate.—PLOWDEN *v.* HYDE (1852), 2 De G. M. & G. 684; 21 L. J. Ch. 796; 20 L. T. O. S. 18; 16 Jur. 823; 42 E. R. 1040, L. JJ.; *revsg.*, 2 Sim. N. S. 171.

Annotations:—**Reld.** Whitbread *v.* Smith (1854), 3 De G. M. & G. 727; Jones *v.* Davies (1878), 8 Ch. D. 205. **Mentd.** Jacob *v.* Jacob (1898), 78 L. T. 825.

504. —— ——.]—Lands of a wife were settled to such uses as she & her husband should appoint & subject thereto to the use of the husband for life, with remainder to the wife for life, with remainder to the children of the marriage. Two days afterwards the husband & wife, in exercise of the power, appointed the lands to the use of trustees upon such trusts as the husband alone should appoint, & subject thereto in trust for the husband for his life, or till his bkpcy., with remainder in trust for the wife for life, & after her death on the trusts declared by the former deed. Some months afterwards the husband executed a mtge., reciting merely an agreement for a loan, & thereby appointed that the trustees should hold the lands upon trusts for sale, & securing the repayment of the mtge. money, & subject thereto upon trust for the husband & his heirs:—*Held:* the equity of redemption was effectually resettled, & belonged to the husband in fee.—HEATHER *v.* O'NEIL (1858), 2 De G. & J. 399; 27 L. J. Ch. 512; 31 L. T. O. S. 125; 4 Jur. N. S. 957; 6 W. R. 484; 44 E. R. 1044, L. C. & L. JJ.

Annotations:—**Distd.** Atkinson *v.* Smith (1858), 3 De G. & J. 186. **Consd.** Jones *v.* Davies (1878), 8 Ch. D. 205. **Reld.** *Re* Byron's Settlmt., Williams *v.* Mitchell, [1891] 3 Ch. 474.

505. —— ——.]—A husband & wife mortgaged by feoffment & fine land of which they were tenants by entireties in fee simple, & by the proviso for redemption the land was to be reconveyed to the husband & wife & their heirs, or to such other persons or person & for such intents & purposes as the husband & wife or the survivor of them, or the heirs or assigns of such survivor, should nominate, direct or appoint. By a reconveyance, executed by the mtgee. & by the husband & wife on the mtge. debt being paid off, the mtgee. by the direction & appointment of the mtgor. & his wife, released & the husband & wife appointed & released the premises to the use of the wife for life, with remainder to the use of the husband for life, with remainder to uses in favour of their daughter & her children. After the death of the wife the husband conveyed the property to a purchaser for value:—*Held:* the mtge. sufficiently indicated an intention to charge or modify the wife's estate, for the purpose of enabling her to deal with the equity of redemption without a fine & her occurrence in the settlement made by the reconveyance was a sufficient consideration to sustain the settlement against the subsequent purchaser.—ATKINSON *v.* SMITH (1858), 3 De G. & J. 186; 28 L. J. Ch. 2; 32 L. T. O. S. 140; 4 Jur. N. S. 1160; 7 W. R. 42; 44 E. R. 1240, L. C.

506. —— ——.]—A married woman was entitled for life in the event of surviving her husband to a rentcharge. She joined him in executing a mtge. of the estates upon which it was charged, & by the mtge. deed absolutely released & extinguished her rentcharge. A portion of the estates was reconveyed by the mtgees. to the husband released from the mtge., & he afterwards remortgaged the same to other mtgees., who under a power entered into a contract for sale. The title being objected to on the ground that the rentcharge was still subsisting the vendors produced parol evidence that the former mtgees. had stipulated with the solr. of the mtgor. & his wife for the absolute release of the rentcharge:—*Held:* where a wife joins in a mtge. deed her equity of redemption is not released if there be no express contract on her part to do so, & at any rate the title was too doubtful to be forced upon the purchasers.—*Re* BETTON'S TRUST ESTATES (1871), L. R. 12 Eq. 553; 19 W. R. 1052; *sub nom. Re* BELTON'S TRUSTS, 25 L. T. 404.

507. —— ——.]—Where in a deed of mtge. it was recited that the mtgor. was entitled under his father's will to a life estate in the hereditaments comprised in the said deed, with remainder to his children as tenants in tail general, with cross remainders between them, & that for the purpose of increasing the mtgee.'s security one of his daughters & her husband, parties thereto of the second part, had agreed to bar the estate tail in remainder vested in them, the reconveyance to be made to the mtgors. respectively according to their original respective estates & interests therein:—*Held:* according to the true construction of the proviso for redemption, the parties were entitled to a reconveyance of the estates as originally created by the will, & not as altered for the purposes of the mtge.—PLOMLEY *v.* FELTON

(1888), 14 App. Cas. 61; 58 L. J. P. C. 50; 60 L. T. 193, P. C.

Annotation:—**Refd.** *Re* Byron's Settlmt., Williams *v.* Mitchell, [1891] 3 Ch. 474.

508. —— ——.]—By a settlement of 1862 real estate, then subject to a mtge. in fee, was conveyed by B. to trustees, upon trust to permit her daughter R., a married woman, to receive the rents for her separate use, & upon further trust "for such person or persons, not being her present husband, or any friend or relative of his, & for such estate or estates" as R. should by deed or will appoint; &, in default of appointment, then over. In 1868 B. & R., by a deed containing no recitals, mtged. the property in fee, subject to the prior mtge., the proviso for redemption reserving the right of reconveyance to R., "her heirs or assigns, or as she or they shall direct." In 1885 R., her husband being then dead, made a will consisting of a general devise of all her real & personal estate in favour of a sister & her children:—*Held:* the limitations in the settlement were not altered by the form of the proviso for redemption in the mtge. of 1868 so as to confer upon R. an absolute estate in fee simple.—*Re* BYRON'S SETTLEMENT, WILLIAMS *v.* MITCHELL, [1891] 3 Ch. 474; *sub nom. Re* REYNOLDS, WILLIAMS *v.* MITCHELL, 60 L. J. Ch. 807; 65 L. T. 218; 40 W. R. 11.

509. Proviso precluding redemption for fixed term.]—If there are first & subsequent mtgees. of the same estate, the mtgor. cannot require the first mtgee. to assign the debt & property to a nominee of his own, under Conveyancing & Law of Property Act, 1881 (c. 41), s. 15, without the consent of the puisne mtgee. The "mtgor. entitled to redeem" in that sect. means a mtgor., or person claiming under the mtgor., who has a right to require a reconveyance from the mtgee.; & no other person can take advantage of that sect.

Every mtgor. is entitled to redeem, but there is a difference in their rights. Where there is one mtgor. & one mtgee., there, of course, his right to redeem is absolute. But where there are several successive mtgees. the mtgor. can redeem the next to him without redeeming any other; but if he wishes to redeem any anterior mtge. he must also redeem all who are between that mtgee. & himself. A puisne mtgee. indeed is in rather a worse position than this; for, although he is entitled to redeem those above him, he cannot do so without foreclosing those between himself & the ultimate equity of redemption. So that the words "where a mtgor. is entitled to redeem" really includes every mtgor., except a mtgor. who is precluded by some special term in his mtge. deed from redeeming within a specific time. For although the law will not allow a mtgor. to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years (JESSEL, M.R.).—TEEVAN *v.* SMITH (1882), 20 Ch. D. 724; 51 L. J. Ch. 621; 47 L. T. 208; 30 W. R. 716, C. A.

Annotations:—**Apld.** Alderson *v.* Elgey (1884), 26 Ch. D. 567. **Distd.** Kinnaird *v.* Trollope (1888), 39 Ch. D. 636. **Apld.** Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307. **Consd.** Morgan *v.* Jeffreys, [1910] 1 Ch. 620. **Refd.** Corbett *v.* National Provident Institution (1900), 17 T. L. R. 5; Rice *v.* Noakes, [1900] 1 Ch. 213; Bradley *v.* Carritt, [1903] A. C. 253.

510. —— **Similar provision against calling in by mortgagee.**]—In 1896 a lessee of land on which he had built a hotel mortgaged it to a brewer to secure £5,500 & interest, & covenanted to buy all beer & other liquors consumed at the house from the mtgee. for a period of twenty-eight years & so long after as any money should remain due upon the security. The deed also provided that the mtgor. should not be entitled to pay off the mtge. before 1924 without the consent of the mtgee. There was a power of sale without notice upon the happening of any one of numerous events, & upon a sale under the power the purchaser might be required to take a conveyance subject to the "tie." In an action by the mtgor. to redeem the mtge.:—*Held:* the proviso against redemption for twenty-eight years, even if it might be supported in a case where there was a similar provision against calling in the mtge., exceeded all reasonable limits & could not be enforced.—MORGAN *v.* JEFFREYS, [1910] 1 Ch. 620; 79 L. J. Ch. 360; 74 J. P. 154; 26 T. L. R. 324.

Limitations on right to redeem.]—*See* Part VII., Sect. 4, *post*.

511. Meaning of "month."]—"Month" in law is, *primâ facie*, a lunar month, or twenty-eight days, unless otherwise expressed. But, in mtge. transactions, a month means a calendar month.

By a mtge. dated Mar. 9, 1917, defts., as mtgors., conveyed certain lands in Cornwall containing about 500 acres, with the mines & minerals thereunder, to pltf. as mtgee. to secure £5,000 & interest at 6 per cent. The mtge. contained a provision that if interest were paid on every half-yearly day on which it was payable until Mar. 9, 1923, or within "twenty-eight days" after each such day, the mtgee. would not call it in, "provided also that in case a co. shall be formed with limited liability within six months of the declaration of peace, & which co. shall acquire the said premises," then the mtgee. would accept first mtge. debentures of the said co. for the £5,000 to be in full satisfaction & discharge of the principal moneys secured by the mtge. No interest on the mtge. had been paid since Mar. 1922. Within six calendar months of the declaration of peace, but some days after the expiration of six lunar months, a co. with limited liability was formed by defts. with a memorandum & articles duly registered & a capital of £10,000, divided into 100,000 shares of 2*s.* each, & defts. agreed to sell to the new co. the premises comprised in the mtge. of Mar. 9, 1917. Some three & a half years before the formation of this co. the premises & mines comprised in the mtge. had been entirely abandoned, certain of the plant & machinery sold, & the shafts filled up. Only £10 12*s.* of the capital of the co. had been paid up, & there was no ostensible business to be carried on. Pltf. claimed judgment for £5,000 on account, &, in default of payment, foreclosure. The defence was that there had been a compliance with the proviso in both respects:—*Held:* the transaction being one of mtge. was excepted from the rule at common law that "month" *primâ facie* meant lunar month, & further, apart from its being an exception to the rule, there was sufficient context in the mtge. deed to show that the six months referred to in the proviso for redemption meant six calendar months.—SCHILLER *v.* PETERSEN & CO., LTD., [1924] 1 Ch. 394; 93 L. J. Ch. 386; 130 L. T. 810; 40 T. L. R. 268; 68 Sol. Jo. 340, C. A.

Annotation:—**Mentd.** Phipps (Northampton & Towcester Breweries) *v.* Rogers, [1924] 2 K. B. 45.

509 i. *Proviso precluding redemption for fixed term.*]—BAKHTAWAR BEGAM *v.* HUSAINI KHANUM (1914), I. L. R. 36 All. 195.—**IND.**

n. *Whether operating as redemise to mortgagor.*]—The proviso for redemption will not operate as a redemise to the mtgor. so as to entitle him to

SECT. 4.—**WHERE SEVERAL MORTGAGEES.**

See, now, Law of Property Act, 1925 (c. 20), s. 111 (1) (2); Land Registration Act, 1925 (c. 21), s. 23.

512. Presumption that money belongs to mortgagees in severalty.]—PETTY *v.* STYWARD (1631), 1 Rep. Ch. 57; 1 Eq. Cas. Abr. 290; 21 E. R. 506.

Annotations:—**Dbtd.** Matson *v.* Dennis (1864), 4 De G. J. & Sm. 345. **Refd.** Robinson *v.* Preston (1858), 4 K. & J. 505; Harrison *v.* Barton (1860), 30 L. J. Ch. 213. **Mentd.** Stoeds *v.* Stoeds (1889), 22 Q. B. D. 537.

513. —— Conveyance made jointly.]—If two persons advance money upon a mtge., though the conveyance be made to them jointly, it shall be a tenancy in common.—RIGDEN *v.* VALLIER (1751), 3 Atk. 731; 2 Ves. Sen. 252; 26 E. R. 1219.

Annotations:—**Refd.** Campbell *v.* Campbell (1792), 4 Bro. C. C. 14; Morley *v.* Bird (1798), 3 Ves. 628; Aveling *v.* Knipe (1815), 19 Ves. 441; Harrison *v.* Barton (1860), 1 John. & H. 287; Steeds *v.* Steeds (1889), 22 Q. B. D. 537. **Mentd.** Fisher *v.* Wigg (1700), 1 P. Wms. 14, n.; Goodtitle d. Hord *v.* Stokes (1753), Say. 67; Fletcher *v.* Fletcher (1844), 4 Hare, 67; Matson *v.* Dennis (1864), 4 De G. J. & Sm. 345.

514. —— —— Joint account clause.]—*Re* JACKSON, SMITH *v.* SIBTHORPE, No. 312, *ante.*

515. Advance by husband & wife—Joint account clause—Presumption of advancement on death of husband.]—A husband & his wife advanced sums on mtge. expressed to be out of moneys belonging to them on a joint account. There was clear evidence that half of the respective loans belonged to the separate estate of the wife. The mtge. interest was during the husband's life collected & paid to him, & he paid half of the sums so received to her. The husband died leaving his wife surviving:—*Held:* the presumption in favour of advancement was not rebutted & the widow was entitled to the mtge. by survivorship.—*Re* HICKS, HICKS *v.* HICKS (1917), 117 L. T. 360.

SECT. 5.—**EXTENT OF INTEREST CONVEYED.**

SUB-SECT. 1.—THE "ALL ESTATE" CLAUSE.

See DEEDS, Vol. XVII., pp. 383, 384, Nos. 1916, 1918–1920.

SUB-SECT. 2.—ESTOPPEL OF MORTGAGOR.

Estoppel generally, *see* ESTOPPEL, Vol. XXI., pp. 132 *et seq.*

Estoppel by recital of title.]—*See* ESTOPPEL, Vol. XXI., pp. 252 *et seq.*

Acquisition of good title subsequent to mortgage.]—*See* ESTOPPEL, Vol. XXI., pp. 283 *et seq.*

SUB-SECT. 3.—FIXTURES.

A. Ordinary Fixtures.

(a) In General.

516. Where fixtures not mentioned in deed.]—Lessee of a house containing fixtures, executed an assignment of the premises by way of mtge., not mentioning the fixtures. He afterwards assigned the premises, & all his estate & effects, to trustees. The trustees being in treaty for a sale of the fixtures, the mtgee., whose principal & interest were due, took forcible possession of the house, & refused, on demand, to deliver the fixtures up. The trustees brought trover:—*Held:* they could not recover for the fixtures.—LONGSTAFF *v.* MEAGOE (1834), 2 Ad. & El. 167; 4 Nev. & M. K. B. 211; 4 L. J. K. B. 28; 111 E. R. 65.

Annotation:—**Refd.** Hitchman *v.* Walton (1838), 4 M. & W. 409.

517. —— All fixtures whether attached before or after deed.]—Whatever is affixed to freehold by the owner of the inheritance is to be considered as a fixture till severed by him; & whether so affixed before or after a mtge., passes absolutely to the mtgee.—*Re* MABERLY, *Ex p.* BELCHER (1835), 4 Deac. & Ch. 703; 2 Mont. & A. 160; 4 L. J. Bcy. 29, Ct. of R.

Annotations:—**Folld.** *Re* Gye & Hughes, *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443. **Consd.** Walmsley *v.* Milne (1859), 7 C. B. N. S. 115. **Refd.** Tottenham *v.* Swansea Zinc Ore Co. (1885), 52 L. T. 738.

518. —— ——.]—HITCHMAN *v.* WALTON, No. 674, *post.*

519. —— ——.]—Bkpts. purchased certain copyhold property with various fixtures erected thereon which were in law removable as between landlord & tenant as well as on the principle of the benefit of trade. They afterwards mortgaged the property together with all these fixtures describing them precisely in the words used in the purchase deed. After the mtge. they erected on the premises some other fixtures of the like nature & continued in the possession of the whole property up to the period of their bkpcy:—*Held:* all these fixtures passed to the mtgees. as parcel of the mtged. estate & were not to be considered as goods or chattels in the order & disposition of the bkpts. at the time of their bkpcy.—*Re* GYE, *Ex p.* REYNAL (1841), 2 Mont. D. & De G. 443.

Annotations:—**Consd.** *Re* Wood (1852), 1 Bankr. & Ins. R. 70, n. **Refd.** Walmsley *v.* Milne (1859), 29 L. J. C. P. 97; Brantom *v.* Griffits (1876), 45 L. J. Q. B. 588.

520. —— ——.]—*Re* NUTTER, *Ex p.* COTTON, No. 531, *post.*

521. —— ——.]—MEUX *v.* JACOBS, No. 561, *post.*

522. —— ——.]—*Re* KITCHIN, *Ex p.* PUNNETT, No. 570, *post.*

523. —— ——.]—The mtgor. of a house, subsequently to the mtge., removed the ordinary fixed grates from various rooms in the house & substituted for them "dog grates" which were of considerable weight, but were not physically attached to the structure of the house in any way:—*Held:* under the circumstances the true inference was that the mtgor. placed the dog grates in the house with the object of improving the inheritance, & they were therefore fixtures which passed to the mtgee.—MONTI *v.* BARNES, [1901] 1 K. B. 205; 70 L. J. Q. B. 225; 83 L. T. 619; 49 W. R. 147; 17 T. L. R. 88, C. A.

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the possession of the land until default made, unless there be a stipulation to that effect.—DOE d. BURNHAM *v.* WATTS (1844), 2 Kerr, 441.—**CAN.**

PART IV. SECT. 4.

512 i. *Presumption that money belongs to mortgagees in severalty.*]—Mtgees. are not trustees under 4 Will. 4, c. 1, s. 48, so as to take jointly, when the deed is silent as to the tenancy created.—DOE d. SHUTER *v.* (1823–1900), 3 Ont. Dig. 7073.—**CAN.**

PART IV. SECT. 5, SUB-SECT. 3.—A. (a).

517 i. *Where fixtures not mentioned in deed—All fixtures whether attached before or after deed.*]—A hot-air furnace fixed to the floor by screws & placed in a dwelling-house, during its construction, by a mtgor., in pursuance of the agreement for the loan on the property, cannot be removed by him during the currency of the mtge. The mtgee. is entitled to an order restraining its removal, & if removed no title to it passes as against the mtgee., even to an innocent purchaser, & the mtgee. is entitled to an order for its replacement.—SCOTTISH AMERICAN INVESTMENT CO. *v.* SEXTON (1894), 26 O. R. 77.—**CAN.**

517 ii. —— ——.]—OBERHOLSTER *v.* HOLTMAN (1840), 2 M. 346.—**S. AF.**

517 iii. —— ——.]—VENTER *v.* GRAHAM & MULLER (1906), 23 S. C. 729; 16 C. T. R. 1086.—**S. AF.**

524. Where fixtures mentioned in deed.] — Where the lessee for years of a house, being also possessed of the fixtures therein by separate purchase, mortgaged his term with the fixtures, & afterwards became bkpt.:—*Held:* his assignee, who removed & converted them, was liable in trover by the mtgee. to pay the value of them while fixed on the demised premises.—BOYDELL *v.* M'MICHAEL (1834), 1 Cr. M. & R. 177; 3 Tyr. 974; 3 L. J. Ex. 264; 149 E. R. 1043.

Annotations:—**Refd.** *Re* Butterworth, *Ex p.* Wilson (1835), 4 Deac. & Ch. 143; *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703; Minshall *v.* Lloyd (1837), 2 M. & W. 450; Hitchman *v.* Walton (1838), 4 M. & W. 409; *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510; *Re* Gye & Hughes, *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443; *Re* Garwan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403; Wilde *v.* Waters (1855), 24 L. J. C. P. 193; Waterfall *v.* Penistone (1856), 6 E. & B. 876.

525. —— Question of intention.] — A house fitted up for, & intended to be used as, a club was mortgaged with all fixtures therein:—*Held:* in determining what articles were included in the mtge. under the term "fixtures," regard must be had to the intentions of the parties, the one in mortgaging & the other in taking a security for the sum advanced; & such things as were substantially part of the house, so that they could not be removed without depriving the house of what was intended to be used with it, must be regarded as fixtures.—SMITH *v.* MACLURE (1884), 32 W. R. 459.

526. Where some fixtures mentioned in deed — All fixtures included.]—In the absence of an intention to the contrary being expressed in the mtge. deed, a mtge., whether of leasehold or real estate, will pass all fixtures to the mtgee., notwithstanding that only some of the fixtures have been specified in the mtge. deed. When the mtge. is by demise, the right to sever the fixtures remains in the mtgor. at the end of the mtge. term, but the mtgee. has the right to use them during that term.—SOUTHPORT & WEST LANCASHIRE BANKING CO. *v.* THOMPSON (1887), 37 Ch. D. 64; 57 L. J. Ch. 114; 58 L. T. 143; 36 W. R. 113, C. A.

Annotations:—**Consd.** National Provincial & Union Bank of England *v.* Charnley, [1924] 1 K. B. 431. **Refd.** *Re* Yates, Batcheldor *v.* Yates (1888), 59 L. T. 47; Power *v.* Wells (1889), 6 T. L. R. 32; Gough *r.* Wood, [1894] 1 Q. B. 713; Reynolds *v.* Ashby, [1904] A. C. 466; *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110.

(*b*) *Mortgage by Deposit of Title Deeds.*

527. All fixtures pass — Deposit with memorandum.]—A memorandum of deposit, accompanying an equitable mtge., stated that the bkpt. had deposited "the deeds & documents under which I hold the steam mills, cottages, land, buildings & premises at L.":—*Held:* the equitable mtgee. had a lien on the fixtures, whether erected before or after the time of the deposit, including those which were movable as between landlord & tenant.—*Re* STEAD, *Ex p.* PRICE (1842), 2 Mont. D. & De G. 518; 11 L. J. Bcy. 27; 6 Jur. 327, Ct. of R.

Annotations:—**Refd.** Walmsley *v.* Milne (1859), 7 C. B. N. S. 115. **Mentd.** *Re* Wethered, *Ex p.* Salaman's Trustee, Trustee *v.* Bance (1925), 95 L. J. Ch. 127.

528. —— ——.]—A lessee annexed tenant's fixtures & then deposited the lease by way of mtge. with a memorandum not noticing the fixtures:—*Held:* on his becoming bkpt., the security extended to the fixtures.—*Re* MACKIE, *Ex p.* TAGART (1847), De G. 531, Ct. of R.

Annotations:—**Refd.** *Re* Mullen, *Ex p.* Heathcoat (1849), Fonbl. 42; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115. **Mentd.** *Re* Walker, *Ex p.* Acton (1861), 4 L. T. 261.

529. —— ——.]—A., by a memorandum in writing, stated that he had placed in the possession of B. seven leases of seven pieces of ground, messuages, & premises, numbered respectively, mentioning the numbers; & undertook to execute proper mtges. of the same to B. to secure a sum advanced by B. to A. A. became bkpt. B. presented the usual equitable mtgee.'s petition:—*Held:* B. was entitled to the "tenant's fixtures" which were in the houses agreed to be mortgaged.—*Re* INWOOD, *Ex p.* COWELL (1848), 17 L. J. Bcy. 16; 11 L. T. O. S. 156; 12 Jur. 411.

530. —— Deposit without memorandum.] — Under an equitable mtge. by the simple deposit of a lease, unaccompanied by any memorandum, the tenants' fixtures will be included.—WILLIAMS *v.* EVANS (1856), 23 Beav. 239; 53 E. R. 94.

Annotation:—**Refd.** *Re* Walker, *Ex p.* Acton (1861), 4 L. T. 261.

B. Trade Fixtures.

(*a*) *In General.*

531. General rule.] — (1) A trader mortgaged the trade premises in fee, & then entered into partnership, & the firm carried on business on the same premises, & erected trade fixtures:—*Held:* on the bkpcy., the mtgee. was entitled to the trade fixtures.

(2) By the general rule of law fixtures belong to the premises to which they are affixed, as between mtgor. & mtgee., without any such distinction as that of tenants fixtures. . . . He [the mtgee.] is entitled to all the fixtures which he finds on the mtged. premises (SIR JOHN CROSS).—*In re* NUTTER, *Ex p.* COTTON (1842), 2 Mont. D. & De. G. 725; 6 Jur. 1045.

Annotations:—*As to* (1) **Folld.** Cullwick *v.* Swindell (1866), L. R. 3 Eq. 249. **Consd.** Climie *v.* Wood (1868), L. R. 3 Exch. 256; Sanders *v.* Davis (1885), 15 Q. B. D. 218. **Refd.** Gough *v.* Wood, [1894] 1 Q. B. 713. *As to* (2) **Refd.** Walmsley *v.* Milne (1859), 7 C. B. N. S. 115; Climie *v.* Wood (1868), L. R. 3 Exch. 256.

532. ——.]—The S. co. carried on the business of manufacturing zinc & spelter, sulphuric acid, & zinc oxide on leasehold premises. They had erected a number of cupola & other furnaces for the purposes of their manufacture, which, as between them & their landlords, were admitted to be trade fixtures. In 1880 the co. conveyed the land & buildings comprised in its lease to trustees for debenture-holders upon trust to permit the co. to carry on business until default in payment of the debentures or winding up, & then to sell. In 1883 the co. executed a second mtge. to trustees for a second set of debenture-holders, which comprised, besides the land & buildings, all stock-in-trade, stock of ores, & loose plant & material. It appeared that in the course of smelting metals for the co.'s business small quantities of gold & silver were given off in the form of vapour, & became imbedded in the bricks lining the furnaces. The co. having been ordered to be wound up, the trustees of the first mtge. deed entered & sold. The second mtgees. took out a summons that they might be allowed to enter & remove the gold, silver, & other metal imbedded in the said bricks, claiming that it was included in their mtge., & not in the first. It was admitted that the metals

PART IV. SECT. 5, SUB-SECT. 3.—B. (a).

531 i. *General rule.*]—In the absence of some special arrangement to which the mtgee. was a party a trade fixture annexed to the soil in a *quasi* permanent manner passes to the mtgee.—*Re* NEW SOUTH WALES CO-OPERATIVE ICE COLD STORAGE CO. (1891), 12 N. S. W. Eq. 87; 7 N. S. W. W. N. 12.—**AUS.**

531 ii. ——.]—WATEROUS ENGINE WORKS CO. *v.* HENRY (1855), 2 Man. L. R. 169.—**CAN.**

531 iii. ——.]—KEEFER *v.* MERRILL (1881), 6 A. R. 121.—**CAN.**

Sect. 5.—Extent of interest conveyed: Sub-sect. 3, B. (a).]

could not be extracted without pulling down the furnaces & pounding up some of the bricks:—*Held:* the doctrine of trade fixtures has no application as between mtgee. & mtgor.; whatever might have been the case between landlord & tenant, the mtgee. was entitled to everything which his mtgor., intentionally or not, or for trade purposes or otherwise, had fixed to the mtged. premises, & the summons must be dismissed with costs.—TOTTENHAM *v.* SWANSEA ZINC ORE CO., LTD. (1885), 52 L. T. 738; 1 T. L. R. 367.

533. Fixtures not expressly included—Right of mortgagee.]—A mtge. of a brewhouse with the appurtenances, will not carry the utensils, but the things only belonging to out-houses.—*Ex p.* QUINCY (1750), 1 Atk. 477; 26 E. R. 304, L. C.

Annotations:—**Consd.** *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510. **Refd.** *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703; *Re* Gye & Hughes, *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443. **Mentd.** Elwes *v.* Maw (1802), 3 East, 38; Winn *v.* Ingilby (1822), 5 B. & Ald. 625; Bishop *v.* Elliott (1855), 11 Exch. 113.

534. —— ——.]—By a mtge. of a mill, the stones, tackling & implements necessary for the working of the mill pass to the mtgee.—PLACE *v.* FAGG (1829), 4 Man. & Ry. K. B. 277; 7 L. J. O. S. K. B. 195.

Annotations:—**Apld.** Mather *v.* Fraser (1856), 2 K. & J. 536. **Refd.** Hare *v.* Horton (1833), 5 B. & Ad. 715; *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115; Longbottom *v.* Berry (1869), 10 B. & S. 852; Southport & West Lancashire Banking Co. *v.* Thompson (1887), 58 L. T. 143. **Mentd.** *Re* Ogden, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765; Pole-Carew *v.* Western Counties & General Manure Co., [1920] 2 Ch. 97.

535. —— ——.]—Where the owner of the inheritance annexes thereto fixtures, which would in the ordinary case of landlord & tenant be removable by the latter during his term, for a permanent purpose, and for the better enjoyment of his estate, they become part of the freehold.

A., the owner of land, in 1853 mtged. it in fee to B., & afterwards erected certain buildings thereon, to which, for the more convenient use of the premises in his business of an innkeeper, brewer, & bath-proprietor, he affixed a steam-engine & boiler, a hay-cutter, a malt-mill or corn-crusher, & a pair of grinding-stones. The lower grinding-stone was boxed on to the floor of part of the premises, by means of a frame screwed thereto, the upper one being fixed in the usual way; & the steam-engine & other articles, except the boiler, were fastened by means of bolts & nuts to the walls or the floors for the purpose of steadying them, but were all capable of being removed without injury either to themselves or to the premises. The engine was used to supply water to the baths & to put the other machines in motion; & the whole were subservient to the business carried on by A. A. continued in possession until 1858, when he became bkpt.:—*Held:* his assignees were not entitled to claim these fixtures, but they passed to the assignee of the mtgee. as part of the freehold.—WALMSLEY *v.* MILNE (1859), 7 C. B. N. S. 115; 29 L. J. C. P. 97; 1 L. T. 62; 6 Jur. N. S. 125; 8 W. R. 138; 141 E. R. 759.

Annotations:—**Consd.** Holland *v.* Hodgson (1872), L. R. 7 C. P. 328; Tottenham *v.* Swansea Zinc Ore Co. (1885), 52 L. T. 738. **Refd.** *Re* Walker, *Ex p.* Acton (1861), 4 L. T. 261; Cullwick *v.* Swindell (1866), L. R. 3 Eq. 249; R. *v.* Lee (1866), L. R. 1 Q. B. 241; *Re* Trevey (1866), 14 L. T. 193; Climie *v.* Wood (1869), L. R. 4 Exch. 328; Longbottom *v.* Berry (1869), L. R. 5 Q. B. 123; Gough *v.* Wood, [1894] 1 Q. B. 713; Hobson *v.* Gorringe, [1897] 1 Ch. 182; Reynolds *v.* Ashby, [1904] A. C. 466. **Mentd.** Tyne Boiler Works Co. *v.* Longbenton Overseers (1886), Ryde, Rat. App. (1886–90), 241.

536. —— ——.]—Trade fixtures affixed to mtged. freehold premises, after the mtge., by the mtgor. & his partner occupying the premises for the purpose of their trade, pass to the mtgee.—CULLWICK *v.* SWINDELL (1866), L. R. 3 Eq. 249; 36 L. J. Ch. 173; 31 J. P. 228; 15 W. R. 216.

Annotations:—**Consd.** Climie *v.* Wood (1868), L. R. 3 Exch. 256; Begbie *v.* Fenwick, Fenwick *v.* Begbie (1871), 8 Ch. App. 1075, n. **Refd.** Longbottom *v.* Berry (1869), L. R. 5 Q. B. 123; Sanders *v.* Davis (1885), 15 Q. B. D. 218; Gough *v.* Wood, [1894] 1 Q. B. 713.

537. —— ——.]—Trade fixtures which have been annexed to the freehold for the more convenient using of them, & not to improve the inheritance, & which are capable of being removed without any appreciable damage to the freehold, pass under a mtge. of the freehold to the mtgee.—CLIMIE *v.* WOOD (1869), L. R. 4 Exch. 328; 38 L. J. Ex. 223; 20 L. T. 1012, Ex. Ch.

Annotations:—**Apld.** Longbottom *v.* Berry (1869), L. R. 5 Q. B. 123. **Consd.** Begbie *v.* Fenwick, Fenwick *v.* Begbie (1871), 8 Ch. App. 1075, n.; Holland *v.* Hodgson (1872), L. R. 7 C. P. 328. **Apld.** Cross *v.* Barnes (1877), 46 L. J. Q. B. 479. **Consd.** Gough *v.* Wood, [1894] 1 Q. B. 713; Hobson *v.* Gorringe, [1897] 1 Ch. 182; Reynolds *v.* Ashby, [1904] A. C. 466. **Refd.** Elwes *v.* Brigg Gas Co. (1886), 33 Ch. D. 562; *Re* British Red Ash Collieries, [1920] 1 Ch. 326. **Mentd.** Wake *v.* Hall (1880), 50 L. J. Q. B. 545.

538. —— ——.]—The owner in fee of a worsted mill, at which he carried on the business of a worsted spinner & stuff manufacturer, mortgaged it to pltfs. By a deed of arrangement under Bkpcy. Act, 1861 (c. 134), subsequently executed, the mtgor. assigned all his property to defts. as trustees for the benefit of his creditors. Under this latter deed defts. seized certain looms which were in the mill that was mortgaged. These looms were attached to the stone floors of the mill by means of nails driven through holes in the feet of the looms, in some cases into beams which had been built into the stone, & in other cases into plugs of wood driven into holes drilled in the stone for the purpose. It was necessary that the looms should be so attached for the purpose of steadying them & keeping them in a true direction, perpendicular to the line of the shafting, by means of which the steam power was applied to them. It was impossible to remove the looms without drawing the nails; but this could be done easily & without any serious damage to the flooring. Pltfs. brought trover for the looms:—*Held:* the looms passed by the mtge. of the mill as part of the realty, & the action was therefore maintainable.—HOLLAND *v.* HODGSON (1872), L. R. 7 C. P. 328; 41 L. J. C. P. 146; 26 L. T. 709; 20 W. R. 990.

Annotations:—**Consd.** Hawtry *v.* Butlin (1873), L. R. 8 Q. B. 290. **Apld.** Cross *v.* Barnes (1877), 46 L. J. Q. B. 479. **Consd.** Gough *v.* Wood, [1894] 1 Q. B. 713; Huddersfield Banking Co. *v.* Lister (1895), 72 L. T. 703; Hobson *v.* Gorringe, [1897] 1 Ch. 182. **Apld.** Monti *v.* Barnes, [1901] 1 K. B. 205. **Apprvd.** Reynolds *v.* Ashby, [1904] A. C. 466. **Consd.** Vaudeville Electric Cinema *v.* Muriset, [1923] 2 Ch. 74. **Refd.** Chidley *v.* West Ham (1874), 32 L. T. 486; *Re* Armytage, *Ex p.* Moore & Robinson's Banking Co. (1880), 14 Ch. D. 379; Southport & West Lancashire Banking Co. *v.* Thompson (1887), 37 Ch. D. 64; *Re* Yates, Batcheldor *v.* Yates (1888), 59 L. T. 47; Bulkeley *v.* Lyne Stephens, *Re* Lyne Stephens, Lyne Stephens *v.* Lubbock (1895), 11 T. L. R. 564; *Re* De Falbe, Ward *v.* Taylor, [1901] 1 Ch. 523; Crossley *v.* Lee, [1908] 1 K. B. 86. **Mentd.** *Re* Rose, *Ex p.* Linnell (1888), 4 T. L. R. 255; *Re* Chesterfield's S. E., [1911] 1 Ch. 237.

533 i. *Fixtures not expressly included—Right of mortgagee.*]—ANDERSON *v.* MCEWEN (1859), 9 C. P. 176.—**CAN.**

533 —— ——.]—PATERSON *v.* PYPER (1870), 20 C. P. 278.—**CAN.**

533 iii. —— ——.]—CRAWFORD FINDLAY (1871), 18 Gr. 51.—**CAN.**

533 iv. —— ——.]—DICKSON *v.* HUNTER (1881), 29 Gr. 73.—**CAN.**

533 v. —— ——.]—THOMAS *v.* INGLIS (1885), 7 O. R. 588.—**CAN.**

539. —— ——.] —A portable engine & boiler brought on to colliery premises to be used in sinking a new shaft, & for the purpose of steadying the machinery bolted to a wooden framework, which framework was embedded in a layer of wet mortar laid upon a brick foundation was held to pass to the mtgee. of the realty as affixed to the freehold, & could not be seized by the judgment creditors of the mtgor.—CROSS *v.* BARNES (1877), 46 L. J. Q. B. 479; 36 L. T. 693.

540. Fixtures expressly included — Whether mortgagee entitled.]—In Jan. 1797, several persons carried on business in partnership as calico printers; & in the same month certain premises on which their works were principally carried on were conveyed to one of the partners in fee. The conveyance mentioned the premises to consist, besides land, of dwelling-houses, machine house, & other buildings & erections, & stated them to be then in the possession of the partner to whom they were conveyed & another partner. Various buildings & machines were afterwards, from time to time, erected on the premises by the firm, for the purpose of extending the works. The whole was firmly fixed to the freehold, & stood on that part of the land which was conveyed to one of the partners in 1797; but the part in question could be removed without material injury to the buildings. In the different stock takings of the firm, the lands & buildings were always valued & classed separately from the machinery & fixtures. In the part of the country where the premises were situated, machinery of this description were constantly bought & sold distinctly from the freehold. The freehold in the premises having been subsequently conveyed to the partners, they, in 1828, mortgaged them to pltf.'s wife, under the description of all the messuages, dwelling-houses, & lands, & buildings therein mentioned, " & also, all that & those the steam engine, mill gearing, heavy gear to millwright work, fixed machinery & other matters & things, etc., then standing & being in & upon the thereby demised buildings, works, & premises, which in any manner constituted fixtures & appendages to the freehold of the same or any part thereof." All the machinery, fixtures, etc., appeared to have been in the reputed partnership of the partners who carried on the works until 1831, when they became bkpt., & defts. were appointed their assignees. Pltf., who was the husband of the mtgee., had inspected the statements of affairs of the partners, which treated the machinery as not included in the mtge., & had made no objections to such statements. In Apr. 1831, the assignees sold all the machinery & fixtures, with the exception of two steam engines, two water wheels & iron flooring, & other small articles; & the greater part of them were removed by the purchasers. The articles claimed by the mtgee. were all firmly fixed to the freehold, in such a manner, however, that they might easily be removed without material injury to themselves or the buildings:—*Held:* the machinery did not belong to the inheritance but was part of the personal estate of the bkpts., & it passed to the assignees; & the machinery in question was not intended to pass, & did not pass, to the mtgee., under the mtge. deed.—TRAPPES *v.* HARTER (1833), 2 Cr. & M. 153; 3 Tyr. 603; 3 L. J. Ex. 24; 149 E. R. 712.

Annotations:—**Consd.** *Re* Ogden, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765; *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510; *Re* Wood (1852), 1 Bankr. & Ins. R. 70, n. **Expld.** *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403. **Apld.** *Re* M'Kibbon (1855), 25 L. T. O. S. 148. **Consd.** Whitmore *v.* Empson (1857), 23 Beav. 313; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115; Cullwick *v.* Swindell (1866), L. R. 3 Eq. 249. **Distd.** Reynolds *v.* Ashby, [1904] A. C. 466. **Refd.** Boydell *v.* M'Michael (1834), 1 Cr. M. & R. 177; *Re* Butterworth, *Ex p.* Wilson (1835), 4 Deac. & Ch. 143; Minshall *v.* Lloyd (1837), 2 M. & W. 450; *Re* Gye & Hughes, *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443; *Re* Stead, *Ex p.* Price & Backhouse (1842), 2 Mont. D. & De G. 518; *Re* West, *Ex p.* Bentley, Harris & Dixon (1842), 2 Mont. D. & De G. 591; Hollawell *v.* Eastwood (1851), 6 Exch. 295; Wilde *v.* Waters (1855), 24 L. J. C. P. 193; Mather *v.* Fraser (1856), 2 K. & J. 536.

541. —— ——.] —A., by a deed of mtge., granted, bargained, sold, released, & confirmed to B., in his possession then being by a previous bargain & sale, an iron-foundery & two dwelling-houses, etc., & the appurtenances; together with all grates, boilers, bells, & other fixtures in & about the said two dwelling-houses; & all trees, houses, cottages, commons, etc., easements, profits, etc., to the said foundery, messuages, & lands appertaining. There were cranes, presses, a steam-engine, & other fixtures in the foundery, used for the purposes of the business carried on there, & valued at £600:—*Held:* the specification of the grates & other fixtures in & about the dwelling-houses, showed that those in the foundery were not intended to pass, though they would have passed if the others had not been mentioned.—HARE *v.* HORTON (1833), 5 B. & Ad. 715; 2 Nev. & M. K. B. 428; 3 L. J. K. B. 41; 110 E. R. 954.

Annotations:—**Consd.** Mather *v.* Fraser (1856), 2 K. & J. 536. **Refd.** Southport & West Lancashire Banking Co. *v.* Thompson (1887), 58 L. T. 143; Power *v.* Wells (1889), 6 T. L. R. 32.

542. —— ——.]—A., being owner in fee of certain hereditaments, with a cotton mill thereon, entered into partnership with B., as cotton spinners: they then, out of the partnership funds, erected new machinery in the mill: & afterwards, A., by himself, made a conveyance of the mill, together with all the machinery, erections, & buildings, by way of mtge., to secure a partnership debt. A. & B. afterwards became bkpts., having continued in the use & occupation of the mill, etc. The assignees entered into possession, & sold the wheels, steam engines, standing & going gears, shafts, steam & gas pipes. Upon the petition of the mtgees., praying that the produce of these

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540 i. *Fixtures expressly included—Whether mortgagee entitled.*]—B., who carried on business as an ironfounder on leasehold lands, mortgaged them by sub-lease, together with all " houses, buildings, fixtures," to pltfs.:—*Held:* under the word " fixtures " all the machinery, whether brought upon the land before or subsequently to the mtge. affixed to the ground passed, & also all the machinery resting by its own weight upon a bed affixed to the land for its reception, but not affixed in any way except to the belting which conveyed the motive power to the machinery from a revolving shaft.—AUSTRALIAN JOINT STOCK BANK *v.* COLONIAL FINANCE MORTGAGE, INVESTMENT & GUARANTEE CORPN. (1894), 15 N. S. W. L. R. (L.) 464; 11 N. S. W. W. N. 105.—**AUS.**

540 ii. —— ——.]—GREAT WESTERN RY. CO. *v.* BAIN (1865), 15 C. P. 207.—**CAN.**

540 iii. —— ——.]—*Re* MONTGOMERY (*circa* 1875), R. E. D. 154.—**CAN.**

540 iv. —— ——.]—DEWAR *v.* MALLORY (1879), 27 Gr. 303.—**CAN.**

540 v. —— ——.] —WINFIELD *v.* FOWLIE (1887), 14 O. R. 102.—**CAN.**

540 vi. —— ——.]—Chattels of the nature of plant or machinery not structurally affixed to the freehold, as well as those of a like nature afterwards placed on the mtged. premises, may, by the express terms of a mtge. of the realty, become fixtures for the purposes of the mtge.—CANADA PERMANENT LOAN & SAVINGS CO. *v.* TRADERS BANK (1898), 29 O. R. 479.—**CAN.**

540 vii. —— ——.] —CRONIN *v.* TOWNSEND (Sask.), [1923] 1 W. W. R. 544.—**CAN.**

o. *What amounts to trade fixtures.*] —MCDONALD *v.* WEEKS (1860), 8 Gr. 297.—**CAN.**

p. ——.]—SCHREIBER *v.* MALCOLM (1860), 8 Gr. 433.—**CAN.**

q. ——.]—PATTERSON *v.* JOHNSON (1864), 10 Gr. 583.—**CAN.**

r. ——.]—MCCAUSLAND *v.* MCCALLUM (1882), 3 O. R. 305.—**CAN.**

t. ——.]—ADAMSON *v.* MCILVANIE (1885), 3 Man. L. R. 29.—**CAN.**

a. ——.] —CANADA PERMANENT

Sect. 5.—Extent of interest conveyed: Sub-sect. 3, B. (a) & (b).]

articles might be paid over to them, as forming part of their mtge. security:—*Held:* they were so entitled; & they did not belong to the assignees as goods & chattels within the order & disposition of the bkpts., by force of 6 Geo. 4, c. 16, s. 72.—*Re* ASHTON, *Ex p.* SCARTH (1840), 1 Mont. D. & De G. 240; 9 L. J. Bcy. 35; 4 Jur. 826.

543. ——— ———.]—Mtge. by two, described in the deed as copper roller manufacturers, reciting a conveyance to them of land, & mills or factories, in a manufacturing town, as tenants in common in fee, & that they were carrying on business at the said mills or factories as copper roller manufacturers, & in such capacity had lately affixed to or placed upon the land, mills, or factories, a steam-engine & boilers, together with a large quantity of mill gear & millwright work, & granting the land, mills, or factories, & hereditaments comprised in the recited conveyance, to the use of pltfs. in fee, subject to a proviso for redemption. As between pltfs. & the mtgor.'s assignees in bkpcy.:—*Held:* (1) assuming it possible to distinguish between the case of machinery placed upon land for the purpose of trade or manufacture as collateral to & independent of the use & enjoyment of the land, & that of machinery placed upon land for the purpose of better & more profitably enjoying the land (as to which *qu.*), the recitals showed that this was a case of the latter description; & although the means of the proposed use & enjoyment of the land was manufacture or trade, all articles fixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, partook of the nature of the soil, & would have descended to the heir along with & as part of the soil itself; (2) the mere grant of the land, following upon the preceding recitals, was sufficient to pass all articles so fixed, & a subsequent enumeration of certain of such articles did not rebut the inference that all articles so fixed passed by the mere grant of the land, as forming part of the freehold.—MATHER *v.* FRASER (1856), 2 K. & J. 536; 25 L. J. Ch. 361; 27 L. T. O. S. 41; 2 Jur. N. S. 900; 4 W. R. 387; 69 E. R. 895.

Annotations:—As to (1) **Consd.** *Re* Brooke, *Ex p.* Scott (1857), 29 L. T. O. S. 314; Climie *v.* Wood (1868), L. R. 3 Exch. 256; Longbottom *v.* Berry (1869), L. R. 5 Q. B. 123. **Apld.** Cross *v.* Barnes (1877), 46 L. J. Q. B. 479. **Consd.** *Re* Yates, Batcheldor *v.* Yates (1888), 38 Ch. D. 112; Gough *v.* Wood, [1894] 1 Q. B. 713. **Refd.** Metropolitan Counties, etc. Soc. *v.* Brown (1859), 26 Beav. 454; Boyd *v.* Shorrock (1867), L. R. 5 Eq. 72; Holland *v.* Hodgson (1872), L. R. 7 C. P. 328; Hawtry *v.* Butlin (1873), L. R. 8 Q. B. 290. *Generally,* **Refd.** Waterfall *v.* Penistone (1856), 6 E. & B. 876; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115; Haley *v.* Hammersley (1861), 3 De G. F. & J. 587; Cullwick *v.* Swindell (1866), L. R. 3 Eq. 249; *Re* Patent Peat Co. (1867), 17 L. T. 69; *Re* Richards, *Ex p.* Astbury, *Ex p.* Lloyd's Banking Co. (1869), 4 Ch. App. 630; Begbie *v.* Fenwick, Fenwick *v.* Begbie (1871), 8 Ch. App. 1075, n.; Meux *v.* Jacobs (1875), L. R. 7 H. L. 481; *Re* Armytage, *Ex p.* Moore & Robinson's Banking Co. (1880), 14 Ch. D. 379; Southport & West Lancashire Banking Co. *v.* Thompson (1887), 57 L. J. Ch. 114; Huddersfield Banking Co. *v.* Lister (1895), 72 L. T. 703; Hobson *v.* Gorringe, [1897] 1 Ch. 182; Reynolds *v.* Ashby, [1904] A. C. 466; *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110. **Mentd.** *Re* Chesterfields' S. E., [1911] 1 Ch. 237; Polo-Carew *v.* Western Counties & General Manure Co., [1920] 2 Ch. 97.

544. ——— ———.]—Looms in a mill were not fixed, but were merely steadied, by having their four iron legs let into four loom foots dropped into the floor:—*Held:* they did not pass by a mtge. of the mill & the machinery belonging to the mill, nor by a contract for sale in similar terms.—HUTCHINSON *v.* KAY (1857), 23 Beav. 413; 26 L. J. Ch. 457; 29 L. T. O. S. 138; 3 Jur. N. S. 652; 5 W. R. 341; 53 E. R. 163.

Annotations:—**Consd.** *Re* Trevey (1866), 14 L. T. 193. **Distd.** Boyd *v.* Shorrock (1867), L. R. 5 Eq. 72. **Refd.** Cort *v.* Sagar (1858), 3 H. & N. 370; Metropolitan Counties, etc. Soc. *v.* Brown (1859), 26 Beav. 454.

545. ——— ———.]—Mtge. of iron works & rolling mill, with the machinery, etc., specified in schedule, " & all engines, machinery, fixtures, & things which might thereafter be fixed & fastened in or upon the same premises, whether in addition or substitution:—*Held:* the words " fastened in or upon the same premises " governed the sentence, & subsequent additions, consisting of an engine for turning a lathe, a steam hammer, & anvil, a boiler & furnace, passed to the mtgees.; but cutters, bedplate, straightening plate, & the metal flooring of the mill, did not.—METROPOLITAN COUNTIES, ETC. SOCIETY *v.* BROWN (1859), 26 Beav. 454; 28 L. J. Ch. 581; 33 L. T. O. S. 53; 23 J. P. 341; 5 Jur. N. S. 378; 7 W. R. 303; 53 E. R. 973.

Annotations:—**Consd.** *Re* Richards, *Ex p.* Astbury, *Ex p.* Lloyd's Banking Co. (1869), 4 Ch. App. 630. **Refd.** *Re* Yates, Batcheldor *v.* Yates (1888), 59 L. T. 47.

546. ——— ———.]—A mtge. of a silk mill, with the steam engines, boilers, steam pipes, main shafting, mill gearing, millwright's work, & all other machinery whatsoever being, or which should thereafter be, on the lands described in the mtge.:—*Held:* as against a second mtge., not to be confined to machinery necessary for giving power to the mill as being *ejusdem generis* with the specified particulars, but to extend to silk spinning machines, resting by their weight only on the ground, but attached by movable bolts to iron rods fixed to mill beams overhead.—HALEY *v.* HAMMERSLEY (1861), 3 De G. F. & J. 587; 30 L. J. Ch. 771; 4 L. T. 269; 7 Jur. N. S. 765; 9 W. R. 562; 45 E. R. 1006, L. C.

Annotations:—**Consd.** Southport & West Lancashire Banking Co. *v.* Thompson (1887), 58 L. T. 143; *Re* Yates, Batcheldor *v.* Yates (1888), 59 L. T. 47.

547. ——— ———.]—In Feb. 1865, A. & B., the lessees of a cloth mill, mortgaged the mill, with all the looms & other machinery, to C. & D., to whom they were largely indebted. In the following June A. & B., who remained in possession of the premises, became bkpt.:—*Held:* the looms having been affixed to the freehold for the convenience of the occupiers during the term, passed as fixtures to C. & D. as against the assignees in bkpcy.—BOYD *v.* SHORROCK (1867), L. R. 5 Eq. 72; 37 L. J. Ch. 144; 17 L. T. 197; 32 J. P. 211; 16 W. R. 102.

Annotations:—**Consd.** Begbie *v.* Fenwick, Fenwick *v.* Begbie (1871), 8 Ch. App. 1075, n.; Holland *v.* Hodgson (1872), L. R. 7 C. P. 328; *Re* Wilde, *Ex p.* Daglish (1873), 8 Ch. App. 1072. **Refd.** Hawtry *v.* Butlin (1873), L. R. 8 Q. B. 290; *Re* Trethowan, *Ex p.* Tweedy (1877), 5 Ch. D. 559; *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110. **Mentd.** Chidley *v.* West Ham (1874), 32 L. T. 486.

LOAN & SAVINGS CO. *v.* MERCHANTS BANK (1885), 3 Man. L. R. 285.—**CAN.**

b. ———.]—ROGERS *v.* ONTARIO BANK (1891), 21 O. R. 416.—**CAN.**

c. ———.]—SUN LIFE ASSURANCE CO. *v.* TAYLOR (1893), 9 Man. L. R. 89.—**CAN.**

d. ———.]—DON *v.* WARNER (1896), 28 N. S. R. 202.—**CAN.**

e. ———.]—The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of movable articles in permanent structures with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, & where articles have been only slightly affixed, but in a manner appropriate to their use, & showing an intention of permanently affixing them with the object of enhancing the value of mtged. premises, or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between

548. —— ——.] — A mtge. of a foundry, with the engines, fixtures, machinery, tools, & working plant therein, described the chattels assigned as being " more particularly enumerated & specified in an inventory of even date herewith, to be signed by the parties hereto, & read & construed as forming part of these presents." The deed contained no mention of stock-in-trade. The inventory, which was signed by the mtgors. on the same day as the deed, extended over twenty-one pages. The first twenty pages contained a detailed description of the engines & other chattels which were mentioned under general heads in the deed. At the bottom of page twenty was this clause: " The stock-in-trade consists of bolts, brass-work, wrought & cast-iron work, brass & other work, both finished & in preparation "; & at the top of page twenty-one were these words: " Also all cast & wrought iron, steel, timber, & all other stock-in-trade in & upon the before-mentioned foundry, workshops, & premises." Then came this clause: " The contents of the twenty preceeding sheets is a complete & exact inventory of the fixtures, machinery, utensils, & things in, upon, or about the foundry mortgaged by us this day." This was immediately followed by the signature of the mtgors.:—*Held:* the stock-in-trade was not included in the mtge.—*Re* MCMANUS, *Ex p.* JARDINE (1875), 10 Ch. App. 322; 44 L. J. Bcy. 58; 32 L. T. 681; 23 W. R. 736, L. JJ.

549. —— ——.] — A wheel-factory, including the machinery & gear, was mortgaged to pltfs. The deed of mtge. was not registered as a bill of sale. Leathern driving belts were used in working the machinery at the factory; they were fastened to certain wheels or drums, but could be removed at pleasure when the machinery was thrown out of gear. They were necessary parts of the machinery. The mtgor. having liquidated his affairs under Bkpcy. Act, 1869 (c. 71), deft., his trustee, sold the belts:—*Held:* the belts passed to pltfs. under the mtge., & they were entitled to maintain an action of conversion against deft.—SHEFFIELD & SOUTH YORKSHIRE PERMANENT BENEFIT BUILDING SOCIETY *v.* HARRISON (1884), 15 Q. B. D. 358; 54 L. J. Q. B. 15; 51 L. T. 649; 33 W. R. 144; 1 T. L. R. 61, C. A.

Annotation:—**Mentd.** *Re* Rose, *Ex p.* Linnell (1888), 4 T. L. R. 255.

550. —— ——.] — Fresco paintings, a patent frame screen fixed by blocks to the wall, advertising boards fixed to the hall posts by screws, & fixed iron seats of a cinema theatre are fixtures & pass under a mtge. as such.—VAUDEVILLE ELECTRIC CINEMA, LTD. *v.* MURISET, [1923] 2 Ch. 74; 92 L. J. Ch. 558; 129 L. T. 466; 67 Sol. Jo. 595.

551. Fixtures mortgaged separately from freehold.]—Traders mortgaged a leasehold factory to A., & they afterwards mtged. the machinery in it separately to B. Upon the bkpcy. of the traders who had been allowed to retain possession of the machinery:—*Held:* the movable machinery passed to the assignees as being within the order & disposition of the bkpt., but that the machinery fixed to the freehold did not though mtged. separately.—WHITMORE *v.* EMPSON (1857), 23 Beav. 313; 26 L. J. Ch. 364; 28 L. T. O. S. 300; 3 Jur. N. S. 230; 5 W. R. 217; 53 E. R. 123.

Annotation:—**Reld.** *Re* Baldwin, *Ex p.* Foss, *Ex p.* Baldwin (1858), 30 L. T. O. S. 354.

(b) Mortgage by Deposit of Title Deeds.

552. Deposit without memorandum — Whether mortgagee entitled.]—Fixtures belonging to a lessee & removable by him at pleasure, as between himself & the lessor, form part of the security under an equitable mtge. by deposit of the lease.

Where a rolling-machine, which itself was admittedly a fixture, was fitted with a number of different sets of loose rollers, one of which only could be actually attached to the machine & used at one time, but the duplicates were kept for the purpose of effecting different kinds of work:—*Held:* in a contest between mtgees. & the assignees in bkpcy. of the mtgor., all the rollers that had been fitted to the machine thereby became part of it, & passed to the mtgees., by virtue of an equitable mtge. by deposit of the lease of the mill; other rollers which had been purchased with the view of using them in the machine, but had not been fitted to the machine, were not part of the machine, & did not pass to the mtgees.—*Re* RICHARDS, *Ex p.* ASTBURY, *Ex p.* LLOYD'S BANKING CO. (1869), 4 Ch. App. 630; 38 L. J. Bcy. 9; 20 L. T. 997; 17 W. R. 997, L. J.

Annotations:—**Distd.** Cross *v.* Barnes (1877), 46 L. J. Q. B. 479. **Mentd.** British Economical Lamp Co. *v.* Empire Mile End (1913), 29 T. L. R. 386.

553. —— ——.] — The owner in fee in possession of land & premises deposited the title deeds with a banking co. as an equitable mtge., to secure the balance of his account with them for the time being. He then erected a mill, & set up, not only steam power applicable to all mills, but machinery applicable only to the purposes of a particular manufacture which he carried on there. He afterwards made a bill of sale of all the machinery, the assignee having notice of the previous deposit of the deeds:—*Held:* as between the mtgees. & assignee, all of the machinery which was annexed to the floor, ceilings, or sides of the building, in a " quasi permanent manner," by means of bolts & screws, passed to the mtgees.; & it made no difference that the object of the annexation was merely to steady the machines when in use, & that they could be removed without any injury to them or the freehold, nor that the machines were in the nature of trade fixtures, which would, as between landlord & tenant, belong to the tenant.—LONGBOTTOM *v.* BERRY (1869), L. R. 5 Q. B. 123; 10 B. & S. 852; 39 L. J. Q. B. 37; 22 L. T. 385.

Annotations:—**Apprvd.** Holland *v.* Hodgson (1872), L. R. 7 C. P. 328. **Folld.** Cross *v.* Barnes (1877), 46 L. J. Q. B. 479. **Apprvd.** Sheffield & South Yorkshire Permanent Benefit Bldg. Soc. *v.* Harrison (1884), 15 Q. B. D. 358. **Distd.** Gough *v.* Wood, [1894] 1 Q. B. 713. **Consd.** Huddersfield Banking Co. *v.* Lister (1895), 72 L. T. 703; Hobson *v.* Gorringe, [1897] 1 Ch. 182; Reynolds *v.* Ashby, [1904] A. C. 466. **Reld.** Turner *v.* Cameron (1870), L. R. 5 Q. B. 306; *Re* Armytage, *Ex p.* Moore & Robinson's Banking Co. (1880), 14 Ch. D. 379.

554. —— ——.] — The lease of a shipbuilding yard & the trade fixtures therein were assigned to a shipbuilder, to hold the leasehold premises for the residue of the term granted by the lease, & to hold the trade fixtures absolutely. He deposited the lease & the assignment with his bankers as security for advances made by them to him. No memorandum of charge was executed. The mtgor. afterwards filed a liquidation petition. The bankers had not taken any possession of the trade fixtures:—*Held:* as against the trustee in the

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a mtgor. & his mtgee., for concluding that both as to the degree & object of the annexation they became parts of the realty.—HAGGART *v.* BRAMPTON (TOWN) (1897), 28 S. C. R. 174.—**CAN.**

f. ——.]—MILES *v.* ANKATELL (1898), 25 A. R. 458.—**CAN.**

g. ——.] — GOLDIE & MCCULLOCH CO., LTD. *v.* HEWSON (1901), 35 N. B. R. 349.—**CAN.**

h. ——.] — SEELEY *v.* CALDWELL (1908), 18 O. L. R. 472; 12 O. W. R. 1245.—**CAN.**

k. ——.]—ROYAL BANK OF CANADA *v.* COUGHLAN (B. C.), [1919] 2 W. W. R. 382.—**CAN.**

PART IV. SECT. 5, SUB-SECT. 3.—B. (b).

1. *General rule.*]—Where a tenant for a term of certain premises mortgages such term by way of equitable deposit of the lease the mtgee. takes under his mtge. an interest in trade fixtures

Sect. 5.—Extent of interest conveyed: Sub-sect. 3, B. (b) & (c).]

liquidation, the bankers had no title to the trade fixtures.—*Re* TRETHOWAN, *Ex p.* TWEEDY (1877), 5 Ch. D. 559; 46 L. J. Bcy. 43; 36 L. T. 70; 41 J. P. 596; 25 W. R. 399.

555. Deposit with memorandum — Fixtures not included in memorandum.]—An equitable mtge. of leasehold premises will carry all the fixtures, although erected for the purposes of trade, & therefore removable as between landlord & tenant, & although they are not specified in the lease deposited or the memorandum of deposit.—*Re* M'NEILL, *Ex p.* BROADWOOD (1841), 1 Mont. D. & De G. 631, Ct. of R.

Annotations:—**Refd.** *Re* Mackie, *Ex p.* Tagart (1847), De G. 531; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115.

556. —— ——.]—The deeds of a brewery held upon lease were deposited with a creditor, an offer being made by the debtor to have a legal mtge. prepared of the brewery plant & fixtures. A letter was afterwards written by the debtor to his own solr., stating the provisions to be contained in the mtge., but not mentioning the plant & fixtures. Before the mtge. was prepared the debtor became bkpt.:—*Held:* the creditor had an equitable mtge. upon the brewery, plant & fixtures, & was entitled to the ordinary equitable mtgee.'s order.—*Re* KEEN, *Ex p.* CHUCK (1849), 13 L. T. O. S. 287; 13 Jur. 531.

557. — — ——.]—In Aug. 1887, W. purchased certain leaseholds with fixed machinery thereon. J. provided the money on the understanding that W. should hold the property & machinery for him until he required an assignment. In Feb. W. deposited the title deeds with J. with a memorandum, "I acknowledge that the purchase . . . was made out of moneys provided by J. on the understanding . . . that I should hold the lease & effects as trustee . . . until he should require an assignment . . . & I hereby undertake . . . to execute in his favour an assignment . . . by way of mtge. . . . or absolutely as he shall elect & until election I have deposited with him the lease & . . . documents of title . . . as an equitable mtgee." W. became bkpt., & his trustee claimed the machinery, & this was a motion by J. to have it declared that he was entitled to the same:—*Held:* allowing the motion, the mtge. of the lease carried with it the trade machinery, there was no separate assignment of such trade machinery requiring registration as a bill of sale, & J. was entitled to succeed.—*Re* LUSTY, *Ex p.* LUSTY *v.* OFFICIAL RECEIVER (1889), 60 L. T. 160; 37 W. R. 304; 6 Morr. 18.

558. —— **Fixtures expressly included.**]—A., who was a partner with B., deposited with their bankers the deeds of a freehold cotton mill belonging to A., as a security for advances made by the bankers for the use of the firm of A. & B.; & in the memorandum of deposit it was stated, that the buildings were insured for £2,000 & "the machinery, etc., for £2,000 more"; a steam engine & other machinery having been previous to the deposit erected by A. & B. for the purposes of their trade. A. & B. continued in possession of the premises, with all the machinery, up to the period of their bkpcy.:—*Held:* the steam engine & machinery, though removable by a tenant as fixtures erected by him for the purposes of trade, yet being firmly attached to the walls & floors of the buildings, & being such fixtures as are frequently put up by the owners of cotton mills, & let with the mills to a tenant, were not to be considered as in the reputed ownership of bkpts., within 6 Geo. 4, c. 16, s. 72.—*Re* OGDEN, *Ex p.* LOYD (1834), 3 Deac. & Ch. 765; 1 Mont. & A. 494; 3 L. J. Bcy. 108, C. of R.

Annotations:—**Refd.** *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703; *Re* M'Neill, *Ex p.* Broadwood (1841), 1 Mont. D. & De G. 631.

559. —— ——.]—A firm deposited a lease with their bankers as a security. Several fixtures on the premises were the property of the firm. The lease expired, & the firm continued to occupy the premises as yearly tenants, & afterwards made an agreement for a new lease, the counterpart of which was deposited with the bankers, & they engaged to deposit the new lease when they obtained it; the firm then became bkpt., & the landlord thereupon declared the lease forfeited:—*Held:* the tenants' fixtures were not in their "order & disposition," so as to pass to their assignees, but the bankers had a valid lien upon them.—FEARENSIDE *v.* DERHAM, THOMPSON *v.* DERHAM (1844), 13 L. J. Ch. 354; 3 L. T. O. S. 97; *sub nom. Re* DERHAM, *Ex p.* THOMPSON, FEARENSIDE *v.* DERHAM, THOMPSON *v.* DERHAM, 8 Jur. 633, L. C.

560. —— ——.]—A., a publican, being indebted to C. deposited with him the lease of a public house & other houses accompanied by a memorandum expressly constituting C. equitable mtgee. of the leasehold premises & of the fixtures to the premises belonging. A. remained in possession of the premises & became bkpt.:—*Held:* the fixtures consisting of ordinary house fixtures & trade fixtures were not in the order & disposition of the bkpt. within 12 & 13 Vict. c. 106, s. 125, but belonged to the mtgee.—*Re* GAWAN, *Ex p.* BARCLAY (1855), 5 De G. M. & G. 403; 26 L. T. O. S. 97; 19 J. P. 804; 1 Jur. N. S. 1145; 4 W. R. 80; 43 E. R. 926; *sub nom. Re* BARCLAY, *Ex p.* GAWAN, 25 L. J. Bcy. 1, L. C. & L. JJ.

Annotations:—**Consd.** Mather *v.* Fraser (1856), 2 K. & J. 536. **Apld.** Whitmore *v.* Empson (1857), 23 Beav. 313; Tebb *v.* Hodge (1869), 38 L. J. C. P. 217. **Consd.** Begbie *v.* Fenwick, Fenwick *v.* Begbie (1871), 8 Ch. App. 1075, n.; Reynolds *v.* Ashby, [1904] A. C. 466. **Refd.** Gough *v.* Wood, [1894] 1 Q. B. 713. **Mentd.** Boyd *v.* Shorrock (1867), L. R. 5 Eq. 72.

561. —— ——.]—A mtge. of premises will pass the fixtures upon the premises. A mtge. of a lease made by the lessee will carry the fixtures of that property which is in lease, & the power to remove which fixtures was in the tenant. Fixtures attached by the mtgor. to the property after the date of the mtge., will also, unless under special stipulations, pass to the mtgee. There is no difference in this respect between a mtge. in fee by a freeholder & a mtge. by way of assignment of a term by a leaseholder.

A. was the lessee of a public-house. On obtaining, in 1869, from M. a loan of £800, he deposited the lease with M. together with a memorandum reciting that it was deposited as security for the loan, & for any money that might become due to M. for goods sold, & for the expense of "insuring the premises & the fixtures & fittings therein" from fire, & the memorandum also contained an undertaking to execute, when required, a legal mtge. In Apr. 1873, A. borrowed a sum of £55 from J., & gave J. a bill of sale of the fixtures & fittings. J. afterwards put a man in possession &

erected upon the leasehold premises by the tenant, & removable by him under the provisions of the lease, commensurable only with his interest in the term, & is not, as such, absolutely entitled to the proceeds of the sale of such fixtures.—COLONIAL BANK OF AUSTRALASIA, LTD. *v.* RILEY (1896), 22 V. L. R. 288.—**AUS.**

advertised the fittings for sale. M. thereupon filed a bill to restrain the sale:—*Held:* the equitable mtge. effected in 1869 passed the fixtures & fittings, & did not require registration under 17 & 18 Vict. c. 36, to give it effect as to them.—MEUX *v.* JACOBS (1875), L. R. 7 H. L. 481; 44 L. J. Ch. 481; 32 L. T. 171; 39 J. P. 324; 23 W. R. 526, H. L.

Annotations:—**Consd.** *Re* Eslick, *Ex p.* Alexander (1876), 4 Ch. D. 503. **Apld.** Cross *v.* Barnes (1877), 46 L. J. Q. B. 479. **Distd.** *Re* Trethowan, *Ex p.* Tweedy (1877), 5 Ch. D. 559; Sanders *v.* Davis (1885), 15 Q. B. D. 218. **Consd.** Paine *v.* Matthews (1885), 53 L. T. 872; *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110. **Refd.** Topham *v.* Greenside Glazed Fire-brick Co. (1887), 37 Ch. D. 281; Gough *v.* Wood, [1894] 1 Q. B. 713; Ellis *v.* Glover & Hobson, [1908] 1 K. B. 388. **Mentd.** Bain *v.* Brand (1876), 1 App. Cas. 762; Thomas *v.* Kelly (1888), 60 L. T. 114.

(c) *Acquired under Hire Purchase Agreement.*

562. Legal mortgage — Implied authority to mortgagor in possession to hire.]—By agreement between defts. & E., who was tenant for a term of years of a piece of land, defts. agreed to supply him with a boiler for the purpose of his trade, to be paid for by instalments & to remain the property of defts. till all the instalments were paid; & it was further agreed that in case of default of payment of any of the instalments, defts. might enter & carry away the boiler. E. then mortgaged his interest in the land by underlease to pltf., who had no notice of the agreement, & who allowed E. to remain in possession. Defts. afterwards supplied the boiler, which was fixed in the land. One of the instalments not being paid, defts. entered & carried the boiler away. In an action by pltf. against defts. for removing the boiler:—*Held:* pltf. having allowed the mtgor. to remain in possession, must be taken to have acquiesced in his making agreements for fixing & removing fixtures for the purposes of his trade, & he could not claim the boiler as against defts.—GOUGH *v.* WOOD & Co., [1894] 1 Q. B. 713; 63 L. J. Q. B. 564; 70 L. T. 297; 42 W. R. 469; 10 T. L. R. 318; 9 R. 509, C. A.

Annotations:—**Expld.** Huddersfield Banking Co. *v.* Lister, [1895] 2 Ch. 273. **Distd.** Thomas *v.* Jennings (1896), 66 L. J. Q. B. 5; Hobson *v.* Gorringe, [1897] 1 Ch. 182. **Consd.** Reynolds *v.* Ashby, [1904] A. C. 466. **Distd.** *Re* Allen, [1907] 1 Ch. 575; Ellis *v.* Glover & Hobson, [1908] 1 K. B. 388; *Re* Morrison, Jones & Taylor, Cookes *v.* Morrison, Jones & Taylor, [1914] 1 Ch. 50. **Consd.** *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110.

563. —— —— Chattel fixed to freehold—Entry by mortgagee into possession.]—In determining whether or not a chattel has become a fixture the intention of the person affixing it to the soil is only so far as it can be presumed from the degree & object of the annexation.

A gas engine was let out on the hire & purchase system under an agreement in writing which provided that it should not become the property of the hirer until the payment of all the instalments & should be removable by the owner on the failure of the hirer to pay an instalment. The engine was affixed to freehold land of the hirer by bolts & screws to prevent it from rocking & was used by him for the purposes of his trade. Default having been made in the payment of the instalments, the engine was claimed by the owner, & also by the mtgee. of the land, who took his mtgee. after the hiring agreement & without notice of it, & had entered into possession while the engine was still on the land:—*Held:* the engine was sufficiently annexed to the land to become a fixture, & any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture; & consequently it passed to the mtgee. as part of the freehold; even if a licence to remove the engine could be implied from the mtgee. leaving the mtgor. in possession the entry of the mtgee. into possession determined such licence.—HOBSON *v.* GORRINGE, [1897] 1 Ch. 182; 66 L. J. Ch. 114; 75 L. T. 610; 45 W. R. 356; 13 T. L. R. 139; 41 Sol. Jo. 154, C. A.

Annotations:—**Distd.** Lyon *v.* London City & Midland Bank, [1903] 2 K. B. 135. **Apprvd.** Reynolds *v.* Ashby, [1904] A. C. 466. **Distd.** *Re* Allen, [1907] 1 Ch. 575; Ellis *v.* Glover & Hobson, [1908] 1 K. B. 388; *Re* Morrison, Jones & Taylor, Cookes *v.* Morrison, Jones & Taylor, [1914] 1 Ch. 50. **Refd.** Crossley *v.* Lee, [1908] 1 K. B. 86; Horwich *v.* Symond (1914), 110 L. T. 1016; Vaudeville Electric Cinema *v.* Muriset, [1923] 2 Ch. 74. **Mentd.** Becker *v.* Riebold (1913), 30 T. L. R. 142.

564. —— —— —— ——.]—Chairs were hired from pltfs. for use in a hippodrome by the owner & occupier of the building under an agreement for hire containing an option of purchase which was never exercised. The chairs were fastened to the floor of the building by means of screws, in accordance with the requirements of the local authority:—*Held:* the chairs did not cease to be chattels because they were screwed down to the floor, & the property in them did not pass as against pltfs. to the mtgee. of the freehold under a mtge. of the building & fixtures.—LYON & Co. *v.* LONDON CITY & MIDLAND BANK, [1903] 2 K. B. 135; 72 L. J. K. B. 465; 88 L. T. 392; 51 W. R. 400; 19 T. L. R. 334; 47 Sol. Jo. 386.

Annotations:—**Apprvd.** Reynolds *v.* Ashby, [1904] A. C. 466. **Distd.** Vaudeville Electric Cinema *v.* Muriset, [1923] 2 Ch. 74.

565. —— —— —— ——.]—Machines were supplied by the owner of them to the lessee of a factory upon the hire purchase system, the machines to remain the property of the owner till they had been wholly paid for; upon default in payment the owner to have power to determine the hiring & remove the machines. They were affixed, as the owner knew, to concrete beds in the floor of the factory by bolts & nuts & could have been removed without injury to the building or the beds. The lessee made default in payment, & the owner brought an action to recover the machines or their value from a mtgee. of the premises who had taken possession:—*Held:* the machines had been so affixed as to pass by the mtge. to the mtgee.—REYNOLDS *v.* ASHBY & SON, [1904] A. C. 466; 73 L. J. K. B. 946; 91 L. T. 607; 53 W. R. 129; 20 T. L. R. 766, H. L.

Annotations:—**Distd.** Lyon *v.* London, City & Midland Bank (1903), 72 L. J. K. B. 465; *Re* Allen, [1907] 1 Ch. 575; Ellis *v.* Glover & Hobson, [1908] 1 K. B. 388; *Re* Morrison, Jones & Taylor, Cookes *v.* Morrison, Jones & Taylor, [1914] 1 Ch. 50; Hamer *v.* London, City & Midland Bank (1918), 87 L. J. K. B. 973. **Consd.** *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110. **Refd.** Crossley *v.* Lee, [1908] 1 K. B. 86. **Mentd.** Becker *v.* Riebold (1913), 30 T. L. R. 142; Horwich *v.* Symond (1914), 110 L. T. 1016.

566. —— —— —— ——.]—ELLIS *v.* GLOVER & HOBSON, LTD., No. 644, *post.*

567. Equitable mortgage by deposit of title deeds—Subsequent to hire purchase agreement—Prior equitable interest of vendor.]—A co. hired machinery fixed on its business premises from L. & H. on the terms of a hire purchase agreement, which provided that the co. was to pay a monthly rent for the hire of the machinery, & should become the purchaser on payment of a certain sum in which event credit would be given for the previous payments of rent. Until the purchase the co. was to be a mere bailee of the machinery, & in case of default in making the monthly payments or breach of the conditions of the agreement L. & H. were empowered to enter & remove the machinery. Subsequently, the co. gave to a

bank an equitable mtge. of the business premises by a deposit of the deeds thereof accompanied by a written charge under the common seal of the co. containing an agreement to give a legal mtge. on demand. The bank took without notice of the hire purchase agreement. The co. failed to pay the instalments & committed breaches of the conditions of the hire purchase agreement; L. & H. demanded delivery up of the machinery & a winding up order was made against the co. The principal secured to the bank was due with an arrear of interest:—*Held:* the bank being merely an equitable mtgee. & L. & H. having an equitable interest in the machinery under their hire purchase agreement the interest under that agreement had priority over the interest of the bank.—*Re* ALLEN (SAMUEL) & SONS, LTD., [1907] 1 Ch. 575; 76 L. J. Ch. 362; 96 L. T. 660; 14 Mans. 144.

Annotations:—**Apprvd.** *Re* Morrison, Jones & Taylor, Cookes *v.* Morrison, Jones & Taylor, [1914] 1 Ch. 50. **Reid.** Hamer *v.* London, City & Midland Bank (1918), 87 L. J. K. B. 973. **Mentd.** Becker *v.* Riebold (1913), 30 T. L. R. 142.

——— ———.]—*See* COMPANIES, Vol. X., p. 768, No. 4803.

(d) Fixtures attached by Tenant of Mortgagor.

568. Demise by mortgagor in possession—Right of tenant to remove fixtures during term.]—Trade fixtures attached by the landlord, who is mtgor. in possession, are not in his reputed ownership.

We are satisfied . . . that the pipes & machinery were so attached as to be part of the freehold at common law. If the bkpt. had been a tenant, & had fixed the property in question for trade purposes, I should even then have thought it not within 6 Geo. 4, c. 16, s. 72, the then reputed ownership sect., though there might be fixtures which would be within that sect. . . . In this case, however, the bkpt. was the freeholder & owner of the machinery, & the moment he affixed them they became part of the freehold, & consequently not chattels in his reputed ownership. Therefore, the mtgee. is entitled to the usual order (LORD ERSKINE, C.J.).—*Re* BUTTERWORTH, *Ex p.* WILSON (1835), 4 Deac. & Ch. 143; 2 Mont. & A. 61; 4 L. J. Bcy. 24, Ct. of R.

Annotations:—**Distd.** *Re* Maberley, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703. **Refd.** *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510.

569. ——— ———.]—A mtgor. in possession of premises let them to a tenant who brought on to them certain trade fixtures. The mtgee. subsequently entered & sold the premises under the power of sale contained in the mtge.:—*Held:* the fixtures did not pass under the mtge., but remained the property of the tenant.—SANDERS *v.* DAVIS (1885), 15 Q. B. D. 218; 54 L. J. Q. B. 576; 33 W. R. 655; *sub nom.* SAUNDERS *v.* DAVIS, 1 T. L. R. 490.

Annotations:—**Consd.** Gough *v.* Wood, [1894] 1 Q. B. 713. **Apld.** Hobson *v.* Gorringe (1896), 75 L. T. 610. (*See* 75 L. T. 613.) **Refd.** Thomas *v.* Jennings (1896), 66 L. J. Q. B. 5; Ellis *v.* Glover & Hobson, [1908] 1 K. B. 388.

C. Registration as Bill of Sale.

As bill of sale.]—*See* BILLS OF SALE, Vol. VII., pp. 33–39, Nos. 172–203.

Under Companies Act, 1908 (c. 69), s. 93.]—*See* COMPANIES, Vol. X., p. 788, Nos. 4931–4934.

SUB-SECT. 4.—ACCRETIONS.

570. General rule.] — The goodwill of a public-house is not a personal goodwill, but on sale of the house passes with it.

K., the lessee of a hotel, demised it by way of mtge. to P. to secure an advance. The deed contained an attornment clause by which, "for better securing payment of the interest" the mtgor. attorned tenant to the mtgee. at a rent which was equal to the amount of the yearly interest on the sum advanced. K. subsequently mortgaged the same premises to H. The deed recited the first mtge., & contained an attornment clause in similar words to that in the first mtge. K. filed a liquidation petition on July 3, 1879. Trustees were appointed on July 14. Afterwards the first mtgees. distrained for a quarter's rent due under the attornment clause in their mtge. on July 18. In Sept., the second mtgee. distrained under his attornment clause for a half-year's rent due in Aug. The hotel was subsequently put up for sale by auction by the first mtgees. under an arrangement, & the trade fixtures & also the furniture & loose chattels were sold:—*Held:* (1) the second mtgee. had a right to distrain after the bkpcy. of K. under the attornment clause in his mtge. for one year's rent, & his right was not at all affected by the fact that there was a prior attornment to a prior mtgee.; (2) the attornment being for the better securing payment of the interest does not constitute between mtgor. & mtgee. the relation of tenant & landlord only, nor compel the mtgee. to elect between his character of mtgee. & landlord; he remains mtgee. with all the incidents attaching to that position, the attornment is merely an additional security; therefore fixtures added by the mtgor. after the date of the mtge. pass to the mtgee. in his capacity of mtgee.

(3) Everything that the mtgor. adds to the house to improve its value must be taken to be an accretion for the benefit of the mtgee. (LUSH, L.J.).—*Re* KITCHIN, *Ex p.* PUNNETT (1880), 16 Ch. D. 226; 50 L. J. Ch. 212; 44 L. T. 226; 29 W. R. 129, C. A.

Annotations:—*As to* (1) **Consd.** *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384. *As to* (2) **Refd.** *Re* Knight, *Ex p.* Volsey (1882), 21 Ch. D. 442. *Generally.* **Mentd.** West London Syndicate *v.* I. R. Comrs., [1898] 2 Q. B. 507.

571. Improvement by mortgagee — Renewal of lease—Equity of redemption attaches to renewed lease.]—If a college lease be mortgaged, & the mtgee. renews his lease, this shall be for the benefit of the mtgor., paying the mtgee. his charges; & the lessee of a college, etc., has a tenant-right in France & all other places almost but here, & the college are bound to let him renew, but the law is not so here; but, however, the mtgee. here does but graft upon his stock, & it shall be for the mortgagor's benefit.—RUSHWORTH'S CASE (1676), Freem. Ch. 13; 22 E. R. 1026.

Annotations:—**Consd.** Langhorne *v.* Harland (1856), 28 L. T. O. S. 227. **Refd.** *Re* Biss, Biss *v.* Biss, [1903] 2 Ch. 40.

PART IV. SECT. 5, SUB-SECT. 3.—B. (d).

568 i. *Demise by mortgagor in possession—Right of tenant to remove fixtures during term.*]—In the absence of express stipulation to the contrary a mtgor. in possession has the right to permit trade fixtures to be put up & removed from the mtged. premises provided they are removed before the mtgee. takes possession, but the right of removal ceases when possession is taken by the mtgee.—CREDIT FONCIER FRANCO CANADIEN *v.* LINDSAY-WALKER CO. (Sask.), [1919] 2 W. W. R. 385.—**CAN.**

PART IV. SECT. 5, SUB-SECT. 4.

m. *Improvements by assignee of equity of redemption—Right to set off value against rents & profits.*]—BUCHANAN *v.* MCMULLEN (*circa* 1877), 25 Gr. 193, n.—**CAN.**

572. —— —— ——.]—A bill in equity will not lie to redeem a mtge. of chambers in the inns of ct., but pltf. must apply to the bench or to the judges of the society; *secus:* if on application to the bench they refer pltf. to his remedy in equity.

A., possessed of a renewable term, mortgaged it to J., who gained a new term from the original landlord to commence after the old one:—*Held:* this new term should be subject to the old equity of redemption.—RAKESTRAW *v.* BREWER (1729), 2 P. Wms. 511; Cas. *temp.* King, 55; Mos. 189; 2 Eq. Cas. Abr. 162, 601; 24 E. R. 839, L. C.

Annotations:—**Consd.** Leigh *v.* Burnett (1885), 29 Ch. D. 231; *Re* Biss, Biss *v.* Biss, [1903] 2 Ch. 40. **Mentd.** R. *v.* Gray's Inn (1780), 1 Doug. K. B. 353.

573. —— —— ——.]—There is no authority for the general proposition that if a person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease. A person renewing is only held to be a constructive trustee of the new lease if, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested: as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a partnership lease, or by a mtgee. of a mtged. lease. In all such cases the new lease is treated as engrafted on or as forming part of the original lease.—*Re* BISS, BISS *v.* BISS, [1903] 2 Ch. 40; 72 L. J. Ch. 473; 88 L. T. 403; 51 W. R. 504; 47 Sol. Jo. 383, C. A.

Annotation:—**Refd.** Griffith *v.* Owen, [1907] 1 Ch. 195.

574 Improvement by mortgagor or his personal representative — Renewal of lease.]—Defts., who were entitled to the equity of redemption of leaseholds charged with a mtge., attempted to get rid of it by fraudulently incurring a forfeiture, which they induced the lessor to take advantage of. They afterwards obtained a new lease from him, which they sold:—*Held:* the new lease was subject to the mtge., notwithstanding C. L. P. Act, 1852 (c. 76), s. 210, & a decree was made for payment by defts. of the mtge. with costs.—HUGHES *v.* HOWARD (1858), 25 Beav. 575; 53 E. R. 756.

Annotation:—**Mentd.** Stratton *v.* Murphy (1867), 15 W. R. 1125.

575. —— ——.]—An ecclesiastical lease of a house for a term of years which was renewable by custom though it contained no covenant by the lessors for renewal was mortgaged & the equity of redemption was afterwards assigned for value. The Ecclesiastical Comrs. in whom the reversion had become vested would not renew the lease, but before the expiration they agreed to sell the reversion to the assignee of the equity of redemption. The conveyance was not executed till after the expiration of the lease. While the negotiation for the purchase of the reversion was in progress the assignee borrowed £300 giving the lender a memorandum in writing which stated that the money was to be secured by a mtge. from him of the house "so soon as he had completed the enfranchisement of the property from the Comrs." The lender had no notice of the mtge. of the lease:—*Held:* the mtgor. could only hold the fee simple of the property subject to the mtge. of the lease & he, & consequently the lender of the £300, was not entitled to any prior lien on the property for the purchase-money of the reversion notwithstanding the fact that the mtgor. was under no obligation to the mtgees. of the lease to obtain a renewal of it, or to purchase the reversion.

The doctrine of this ct. has always been that the mtgor. of a renewable lease can hold a renewed lease only subject to the mtge. (PEARSON, J.).—LEIGH *v.* BURNETT (1885), 29 Ch. D. 231; 54 L. J. Ch. 757; 52 L. T. 458.

576. —— **Lease after building agreement.**]—G. insisting that J., the owner of an agreement for a building lease, had deposited it to secure to him £900, claimed payment of the money from the administrator of J., who had expended money out of his own pocket in finishing the houses, & had obtained leases from the lessors, & questioned the deposit & the extent of the advance, if any had been made:—*Held:* the affidavits affording evidence of deposit, the ct. was bound to act upon them; when the deposit was made, it gave G. a title to a mtge., & he had a right to payment; & the ct. made a decree for an account & sale of the houses comprised in the agreement.—SIMS *v.* HELLING (1851), 21 L. J. Ch. 76; 18 L. T. O. S. 191.

577. —— **Purchase of copyholds by lord—After mortgage of manor.**]—If a lord of a manor mtge. the manor in fee to A. & afterwards purchase copyholds held of the manor, & take surrenders of them to himself in fee, they shall enure, to the benefit of the mtgee.; & a settlement by the lord of all his estate mortgaged to A. shall pass the equity of redemption of such surrendered copyholds.—DOE *v.* POTT (1781), 2 Doug. K. B. 710; 99 E. R. 452.

Annotations:—**Consd.** St. Paul *v.* Dudley & Ward (1808), 15 Ves. 167. **Refd.** Christchurch Cathedral, Oxford *v.* Buckingham & Chandos (1864), 17 C. B. N. S. 391. **Mentd.** Goodright *v.* Wells (1781), 2 Doug. K. B. 771; Cave *v.* Holford (1798), 3 Ves. 650; Delacherois *v.* Delacherois (1862–4), 11 H. L. Cas. 62.

578. Mortgage of contingent remainder — Remainder barred by tenant in tail in possession—Bequest of interest in land to mortgagor.]—A. had contingent remainder in fee, & conveyed it to B. as a security. The contingent remainder was afterwards barred by A.'s mother, who acquired the fee, &, by her will, devised her real estates to trustees, upon trust to sell, & invest the money, & pay two-thirds of the dividends to or for the benefit of A., for his life, with similar trust as to two-thirds of the rents of the estates not sold:—*Held:* the interest of A. is bound by the security given to B.—BROWNE *v.* BLOUNT (1830), 2 Russ. & M. 83; 9 L. J. O. S. Ch. 74; 39 E. R. 326.

Annotations:—**Mentd.** Lyde *v.* Hale (1835), 4 L. J. Ch. 180; Shaw *v.* Shore (1835), 5 L. J. Ch. 79; Holmes *v.* Bell (1840), 2 Beav. 298; Malcolm *v.* Scott (1843), 3 Hare, 39; Kirwan *v.* Daniel (1849), 7 Hare, 347; M'Calmont *v.* Rankin (1850), 8 Hare, 1; Hele *v.* Bexley, Whitfield *v.* Bowyer, Whitfield *v.* Knight (1855), 20 Beav. 127; Minter *v.* Kent, Sussex & General Land Soc. (1895), 72 L. T. 186.

579. Extension of patent — Right of mortgagee to extended term.]—C., being the grantee of two patents, transferred them to a limited co., who mortgaged them to R. by assignment. The co. presented a petition for prolongation of the terms of the patents, & the mtgee. was not a party to the petition. The prolongation was opposed mainly on the ground of want of novelty, &, therefore, of merit:—*Held:* as the invention was useful there was not that absence of novelty as would be fatal to an application for prolongation; the whole of the first patent & a portion of the second ought to be extended for five years upon petitioners undertaking to give the mtgee. the same security over the new patents that he had over the old.—CHURCH'S PATENTS (1886), 3 R. P. C. 95; Griffin's Patent Cases (1884–1887), 256, P. C.

Sect. 5.—Extent of interest conveyed: Sub-sects. 5, 6, 7 & 8. Sect. 6.]

SUB-SECT. 5.—COMPENSATION MONEYS.

Mortgaged property taken under compulsory powers.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 274, 275, Nos. 2017–2027.

Statutory compensation for public house.]—*See* INTOXICATING LIQUORS, Vol. XXX., pp. 56, 57, Nos. 428–432.

SUB-SECT. 6.—GOODWILL.

Goodwill, generally, *see* PARTNERSHIP; TRADE & TRADE UNIONS.

580. Goodwill attached to premises — Right of mortgagee—Upholsterer.]—CHISSUM *v.* DEWES, No. 214, *ante*.

581. —— —— Baker.]—A baker, having mortgaged the leasehold shop in which he carried on business, was served with a notice to treat by a railway co. who required the mtged. premises. He sent in a claim for the lease & loss of profits. The gross amount of his claim was reduced by agreement between the parties:—*Held:* as against the mtgee., whose debt was greater than the amount thus agreed upon, the mtgor. was not entitled to any portion of the purchase-money.—KING *v.* MIDLAND RY. CO. (1868), 17 W. R. 113.

582. —— —— Graving dock.]—A graving dock & premises, together with the movable & fixed machinery & fixtures, were mortgaged to secure a balance on a banker's account. A railway co. gave notice to take compulsorily a portion of the mtged. premises, but before the price was fixed the mtgor. died, & the mtgees. entered into possession. The amount of compensation was eventually fixed by arbn., & the sum of £2,800 was awarded in respect of the loss of profits in carrying on the business:—*Held:* the £2,800 belonged to the mtgees., & did not form part of the general estate of the mtgor.—PILE *v.* PILE, *Ex p.* LAMBTON (1876), 3 Ch. D. 36; 45 L. J. Ch. 841; 35 L. T. 18; 40 J. P. 742; 24 W. R. 1003, C. A.

583. —— —— Public house.]—*Re* KITCHIN, *Ex p.* PUNNETT, No. 570, *ante*.

584. —— —— —— Right of mortgagee to renewal.]—Deft. mortgaged, by demise, a leasehold public-house, with the goodwill of the business carried on there, to pltf. The deed contained a covenant for further assurance. Default was made & pltf. in a foreclosure action obtained a receiver:—*Held:* deft. was bound, under the terms of the mtge., to assign his licence to the receiver.—RUTTER *v.* DANIEL (1882), 30 W. R. 801, C. A.

Annotation:—**Refd.** West London Syndicate *v.* I. R. Comrs., [1898] 2 Q. B. 507.

585. —— —— —— ——.]—The tenant & occupier of a house, licensed for the sale of beer on the premises, in 1876, assigned all his interest in the premises for the residue of his term of years, & the benefit of the license, to applts. by way of first mtge. to secure the repayment of moneys advanced by them; & by the mtge. deed irrevocably constituted applts. his attorneys, in his name, & as his act & deed, to do all acts necessary to procure a transfer of the license. In 1883, the moneys secured by the mtge. being still unpaid, the occupier sent a written application for a renewal of his license to the justices at their annual licensing meeting, & they adjourned the hearing of the application. At the adjourned hearing applts. applied, as mtgees. & under their power of attorney, for a renewal of the license to the occupier, who appeared, but stated that he did not wish for a renewal. No objection was made to the renewal on any of the grounds specified in 32 & 33 Vict. c. 27, which Act applied to the occupier's license. The justices refused the application, & applts. appealed to quarter sessions in their own names, as mtgees., & also as attorneys of the occupier, & in his name, & for & on his behalf. At the hearing the occupier again appeared, & stated that he did not wish the license to be renewed, & quarter sessions thereupon affirmed the order of the licensing justices:—*Held:* upon the facts stated the licensing justices & the ct. of quarter sessions were bound to grant the application of applts. for a renewal of the license to the occupier.—GARRETT *v.* ST. MARYLEBONE, MIDDLESEX JJ. (1884), 12 Q. B. D. 620; 53 L. J. M. C. 81; 32 W. R. 646; *sub nom.* R. *v.* GARRETT, 48 J. P. 357, D. C.

Annotation:—**Mentd.** R. *v.* Andover JJ. (1886), 16 Q. B. D. 711.

586. —— —— —— Mortgage confined to building.]—WHITLEY *v.* CHALLIS, No. 119, *ante*.

587. —— —— Premises comprised in colliery lease—Right of mortgagee to receiver of business.]—A colliery co. executed a mtge. to a banking co. by subdemise of their lands, mines, & seams of coal & other premises comprised in certain leases, & also their buildings & some of their fixed machinery. Default having been made of principal & interest, the bank took possession of the mines & appointed a receiver of the income, but did not work the mines. They afterwards brought a foreclosure action against the colliery co., & moved for a receiver & manager of the colliery:—*Held:* although the business of the colliery was not expressly mentioned in the mtge. deed, it was intended to pass & did pass to the mtgees., & they were entitled to apply in the action for a receiver & manager of the colliery; the ct. would, in the exercise of its discretion, appoint a receiver & manager, although the mtgees. had taken possession & appointed a receiver of the income.—COUNTY OF GLOUCESTER BANK *v.* RUDRY MERTHYR STEAM & HOUSE COAL COLLIERY CO., [1895] 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486; 39 Sol. Jo. 331; 2 Mans. 223; 12 R. 183, C. A.

Annotations:—**Refd.** Poole *v.* Downes (1897), 76 L. T. 110; Stamford, Spalding & Boston Banking Co. *v.* Keeble (1913), 82 L. J. Ch. 388. **Mentd.** *Re* Bank of Syria, Owen & Ashworth's Claim, Whitworth's Claim, [1900] 2 Ch. 272; Duck *v.* Tower Galvanizing Co., [1901] 2 K. B. 314; Ruben *v.* Great Fingall Consolidated, [1904] 1 K. B. 650; Premier Industrial Bank *v.* Carlton Manufacturing Co. & Crabtree, [1909] 1 K. B. 106; *Re* Fireproof Doors, Umney *v.* The Co., [1916] 2 Ch. 142; Dey *v.* Pullinger Engineering Co., [1921] 1 K. B. 77; Underwood *v.* Bank of Liverpool, Same *v.* Barclays Bank, [1924] 1 K. B. 775.

588. Goodwill attached to personal reputation—Tailor.]—A public body acting under the power of their Act & of the Lands Clauses Consolidation Act, 1845 (c. 18), gave notice to pltf. who was a tailor to take his house which was leasehold. After some negotiation they offered him £400, of which £150 was to be apportioned to his leasehold interest & £250 to his trade damage & personal expenses to which pltf. agreed. Pltf. had mortgaged his leasehold interest & could not make a good title. Pltf. then brought an action for specific performance of the agreement & defts. afterwards paid the £400 into ct. under Lands Clauses Consolidation Act, 1845 (c. 18), s. 76, executed a deed poll & took possession:—*Held:* pltf. was entitled to judgment in the action & to have the £250 paid at once to him with interest from the time when defts. took possession. Although in some cases the goodwill of trade

premises passes to a mtgee. that does not apply to a case where the goodwill depends on the personal skill of the owner.—COOPER *v.* METROPOLITAN BOARD OF WORKS (1883), 25 Ch. D. 472; 53 L. J. Ch. 109; 50 L. T. 602; 32 W. R. 709, C. A.

Annotation:—**Consd.** West London Syndicate *v.* I. R. Comrs., [1898] 2 Q. B. 507.

SUB-SECT. 7.—INSURANCE MONEYS.

See Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83; Law of Property Act, 1925 (c. 20), s. 108 (3), (4).

Insurance generally, *see* INSURANCE, Vol. XXIX. pp. 24 *et seq.*

589. Whether mortgagee entitled to demand that policy moneys be applied in rebuilding.]—Pursuers having a heritable security by bond on certain premises insured them against fire in defender's office for £900. Prior securities had been given by the owner upon the same premises to other creditors, & those creditors had insured in other offices. The premises having been in part destroyed by fire, the prior incumbrancers, recovered from & were paid by the offices in which they were insured an amount sufficient for the re-instatement of the premises, & for the payment of the rent during the period of re-instatement, but the premises were not in fact re-instated. It appeared that immediately before the date of the fire the value of the premises was sufficient to cover the prior bonds & that of pursuers, but in consequence of the fire the value of the premises was so reduced that they were not sufficient to meet the balance remaining due to the prior creditors, & the pursuers' bond was left entirely uncovered:—*Held:* (1) pursuers were entitled notwithstanding the amount paid to the other creditors, to recover to the full extent of their loss; but pursuers were not entitled to recover anything in respect of the loss of rent of the premises after they had been damaged by fire.

(2) It has not so far as I know ever been decided that it [Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83] applies as between mtgor. & mtgee. (LORD SELBORNE).—WESTMINSTER FIRE OFFICE *v.* GLASGOW PROVIDENT INVESTMENT SOCIETY (1888), 13 App. Cas. 699; 59 L. T. 641; 4 T. L. R. 779, H. L.

Annotations:—*As to* (2) **Dbtd.** Sinnott *v.* Bowden, [1912] 2 Ch. 414. *Generally*, **Mentd.** Griffiths *v.* Fleming, [1909] 1 K. B. 805.

590. ——.]—By a deed executed in Nov. 1911, B. charged a house in Walthamstow with payment to C. of a sum of money & covenanted to insure & keep insured the mtged. property against fire in a certain amount. Prior to the charge the property had been insured by B. under an annual policy expiring at Christmas, & after the date of the charge B. renewed the policy for the ensuing year. In Feb. 1912, the house was destroyed by fire, & in May, 1912, S., a judgment creditor of B., obtained a garnishee order *nisi* attaching the money due under the policy. After the date of the order C. served the insurance co. with notice that he required the money to be applied in rebuilding the house, & at the hearing of an application to make the order absolute his counsel insisted on this being done:—*Held:* (1) Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, giving interested persons the right to have insurance moneys expended in rebuilding, was of general as opposed to local application; (2) the same sect. applied so as to enable a mtgee. to require the money to be expended in rebuilding.—SINNOTT *v.* BOWDEN, [1912] 2 Ch. 414; 81 L. J. Ch. 832; 107 L. T. 609; 28 T. L. R. 594; 6 B. W. C. C. N. 157.

Annotation:—**Refd.** Matthey *v.* Curling, [1922] 2 A. C. 180.

SUB-SECT. 8.—OTHER CASES.

591. Mortgage by trustee-beneficiary—At instance of other beneficiary—Whether interest of trustee passes.]—A widow who, under her marriage settlement & otherwise, was entitled to annual & other sums charged on her husband's estates, was one of the trustees of his will, whereby the estates were devised in trust to raise £200 for her benefit, & subject thereto in trust to convey the estates as testator's daughter by a former marriage should direct. The daughter borrowed money upon the security of a mtge. of some of the estates, in which the widow & her co-trustee joined, & whereby, after reciting the will & the agreement for the loan, & that the daughter had directed the widow & her co-trustee to make such conveyance as was thereinafter contained, the widow & her co-trustee, as devisees in trust, by the direction of the daughter, conveyed the estates to the mtgee. upon trusts for sale & for payment of the mtge. debt, & of the surplus as the daughter should appoint, & subject thereto according to the trusts of the will:—*Held:* the mtge. did not pass the beneficial interest of the widow; nevertheless, her charges must be postponed to the mtge., she having concurred in it, without reserving her priority.—STRONGE *v.* HAWKES (1853), 4 De G. M. & G. 186; 43 E. R. 478, L. JJ.

Annotation:—**Refd.** Williams *v.* Pinckney (1897), 67 L. J. Ch. 34.

592. Mortgage over all assets "except logs on the way to mill"—Exception not confined to logs on the way at date of security.]—A mtge. granted over the whole assets, real & personal & the property of a co. now owned by it, or which may hereafter be acquired "excepting logs on the way to the mill," must be construed to except not only logs on the way to the mill at the date of the mtge., but also all logs on the way to the mill from time to time.—IMPERIAL PAPER MILLS OF CANADA *v.* QUEBEC BANK (1913), 83 L. J. P. C. 67; 110 L. T. 91, P. C.

SECT. 6.—**AGREEMENTS FOR COLLATERAL BENEFIT.**

593. Validity.]—JENNINGS *v.* WARD, No. 998, *post.*

PART IV. SECT. 5, SUB-SECT. 8.

n. *Plant—What included.*]—A mortgage of an electro-plating factory, "together with all the plant & machinery at present in use in the factory," does not cover patterns used in the business.—MCCOSH *v.* BURTON (1901), 21 C. L. T. 371; 2 O. L. R. 77.—**CAN.**

o. —— ——.]—The word "plant" in a mtge. of a mill, held not to include office furniture, or a horse & carriage used for occasional errand purposes in connection with the mill, or material kept on hand for repairs to machinery; but held to include scows used for lightering the output of the mill from its wharf to steamers, & in lightering coal for the use of the mill, & also to include such stores as axes, shovels & files & other articles complete in themselves, used in carrying on the mill business.—EASTERN TRUST CO. *v.* CUSHING SULPHITE FIBRE CO. (1906), 3 N. B. Eq. Rep. 378; 2 E. L. R. 28.—**CAN.**

p. *Proceeds of sale of rights under Output of Beer (Restriction) Act, 1916.*]—License holders have, under sect. 5 of above Act, certain rights to obtain beer. Chargeants, whose charges were well charged on the license & licensed premises, having claimed that their charges were also well charged on the proceeds of the sale of these rights:—*Held:* the charges did not extend to such proceeds.—*Re* CARR, [1918] 2 I. R. 448.—**IR.**

Sect. 6.—*Agreements for collateral benefit.* *Sect.* 7: *Sub-sect.* 1.]

594. ——.] — The mtgor., from the circumstances of control under which he stands with respect to the mtgee., cannot deal with him as he could with other persons & as the mtgor. can make no effectual lease without the concurrence of the mtgee., if the mtgor. refuses to accede to the terms of the mtgee. the latter may distress him so as to make it better for him to consent to a lease on unreasonable conditions than refuse to comply (LORD REDESDALE).—HICKES *v.* COOKE (1816), 4 Dow. 16; 3 E. R. 1074, H. L.

Annotation:—**Refd.** Ford *v.* Olden (1867), L. R. 3 Eq. 461.

595. ——.] — J., a young man in very poor circumstances, was deft. in a probate action in which he claimed a share of certain real estate as co-heir of deceased. To enable him to conduct his defence he borrowed money from K., a solr., to whom he executed a mtge. whereby he, J., covenanted to employ a particular person as his solr. in the action & if he should be successful in the action to pay K. £225 " by way of bonus "; & it was provided that K. should make such further advances to J. as & when K. should think fit to meet any further necessities of J., or to be applied in or towards the costs of the action. The deed then charged J.'s interest in the real estate in question with present & future advances & interest at 5 per cent. & the £225 bonus. J. received a further advance from K. making a total of £100 for advances, & was ultimately successful in establishing his claim in the probate action. In action by J. to redeem:—*Held:* (1) the mtge. was tainted with champerty; (2) the bonus was illegal as being a collateral advantage stipulated for by a mtgee.; (3) the transaction was voidable as an undue advantage obtained from J., when under the pressure of distress & in a position analogous to that of an expectant heir; & accordingly redemption was decreed on payment only of the sums actually advanced to J., with interest. —JAMES *v.* KERR (1889), 40 Ch. D. 449; 58 L. J. Ch. 355; 60 L. T. 212; 53 J. P. 628; 37 W. R. 279; 5 T. L. R. 174.

Annotations:—*As to* (1) **Refd.** Rees *v.* De Bernardy, [1896] 2 Ch. 437; Cole *v.* Booker (1913), 29 T. L. R. 295. *As to* (2) **Folld.** Field *v.* Hopkins (1890), 44 Ch. D. 524. **N.F.** Santley *v.* Wilde, [1899] 2 Ch. 474. **Refd.** Mainland *v.* Upjohn (1889), 41 Ch. D. 126; Eyre *v.* Wynn-Mackenzie (1893), 63 L. J. Ch. 239; Carritt *v.* Bradley, [1901] 2 K. B. 550. *As to* (3) **Distd.** Biggs *v.* Hoddinott, Hoddinott [1898] 2 Ch. 307.

596. —— **Not arising naturally out of mortgage.**]—A mtgee. cannot, at the time when he advances his money, stipulate for an advantage not naturally arising out of his mtge. Therefore, where auctioneers, at the time of advancing their money upon mtge., stipulated for an authority to conduct the sale of the estate & for a commission of 5 per cent. upon the amount of the purchase-money, over & above the repayment of principal & interest:—*Held:* the charge for commission was not covered by the security; but, some expenses having been incurred in taking preliminary steps to sell, a reference to chambers was directed to ascertain the value of the services rendered under the contract.—BROAD *v.* SELFE (1863), 2 New Rep. 541; 9 L. T. 43; 9 Jur. N. S. 885; 11 W. R. 1036.

Annotations:—**Apld.** James *v.* Kerr (1889), 40 Ch. D. 449. **Consd.** Mainland *v.* Upjohn (1889), 41 Ch. D. 126. **Folld.** Field *v.* Hopkins (1890), 44 Ch. D. 524. **Distd.** Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307; Carritt *v.* Bradley, [1901] 2 K. B. 550. **Refd.** Santley *v.* Wilde (1899), 80 L. T. 155.

597. —— **Obtained under undue influence.**]—Agreements giving a solr., the mtgee. of a colliery, commission on sales of coke & coal were set aside; & agreements giving him lump sums as commission in the purchase of additions to the colliery were directed to stand for what it should be found on inquiry ought to be allowed, on the ground that such agreements were obtained from the client under pecuniary pressure & without independent advice.—WARD *v.* SHARP (1884), 53 L. J. Ch. 313; 50 L. T. 557; 32 W. R. 584.

598. —— **Bargain not unconscionable or oppressive.**]—BIGGS *v.* HODDINOTT, HODDINOTT *v.* BIGGS, No. 993, *post.*

599. —— ——.]—SANTLEY *v.* WILDE, No. 1, *ante.*

600. —— ——.]—KREGLINGER *v.* NEW PATAGONIA MEAT & COLD STORAGE CO., LTD., No. 20, *ante.*

601. —— **Provided equity of redemption not clogged.**]—BIGGS *v.* HODDINOTT, HODDINOTT *v.* BIGGS, No. 993, *post.*

602. —— ——.] — KREGLINGER *v.* NEW PATAGONIA MEAT & COLD STORAGE CO., LTD., No. 20, *ante.*

— **What amounts to clog in equity.**]—*See* Part VII., Sect. 4, sub-sect. 2, *post.*

603. Termination on repayment of debt.] — NOAKES & CO., LTD. *v.* RICE, No. 19, *ante.*

SECT. 7.—STAMPS.

SUB-SECT. 1.—IN GENERAL.

See Stamp Act, 1891 (c. 39), ss. 86–88, sched. I., Revenue Act, 1903 (c. 46), s. 7, &, *generally*, REVENUE.

604. Necessity for stamp—Deposit of documents of title.]—A firm that was negotiating to obtain an advance of money on their bill, wrote to the proposed lender, stating that, in consideration of his accepting their draft, they handed him therewith the bill of lading & policy of insurance for wines expected to arrive, which would afford him security beyond the amount of the bill, & engaging to land & warehouse the wines, to be held at his disposal: —*Held:* this document did not require a mtge. stamp, within Stamp Act, 1815 (c. 184), sched., Part I, title " Mortgage."—HARRIS *v.* BIRCH (1842), 9 M. & W. 591; 1 Dowl. N. S. 899; 11 L. J. Ex. 219; 152 E. R. 249.

Annotations:—**Folld.** *Re* Attenborough & I. R. Comrs. (1855), 11 Exch. 461. **Mentd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74.

605. —— ——.] — The following instrument was held not to require a mtge. stamp: " I have this day deposited with A. the following goods, viz. tea & coffee set, etc., to be held by him as a security for the payment of £160, this day lent to me, together with interest; & should such sum of £160 not be paid by me to A. by Mar. 25 next, I hereby authorise & empower him to sell & dispose of the said articles, & out of the proceeds thereof to pay the expenses of the sale & retain the said sum of £160, & interest thereon."—*Re* ATTENBOROUGH & INLAND REVENUE COMRS. (1855), 11 Exch. 461; 156 E. R. 912; *sub nom.* ATTENBOROUGH *v.* INLAND REVENUE COMRS., 25 L. J. Ex. 22.

PART IV. SECT. 6.

603 i. *Termination on repayment of debt.*]—TOOTH & CO. *v.* PARKES (1900), 21 N. S. W. L. R. (Eq.) 173; 17 N. S. W. W. N. 17.—**AUS.**

PART IV. SECT. 7, SUB-SECT. 1.

q. *Necessity for stamp—On purchase of equity of redemption.*]—FARMER & CO., LTD. *v.* INLAND REVENUE COMRS., [1898] 2 Q. B. 141.—**AUS.**

r. —— *On agreement for mortgage.*] —A deed poll in point of form a mtge. of lands in a foreign country, containing in its recitals a power of attorney, & containing also special

606. —— ——.]—MEEK *v.* BAYLISS, No. 145 *ante*.

607. —— **Assignment of insurance policy.**]—An assignment of a policy of assurance as security for a debt, with a proviso for redemption on payment, is a mtge. within Stamp Act, 1815 (c. 184) sched., Part I., & therefore requires an *ad valorem* stamp.—CALDWELL *v.* DAWSON (1850), 5 Exch. 1; 14 Jur. 316; 155 E. R. 1; *sub nom.* COLWELL *v* DAWSON, 14 L. T. O. S. 468.

Annotation:—**Mentd.** Potter *v.* I. R. Comrs. (1854), 10 Exch. 147.

608. —— **Acknowledgment of part payment of mortgage debt—Transfer of balance of debt to assignees.**]—By an indenture, after reciting an indenture of mtge. whereby certain land was mortgaged to secure a sum of £1,100 with interest thereon, & that £100 part of the £1,100 had been paid off by the mtgor. & that £1,000 & no more then remained due on the mtge., the balance of £1,000 then remaining due on the mtge. was, at the request of the mtgor. & in pursuance of an agreement for that purpose, assigned by the mtgees. to certain transferees, the consideration for such assignment being the payment by the transferees of the £1,000 to the mtgees.; & the mtgees. & mtgor. thereby assigned the mtged. property to such transferees free from all right or equity of redemption in the original indenture of mtge., & with a new proviso of redemption substituted therefor. The Comrs. of Inland Revenue having assessed the indenture to the double stamp duty on the £1,000 transferred, & also on the £1,100, the amount of the original mtge. debt, as being a "release" of that amount:—*Held:* the indenture was a "transfer" of the mtge. debt for £1,000 within Stamp Act, 1891 (c. 39), sched., & was liable only to the duty on such transfer, but was not a "release" of the £1,100, the amount secured by the original mtge., & was therefore not liable to the second duty assessed upon it as such release.—HUMPHREYS *v.* INLAND REVENUE COMRS. (1899), 81 L. T. 199; 43 Sol. Jo. 690, D. C.

609. —— **Covenant as security for repayment.**]—A limited co., by deed, in consideration of £373,000, then advanced to them by a building society, agreed to execute, whenever called upon by the society, a mtge. or charge, in such form as the society should request, of all the co.'s interest in certain hereditaments to secure the repayment of the sum advanced, with interest. A receiver was appointed by the deed to receive the rents & profits so long as any money remained due to the society; but there was a provision that he was not to enter into possession of such rents & profits until default should be made in payment of the principal & interest:—*Held:* this instrument was chargeable with *ad valorem* stamp duty under the head "Mtge., Bond, Debenture, Covenant," in the Stamp Act, 1891 (c. 39), sched. I.

I am of opinion that the instrument in question falls under the description both of "mortgage" & of "covenant" for the purposes of the Stamp Act, 1891 (c. 39) (WILLS, J.).—UNITED REALIZATION CO. *v.* INLAND REVENUE COMRS., [1899] 1 Q. B. 361; 68 L. J. Q. B. 218; 79 L. T. 556; 47 W. R. 381; 43 Sol. Jo. 153, D. C.

610. Sufficiency of stamp—Aggregate divisible into separate debts.]—Upon a mtge. to R., A., & B. as a security for £365 due from the mtgor., no other sum being specified in the deed:—*Held:* a £4 *ad valorem* stamp was sufficient, although the £365 was made up of three separate debts due to R., A., & B. severally.—REED *v.* WILMOT (1831), 7 Bing. 577; 5 Moo. & P. 553; 131 E. R. 223; *sub nom.* READ *v.* WILMOTT, 9 L. J. O. S. C. P. 176.

Annotation:—**Folld.** Doe d. Downe *v.* Govier (1845), 5 L. T. O. S. 37.

611. —— ——.]—A statement indorsed on a mtge. deed by the mtgee., from which it appears that the consideration money was partly advanced by himself & partly by another person, does not make it necessary, for the admission of the deed in evidence, that it bear a stamp for each sum, instead of one stamp only on the aggregate amount.—DOE d. DOWNE *v.* GOVIER (1845), 5 L. T. O. S. 37.

612. —— **Mortgage to secure principal sum & costs & expenses.**]—*Semble:* a mtge. to secure a principal sum, & also the costs of the trustees, & a reasonable sum by way of compensation to them for their trouble, requires only a stamp of such an amount as will cover the principal sum.—PADDON *v.* BARTLETT (1834), 2 Ad. & El. 9; 4 Nev. & M. K. B. 1; 4 L. J. K. B. 65; 111 E. R. 4.

Annotations:—**Reld.** Barker *v.* Smark (1841), 7 M. & W. 590; Wroughton *v.* Turtle (1843), 1 Dow. & L. 473; Frith *v.* Rotherham (1846), 15 M. & W. 39.

613. —— **Collateral, additional, or substituted security—Further advance.**]—A deed of assignment of a mtge. requires an *ad valorem* stamp, if a further sum be added to the principal before secured, & the mtgor. is liable to the charge of such duty. Stamp Act, 1822 (c. 117), s. 3, applies only to additional securities between the same parties, or further advances to the principal before secured.—MARTIN *v.* BAXTER (1828), 5 Bing. 160; 2 Moo. & P. 240; 6 L. J. O. S. C. P. 242; 130 E. R. 1022.

Annotations:—**Reld.** Doe d. Crawley *v.* Gutteridge (1848), 11 Q. B. 409. **Mentd.** *Re* Radcliffe (1856), 22 Beav. 201.

——.]—P. mortgaged land to L. for £400. Afterwards P. borrowed £1,000 more from L., & mortgaged other land to him as a security for the whole £1,400:—*Held:* under Stamp Act, 1855 (c. 184), the last mtge. required an *ad valorem* mtge. stamp, with progressive duty, on the £1,000, & also a deed stamp on the fresh security upon the £400, as a deed not otherwise charged for.—LANT *v.* PEACE (1838), 8 Ad. & El. 248; 3 Nev. & P. K. B. 329; 1 Will. Woll. & H. 271; 7 L. J. Q. B. 135; 2 Jur. 775; 112 E. R. 832.

Annotations:—**Folld.** Brown *v.* Pegg (1844), 6 Q. B. 1. **Reld.** Doe d. Smale *v.* Thom (1843), 1 L. T. O. S. 145.

615. —— —— ——.]—P. demised land to V. for 1,000 years, to secure a loan. By a subsequent deed he charged the premises with payment to V. of a further loan, making the whole £150. V. called in the money; &, B. & C. having agreed to advance it, an indenture was executed, whereby, in consideration of payment of £150 to V. by B. & C., & of £15 advanced by them to P., the mtgor. P. appointed that the land should remain, etc. to the use of B. & C., their heirs, etc., with proviso for reconveyance on payment by P. of £165 & interest, & with a covenant by P. to pay the same; & V., the prior mortgagee, assigned the term of 1,000 years to B. & C.:—*Held:* on this last deed an *ad valorem* stamp of £1, in respect of the additional £15, with stamps for progressive duty, was not sufficient, the conveyance of the fee creating a new security, in respect of which a deed stamp was necessary.—BROWN *v.* PEGG (1844), 6 Q. B. 1;

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covenants for the execution of a proper instrument, according to the law in the foreign country, with a covenant for further assurance:—*Held:* to be a mere agreement for a mtge. & not to require a £5 stamp.—CAMPBELL *v.* HYNES (1845), 8 I. L. R. 12.—**IR.**

t. Sufficiency of stamp—Collateral, additional, or substituted security—Necessity for stamp on principal mortgage.]—A mtge. does not escape *ad valorem* duty as a collateral mtge. under Finance Act, 1916, Sched. III., unless there is a primary or principal

Sect. 7.—Stamps: Sub-sect. 1.]

13 L. J. Q. B. 270 ; 3 L. T. O. S. 220 ; 8 Jur. 954 ; 115 E. R. 1.

Annotations :—**Folld.** Humberston *v.* Jones (1847), 16 M. & W. 763. **Apld.** Doe d. Crawley *v.* Gutteridge (1848), 11 Q. B. 409.

616. —— —— ——.]—In 1773, J. mortgaged premises in fee to M. to secure £1,000, with the usual proviso for redemption on payment, etc., & without any power of sale. In 1837, by indenture between R., the heir-at-law of J., of the first part ; B. the devisee of M., of the second ; & H. of the third reciting that the £1,000 was still due to B., that H. had agreed to pay it off, & had advanced to R. £1,723 more ; B., in consideration of the £1,000 & R. conveyed the same premises to H. in fee, subject to a proviso for redemption of payment of £2,723 ; & interest, with a covenant by R. to pay that sum on a day different from that limited in the deed of 1773, & a power of sale in case of non-payment of the said sum of £2,723 & interest, or any part thereof, on the day thereby limited for payment thereof :—*Held :* this deed required an *ad valorem* stamp in respect of the £1,723 ; & also a deed stamp in respect of the new security taken for the £1,000.—HUMBERSTON *v.* JONES (1847), 16 M. & W. 763 ; 2 New Pract. Cas. 131 ; 16 L. J. Ex. 293 ; 9 L. T. O. S. 55 ; 11 Jur. 337 ; 153 E. R. 1398.

Annotation :—**Apld.** Doe d. Crawley *v.* Gutteridge (1848), 11 Q. B. 409.

617. —— —— ——.]—(1) An indenture quadripartite between A. B. C. & D., recited that A. was entitled to certain copyhold land ; that he had contracted for the sale of it to D. who had been let into possession, & had erected certain cottages on the land : that D. had entered into an agreement to mtge. the land to C. for £400 : that, for the purpose of carrying the agreements for mtge. & purchase simultaneously, into effect, certain surrenders to a trustee had been made by A. & B., the one by direction of D., to such uses as C. should appoint, &, in default of appointment, to the use of C. & his heirs, the other to the use of D. & his heirs, subject to the surrender in favour of C. The indenture then witnessed, that in pursuance of the agreements, & in consideration of the premises A. & B. covenanted with C., his heirs & assigns, & also separately with D. his heirs & assigns, that they A. & B. had right to convey, for quiet enjoyment, etc., & that, in further pursuance of the agreements, & in consideration of the premises D. covenanted with C. for payment of the £400 & interest, with power of sale on default, a proviso for quiet enjoyment, & a declaration that the trustee in whom the copyholds were vested, should stand seised, in trust for pltf., his heirs & assigns, for securing payment of principal & interest, &, subject thereto, for deft., his heirs, etc. :—*Held :* this indenture was not an instrument operating upon several "matters or things" within 12 Ann. stat. 2, c. 9, s. 24, & the first skin was therefore properly stamped with a single 35*s.* stamp.

(2) By a second indenture, made between D. & C. reciting the former indenture, that D. had made default in payment of the £400, & interest & had applied to C. to lend him the further sum of £100, which C. had consented to do, D. covenanted with C. his heirs, etc., that the copyhold should remain further charged with the £100, & interest & that C. should hold the property as security for the whole sum of £500 & interest :—*Held :* this indenture operated as a further charge, & therefore was properly stamped with a 30*s.* stamp, under Stamp Act, 1815 (c. 184).—RUSHBROOK *v.* HOOD (1847), 5 C. B. 131 ; 17 L. J. C. P. 58 ; 10 L. T. O. S. 88 ; 11 Jur. 931 ; 136 E. R. 824.

618. —— —— ——.]—A., being tenant in fee of land, mortgaged for a term to secure £150, & afterwards died, having devised the land to B. for life, remainder to C. in fee. Afterwards, B. & C. borrowed from Z. £165, to pay off the principal & interest, & also £185 more ; & the mtgee., by assignment, to which B. & C. were parties, assigned the term to Z., as a security for the whole £350 ; & B. & C. covenanted for the payment of the whole £350 :—*Held :* the deed required, besides an *ad valorem* stamp on the £185, a stamp in respect of the covenant of B. & C., since they became, by the deed, absolutely liable to the payment of the £165, which otherwise they would not have been without assets : & the covenant, as to such liability, could not be considered as merely incident to the assignment in respect of the old loan or the new security for the new loan.—DOE d. CRAWLEY *v.* GUTTERIDGE (1848), 11 Q. B. 409 ; 3 New Pract. Cas. 2 ; 17 L. J. Q. B. 99 ; 10 L. T. O. S. 372 ; 12 Jur. 51 ; 116 E. R. 530.

619. —— ——.]—A mtge. deed which bears an *ad valorem* stamp on the amount advanced, does not require a £1 15*s.* deed stamp, because it contains also an assignment by a former mtgee. to whom part of the money is paid in satisfaction of his mtge., & a deed of assignment of a term, for a nominal consideration, to a trustee for a mtgee., in order to the better securing of the repayment of the mortgage money, requires only a £1 stamp, & not an *ad valorem* stamp.

(2) A. mortgaged certain premises in fee, & B., his son & heir-at-law, joined in the deed & covenanted for payment of the mortgage money. After A.'s death, B., to whom the property had been devised by him, executed a deed, which recited that the premises were in his occupation, appointing C. receiver of the estate, for the purpose of securing the due payment of principal & interest to the mtgee. ; & empowering him to collect the rents from tenants, to determine tenancies by notice, etc., to distrain, to enforce any remedies by ejectment or otherwise, for non-payment of rent or non-performance of agreements by tenants, &, with the mtgee.'s consent, to let to new tenants, etc. :—*Held :* B. was not estopped from setting up, as a defence, that there was an outstanding tenancy from year to year in tenants who had paid rent to the mtgee.—DOE d. BOWMAN *v.* LEWIS (1844), 13 M. & W. 241 ; 2 Dow. & L. 667 ; 13 L. J. Ex. 200 ; 14 L. J. Ex. 198 ; 3 L. T. O. S. 58 ; 153 E. R. 100.

Annotations :—*Generally,* **Mentd.** Sharland *v.* Loaring (1847), 1 Exch. 375 ; Alcock *v.* Wilshaw (1860), 2 E. & E. 633.

620. —— **Security for uncertain & indefinite amount—Covenant for payment of all costs—With interest.**]—A mtge. deed for £3,000 contained a power of sale & leasing to secure the principal & all expenses, with interest ; there was also a covenant to pay principal & interest, & all expenses, with interest on the amount of them :—*Held :* not a security for an uncertain & indefinite amount under Stamp Act, 1815 (c. 184), & a £9 stamp was sufficient.—DOE d. SCRUTON *v.* SNAITH (OR SCRUTON) (1832), 8 Bing. 146 ; 1 Moo. & S. 230 ; 1 L. J. C. P. 59 ; 131 E. R. 356.

Annotations :—**Apld.** Doe d. Jarman *v.* Larder (1836), 2 Hodg. 186 ; Doe d. Merceron *v.* Bragg (1838), 8 Ad. & El.

mortgage duly stamped with *ad valorem* duty under Finance Act, 1915. —HALL *v.* MINISTER OF STAMP DUTIES, [1925] N. Z. L. R. 360.—**N.Z.**

620 1. —— *Security for uncertain & indefinite amount—Covenant for payment of all costs—With interest.*]—LYSAGHT *v.* WARREN (1846), 10 I. L. R. 269.—**IR.**

620. **Consd.** Wroughton *v.* Turtle (1843), 11 M. & W. 561; Suffield *v.* I. R. Comrs., [1908] 1 K. B. 865. **Refd.** Wills *v.* Noott (1834), 4 Tyr. 726; Barker *v.* Smark (1841), 7 M. & W. 590; Frith *v.* Rotherham (1846), 15 M. & W. 39.

621. —— —— —— Renewal of leasehold.] On a mtge. of a term for years determinable on lives £130 was advanced with a power for mtgee. to pay £70 for renewal in case a life should drop :—*Held :* a £2 stamp was sufficient notwithstanding there was a covenant by mtgor. to procure a renewal without any limit of the sum to be paid by him for that purpose.—DOE d. JARMAN *v.* LARDER (1836), 3 Bing. N. C. 92; 2 Hodg. 186; 3 Scott, 407; 5 L. J. C. P. 322; 132 E. R. 344.

Annotation :—**Refd.** Frith *v.* Rotherham (1846), 15 M. & W. 39.

622. —— —— —— ——.]—Where a mtge. of certain leasehold premises, subject to a proviso for redemption on payment of the principal money & interest, contained covenants by the lessee, the mtgor., to procure at his own costs, renewals of the lease, under the power contained in the original lease, & in case the mtgor. refused or neglected to do so, then it should be lawful for the mtgee. to procure such renewals; & a covenant that all the fines costs, & expenses of the mtgee. in procuring such renewals, should be a charge on the mtged. premises, & the same should not be redeemed or redeemable until payment of such costs, charges, & expenses :—*Held :* an *ad valorem* stamp of £4 was sufficient, & the deed did not require a stamp of £25, as being a security for the repayment of money to be thereafter advanced or paid, the amount of which was uncertain & without limit.—WROUGHTON *v.* TURTLE (1843), 11 M. & W. 561; 1 Dow. & L. 473; 13 L. J. Ex. 57; 152 E. R. 929; *sub nom.* WRAUGHTON *v.* TURTLE, 1 L. T. O. S. 147.

Annotations :—**Apld.** Doe d. Young *v.* Warner (1850), 15 L. T. O. S. 89; Lawrance *v.* Boston (1851), 7 Exch. 28. **Consd.** Suffield *v.* I. R. Comrs., [1908] 1 K. B. 865. **Refd.** Canning *v.* Raper (1852), 22 L. J. Q. B. 87. **Mentd.** Waddington *v.* London Union Grdns. (1858), E. B. & E. 391.

623. —— —— ——.]—A mtge. deed of certain leasehold premises provided for the security of certain sums advanced & to be advanced not exceeding in the whole £2,000 & for the repayment & reimbursement of all sums paid by the mtgee. for repairs, insurance, ground rent, the expenses of the deed & all other costs & expenses which he might be put to in performance of the covenants of the lease & was stamped as a security for £2,000 : —*Held :* such mtge. was not a " security for the repayment of money to be thereafter lent advanced or paid " to an amount " uncertain & without any limit " so as to come within the provisions of Stamp Act, 1815 (c. 184), sched., Part I., title " Mortgage."—DOE d. YOUNG *v.* WARNER (1850), 15 L. T. O. S. 89.

624. —— —— Covenant for payment by mortgagor of all rates & taxes.]—Land was mortgaged with a proviso of redemption on payment of principal & interest, & the mtgor. covenanted by the deed to pay all taxes, rates, or assessments upon the premises. The proviso for redemption was made subject to the performance of this covenant :—*Held :* such mtge. was not a " security for the repayment of money to be thereafter lent, advanced, or paid," to an amount " uncertain & without any limit," within Stamp Act, 1815 (c. 184), sched. Part I., title Mortgage.—DOE d. MERCERON *v.* BRAGG (1838), 8 Ad. & El. 620; 3 Nev. & P. K. B. 644; 1 Will. Woll. & H. 529; 7 L. J. Q. B. 263; 112 E. R. 973.

Annotations :—**Consd.** Wroughton *v.* Turtle (1843), 11 M. & W. 561; Frith *v.* Rotherham (1846), 15 M. & W. 39. **Apld.** Doe d. Young *v.* Warner (1850), 15 L. T. O. S. 89. **Consd.** Suffield *v.* I. R. Comrs., [1908] 1 K. B. 865.

625. —— —— Expenditure contemplated only incidental to mortgage—Not collateral.]—A. being indebted to deft. in the sum of £184 7*s.* 6*d.* by indenture assigned to him certain furniture, & also a policy of assurance, with a proviso for redemption on payment of the principal money & interest; & a further proviso, that, in default of payment, it should be lawful for deft. to take & sell the furniture & policy, & out of the proceeds, to reimburse himself all costs & expenses, & all sums he might expend in keeping on foot the policy. Then followed a covenant by A. for payment to deft. of £184 7*s.* 6*d.* & for payment to the insurance office of the premiums; & that, in case of the avoidance of the policy, or the insolvency of the insurance co., A. would insure in another office, & assign the new policy to deft.; & that if A. should neglect to pay the premium or insure in some other office, deft. might do so, & the sums so advanced by deft. for continuing the insurance or making a fresh policy should be considered as principal moneys & bear interest, & the policy should be a security for the repayment thereof, & should not be redeemed without payment to deft. of the sums so advanced & interest, as well as the £184 7*s.* 6*d.* : —*Held :* such mtge. was not " a security for the repayment of money to be thereafter lent, advanced, or paid," etc., to an amount " uncertain & without limit " within Stamp Act, 1815 (c. 184), sched. Part I., title " Mortgage " & therefore did not require a £25 stamp.—LAWRANCE *v.* BOSTON (1851), 7 Exch. 28; 21 L. J. Ex. 49; 155 E. R. 842; *sub nom.* LAURENCE *v.* BOSTON, 18 L. T. O. S. 126.

—**Refd.** Canning *v.* Raper (1852), 22 L. J. Q. B. 87.

626. —— Bill of sale—To secure principal sum with interest from previous date.]—Where a warrant of attorney had been given to secure a principal sum, upon which the *ad valorem* duty had been paid, & default had been made in payment, but judgment had not been signed, & a bill of sale reciting the warrant of attorney & the default, was given to secure the payment of the principal sum & such portion of the interest as remained unpaid :—*Held :* the bill of sale fell within the exemption in Stamp Act, 1815 (c. 184), sched., title Mortgage, as " an additional security for a sum already secured by another instrument "; &, therefore, such bill was only liable to a common deed stamp.—PIERPOINT *v.* GOWER (1812), 4 Man. & G. 795; 2 Dowl. N. S. 652; 5 Scott, N. R. 605; 12 L. J. C. P. 55; 6 Jur. 952; 134 E. R. 327.

627. —— Mortgage securing contingent debt—Sale by mortgagor.]—A contingent debt is included in the words " mortgage etc. or other debt," in Stamp Act, 1853 (c. 59), s. 10; & therefore a conveyance of a reversionary interest, subject to the payment of a sum of money by the purchaser to a third party, within three months after the death of N., provided N. should die without issue male, is chargeable with *ad valorem* duty on that sum: the object of the Act being that upon every purchase *ad valorem* duty should be paid on the entire consideration, which either directly or indirectly represents the value of the free & unencumbered corpus of the subject-matter of sale.—MORTIMORE *v.* INLAND REVENUE COMRS. (1864), 2 H. & C. 838; 33 L. J. Ex. 263; 10 L. T. 655; 10 Jur. N. S. 868; 159 E. R. 347.

Annotations :—**Refd.** Underground Elec. Rys. *v.* I. R. Comrs. (1904), 74 L. J. K. B. 200; Underground Elec. Rys. of London & Glyn, Mills, Currie *v.* I. R. Comrs., [1916] 1 K. B. 306. **Mentd.** Swayne *v.* I. R. Comrs., [1899] 1 Q. B. 335.

628. —— Right to require sufficient stamp—Purchaser from mortgagor.]—A ten shilling deed

Sect. 7.—*Stamps: Sub-sects.* 1 & 2. *Part V. Sects.* 1, 2, 3, 4, 5 & 6; *Sub-sects.* 1 & 2, *A., B. & C. Sect.* 7. *Part VI. Sects.* 1, 2 & 3: *Sub-sect.* 1.]

stamp on a mtge. deed is insufficient; therefore a purchaser is entitled, on a contract for sale with a mtgor., to require the mtge. deed, where so stamped, to be stamped before completion to the full *ad valorem* duty at the vendor's expense, notwithstanding that the mtgee. may have consented to join in conveyance.—WHITING TO LOOMES (1881), 17 Ch. D. 10; 50 L. J. Ch. 463; 44 L. T. 721; 29 W. R. 435.

Annotations:—**Expld.** *Ex p.* Birkbeck Freehold Land Soc. (1883), 24 Ch. D. 119. **Refd.** Maynard *v.* Consolidated Kent Collieries Corpn., [1903] 2 K. B. 121.

Debentures & debenture stock.]—*See* COMPANIES, Vol. X., pp. 784–786, Nos. 4907–4917.

SUB-SECT. 2.—EXEMPTIONS.

Mortgage to building society.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 483, 484, Nos. 175–182.

Mortgages to friendly society.]—*See* FRIENDLY SOCIETIES, Vol. XXV., p. 295, Nos. 46, 47.

Ship mortgages.]—*See* SHIPPING.

Part V.—Mortgages of Particular Property.

SECT. 1.—FREEHOLDS.

See, now, Law of Property Act, 1925 (c. 20), ss. 1 (1) (3), 85, 87 (1); sched. 1., Part VII. (1) (2) (3).

Form & contents of mortgages.]—*See, generally*, Part IV., *ante*.

629. Mortgage by equitable assignment—Declaration of trust of legal estate—Right of mortgagee to appoint new trustee.]—(1) A mtgor. of land by deposit of deeds declared himself trustee of the legal estate for the mtgee.:—*Held:* new trustees appointed in lieu of the mtgor. by the mtgee. were "trustees for performing the trust" within Trustee Act, 1893 (c. 53), s. 12 (1).

(2) The mtgor. conveyed the fee to a subsequent incumbrancer with notice of the prior mtge.:—*Held:* a vesting declaration in the deed appointing new trustees operated to vest the legal estate in them.—LONDON & COUNTY BANKING CO. *v.* GODDARD, [1897] 1 Ch. 642; 66 L. J. Ch. 261; 76 L. T. 277; 45 W. R. 310; 13 T. L. R. 223; 41 Sol. Jo. 295.

Annotations:—*As to* (1) **Refd.** London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515. *Generally* **Refd.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231; *Re* James' Mortgage Trusts, [1919] 1 Ch. 61. **Mentd.** *Re* Chafer & Randall's Contract, [1916] 2 Ch. 8.

Necessity for deed.]—*See, now*, Law of Property Act, 1925 (c. 20), ss. 52, 205 (i) (ii).

SECT. 2.—COPYHOLDS.

See, now, Law of Property Act, 1922 (c. 16), s. 128 (1).

Mortgage of copyholds.]—*See* COPYHOLDS, Vol. XIII., pp. 114–118, Nos. 1443–1488.

SECT. 3.—LEASEHOLDS.

See, now, Law of Property Act, 1925 (c. 20), s. 86, Sched. I., Part VIII. (1) (2).

Mortgage by assignment.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 407, 408, Nos. 5529–5541.

Mortgage by sub-demise.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 408, Nos. 5542–5543.

630. —— Effect of declaration of trust of head lease.]—A lessee who mortgages his term with the reservation of a day, & covenants to stand possessed of the reversion for the mtgee. & his assigns, is not a trustee within Trustee Act, 1850 (c. 60).—*Re* PROBERT'S ESTATE (1853), 1 W. R. 237, C. A.; *sub nom. Re* PROPERT'S PURCHASE, 22 L. J. Ch. 948, L. JJ.

Annotation:—**Refd.** *Re* Carpenter (1854), Kay, 418.

631. —— Effect of creation of second mortgage—Legal term vested in second mortgagee.]—Leaseholds were mortgaged by a sub-demise for the residue of the original term except the last day. Afterwards by another mtge. they were sub-demised to a second mtgee. for the residue of the original term except the last day, subject to the first mtge. The second mtge. was paid off during the continuance of the first mtge. & the mtge. deed handed back to the mtgor. A purchaser of the leaseholds from the mtgor. declined to complete without a formal surrender being obtained of the term created by the second mtge.:—*Held:* by the second mtge. there was vested in the mtgee. a legal term which was not determined nor revested in the mtgor. by mere repayment of the principal money & interest, & the purchaser was entitled to require a surrender or assignment of the outstanding residue of the term created by the second mtge.—*Re* MOORE & HULM'S CONTRACT, [1912] 2 Ch. 105; 81 L. J. Ch. 503; 106 L. T. 330; 56 Sol. Jo. 89.

—]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 373, 374, 405, 406, Nos. 5193–5199, 5510–5520.

Covenants for title.]—*See* Law of Property Act, 1925 (c. 20), s. 76 (1) D., Sched. II., Part IV.

SECT. 4.—INCORPOREAL HEREDITAMENTS.

Advowson—Appendant to manor.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 378, Nos. 1986–1999.

—— **Patronage of mortgaged advowson**]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 372, Nos. 1915–1917.

Manor.]—*See* No. 577, *ante*.

Rates.]—*See* RATES & RATING.

Railway, navigation & similar rates, tolls & duties.]—*See* CHARITIES, Vol. VIII., p. 270, Nos. 344–351.

SECT. 5.—PERSONAL CHATTELS.

See, generally, BILLS OF SALE, Vol. VII., pp. 1 *et seq.*

Form of bill of sale by way of security.]—*See* BILLS OF SALE, Vol. VII., pp. 51–76, Nos. 268–433.

SECT. 6.—POLICIES OF INSURANCE AND OTHER CHOSES IN ACTION.

SUB-SECT. 1.—POLICIES OF INSURANCE.

Life insurance generally, *see* INSURANCE, Vol. XXIX., pp. 343 *et seq.*

Mode of assignment.]—*See* INSURANCE, Vol. XXIX., p. 375, No. 3004.

Notice of assignment.]—*See* INSURANCE, Vol. XXIX., pp. 375, 376, Nos. 3009–3011; BANKRUPTCY, Vol. V., pp. 776, 777, Nos. 6667–6673.

Priorities of assignment.]—*See* INSURANCE, Vol. XXIX., pp. 376, 377, Nos. 3012–3015.

Lien on policies.]—*See* INSURANCE, Vol. XXIX., pp. 383, 384, Nos. 3066–3069, 3073–3076; LIEN, Vol. XXXII., pp. 261, 262, Nos. 449–455; Law of Property Act, 1925 (c. 20), ss. 101 (i) (ii), 108.

Title to policy & insurance money.]—*See* INSURANCE, Vol. XXIX., pp. 378–383, Nos. 3032–3064.

Policies under Friendly Societies Acts.]—*See* FRIENDLY SOCIETIES, Vol. XXV., p. 307, Nos. 146–148.

Policies under Policies of Assurance Act, 1867 (c. 144).]—*See* INSURANCE, Vol. XXIX., p. 378, Nos. 3026–3030.

Effect of breach of condition against suicide.]—*See* INSURANCE, Vol. XXIX., pp. 367–369, Nos. 2957–2967.

SUB-SECT. 2.—OTHER CHOSES IN ACTION.

A. Debts and Equitable Interests in Personalty.

Choses in action, generally, *see* CHOSES IN ACTION, Vol. VIII., pp. 421 *et seq.*

What choses may be assigned.]—*See, generally,* CHOSES IN ACTION, Vol. VIII., pp. 426–442, Nos. 47–188.

—— **Bill of exchange.**]—*See* BILLS OF EXCHANGE, Vol. VI., p. 9, No. 3.

—— **Book debts.**]—*See* BILLS OF SALE, Vol. VII., pp. 124, 125, Nos. 705, 706.

—— **By bill of sale.**]—*See* BILLS OF SALE, Vol. VII., pp. 32, 33, Nos. 166–171.

Assignments by way of security.]—*See* CHOSES IN ACTION, Vol. VIII., pp. 443, 444, Nos. 194–200.

Rights & duties of assignor.]—*See* CHOSES IN ACTION, Vol. VIII., p. 478, Nos. 473, 474.

B. Bills of Lading.

See SHIPPING.

C. Stocks and Shares.

Shares of companies under Companies Acts.]—*See* COMPANIES, Vol. IX., pp. 411–418, Nos. 2646–2704.

Shares of statutory companies for public purposes.]—*See* COMPANIES, Vol. X., pp. 1145, 1146, Nos. 8096–8100.

SECT. 7.—**SHIP'S CARGO AND FREIGHT.**

See SHIPPING.

Insurable interest of mortgagor or mortgagee—Policy of marine insurance.]—*See* INSURANCE, Vol. XXIX., pp. 110–112, Nos. 656–667.

Part VI.—Rights and Liabilities of the Mortgagor.

SECT. 1.—**THE EQUITY OF REDEMPTION.**

See, generally, Part VII., *post.*

Right of redemption.]—*See* Part I., Sect. 4, *ante*

Action for redemption.]—*See* Part XIV., Sect. 1 *post.*

SECT. 2.—**RIGHT TO POSSESSION.**

See, now, Law of Property Act, 1925 (c. 20), ss. 85, 86, 98.

632. Entitled until mortgagee demands possession.]—Mtgor. presented a petition for liquidation of his estate, & the trustee appointed went into possession of the mtged. lands & commenced cutting the growing crops. The mtgee. then put a man in possession & required the trustee to give up possession, which he declined to do.

The possession of the mtgor. after the demand of possession was made on behalf of the mtgees. was a wrongful withholding of possession from them (HALL, V.-C.).—BAGNALL *v.* VILLAR (1879), 12 Ch. D. 812; 48 L. J. Ch. 695; 28 W. R. 242.

Annotation:—**Refd.** *Re* Gordon, *Ex p.* Official Receiver (1889), 61 L. T. 299.

633. ——.]—It was of the nature of the transaction that the mtgor. should continue in possession. His possession was rightful & not by wrong. He was entitled to the rents & profits so long as he remained in possession; mesne profits accrued due & received prior to action or demand could not be recovered from him by the mtgee. (LORD SELBORNE, C.).—HEATH *v.* PUGH (1881), 6 Q. B. D. 345; 50 L. J. Q. B. 473; 44 L. T. 327; 29 W. R. 904, C. A.; *on appeal, sub nom.* PUGH *v.* HEATH (1882), 7 App. Cas. 238, H. L.

Annotations:—**Consd.** Thornton *v.* Franco, [1897] 2 Q. B. 143; Matthews *v.* Usher (1899), 68 L. J. Q. B. 988; Turner *v.* Walsh, [1909] 2 K. B. 484. **Refd.** Harlock *v.* Ashberry (1882), 19 Ch. D. 539; Wood *v.* Wheater (1882), 22 Ch. D. 281; Badeley *v.* Consolidated Bank (1886), 34 Ch. D. 536; *Re* Lake's Trusts (1890), 63 L. T. 416; *Re* Owen, [1894] 3 Ch. 220; London & Midland Bank *v.* Mitchell, [1899] 2 Ch. 161; United Realization Co. *v.* I. R. Comrs., [1899] 1 Q. B. 361; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385; *Re* Lovell & Collard's Contract, [1907] 1 Ch. 249; Copestake *v.* Hoper, [1908] 2 Ch. 10; *Re* Witham, Chadburn *v.* Winfield, [1922] 2 Ch. 413. **Mentd.** Fowke *v.* Draycott (1885), 29 Ch. D. 996; Huntington *v.* I. R. Comrs., [1896] 1 Q. B. 422; Williams *v.* Thomas (1909), 100 L. T. 630.

634. ——.]—YORKSHIRE BANKING CO. *v.* MULLAN, No. 695, *post.*

Right of mortgagee to possession.]—*See* Part IX., Sect. 2, *post.*

SECT. 3.—**RIGHTS AND LIABILITIES WHILE IN POSSESSION.**

SUB-SECT. 1.—IN GENERAL.

See Law of Property Act, 1925 (c. 20), ss. 85–87, 98.

635. General rule—All rights of ownership.]—This action must be founded on the idea that the mtgor. in possession is the servant & agent for the mtgee., which is not the case. Till the mtgee. takes possession the mtgor. is owner to all the world; he bears the expenses & he is to reap the

632 l. *Entitled until mortgagee demands possession.*]—SIDEY *v.* HARDCASTLE (1853), 11 U. C. R. 162.—CAN.

Sect. 3.—Rights and liabilities while in possession: Sub-sects. 1, 2, 3, 4, 5 & 6.]

profits (LORD MANSFIELD).—CHINNERY *v.* BLACKBURNE (1784), 1 Hy. Bl. 117, n.; 3 Doug. K. B. 391; 126 E. R. 71.

Annotations:—**Apld.** Jackson *v.* Vernon (1789), 1 Hy. Bl. 114. **Distd.** Dean *v.* M'Ghie (1826), 12 Moore, C. P. 185. **Refd.** Briggs *v.* Wilkinson (1827), 7 B. & C. 30; Kerswill *v.* Bishop (1832), 2 Cr. & J. 529; Myers *v.* Willis (1855), 17 C. B. 77; Willis *v.* Palmer (1860), 7 C. B. N. S. 340; Rusden *v.* Pope (1868), L. R. 3 Exch. 269; Shillito *v.* Biggart, [1903] 1 K. B. 683.

636. —— ——.] — BEVAN *v.* HABGOOD, No. 766, *post.*

637. —— —— **If security not diminished.**] — The mtgor. in equity is the owner of the estate; he is in possession as such, & is allowed to exercise all the rights of ownership, not diminishing the security, or rendering it insufficient (LORD TRURO, C.).—KEKEWICH *v.* MARKER (1851), 3 Mac. & G. 311; 21 L. J. Ch. 182; 17 L. T. O. S. 193; 15 Jur. 687; 42 E. R. 280, L. C.; *previous proceedings, sub nom.* MARKER *v.* KEKEWICH (1850), 8 Hare, 291.

Annotations:—**Refd.** Briggs *v.* Oxford (1851), 5 De G. & Sm. 156. **Mentd.** Dashwood *v.* Magniac (1891), 60 L. J. Ch. 809.

638. Possession only at pleasure of mortgagee.] —POPE *v.* BIGGS, No. 817, *post.*

639. Cannot dispute mortgagee's title.] — POPE *v.* BIGGS, No. 817, *post.*

640. Whether agent or servant of mortgagee.]—CHINNERY *v.* BLACKBURNE, No. 635, *ante.*

641. ——.]—GALLIERS *v.* MOSS, No. 1324, *post.*

642. Liability to occupation rent — Prior to demand by mortgagee or receiver.] —YORKSHIRE BANKING CO. *v.* MULLAN, No. 695, *post.*

SUB-SECT. 2.—FIXTURES.

See Law of Property Act, 1925 (c. 20), ss. 85–87.

643. General right to fix or remove.] — GOUGH *v.* WOOD & CO., No. 562, *ante.*

644. ——.]—In the absence of express stipulation to the contrary, a mtgor. in possession has the right to permit trade fixtures to be put up & removed from the mtged. premises provided they are removed before the mtgee. takes possession, but this right of removal ceases when possession is taken by the mtgee.

In Nov. 1902, a freehold laundry was mortgaged in the usual form for £400, the mtgor. covenanting not to remove any fixtures without the written consent of the mtgee. In June, 1903, trade machinery was fixed up in the premises under a hire & purchase agreement, which provided that it should not become the property of the hirer until all instalments had been paid, & should be removable by the owner on the failure of the hirer to pay any instalment. Default having been made in payment of an instalment, the owner entered & removed the machinery.

In an action by the mtgee. against the owner of the machinery for wrongful removal:—*Held:* the machinery passed to the mtgee. as part of the freehold.

If he does not care to take possession. . . . I think that a mtgee. would fail to obtain an injunction to restrain the removal of such fixtures, unless he also proved that his security was deficient, or would become so by such removal (FARWELL, L.J.).—ELLIS *v.* GLOVER & HOBSON, LTD., [1908] 1 K. B. 388; 77 L. J. K. B. 251; 98 L. T. 110, C. A.

Annotations:—**Distd.** *Re* Morrison, Jones & Taylor, Cookes *v.* Morrison, Jones & Taylor, [1914] 1 Ch. 50; *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110.

645. Right to remove — Only when assent of mortgagee implied.]—A mtgor. in possession is not entitled to remove fixtures, except in cases where the assent of his mtgee. to his so doing can be implied.—HUDDERSFIELD BANKING CO., LTD. *v.* LISTER (HENRY) & SON, LTD., [1895] 2 Ch. 273; 64 L. J. Ch. 523; 72 L. T. 703; 43 W. R. 567; 39 Sol. Jo. 448; 12 R. 331, C. A.

Annotations:—**Refd.** Hobson *v.* Gorringe, [1897] 1 Ch. 182; Ellis *v.* Glover & Hobson, [1908] 1 K. B. 388. **Mentd.** Ainsworth *v.* Wilding, [1896] 1 Ch. 673; Wilding *v.* Sanderson, [1897] 2 Ch. 534.

646. —— **Security inadequate.**] — Mtgor. in possession will be restrained from removing from a worsted mill engines, shafting, going-gear, & other apparatus & fixtures, including cross shafting in & upon the mill, & which were set up therein, & comprised in a mtge. deed executed by the mtgor., the mtge. having been proved to be an inadequate security for the amount due thereon. —ACKROYD *v.* MITCHELL (1860), 3 L. T. 236.

Annotations:—**Refd.** Longbottom *v.* Berry (1869), 10 B. & S. 852; Gough *v.* Wood, [1894] 1 Q. B. 713.

647. —— ——.]—ELLIS *v.* GLOVER & HOBSON, LTD., No. 644, *ante.*

Whether fixtures included in mortgage.]—*See* Part IV., Sect. 5, sub-sect. 3, *ante.*

SUB-SECT. 3.—LEASES AND TENANCIES.

See Sect. 5, *post.*

SUB-SECT. 4.—PATRONAGE OF ECCLESIASTICAL BENEFICES.

See ECCLESIASTICAL LAW, Vol. XIX., pp. 372, 378, Nos. 1916, 1917, 1986–1999.

SUB-SECT. 5.—RENTS AND PROFITS.

See Law of Property Act, 1925 (c. 20), ss. 85–87, 98.

648. General rule—Rents received to own use.] —(1) The mtgor., when he receives the rent does so for his own absolute use & not for the use of the mtgee. (ALDERSON, B.).

(2) The second case is where a man in actual possession of the land mortgages it, & afterwards demises it to a tenant at a rent. In this case the demise is absolutely void, as against the mtgee.; but nevertheless it is good as between the mtgor. & his tenant until the mtgee. interferes (ALDERSON, B.).—TRENT *v.* HUNT (1853), 9 Exch. 14; 1 C. L. R. 752; 22 L. J. Ex. 318; 22 L. T. O. S. 23; 17 Jur. 899; 1 W. R. 481; 156 E. R. 7.

Annotations:—*As to* (1) **Refd.** Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224; Reece *v.* Strousberg (1885), 54 L. T. 133. *Generally,* **Mentd.** Cadle *v.* Moody (1861), 30 L. J. Ex. 385; Snell *v.* Finch (1863), 13 C. B. N. S. 651; Christchurch Cathedral, Oxford *v.* Buckingham & Chandos (1864), 17 C. B. N. S. 391; Kearsley *v.* Philips (1883), 11 Q. B. D. 621; *Re* Roundwood Colliery Co., Lee *v.* Rounewood Colliery Co. (1897), 66 L. J. Ch. 186; Woolston *v.* Ross, [1900] 1 Ch. 788.

PART VI. SECT. 3, SUB-SECT. 5.

a. *Right to growing grass & crops—Whether assent of mortgagee implied.*] —DOE d. PATTERSON *v.* BROWN (1843), 2 Ont. Dig. 4430.—**CAN.**

b. —— ——.]—Where the mtgees. have not given any notice of intention to take the rents, & profits of land in possession of the mtgor., grass growing on the land will be deemed to be the property of the mtgor., with the assent of the mtgee.—BAXTER *v.* JOHNSTON (1862), 5 All. 350.—**CAN.**

c. ——.]—BLOOMFIELD *v.* HELLYER (1895), 22 A. R. 232.—**CAN.**

649. —— ——.] — JOLLY *v.* ARBUTHNOT, No. 677, *post*.

650. —— ——.] — A mtgor. is, no doubt, entitled to receive by himself on his agent, the rents of the mtged. property, unless & until the mtgee. elects to receive them himself (JAMES, L.J.).—MARKWICK *v.* HARDINGHAM (1880), 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361, C. A.

Annotation :—**Mentd.** Sanders *v.* Sanders (1881), 19 Ch. D. 373.

651. —— ——.] — HEATH *v.* PUGH, No. 633, *ante*.

652. Back rents — Not recoverable by mortgagee.]—Mtgee. cannot have a decree for an account of rents for any of the years back during the possession of the mtgor.—HIGGINS *v.* YORK BUILDINGS CO. (1740), 2 Atk. 107; 26 E. R. 467, L. C.

653. —— ——.] — Mtgee. not entitled to an account of past rents from the mtgor.—*Ex p.* WILSON (1813), 2 Ves. & B. 252; 35 E. R. 315; *sub nom. Re* STUART, *Ex p.* WILSON, 1 Rose, 444, L. C.

Annotation :—**Refd.** Clarendon *v.* Barham (1842), 1 Y. & C. Ch. Cas. 688.

654. —— ——.] — A married woman being equitable tenant in tail in remainder of an undivided share in lands to be purchased with a sum of trust money, she & her husband joined in mortgaging her interest. The fund was misappropriated. Proceedings having been taken for its recovery, the husband & wife succeeded in obtaining the restitution of her share of the fund, which was brought into ct., with arrears of interest since the time when her estate came into possession. The mtgee. did not concur in any steps to recover this share. The husband, when the mtge. was made, was maintaining his wife, but had become a bkpt. before her interest came into possession, & was uncertificated :—*Held :* the mtgee. had no claim to the arrears of income of the mtged. property, which he had taken no steps to recover. —LIFE ASSOCN. OF SCOTLAND *v.* SIDDAL (1861), 3 De G. F. & J. 271; 45 E. R. 882, L. JJ.

Annotation :—**Mentd.** *Re* Carr's Trust (1871), 19 W. R. 675.

655. —— —— **Although security insufficient.**] —Mtgee. cannot have an account of rents & profits received by the mtgor.; though the security, being upon an estate for lives, is become insufficient.—COLMAN *v.* ST. ALBANS (DUKE) (1796), 3 Ves. 25; 30 E. R. 871, L. C.

656. —— —— **Against mortgagor or agent.**]—No account of bygone rents will be directed against a mtgor. in possession, nor against his agent, nor against a person claiming under his voluntary revocable deed.—HELE *v.* BEXLEY (LORD), WHITFIELD *v.* BOWYER, WHITFIELD *v.* KNIGHT (1855), 20 Beav. 127; 52 E. R. 551.

657. —— —— **Against party claiming under mortgagor.**]—HELE *v.* BEXLEY (LORD), WHITFIELD *v.* BOWYER, WHITFIELD *v.* KNIGHT, No. 656, *ante*.

658. —— —— **Against receiver of estate of deceased mortgagor.**]—Mtgor. of shares in a co. paid interest on the loan till 1888, & died in 1889. In a creditor's action for the administration of his estate a receiver was appointed, to whom the co. issued debenture bonds representing dividends accrued due on the mtged. shares during the mtgor.'s life. The mtgee. subsequently took possession by being registered as transferee of the shares :—*Held :* the receiver stood in the place of the exors. so far as the receipt of assets was concerned, & the mtgee. was not entitled to the bonds.—*Re* HOARE, HOARE *v.* OWEN, [1892] 3 Ch. 94; 61 L. J. Ch. 511; 67 L. T. 45; 41 W. R. 105; 36 Sol. Jo. 523.

Annotations :—**Apld.** Preston *v.* Tunbridge Wells Opera House, [1903] 2 Ch. 323. **Refd.** *Re* Metropolitan Amalgamated Estates, Fairweather *v.* The Co., [1912] 2 Ch. 497.

659. Rents or mesne profits accrued due — Death of mortgagor tenant for life—Mortgagee not entitled to apportionment—Apportionment Act, 1834 (c. 22), s. 2.]—Mtgee. who is not in possession is not an assign of the mtgor. within above sect. M. the tenant for life of real estate, granted to W. in consideration of an antecedent debt of £6,000, a yearly rentcharge of £960, to be issuing out of the estate for a term of a hundred years, if M. should so long live, with powers of entry & distress in the event of the rentcharge falling into arrear; & M. also demised the estate for a term of two hundred years, if he should so long live, to a trustee upon trust for the better securing the rentcharge. M. died when the rentcharge was in arrear, but before W. or the trustee had entered on the estate :—*Held :* W. was not entitled to be paid the arrears of the rentcharge out of the apportioned part of the rents for the period which elapsed between the quarter day last preceding M.'s death & the day on which he died.—*Re* ANGLESEY'S (MARQUIS) ESTATE, PAGET *v.* ANGLESEY (1874), L. R. 17 Eq. 283; 22 W. R. 507; *sub nom.* PAGET *v.* ANGLESEA (MARQUIS), WATKINS' CLAIM, 43 L. J. Ch. 437; 29 L. T. 721.

660. —— **& received.**] — HEATH *v.* PUGH, No. 633, *ante*.

661. Right to sue for disturbance of easement —Acquiescence of mortgagees.]—BENNETT *v.* HUGHES, No. 843, *post*.

Right of mortgagee to rents & profits.] —*See* Part IX., Sect. 3, sub-sect. 1, *post*.

Leases by mortgagor or mortgagee.] —*See* Part VII., Sect. 5, *post*.

SUB-SECT. 6.—TITLE DEEDS.

See Law of Property Act, 1925 (c. 20), ss. 85–87, 96.

662. When remaining in mortgagor's possession.]—By marriage settlement, lands were settled on the husband for life, with a joint power of appointment in the husband & wife. They mortgaged the land, with all title deeds, to A for a term, & delivered the deeds to him. M. paid off the mtge.; & took an assignment of the premises from A., the first mtgee., but without mention of title deeds, & M. never demanded them. A. afterwards gave up the deeds to the husband; & he deposited them with defts., solrs., as collateral security for mtge. money which he owed their client. Afterwards, the husband & wife mortgaged the settled lands in fee, subject to the term, without mention of title deeds; & they executed the power of appointment by giving a like power to the wife alone. The husband died; & the wife appointed to herself in fee. She then offered defts. to pay the debt due from her late husband to their client, on receiving back the title deeds, denying, however, that she was liable for such payment; but defts. refused to deliver them unless they were paid also their own charges for business done for their client in respect of the mtge. to him. In trover by the wife against defts. for the deeds :—*Held :* the wife was entitled to hold the deeds as against the mtgee. in fee, having an interest in them in respect of her equity of redemption, no mention being made of them in the conveyance in fee, & the deeds never having been handed over to the mtgee. in fee.

Sect. 3.—*Rights and liabilities while in possession: Sub-sects.* 6 & 7. *Sect.* 4: *Sub-sect.* 1.]

Though it be a mtge. in fee, yet, if the deeds remained with the mtgors., they might lawfully retain them in respect of their equity of redemption as against the mtgee. (DENMAN, C.J.).—DAVIES *v.* VERNON (1844), 6 Q. B. 443; 14 L. J. Q. B. 30; 3 L. T. O. S. 300; 8 Jur. 871; 115 E. R. 169.

663. Mortgage to raise portions — Possession by tenant for life—Deeds taken abroad—Security for safe custody.]—A suit was instituted for raising portions out of a settled estate. Pending the suit the tenant for life took a number of leases to Paris. He afterwards, under an order of the ct., brought the whole of the title deeds & leases into ct. for the purposes of the suit. The purposes of the suit having been satisfied, & the portions raised by mtge., he applied to have the title deeds & leases given up to him, which application was opposed by the mtgees. & was refused by the judge:—*Held:* as the tenant for life had, on a former occasion, taken some of the deeds abroad, the delivery of them to him ought not to be ordered without the consent of the mtgees. *Semble:* the deeds ought to be delivered to him on his giving sufficient security for their safe custody & production, & for returning them to ct. when ordered. —JENNER *v.* MORRIS (1866), 1 Ch. App. 603; 14 W. R. 1003, L. JJ.

Annotation:—**Consd.** Leathes *v.* Leathes (1877), 5 Ch. D. 221.

Right of mortgagee to title deeds.]—*See* Part IX., Sect. 3, *post.*

SUB-SECT. 7.—WASTE.

See Law of Property Act, 1925 (c. 20), ss. 85–87.

664. Cutting timber — Mortgagor restrained—Arrears of charge.]—Where there is an arrear of a charge upon a real estate, an injunction shall go to prevent cutting of timber upon the premises chargeable.—BLANEY (LORD) *v.* MAHON (1723), as reported in 2 Eq. Cas. Abr. 758; 22 E. R. 643, H. L.

Annotation:—**Mentd.** Doe d. Bulkeley *v.* Wilford (1824), 1 C. & P. 284.

665. —— —— **Security threatened.**] — Mtgor. restrained from cutting down timber on the mtged. premises.—USBORNE *v.* USBORNE (1740), 1 Dick. 75; 21 E. R. 196.

Annotation:—**Reld.** Harper *v.* Aplin (1886), 54 L. T. 383.

666. *S. P.* UVEDALE *v.* UVEDALE (1740), 1 Dick. 75, n.; 21 E. R. 196.

Annotation:—**Reld.** Harper *v.* Aplin (1886), 54 L. T. 383.

667. *S. P.* HOPKINS *v.* MONK (1742), 1 Dick. 75, n.; 21 E. R. 196.

Annotation:—**Reld.** Harper *v.* Aplin (1886), 54 L. T. 383.

668. *S. P.* GROSS *v.* CHILTON (1782), 1 Dick. 75, n.; 21 E. R. 196, L. C.

Annotation:—**Reld.** Harper *v.* Aplin (1886), 54 L. T. 383.

669. —— —— ——.] — Mtgees. of land, consisting of copses & of a farm which was let without the shooting or the timber, gave notice to the tenant of the farm to pay the rent to the mtgees. & afterwards moved to restrain the mtgors. from cutting the timber:—*Held:* though the mtgees. had become mtgees. in possession of the farm they had not become mtgees. in possession of the shooting, the copses, or the timber, so as to be liable to accounts for default.—SIMMINS *v.* SHIRLEY (1877), 6 Ch. D. 173; 37 L. T. 121; 26 W. R. 25; *sub nom.* SIMMINS *v.* SHIRLEY, SHIRLEY *v.* SIMMINS, 46 L. J. Ch. 875.

——.]—*See, also,* AGRICULTURE, Vol. II., pp. 72, 73, Nos. 502–509.

670. Deterioration of building—Taking off roofs.] —LEON *v.* HUNT (1843), 1 L. T. O. S. 408.

671. —— **After foreclosure decree — Pulling down house.**]—GOODMAN *v.* KINE (1845), 8 Beav. 937; 50 E. R. 149.

Right of mortgagee to protect security.]—*See* Part IX., Sect. 1, sub-sect. 1.

SECT. 4.—**POSITION AS TENANT.**

SUB-SECT. 1.—MORTGAGOR IN POSSESSION WITHOUT EXPRESS PROVISION.

See, now, Law of Property Act, 1925 (c. 20), ss. 85–87.

672. Whether tenant or trespasser.] — Mtgor. in possession of the premises mortgaged, is tenant to the mtgee.—PARTRIDGE *v.* BERE (1822); 5 B. & Ald. 604; 1 Dow. & Ry. K. B. 272; 106 E. R. 1311.

Annotations:—**Folld.** Hitchman *v.* Walton (1838), 4 M. & W. 409. **Reld.** Doe d. Souter *v.* Hull (1822), 2 Dow. & Ry. K. B. 38; Doe d. Roby *v.* Maisey (1828), 3 Man. & Ry. K. B. 107; Doe d. Griffith *v.* Mayo (1828), 7 L. J. O. S. K. B. 84; Doe d. Fisher *v.* Giles (1829), 5 Bing. 421; Doe d. Jones *v.* Williams (1836), 5 Ad. & El. 291; *Re* Medley, *Ex p.* Barnes (1838), 7 L. J. Bcy. 37; Doe d. Higginbotham *v.* Barton (1840), 11 Ad. & El. 307; Heath *v.* Pugh (1881), 6 Q. B. D. 345. **Mentd.** Garrard *v.* Tuck (1849), 8 C. B. 231.

673. ——.] — (1) In ejectment by mtgee. against mtgor, it is not necessary to demand possession before action brought.

(2) Where the mtgee. suffers the mtgor. to remain in possession of the mtged. premises, the latter is not tenant at will to the former, but at most tenant by sufferance only; & may be treated either as tenant or trespasser at the election of the mtgee.—DOE d. ROBY *v.* MAISEY (1828), 8 B. & C. 767; 3 Man. & Ry. K. B. 107; 108 E. R. 1228.

Annotations:—*As to* (1) **Reld.** Doe d. Price *v.* Price (1832), 9 Bing. 356. *As to* (2) **Reld.** Doe d. Jones *v.* Williams (1836), 5 Ad. & El. 291; Melling *v.* Leak (1855), 16 C. B. 652; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115.

674. ——.] — Where a lessee for years mortgaged his lease, & all his estate & interest in the premises, & afterwards became bkpt.:—*Held:* the mtgee. might declare in case as reversioner against the assignee of the tenant, for the removal of fixtures from the premises, whereby they were dilapidated & injured; & he was also entitled to recover in trover against such assignee the value of all the fixtures, whether landlord's or tenant's, which were affixed to the premises before the execution of the mtge., although there was a

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PART VI. SECT. 3, SUB-SECT. 7.

d. *General rule.*] — A mtgor. continuing in possession is not liable to the mtgee., in general, for waste.—WAFER *v.* TAYLOR & MCLEAN (1854), 9 U. C. R. 609.—**CAN.**

665 i. *Cutting timber — Mortgagor restrained — Security threatened.*] — Although a mtgor. in possession will not be restrained from cutting timber for fuel, fencing, & repairs upon the premises, he will be restrained from felling trees for other purposes, if it does not clearly appear that the property will still remain of sufficient cash value to satisfy the mtge. debt.—RUSS *v.* MILLS (1859), 7 Gr. 145.—**CAN.**

665 ii. —— —— ——.]—Where a mtgor. in possession was felling timber on the mtged. premises, the ct. at the instance of a judgment creditor of the mtgor.; with an execution against lands in the hands of the sheriff, granted an injunction to restrain future cutting by the mtgor., his servants, agents, & workmen, it being shown that the property was a scanty security for the claims of the mtgees. & the amount due the execution creditor.—WASON *v.* CARPENTER (1867), 13 Gr. 329.—**CAN.**

665 iii. —— —— ——.]—Unless a mtgor. prove demonstrably, so as to leave no room for doubt, that the mtged. premises remain ample security for the mtge. debt, the ct. will restrain him from cutting over the whole land. —MCLEAN *v.* BURTON (1876), 24 Gr. 134.—**CAN.**

covenant in the original lease to the mtgor., to yield up to the lessor, at the determination of the term, "all fixtures & things to the premises belonging or to belong."—HITCHMAN *v.* WALTON (1838), 4 M. & W. 409; 1 Horn & H. 374; 8 L. J. Ex. 31; 150 E. R. 1489.

Annotations:—**Apld.** Doe d. Higginbotham *v.* Barton (1840), 11 Ad. & El. 307. **Refd.** Walmsley *v.* Milne (1859), 7 C. B. N. S. 115. **Mentd.** Weeton *v.* Woodcock (1839), 5 M. & W. 143.

675. ——.] —M., being seised in fee of land, mortgaged to O., but remained in possession, afterwards demised part for a term to B., who also entered; after which M. mortgaged to H. H. after this received rent from B., & demised the other part to A. Afterwards B. & A., on notice from O., paid O. rent. H. then brought ejectment, after notice to quit, against B. & A.:—*Held:* B. & A. might both show, in defence, the first mtge. to O., O.'s notice to them, & their payment of rent to O. For, although B. could not dispute M.'s title at the time of the demise, he might show that H. had no derivative title from M., & he was not precluded by having paid rent to H. under a mistake of the facts. A., by showing that M., at the time of the demise to him, was only mtgor. in possession, did not impugn M.'s right to confer upon him, by the demise, a legal title to the possession, but might show that M. had since been treated as a trespasser by the mtgee., so as to determine M.'s right; & O.'s notice to the tenant to pay him the rent might, if received in evidence, tend to show that by so doing O. treated the mtgor. as a trespasser.

The mtgee. may treat the mtgor. as being rightfully in possession, & himself as reversioner; so that as long as he be not treated as a trespasser, his possession is not hostile to, nor inconsistent with the mtgee.'s right (DENMAN, C.J.).—DOE d. HIGGINBOTHAM *v.* BARTON (1840), 11 Ad. & El. 307; 3 Per. & Dav. 194; 9 L. J. Q. B. 57; 4 Jur. 432; 113 E. R. 432.

Annotations:—**Consd.** Claridge *v.* Mackenzie (1842), 4 Man. G. 143. **Refd.** Gouldsworth *v.* Knights (1843), 11 M. & W. 337; Mountney *v.* Collier (1853), 17 J. P. 132; Delaney *v.* Fox (1857), 2 C. B. N. S. 768; Cuthbertson *v.* Irving (1859), 4 H. & N. 742; Hickman *v.* Machin (1859), 4 H. & N. 716; White *v.* Greenish (1861), 11 C. B. N. S. 209; Underhay *v.* Read (1887), 58 L. T. 457; Serjeant *v.* Nash, Field, [1903] 2 K. B. 304. **Mentd.** Nesbitt *v.* Mablethorpe U. C., [1918] 2 K. B. 1.

676. ——.] —Mtgee., under a special power in the mtge. deed, enabling him to distrain for arrears of interest "in like manner as for rent," distrained after the date of the demise in the declaration, but for arrears due before such demise, the mtgor. having, without any express provision in the deed enabling him so to do, continued in possession:—*Held:* such distress did not amount to a recognition of the mtgor. as tenant, so as to disable the mtgee. from bringing ejectment.—DOE d. WILKINSON *v.* GOODIER (1847), 10 Q. B. 957; 16 L. J. Q. B. 435; 11 Jur. 892; 116 E. R. 363.

Annotation:—**Apld.** Metropolitan Counties Assce. Soc. *v.* Brown (1859), 28 L. J. Ex. 340.

677. ——.] —By a receivership deed executed contemporaneously with a mtge. in fee, which it recited, the mtgor. & mtgee. appointed a receiver, & constituted him their agent & attorney to receive the rents of the mtged. property, & to use such remedies by way of entry & distress as should be requisite for that purpose. By the same deed the mtgor. attorned as tenant from year to year to the receiver, & there was a proviso, that if default should be made in payment of the mtge. money, or interest, at the times appointed, the mtgee. might enter & avoid the tenancy created by the attornment. There was also a proviso, that nothing therein contained should lessen the rights, powers or remedies of the mtgee. under the mtge. On the mtgor. being found bkpt.:—*Held:* the relation of the landlord & tenant had been created between the receiver & mtgor. by the receivership deed, & the receiver was entitled to distrain & take the goods which had belonged to the mtgor. on the mtged. premises.

The mtgor. may at any time be treated as a trespasser by the mtgee., who may maintain ejectment against him without any previous notice or demand of possession (LORD CHELMSFORD, C.).

A mtgor., who remains in possession after the execution of a mtge., & continues to enjoy the profits of the land, is not considered as a tenant from year to year to the mtgee., nor even as a tenant at will, he receives the profits for his own use & not as agent, or bailiff of the mtgee., & when he has once received them he is absolutely entitled to keep them as his own (LORD CHELMSFORD, C.).—JOLLY *v.* ARBUTHNOT (1859), 4 De G. & J. 224; 28 L. J. Ch. 547; 33 L. T. O. S. 263; 23 J. P. 677; 5 Jur. N. S. 689; 7 W. R. 532; 45 E. R. 87, L. C.

Annotations:—**Distd.** Hampson *v.* Fellows (1868), 37 L. J. Ch. 694. **Folld.** Morton *v.* Woods (1869), L. R. 4 Q. B. 293; *Re* Threlfall, *Ex p.* Queen's Benefit Bldg. Soc. (1880), 16 Ch. D. 274. **Refd.** Kearsley *v.* Phillips (1883), 11 Q. B. D. 621. **Mentd.** *Re* Roberts, *Ex p.* Hill (1877), 6 Ch. D. 63.

678. Nature of tenancy—Whether tenant at will—Quodam modo tenant at will.]—Now, a mtgor., is not properly tenant at will to the mtgee., for he is not to pay him rent. He is so only *quodam modo* (LORD MANSFIELD).

Where the mtgor. is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered, if there is an undertenant; for there can be no such thing as an undertenant to a tenant at will. The demise itself would amount to a determination of the will. There being in this case a tenant in possession, the mtgor. is, therefore, only a receiver of the rent for the mtgee., who may, at any time, countermand the implied authority, by giving notice not to pay the rent to him any longer (ASHHURST, J.).—MOSS *v.* GALLIMORE (1779), 1 Doug. K. B. 279; 99 E. R. 182.

Annotations:—**Refd.** Birch *v.* Wright (1786), 1 Term Rep. 378; *Ex p.* Wilson (1813), 2 Ves. & B. 252; Christophers *v.* Sparke (1820), 2 Jac. & W. 223; Johnson *v.* Howson (1828), 6 L. J. O. S. K. B. 236; Doe d. Fisher *v.* Giles (1829), 5 Bing. 421; Galliers *v.* Moss (1829), 4 Man. & Ry. K. B. 268; Trent *v.* Hunt (1853), 9 Exch. 14. **Mentd.** Alchorne *v.* Gomme (1824), 2 Bing. 54; Pope ——— (1829), 9 B. & C. 245; Partington *v.* Woodcock (1835), 5 Nev. & M. K. B. 672; Burrowes *v.* Gradin (1843), 1 Dow. & L. 213; Salmon *v.* Dean (1851), 15 Jur. 641; Wilton *v.* Dunn (1851), 17 Q. B. 294; Delaney *v.* Fox (1857), 2 C. B. N. S. 768; Hickman *v.* Machin (1859), 4 H. & N. 716; Heath *v.* Pugh (1881), 6 Q. B. D. 345; Underhay *v.* Read (1887), 58 L. T. 457; Towerson *v.* Jackson, [1891] 2 Q. B. 484; *Re* Ind, Coope & Co., Fisher *v.* The Co., Knox *v.* The Co., Arnold *v.* The Co., [1911] 2 Ch. 223.

679. —— —— ——.] —The argument from there being a tenancy at will arises from a mere fiction; for there is no actual tenancy, no demise, either express or implied. The mtgor. has not even the rights of a tenant at will; he may be turned out of possession without notice, & is not entitled to the emblements. It is only *quodam modo* a tenancy at will (PLUMER, M.R.).—CHRISTOPHERS *v.* SPARKE (1820), 2 Jac. & W. 223; 37 E. R. 612.

Annotation:—**Mentd.** *Re* Seager's Estate, Seager *v.* Aston (1857), 29 L. T. O. S. 154.

680. —— —— **Not when undertenancy created.**]—MOSS *v.* GALLIMORE, No. 678, *ante*.

681. —— —— **In ejectment proceedings.**]—He [the mtgor.] is not a tenant at will because he is

Sect. 4.—Position as tenant: Sub-sects. 1 & 2, A, & B.]

not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings, which are in daily use between mtgor. & mtgee., I mean in ejectments brought for the recovery of the mtged. land (BULLER, J.).—BIRCH *v.* WRIGHT (1786), 1 Term Rep. 378; 99 E. R. 1148.

Annotations:—**Apld.** *Re* Brindley, *Ex p.* Hankey (1829), Mont. & M. 247; Doe d. Fisher *v.* Giles (1829), 5 Bing. 421. **Refd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1. **Mentd.** Pulteney *v.* Warren (1801), 6 Ves. 73; Denn d. Jacklin *v.* Cartright (1803), 4 East, 29; R. *v.* Herstmonceaux (1827), 7 B. & C. 551; Buckworth *v.* Simpson (1835), 5 Tyr. 344; Doe d. Chadborn *v.* Green (1839), 9 Ad. & El. 658; Brydges *v.* Lewis (1842), 3 Q. B. 603; Doe d. Clarke *v.* Smaridge (1845), 7 Q. B. 957; Standen *v.* Christmas (1847), 9 L. T. O. S. 169; Blundell *v.* Drummond (1848), 14 Jur. 573, n.; Cattley *v.* Arnold, Banks *v.* Arnold (1859), 1 John. & H. 651; R. *v.* St. Giles without Cripplegate (1863), 4 B. & S. 509; Willesden Overseers *v.* Paddington Overseers (1863), 3 B. & S. 593; De Nicols *v.* Saunders (1870), 22 L. T. 661; Phillips *v.* Homfray (1883), 24 Ch. D. 439; Horn *v.* Beard, [1912] 3 K. B. 181; A.-G. *v.* De Keyser's Royal Hotel, [1920] A. C. 508; Wheeler *v.* Keeble (1914), Ltd., [1920] 1 Ch. 57; R. *v.* Paulson, [1921] 1 A. C. 271.

682. —— ——.] — DOE d. ROBY *v.* MAISEY, No. 673, *ante*.

683. —— ——.] — JOLLY *v.* ARBUTHNOT, No. 677, *ante*.

684. —— ——.] — The relation of mtgor. & mtgee. does not make a tenancy at will (ERLE, C.J.).—THORP *v.* FACEY (1866), Har. & Ruth. 678; 35 L. J. C. P. 349; 12 Jur. N. S. 741.

685. —— ——.] — *Re* KNIGHT, *Ex p.* ISHERWOOD, No. 719, *post*.

686. —— **Tenancy at sufferance.**] — Mtgor. is no more than a tenant at sufferance, not entitled to notice to quit (LORD ELLENBOROUGH, C.J.).—THUNDER d. WEAVER *v.* BELCHER (1803), 3 East, 449; 102 E. R. 669.

Annotations:—**Refd.** Walmsley *v.* Milne (1859), 7 C. B. N. S. 115; Thorp *v.* Facey (1866), 12 Jur. N. S. 741; Gibbs *v.* Cruikshank (1873), L. R. 8 C. P. 454. **Mentd.** Jones *v.* Mills (1861), 10 C. B. N. S. 788; Simmons *v.* Crossley, [1922] 2 K. B. 95.

687. —— ——.] — DOE d. ROBY *v.* MAISEY, No. 673, *ante*.

688. —— **Tenancy from year to year.**] — JOLLY *v.* ARBUTHNOT, No. 677, *ante*.

689. Rights in respect of tenancy — Not entitled to notice of ejectment.]—THUNDER d. WEAVER *v.* BELCHER, No. 686, *ante*.

690. —— ——.] — CHRISTOPHERS *v.* SPARKE, No. 679, *ante*.

Or demand for possession.

The mere circumstance of a person being the mtgor. in possession does not create such a tenancy between the mtgor. & mtgee. as to entitle the former to a notice to quit, or even to a demand of possession, before ejectment be brought against him at the suit of the latter.—DOE d. GRIFFITH *v.* MAYO (1828), 7 L. J. O. S. K. B. 84.

692. —— —— ——.]—JOLLY *v.* ARBUTHNOT, No. 677, *ante*.

693. —— **Emblements.**] — BIRCH *v.* WRIGHT, No. 681, *ante*.

694. —— ——.] — CHRISTOPHERS *v.* SPARKE, No. 679, *ante*.

695. Liability for occupation rent — After demand by receiver.]—In a foreclosure action against mtgor. in possession, an order having been made for the appointment of a receiver & for the tenants to attorn & pay their rents in arrear & growing rents to such receiver:—*Held:* the possession of the mtgor. being rightful, he was liable to pay an occupation rent from the date of demand by the receiver only, & not from the date of the order appointing the receiver.

The possession of the mtgor is a lawful possession & he is entitled to remain in possession until ordered to deliver up possession or possession has been demanded by or on behalf of the mtgee. (CHETLEY, J.).—YORKSHIRE BANKING CO. *v.* MULLAN (1887), 35 Ch. D. 125; 56 L. J. Ch. 562; 56 L. T. 399; 35 W. R. 593.

Right of mortgagee to possession.]—*See* Part IX., Sect. 2, *post*.

SUB-SECT. 2.—UNDER EXPRESS AGREEMENT.

A. Possession until Default.

See, now, Law of Property Act, 1925 (c. 20), ss. 85–87.

696. Mortgagor entitled to possession until default—Tenant at will.]—If a mtge. be made by bargain & sale, with a proviso & agreement between the parties, that the mtgee., his heirs & assigns, shall not intermeddle with the actual possession of the premises or perception of the rents until default of payment, the mtgor. is a tenant at sufferance to the mtgee., & not a tenant at will, as he would have been on a covenant that he should take the profits till default of payment.—POWSELY *v.* BLACKMAN (1623), Cro. Jac. 659; 2 Roll. Rep. 241, 284; 79 E. R. 569.

Annotations:—**Refd.** Blunden *v.* Baugh (1633), Cro. Car. 302; Freeman *v.* Barnes (1670), 1 Vent. 80; Birch *v.* Wright (1786), 1 Term Rep. 378; Doe d. Parsley *v.* Day (1842), 2 Gal. & Dav. 757. **Mentd.** Geary *v.* Bearcroft (1666), Cart. 57.

697. —— **Whether a re-demise.**] — Pltf. mortgaged land in fee, with a proviso, for redemption on payment of principal in June 1833; but it was agreed that the mtgee. should not call in the principal till 1840 if interest were regularly paid in the meantime; & that the mtgor. should hold the premises & take the rents, issues & profits for his own use, till default should be made in the payment of principal & interest as aforesaid:—*Held:* this operated as a redemise to the mtgor. till 1840.—WILKINSON *v.* HALL (1837), 3 Bing. N. C. 508; 3 Hodg. 56; 4 Scott, 301; 6 L. J. C. P. 82; 132 E. R. 506.

Annotations:—**Folld.** Doe d. Lyster *v.* Goldwin (1841), 2 Q. B. 143. **Dbtd.** Doe d. Parsley *v.* Day (1842), 2 Q. B. 147. **Refd.** Doe d. Roylance *v.* Lightfoot (1841), 8 M. & W. 553; Chapman *v.* Beecham (1842), 3 Gal. & Dav. 71. **Mentd.** Alderman *v.* Neate (1839), 4 M. & W. 716; Gibson *v.* Kirk (1841), 1 Q. B. 850; Manders *v.* Williams (1849), 4 Exch. 339; Duxbury *v.* Sandiford (1898), 80 L. T. 552.

698. —— ——.]—By deeds of lease & release, dated Sept. 7 & 8, 1819, lands were mortgaged in fee, subject to a proviso, that if the mtgor. should well & truly pay the principal money & interest on Mar. 25 then next, the mtgee., his heirs & assigns, should & would reconvey & reassure the mtged. premises to the mtgor., his heirs & assigns. There was also a covenant that it should be lawful for the mtgee., his heirs & assigns, from time to time & at all times after default should be made in the payment of the principal money & interest, contrary to the proviso aforesaid, peaceably & quietly to enter into, have, hold, occupy, possess, & enjoy the said premises; & also a

PART VI. SECT. 4, SUB-SECT. 1.

686 i. *Nature of tenancy—Tenancy at sufferance.*]—A mtgor. in possession after default is a tenant at sufferance, whose tenure is determined by a sale by the mtgee.—GRIFFIN *v.* DUNN (1878), 4 V. L. R. (L.) 419.—**AUS.**

686 ii. —— ——.]—PRICE *v.* MOORE (1864), 14 C. P. 349.—**CAN.**

PART VI. SECT. 4, SUB-SECT. 2.—A.

697 i. *Mortgagor entitled to possession until default—Whether a re-demise.*]—TORONTO PERMANENT BUILDING

covenant by the mtgor. for further assurance in case of such default:—*Held:* the mtgee. had the right of possession, under this deed, from the time of its execution, & not merely from Mar. 25, 1820; & therefore, an ejectment for the recovery of the premises, brought by the heir-at-law of the mtgee., within twenty years of the latter but not of the former date, no interest having been paid in the meantime, was too late.

The legal estate passes by the deed of release, although the releasee cannot sue the releasor on the covenants, unless in case of non-payment on, or interruption after Mar. 25, 1820. There is therefore no ground for saying that a redemise was to be made until that day & indeed it would be very difficult to support such a supposition, seeing that the deed is executed by the mtgor. only. It follows that the right of entry did not accrue to the party under whom the lessor of pltf. claims, within twenty years next before the commencement of this suit; he is therefore not entitled to recover (PARKE, B.).—DOE d. ROYLANCE *v.* LIGHTFOOT (1841), 8 M. & W. 553; 11 L. J. Ex. 151; 5 Jur. 966; 151 E. R. 1158.

Annotations:—**Folld.** Doe d. Parsley v. Day (1842), 2 Q. B. 147; Rogers v. Grazebrook (1846), 8 Q. B. 895. **Refd.** Hemming v. Blanton (1873), 42 L. J. C. P. 158. **Mentd.** Gale v. Burnell (1845), 7 Q. B. 850; Knight v. Robinson (1856), 2 K. & J. 503; R. v. Champneys (1871), L. R. 6 C. P. 384; *Re* Bellis's Trusts (1877), 5 Ch. D. 504.

699. —— After demand in manner specified—Right to time to verify validity of demand—& time for payment.]—Where by the terms of a mtge. deed pltfs. were to remain in possession on their own account, & manage the mtged. property until they should make default in payment of the mtge. money upon demand in writing in manner specified, & such demand was made on the wife of one of pltfs. during pltfs.' absence by a person who represented himself as deft.'s agent, & upon non-payment deft. forthwith entered upon possession & seized the mtged. property. In an action of trespass against the mtgee:—*Held:* such non-payment before pltfs. had had any opportunity to inquire into the truth of the alleged agency did not constitute default, & deft. was liable to the mtgors. in substantial damages.—MOORE *v.* SHELLEY (1883), 8 App. Cas. 285; 52 L. J. P. C. 35; 48 L. T. 918, P. C.

700. Mortgagee not to enter until default — Mortgagor tenant at sufferance.]—POWSELY *v.* BLACKMAN, No. 696, *ante*.

701. —— No redemise.] — DOE d. ROYLANCE *v.* LIGHTFOOT, No. 698, *ante*.

702. Reservation of rent by mortgagee — With right to enter on default of principal moneys—No relation of landlord & tenant.]—A mtge. deed of Jan. 11, 1836, contained a covenant to surrender copyhold property to the mtgee. in fee, as a security for a debt of £850, which was to be repaid on July 11, following, & gave the mtgee. power of sale on default. The deed then contained a clause that the mtgor. should, during his occupation of the premises, yield & pay to the mtgee. the yearly rent or sum of £50, by equal half-yearly payments, on July 11 & Jan. 11, in every year, the first half-yearly payment to be made on July 11 next, & that it should be lawful for the mtgee. to have & use such remedies by distress, as landlords have for rent upon common demises, provided that the reservation of such rent should not prejudice the right of the mtgee. to enter into take possession of the premises covenanted to be surrendered, & evict the mtgor., at any time after default made in payment of the moneys thereby intended to be secured. In Nov. 1837, the mtgee. distrained for £50, "being for rent due up to July 11 last":—*Held:* the above reservation of rent, & distress for rent, had not created the relation of landlord & tenant between the parties, so as to entitle the mtgor. to notice to quit before ejectment.—DOE d. GARROD *v.* OLLEY (1840), 12 Ad. & El. 481; 4 Per. & Dav. 275; 9 L. J. Q. B. 379; 4 Jur. 1084; 113 E. R. 894.

Annotations:—**Folld.** Doe d. Snell v. Tom (1843), 4 Q. B. 615. **Expld.** Jolly v. Arbuthnot (1859), 4 De G. & J. 224. **Apld.** Metropolitan Counties & General Life Assce. Annuity Loan & Investment Soc. v. Brown (1859), 4 H. & N. 428.

Covenant for quiet enjoyment until default.]—*See* Nos. 703, 704, *post*.

Agreement for tenancy at will until default.]—*See* Nos. 707, 708, *post*.

Mortgagee's right to possession.]—*See* Part IX., Sect. 2, *post*.

Liability to distress.]—*See* Sub-sect. 4, *post*.

B. Covenant for Quiet Enjoyment.

See, now, Law of Property Act, 1925 (c. 20), ss. 85–87.

703. Enjoyment until default in payment — Effect of assignment by mortgagee—Mortgagor tenant at sufferance.] — Mtgee. covenants that mtgor. shall quietly enjoy till default of payment, & assigns. After assignment mtgor. is only tenant at sufferance, but his continuing in possession does not turn the term to a right.—SMARTLE *v.* WILLIAMS (1694), 1 Salk. 245; 3 Lev. 387; Comb. 247; Holt, K. B. 478; 91 E. R. 216; *sub nom.* NEWPORT'S CASE, Holt, K. B. 477; Skin. 423.

Annotations:—**Refd.** Birch v. Wright (1786), 1 Term Rep. 378; Hall v. Doe d. Surtees (1822), 5 B. & Ald. 687. **Mentd.** Stanynought v. Cosins (1746), Barnes, 456 Tinkler v. Walpole (1811), 14 East, 226.

704. —— Mortgagor to be tenant at will — Whether relation of landlord & tenant created.]—By indenture between G., proprietor of shares in a building society, & defts., trustees of the society, reciting, among other things, that G. had, pursuant to the rules of the society, agreed to pay unto the society for the term of fourteen years, the quarterly sum of £16 3*s.* 2*d.* in respect of his shares; & that for securing the quarterly payments he had agreed to execute the security intended to be effected by that indenture, G. conveyed a house, of which he was seised in fee, to defts. in fee. The deed contained a proviso for quiet enjoyment by G. if he paid the quarterly sums, etc., & observed the rules of the society & the covenants in the deed; but that in case he made default defts. might enter, & lease or sell the house, & out of the proceeds retain the amount of payments in arrear, etc., & pay the surplus, if any, to G.; & a clause by which G. agreed to become tenant of the house to defts., their heirs or assigns, or other the trustee or trustees for the time being of the society, thenceforth during their will, at the clear net yearly rent of £66, payable on the usual quarterly days, subject to the powers of distress & entry for non-payment thereof, & to all usual remedies as in leases of like property. G. died, leaving payments in arrear; defts. distrained upon the goods in " house, which was in the occupation of his widow, who subsequently took out administration.

SOCIETY *v.* MCCURRY (1862), 12 C. P. 532.—**CAN.**

PART VI. SECT. 4, SUB-SECT. 2.—B.

e. Whether vendor-mortgagee can be sued on covenant.]—Where a purchaser mtges. the same lands to his vendor in fee, to secure payment of the purchase money, he cannot sue the vendor, for ..... of covenant for good title, while the mtge. continues in force.—HWYCK *v.* MCDONALD (1834), 3 O. S. 292.—**CAN.**

Sect. 4.—Position as tenant: Sub-sect. 2, B., C. & D.; sub-sect. 3, A.]

Qu.: whether the deed created the relation of landlord & tenant between the parties: but assuming that it did:—*Held:* the tenancy under the mtge. being at most only a tenancy at will, the distress was not made during the possession of the tenant from whom the rent became due within the proviso in 8 Ann. c. 14, s. 7, & therefore was not justified under sect. 6 of that Act.—TURNER *v.* BARNES (1862), 2 B. & S. 435; 31 L. J. Q. B. 170; 6 L. T. 418; 9 Jur. N. S. 199; 10 W. R. 561; 121 E. R. 1135; *sub nom.* TURNER *v.* BATES, 26 J. P. 628.

Annotation:—**Apld.** Scobie *v.* Collins, [1895] 1 Q. B. 375.

705. Mortgagor tenant at will—No party tenancy created.]—An indenture of mtge., after the usual power of sale by public auction or private contract in the event of the non-payment of the mtge. money, contained a proviso & covenant by the mtgee. that no sale, or public notice or advertisement for any sale, should be made or given, nor any means be taken for obtaining possession, until the expiration of twelve calendar months after notice in writing of such intention should have been given to the mtgor. It also contained a covenant by the mtgee. for quiet enjoyment by the mtgor., as tenant at will to the mtgee., on the payment of a certain yearly rent by two equal half-yearly payments, but no livery of seisin was made to the mtgor.:—*Held:* under this deed, the mtgor. was tenant at will only to the mtgee., & no tenancy from year to year was thereby created.—DOE d. DIXIE *v.* DAVIES (1851), 7 Exch. 89; 21 L. J. Ex. 60; 18 L. T. O. S. 304; 16 Jur. 44; 155 E. R. 868.

C. Mortgagor to Hold as Tenant at Will.

See, now, Law of Property Act, 1925 (c. 20), ss. 85–87.

706. Right to emblements.]—Where the mtgor. in possession was by express contract tenant at will to the mtgee.:—*Held:* the mtgee. was not entitled to the crops upon the mtged. premises at the time of the bkpcy. of the mtgor. or at the time of the order for sale by the comrs.

The mtgor. is here made, not a constructive or quasi tenant at will, but a tenant at will by express contract, & like every other tenant at will by contract, he would be plainly entitled to the emblements (LEACH, V.-C.).—*Re* SKINNER, *Ex p.* TEMPLE & FISHE (1822), 1 Gl. & J. 216.

Annotation:—**Reld.** *Re* Medley, *Ex p.* Barnes (1838), 3 Deac. 223.

707. Possession until default—Whether operating as demise.]—By an indenture between A. & B., holders of shares in a benefit building society, & C. & D., trustees of the society, reciting, amongst other things, the formation of the society, that A. & B. were entitled to a certain sum out of the funds thereof in respect of their shares therein, & that, for the security of all the payments to become due in respect of the said shares, A. & B. had agreed to execute the assurance thereby made, A. & B. conveyed certain premises to C. & D. as such trustees, upon trust to permit A. & B. to receive the rents until default in payment of their contributions; with a power to C. & D., & the trustees for the time being of the society, to appoint a person to receive the rents, in case of default, & a power of sale in the like event, etc. The deed also contained a clause whereby A. & B. agreed "to become tenants of the parties hereto of the second part, & to the trustees for the time being of the society, of the premises hereby demised, henceforth during their will, at the net yearly rent of £200, payable on the usual quarter days":—*Held:* this indenture did not operate as a demise, so as to sustain an avowry alleging a tenancy under the trustees at the yearly rent of £200, the general scope of the deed being altogether inconsistent with such a construction.—WALKER *v.* GILES (1849), 6 C. B. 662; 18 L. J. C. P. 323; 13 L. T. O. S. 209; 14 L. T. O. S. 41; 13 Jur. 588, 753; 136 E. R. 1407.

Annotations:—**Distd.** Pinhorn *v.* Souster (1853), 8 Exch. 763. **Dbtd.** Brown *v.* Metropolitan Counties, etc. Soc. (1859), 1 E. & E. 832. **Reld.** Doe d. Dixie *v.* Davies (1851), 7 Exch. 89; Turner *v.* Barnes (1862), 2 B. & S. 435; *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 127. **Mentd.** Barnard *v.* Pilsworth (1849), 6 C. B. 698, n.; Thorn *v.* Croft (1866), L. R. 3 Eq. 193; *Re* Royal Liver Friendly Soc. (1870), L. R. 5 Exch. 78.

708. —— ——.]—In 1824, H. the tenant of certain copyhold premises, demised them for twenty-one years from Christmas, 1823; & the lease contained a covenant for further renewal. In Jan. 1847, the devisees of H., who had been admitted tenants as such by the lord of the manor, demised the premises to M. who had previously purchased the lessee's interest under the lease of 1824. In May, 1847, M. demised the premises to Q., & in July, 1847, Q. mortgaged the premises to deft. By this deed Q., in consideration of the sum of £400 advanced by deft., granted, bargained, sold, & demised the premises to him for the residue of the term wanting one day, & also the benefit of the covenant for further renewal. The deed contained a proviso for redemption in case Q. should pay £10 being one half-year's interest on Jan. 29, 1848, & £410 the principal sum & interest on July 29, 1848. The deed contained covenants for the payment of principal & interest; & it also provided, that Q. should remain in possession until default in payment, with a power to sell the premises; & the proceeds of such sale were to go first in satisfaction of the principal & interest, & the surplus, if any, to Q.; & it was further agreed that Q. should hold the premises as tenant at will to deft., at the clear yearly rent of £150, payable quarterly, for which rent it should be lawful for deft. to distrain; but that deft. might at any time determine the tenancy, by leaving a written notice on the premises, & that deft. should apply the rent, when received, in satisfaction of the principal & interest, & should pay the surplus, if any, to Q. During the continuance of this lease, Q. assigned his interest in the premises to S., who took possession, & placed a board over the door with "S. late Q." upon it:—*Held:* the clause in the deed of mtge., professing to create a tenancy, was operative, as not being inconsistent with the main object of the instrument, & a tenancy at will was thereby created.—PINHORN *v.* SOUSTER (1853), 8 Exch. 763; 1 C. L. R. 99; 22 L. J. Ex. 266; 21 L. T. O. S. 92; 1 W. R. 336.

Annotations:—**Apld.** Brown *v.* Metropolitan Counties, etc. Soc. (1859), 1 E. & E. 832. **Distd.** Hampson *v.* Fellows (1868), 37 L. J. Ch. 694. **Apld.** Kearsley *v.* Philips (1883), 11 Q. B. D. 621. **Reld.** Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224; Turner *v.* Barnes (1862), 2 B. & S. 435; Gibbs *v.* Cruikshank (1873), 28 L. T. 104; *Re* Potter & Ferrige, *Ex p.* Parke (1874), 43 L. J. Bcy. 139; *Re* Threlfall, *Ex p.* Queen's Benefit Bldg. Soc. (1880), 16 Ch. D. 274; *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 127. **Mentd.** Melling *v.* Leak (1855), 16 C. B. 652.

PART VI. SECT. 4, SUB-SECT. 2.—C.

†. *Possession until default—Whether mortgagee's lessee entitled to notice of ejectment.*]—CANADA PERMANENT BUILDING & SAVINGS SOCIETY *v.* BYERS (1869), 19 C. P. 473.—**CAN.**

D. Other Cases.

See, now, Law of Property Act, 1925 (c. 20), ss. 85–87.

709. Tenancy "at will & pleasure" of mortgagee—Tenancy at will created—Not yearly tenancy.]—A., under a mtge. deed, agreed to become tenant to B. of the premises demised "henceforth at the will & pleasure of B., at the yearly rent of £25 4*s.* payable quarterly":—*Held:* this was a tenancy at will & occupation for two years, & payment of rent under the agreement, did not make B. tenant from year to year.—DOE d. BASTOW *v.* COX (1847), 11 Q. B. 122; 17 L. J. Q. B. 3; 10 L. T. O. S. 132; 11 Jur. 991; 116 E. R. 421.

710. Tenancy commencing on default—Necessity for notice of commencement by mortgagee.]—By a mtge. deed it was provided that the mtgor. in the event of his making default in payment of the sums advanced to him, should immediately, or at any time after such default, hold the mtged. premises as yearly tenant to the mtgees. from the date of the deed at a specified rent, & that they should have the same remedies for recovering the rent as if the same had been reserved upon a common lease. The mtgor. having made default, the mtgees., without having given him any notice of their intention thenceforward to treat him as a tenant, distrained, after the lapse of more than a year from default, as for a year's rent in arrear:—*Held:* not having given him notice of their intention to treat him as a tenant, they were not entitled to distrain.—CLOWES *v.* HUGHES (1870), L. R. 5 Exch. 160; 39 L. J. Ex. 62; 22 L. T. 103; 34 J. P. 344; 18 W. R. 459.

711. Provision for possession for fixed period—Interest in nature of term of years—Tenant at sufferance on expiration of period.]—Certain premises were let to pltf. by P., who had previously mortgaged them to defts., the trustees of a benefit building society, to secure payment of subscriptions, etc., which might become due from him to the society. The mortgage deed gave power to defts. to distrain the goods of P., on the premises for arrears of subscriptions due to the society, as for rent due on a demise. Defts. distrained on the premises for subscriptions due from P., & seized pltf.'s goods. Pltf. replevied the goods, & recovered in the action of replevin, in the county ct., as damages, the amount of the expenses of the replevin bond.

If there be an express agreement in the mtge. deed that the mtgor. shall remain in possession for a certain time, he has an interest in the nature of a term of years during such time; but, upon expiration of such period, if there be default in payment of the money, the mtgor, becomes a mere tenant at sufferance (BOVILL, C.J.).—GIBBS *v.* CRUIKSHANK (1873), L. R. 8 C. P. 454; 42 L. J. C. P. 273; 28 L. T. 735; 37 J. P. 744; 21 W. R. 734.

Annotations:—**Mentd.** Dover *v.* Child (1876), 34 L. T. 737; Smith *v.* Enright (1893), 63 L. J. Q. B. 220.

Agreement for possession until default.]—*See* Sub-sect. 2, A., *ante.*

Attornment clause.]—*See* Sub-sect. 3, *post.*

Mortgagee's right to possession.]—*See* Part IX., Sect. 2, *post.*

Liability to distress.]—*See* Sub-sect. 4, *post.*

SUB-SECT. 3.—UNDER ATTORNMENT CLAUSE

A. In General.

See, now, Law of Property Act, 1925 (c. 20), ss. 85–87.

712. Validity of attornment clause.]—The validity of an attornment clause in a mtge. depends on whether the tenancy created & the rent reserved are a real tenancy & real rent. The proportion the rent reserved bears to the true lettable value of the property is the chief test of the reality of the rent.—*Re* BOWES, *Ex p.* JACKSON (1880), 14 Ch. D. 725; 43 L. T. 272; 29 W. R. 253, C. A.; *revsg.* S. C. *sub nom. Re* BOWES, *Ex p.* BANK OF WHITEHAVEN, 42 L. T. 409.

Annotations:—**Consd.** *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442. **Reid.** *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 129, n.; *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384. **Mentd.** *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373; *Re* Halstead, *Ex p.* Richardson, [1916] 2 K. B. 902.

713. Whether relation of landlord & tenant created.]—A mtge. deed, executed by the mtgor. only, contained a clause, whereby "for the more effectual recovery of the interest, the mtgor. did attorn & become tenant to the mtgee. of the premises, at the yearly rent of £40, to be paid half-yearly, so long as the principal sum remained secured." The mtgor. continued in possession, & made several of these half-yearly payments:—*Held:* the subsequent occupation, connected with the covenant, created the relation of landlord & tenant, & the mtgee. might distrain for a half-yearly payment in arrear.—WEST *v.* FRITCHE (1848), 3 Exch. 216; 18 L. J. Ex. 50; 12 L. T. O. S. 223; 13 J. P. 170; 154 E. R. 822.

Annotations:—**Consd.** Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224. **Apld.** Morton *v.* Woods (1868), L. R. 3 Q. B. 658. **Distd.** Gibbs *v.* Cruikshank (1873), 28 L. T. 104; Scoble *v.* Collins, [1895] 1 Q. B. 375.

714. ——.]—Pltf., by deed of Sept. 23, 1856, mortgaged his interest in certain leasehold premises & goods therein, to V. & co., & thereby, "to the intent that" they might "have, for the recovery of the interest accruing on the principal money secured, the same powers of entry & distress as are by law given to landlords, for the recovery of rent in arrear," pltf. attorned tenant to V. & co. of the premises, from year to year, at a fixed rent. On Feb. 18, 1857, pltf. further mortgaged the same premises & goods to defts., the mtge. deed reserving a power of entry to defts., on default in payment by pltf. Pltf. having made default in payment of principal & interest, defts., on Oct. 27, 1858, paid off V. & co.'s mtge., & took an assignment of it from them, containing the

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PART VI. SECT. 4, SUB-SECT. 2.—D.

g. Lease by mortgagee to mortgagor—Right of mortgagee to proceed against mortgagor—As overholding tenant.]—A mtgee. from whom the mtgor. has accepted a lease of the mtged. premises will not be permitted at the expiration of the term to proceed against the mtgor. as an overholding tenant under C. S. U. C., c. 27, *s.* 63.—*Re* REEVE (1867), 4 P. R. 27.—**CAN.**

PART VI. SECT. 4, SUB-SECT. 3.—A.

h. General rule.]—Where, by virtue of the attornment clause in a mtge., the relationship of landlord & tenant is set up between the mtgee. & the mtgor., the mtgee. can only take the advantages of the relationship subject to the limitations incident to the relationship.—JORDENSEN *v.* ENGELSTAD (Sask.), [1923] 3 W. W. R. 801.—**CAN.**

713 i. *Whether relation of landlord & tenant created.*]—HOBBS *v.* ONTARIO LOAN & DEBENTURE CO. (1890), 18 S. C. R. 483.—**CAN.**

713 ii. ——.]—The purchaser of mtged. premises is not a tenant of the mtgee. or his assignee, although the mtge. contains clauses creating the relation of landlord & tenant between the parties.—CHALMERS *v.* FREEDMAN (1909), 18 Man. L. R. 523; 10 W. L. R. 434.—**CAN.**

713 iii. ——.]—An attornment clause in a "mtge." under Land Titles Act (Sask.), though it may create contractual rights between the parties does not create the relation of landlord & tenant, so as to give the mtgee. the protection of 8 Anne, c. 14, *s.* 1.—FIRST NATIONAL BANK *v.* CUDMORE, [1917] 2 W. W. R. 479; 34 D. L. R. 201; 10 Sask. L. R. 201.—**CAN.**

713 iv. ——.]—GORDON *v.* FRASER (1918), 43 O. L. R. 31.—**CAN.**

Sect. 4.—Position as tenant: Sub-sect. 3, A.]

usual power of attorney. On the same day, defts. took possession of the premises, pltf. continuing in occupation with notice that they had done so. On Nov. 12, 1858, defts. gave pltf. notice to quit, with which he did not comply. On the following Nov. 20, defts. entered, & seized & sold goods on the premises, for payment of interest by way of rent in arrear due to V. & co. before the assignment of their mtge.:—*Held:* the attornment clause in the deed of Sept. 23, 1856, did not justify such seizure & sale; such clause created a tenancy, but gave V. & co. a right to distrain only so long as such tenancy continued; & such tenancy was put an end to by the assignment from V. & co. to defts.—BROWN *v.* METROPOLITAN COUNTIES, ETC., SOCIETY (1859), 1 E. & E. 832; 28 L. J. Q. B. 236; 33 L. T. O. S. 162; 5 Jur. N. S. 1028; 7 W. R. 477; 120 E. R. 1123.

Annotations:—**Refd.** Turner *v.* Barnes (1862), 2 B. & S. 435; *Re* Potter, *Ex p.* Parke (1874), De Colyar's County Court Cases, 235. **Mentd.** *Re* Davis, *Ex p.* Rawlings (1888), 22 Q. B. D. 193.

715. ——.] — A limited co. gave, in 1875, a mtge. to its bankers for its account current, by covenant to surrender its copyhold works, & by the mtge. deed the co. became tenant to the bankers at the rent of £5,000. No surrender of the copyholds was made. On July 16, 1877, the bankers sent an auctioneer to distrain for £10,000, being two years' rent. The auctioneer, on the same day saw the managing director of the co., gave him formal notice of distraint, & by arrangement with him employed two workmen of the co. to keep possession of the chattels distrained. On July 18, the co. requested the bankers not to proceed to an immediate sale, to which the bankers assented, & the two men remained in possession. On July 19, a petition was presented for winding up the co.; & on July 28, a winding-up order was made. By arrangement with the liquidator, the men went out of possession in Oct., & in Nov. the bulk of the chattels was sold by the liquidator without prejudice to the rights of the bankers, & realised less than £5,000:—*Held:* the attornment clause created the relation of landlord & tenant; there being no ground for saying that the rent of £5,000 was so unreasonable as to be fraudulent, the mtgees. had the same rights of distress as any other landlord.—*Re* STOCKTON IRON FURNACE CO. (1879), 10 Ch. D. 335; 48 L. J. Ch. 417; 40 L. T. 19; 27 W. R. 433, C. A.

Annotations:—**Apld.** *Re* Kitchin, *Ex p.* Punnett (1880), 16 Ch. D. 226. **Consd.** *Re* Bowes, *Ex p.* Jackson (1880), 14 Ch. D. 725; *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 127; *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442; *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384; Green *v.* Marsh, [1892] 2 Q. B. 330. **Mentd.** *Re* Bridgewater Engineering Co. (1879), 12 Ch. D. 181; *Re* Crumlin Viaduct Works Co. (1879), 48 L. J. Ch. 537; Shubrook *v.* Tufnell (1882), 30 W. R. 740; *Re* Lewis, Lewis *v.* Williams (1886), 31 Ch. D. 623; *Re* Gardner, Long *v.* Gardner (1894), 71 L. T. 412; *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co. (1896), 75 L. T. 508.

716. ——.] — If a mtge. is created by way of demise for a term of years, & the mtgor. attorns & becomes tenant to the mtgee. at a certain rent, the relation of landlord & tenant is created, & upon failure to pay the rent the mtgee. is entitled to distrain the goods even of a stranger.

J., being lessee for a term of years, demised to P., by way of mtge., all his interest in the term save one day, & J. attorned & became tenant to P. at a certain rent. J., being mtgor., let the mtged. premises to K., who assigned his goods thereon to R. The rent due from J. to P. being unpaid, P. distrained the goods assigned by K. to R. No rent was then due from K. R. having brought an action against P. for the seizure of the goods:—*Held:* by the attornment J. had become tenant to P., & the distress was lawful.—KEARSLEY *v.* PHILIPS (1883), 11 Q. B. D. 621; 52 L. J. Q. B. 581; 49 L. T. 435; 31 W. R. 909, C. A.

717. ——.] — MUMFORD *v.* COLLIER, No. 735, *post.*

718. —— **To exclusion of relation of mortgagor & mortgagee.**]—*Re* KITCHIN, *Ex p.* PUNNETT, No. 570, *ante.*

719. —— ——.] — Notwithstanding the insertion of an attornment clause in a mtge. deed, the real relation between the parties is that, not of landlord & tenant, but of mtgee. & mtgor., & this fact, as well as the nature of the rent reserved by the clause, must be taken into account in considering whether, on giving leave to the trustee in the bkpcy. of the mtgor. to disclaim the tenancy created by the attornment clause, any terms should be imposed for the benefit of the mtgee.

At law the mtgee. was the legal owner of the estates, I am now speaking of freehold estates, & the mtgor. was what was called tenant at will, a very peculiar kind of tenancy (JESSEL, M.R.).—*Re* KNIGHT, *Ex p.* ISHERWOOD (1882), 22 Ch. D. 384; 52 L. J. Ch. 370; 48 L. T. 398; 31 W. R. 442, C. A.

Annotations:—**Refd.** *Re* Bushell, *Ex p.* Izard (1883), 23 Ch. D. 115. **Mentd.** *Re* Witton, *Ex p.* Arnal (1883), 24 Ch. D. 26; *Re* Salkeld, *Ex p.* Good (1884), 13 Q. B. D. 731.

720. Purpose of attornment — Further security —For payment of principal.]—A. assigned the lease for twenty-one years of a house in which he resided, together with two policies of assurance upon his life, to deft., by way of mtge., to secure the repayment of £250 & interest, as well as the premiums upon the policies; & the mtge. deed contained a clause by which the mtgor. attorned tenant from year to year to the mtgee. in respect of the leasehold house at the yearly rent of £175, provided that the mtgee. might at any time, without notice, take possession of the premises & determine the tenancy. There was no specific provision that any part of such rent should be applicable to the principal of the debt. The mtgor. became bkpt., & the mtgee. distrained upon the furniture in the house, which was not the property of A., for a year's rent under the attornment clause, though at that time the landlord's rent of £115, the interest upon the money advanced, & the premiums upon the policies, had been paid. Pltf., who was the owner of the furniture, filed a bill to restrain the sale.

Upon a demurrer, for want of equity:—*Held:* the attornment clause was not intended to enable the mtgee. to repay himself any of the capital advanced, but only to secure the payment of rent, interest, & premiums. *Secus:* if the object of the attornment clause had been expressed to be for enabling the recovery of the principal as well.—HAMPSON *v.* FELLOWS (1868), L. R. 6 Eq. 575; 37 L. J. Ch. 694; 19 L. T. 6.

Annotation:—**Distd.** *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 127.

721. —— —— ——.] — The proceeds of a distress for rent levied under an attornment clause in a mtge. deed are in the absence of any provision to the contrary on the deed applicable to the payment of principal as well as interest. The fact that the yearly rent reserved by the attornment clause is equal in amount to the yearly interest of the mtge. debt as provided by the deed & is made payable on the same days is not of itself sufficient to displace the *primâ facie* right of the mtgee. to apply the proceeds of the distress in satisfaction of principal as well as interest.—*Re*

BETTS, *Ex p.* HARRISON (1881), 18 Ch. D. 127; 50 L. J. Ch. 832; 45 L. T. 290; 30 W. R. 38, C. A.; *affg.* S. C. *sub nom. Re* BETTS, *Ex p.* TEMPEST, 44 L. T. 616.

722. —— —— Payment of interest — Rent & premium.]—HAMPSON *v.* FELLOWS, No. 720, *ante*.

723. —— —— ——.] — *Re* KITCHIN, *Ex p.* PUNNETT, No. 570, *ante*.

724. Nature of tenancy created — Attornment as yearly tenant—Whether yearly tenancy created.]—A mtge. deed gave a power of entry on default; & to the intent that the mtgees. might have for the recovery of interest the same powers of entry & distress as are by law given to landlords for the recovery of rent, the mtgor., deft., thereby attorned tenant from year to year to the mtgees. Deft. continued in possession for more than a year. The mtgees., after default, assigned to pltfs., & gave notice to deft. to quit:—*Held:* there was no tenancy from year to year, & immediately upon the notice pltfs. might maintain ejectment.—METROPOLITAN COUNTIES ASSURANCE CO. *v.* BROWN (1859), 4 H. & N. 428; 28 L. J. Ex. 340; 33 L. T. O. S. 165; 157 E. R. 906.

725. —— —— ——.]—A mtge. deed contained an attornment clause whereby A., the mtgor., attorned & became tenant from year to year to B., the mtgee., for & in respect of the mtged. premises, at the yearly rent of £800, to be paid by equal quarterly payments. It was thereby agreed that it should be lawful for B., at any time after three months from the date of the mtge. without giving previous notice of his intention so to do, to enter upon & take possession of the premises whereof A. had attorned tenant, & to determine the tenancy created by the aforesaid attornment A. filed a liquidation petition & on the same day a receiver was appointed, who entered into possession of A.'s estate & effects. Notice of the petition & of the appointment of a recever was sent to B., who two days later, by virtue of the attornment clause, distrained upon the goods & chattels on the mtged. premises for half a year's rent then due:—*Held:* a tenancy from year to year & not a tenancy at will was created by the attornment clause, & B. was entitled, under Bkpcy. Act, 1869 (c. 71), s. 34, to distrain for the rent due to him from A. at the time of filing the liquidation petition.—*Re* THRELFALL, *Ex p.* QUEEN'S BENEFIT BUILDING SOCIETY (1880), 16 Ch. D. 274; 44 L. T. 74; 29 W. R. 128; *sub nom. Re* THRELFALL, *Ex p.* BLAKEY, 50 L. J. Ch. 318, C. A.

Annotations:—**Refd.** *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442. **Mentd.** King *v.* Eversfield, [1897] 2 Q. B. 475.

726. —— Attornment for term of ten years—Tenancy at will created—Mortgage not executed by mortgagor.]—B. being mtgor. in possession, executed a mtge. on Sept. 12, 1866, of the premises to defts. to secure the repayment with interest of certain advances to be made by defts. The mtge. was by indenture between B., & defts., but was never executed by defts.; the deed recited the previous mtge., which was in fee, & by it B. conveyed all the premises comprised in the recited mtge. to defts., in fee, upon trust that defts. should, either immediately or at any time, sell them, " & as a further security for the principal & interest for the time being due from B. to defts. B. did thereby attorn & become tenant to defts., their heirs & assigns, as & from the date thereof, of such of the premises thereby conveyed as were in his occupation, for & during the term of ten years, if that security should so long continue at the yearly rent of £800, to be paid on Oct. 1, the first yearly rent to be payable on Oct. 1, then next. Provided that, notwithstanding anything therein contained, & without any notice or demand of possession, it should be lawful for defts., their heirs, exors., administrators, or assigns, before or after the execution of the trusts of sale, to enter upon the said mtged. premises, or any part thereof, & to eject B. or any person claiming through him, & to determine the said term of ten years, notwithstanding any lease that might have been granted by B." Defts. made the stipulated advances, & B. continued in occupation of the premises; & on Oct. 15, 1866, defts. distrained for the first year's rent:—*Held:* (1) the intention of the parties, as evidenced by the deed, was to create a tenancy at will only, & not a term of ten years; a deed being therefore unnecessary, the tenancy was created by the assent of the parties & the occupation under it, & the fact that defts. had not executed the deed was immaterial; (2) the parties having agreed that the relation of landlord & tenant should be established between them, the mtgor. was estopped from setting up that defts. had no legal reversion; & it made no difference that the fact of the mtgor. having only the equity of redemption appeared on the face of the deed; & the distress was therefore lawful.—MORTON *v.* WOODS (1869), L. R. 4 Q. B. 293; 9 B. & S. 632; 38 L. J. Q. B. 81; 17 W. R. 414, Ex. Ch.

Annotations:—*As to* (1) **Apld.** *Re* Kitchin, *Ex p.* Punnett (1880), 16 Ch. D. 226. **Expld.** *Re* Threlfall, *Ex p.* Queen's Benefit Bldg. Soc. (1880), 16 Ch. D. 274. *As to* (2) **Refd.** Hartcup *v.* Bell (1883), Cab. & El. 19. *Generally,* **Consd.** Kearsley *v.* Philips (1883), 11 Q. B. D. 621. **Refd.** *Re* Potter, *Ex p.* Park (1874), L. R. 18 Eq. 381; *Re* Bowes, *Ex p.* Jackson (1880), 14 Ch. D. 725; *Re* Knight, *Ex p.* Voisey (1882), 52 L. J. Ch. 121. **Mentd.** *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373; Manchester Brewery Co. *v.* Coombs, [1901] 2 Ch. 608.

727. —— Attornment as monthly tenant—Not made tenancy at will.]—A member of a building society borrowed £7,500 from the society, which was to be repaid in a series of monthly instalments of £71 17*s.* 6*d.* each, including interest at 7 per cent. The instalments were payable at the monthly meetings of the society, &, if the member neglected to pay them, when due, he became liable to a fine, at the rate of 5 per cent. per month on the total amount in arrear & unpaid at each meeting. To secure the loan he executed to the trustees of the society a mtge. of real estate. The deed contained a proviso that if the member should fail for three monthly meetings to pay his subscriptions, interest, fines, or other moneys, or to observe the regulations of the society, or in the event of his becoming bkpt., the mtgees. might enter into possession or receipt of the rents of the mtged. property; & " for the better securing the payments which by the rules of the society ought to be made by the mtgor," it was agreed that, if the mtgees. should at any time become entitled to enter into possession or receipt of the rents, & the mtgor. should then or afterwards be in the occupation of the whole or part of the property, he should during such occupation be tenant thereof from month to month to the mtgees., at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mtgor. from time to time for subscriptions, interest, fines, & other moneys under the rules, & that the tenancy should commence on the day up to which he should have fully paid all & every part of such subscriptions, interest, fines, & other moneys, & the rent for the period intervening between the commencement of the tenancy & the day on which the trustees should be entitled to enter into possession or receipt of rents should be payable & paid on that day, & the monthly rent due upon & subsequently to

Sect. 4.—Position as tenant: Sub-sect. 3, A. & B.; sub-sect. 4. Sect. 5: Sub-sect. 1.]

that day should become due monthly in advance, & be payable at the monthly meetings, the first payment of rent becoming due on the day on which the mtgees. should first become entitled to enter into possession. Power was given to the mtgees. to determine the tenancy by fourteen days' notice. The deed was not executed by the mtgees., nor was it registered under the Bills of Sale Act, 1878 (c. 31). The mtgor. committed default in his payments, & was afterwards adjudicated a bkpt.:—*Held:* it was no objection to the attornment clause that the monthly rent was fluctuating in amount; a rent the amount of which may fluctuate according to the happening of certain events is not an uncertain rent; the tenancy under the attornment clause was not made, by Stat. Frauds, sect. 1, a tenancy at will.—*Re* KNIGHT, *Ex p.* VOISEY (1882), 21 Ch. D. 442; 52 L. J. Ch. 121; 47 L. T. 362; 31 W. R. 19, C. A.

Annotations:—**Refd.** *Re* Knight, *Ex p.* Isherwood (1882), Ch. D. 384; *Re* Middlesbrough Bldg. Soc. (1884), 54 L. J. Ch. 592.

728. Termination of tenancy—Assignment of interest by mortgagee.]—BROWN *v.* METROPOLITAN COUNTIES, ETC., SOCIETY, No. 714, *ante.*

729. —— Death of mortgagee—New tenancy with heir not created.]—A mtge. contained the usual attornment clause, & the mtgor., who was in occupation of the mtged. property, attorned tenant to the mtgees., & during his life paid the interest on the mtge. The mtgor. died intestate, & his heir-at-law entered into possession of the mtged. property, & for a time paid the interest under the mtge., but subsequently became bkpt. The mtgees. having distrained for arrears of interest, on the ground that they were entitled to do so as landlords under the attornment clause:—*Held:* as the original tenancy was determined by the death of the mtgor., & a new tenancy was not created between the mtgees. & the heir-at-law by mere payment of interest, the distress was illegal, & the trustee in bkpcy. was entitled to the proceeds of the distress.—SCOBIE *v.* COLLINS, [1895] 1 Q. B. 375; 64 L. J. Q. B. 10; 71 L. T. 775; 1 Mans. 491; 15 R. 6.

730. —— Assignment of equity of redemption—By mortgagor & mortgagee.]—*Re* JOHNSON, *Ex p.* HYDE & CASH (1897), 41 Sol. Jo. 368.

Liability to distress.]—*See* Sub-sect. 4, *post.*

Whether transaction amounting to bill of sale.]—*See* BILLS OF SALE, Vol. VII., pp. 13, 14, 24, Nos. 56, 57, 113–117.

B. Recovery of Possession by Mortgagee.

See, now, Law of Property Act, 1925 (c. 20), ss. 85–87, 95 (4).

731. Power of re-entry in default—Notice to quit not necessary.]—A mtge. in fee, containing the usual clauses, & a power of sale, in default of payment, had also a provision by which the mtgor. attorned tenant to the mtgee. at a certain rent:—*Held:* after default in paying the mtge. money, the mtgee. might bring ejectment without notice to quit.—DOE d. SNELL *v.* TOM (1843), 4 Q. B. 615; 3 Gal. & Dav. 637; 12 L. J. Q. B. 264; 7 Jur. 847; 114 E. R. 1030; *sub nom.* DOE d. SMALE *v.* THOM, 1 L. T. O. S. 169.

Annotations:—**Refd.** Brown *v.* Metropolitan Counties, etc. Soc. (1859), 1 E. & E. 832; Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224. **Mentd.** Phillips *v.* Ball (1859), 7 W. R. 580.

732. —— Attornment as tenant from year to year—Right of assignee of mortgagee—Immediate ejectment on default.]—METROPOLITAN COUNTIES ASSURANCE CO. *v.* BROWN, No. 724, *ante.*

733. Recovery by summary procedure—R. S. C., Ord. 3, r. 6 (F), Ord. 14.]—The relationship of landlord & tenant may be created by a mtge. deed, & therefore, in an action for recovery of land by mtgees. from a mtgor. in possession under a mtge. deed creating a tenancy between them, the writ may be specially indorsed under R. S. C., Ord. 3, r. 6 (F), so that Ord. 14, will apply, & final judgment may be ordered.—DAUBUZ *v.* LAVINGTON (1884), 13 Q. B. D. 347; 53 L. J. Q. B. 283; 51 L. T. 206; 32 W. R. 772; Bitt. Rep. in Ch. 211, D. C.

Annotation:—**Folld.** Hall *v.* Comfort (1886), 18 Q. B. D. 11.

734. —— ——.]—A mtge. deed contained a clause by which, for the purpose of securing the punctual payment of the interest, the mtgor. attorned tenant to the mtgee., & the mtgee. had a power of re-entry for default in payment. Default having been made, the mtgee. commenced an action for the recovery of the premises & applied for judgment under R. S. C., Ord. 14:—*Held:* the mtgor. was a tenant whose term had expired or had been duly determined by notice to quit within the meaning of R. S. C., Ord. 3, r. 6 (F), & pltf. was entitled to judgment.—HALL *v.* COMFORT (1886), 18 Q. B. D. 11; 56 L. J. Q. B. 185; 55 L. T. 550; 35 W. R. 48.

Annotation:—**Mentd.** *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384.

735. —— ——.]—An attornment clause in a mtge. of real property is effectual to create the relation of landlord & tenant between mtgee. & mtgor., & is not avoided by Bills of Sale Act, 1878 (c. 31), s. 6, except as regards the power of distress which would otherwise be an incident of the tenancy.

Where, by a mtge. deed, the mtgor. had attorned tenant to the mtgee. at a rent equivalent to the mtge. interest, & that interest was in arrear:—*Held:* the mtgee. was entitled to obtain judgment under R. S. C., Ord. 14, in an action for ejectment against the mtgor.—MUMFORD *v.* COLLIER (1890), 25 Q. B. D. 279; 59 L. J. Q. B. 552; 38 W. R. 716, D. C.

Annotation:—**Refd.** Scobie *v.* Collins, [1895] 1 Q. B. 375.

736. —— —— Determination without notice to quit.]—HOBSON *v.* MONK, [1884] W. N. 17.

Annotation:—**N.F.** Daubuz *v.* Lavington (1884), Bitt. Rep. in Ch. 211.

737. —— —— Claim founded on determination of tenancy.]—A mtge. deed contained a clause by which the mtgor. attorned tenant from year to year to the mtgee. at a yearly rental payable half-yearly, & a further clause by which the mtgee. might at any time, without giving any previous notice of his intention so to do, enter upon & take possession of the premises, & determine the tenancy created by the attornment. The rent was in arrear, & the mtgee. brought an action to recover possession, & applied for an order for recovery of the premises under R. S. C., Ord. 14:—*Held:* the claim to recover possession was founded on the determination of a tenancy at will, & not on forfeiture, & the writ could be specially indorsed under R. S. C., Ord. 3, r. 6 (F), & judgment signed under Ord. 14.—KEMP *v.* LESTER, [1896] 2 Q. B.

—There is not such a tenancy existing between a mtgor. & mtgee. as will render the former liable to proceedings by summary ejectment under Consol. Stat. (c. 83), & 43 Vict. c. 12.—*Ex p.* MCBEAN (1885), 24 N. B. R. 362.—CAN.

162 ; 65 L. J. Q. B. 532 ; 74 L. T. 268 ; 44 W. R. 453 ; 12 T. L. R. 292 ; 40 Sol. Jo. 371, C. A.

Mortgagee's right of distress.]—*See* Sect. 5, sub-sect. 7, *post*.

Whether transaction amounting to bill of sale.]—*See* BILLS OF SALE, Vol. VII., pp. 13, 24, Nos. 56, 57, 113–117.

SUB-SECT. 4.—LIABILITY TO DISTRESS.

Under attornment clause.]—*See* DISTRESS, Vol. XVIII., pp. 266, 280–282, Nos. 57, 160–173.

—— **Estoppel of tenant.**]—*See* DISTRESS, Vol. XVIII., p. 271, Nos. 96, 97.

—— **Liability in bankruptcy.**]—*See* BANKRUPTCY, Vol. V., pp. 958, 962, 963, Nos. 7855–7858, 7878–7885.

—— **In winding up of company.**]—*See* COMPANIES, Vol. X., p. 970, Nos. 6674–6678.

Under agreement other than attornment clause.]—*See* DISTRESS, Vol. XVIII., pp. 282, 283, Nos. 174–180.

SECT. 5.—LEASES AND TENANCIES.

SUB-SECT. 1.—CREATED BEFORE MORTGAGE.

See, now, Law of Property Act, 1925 (c. 20), ss. 98, 141, 142, 146, 149, 151, 152.

738. Right of mortgagor to rent—Until notice by mortgagee.]—MOSS *v.* GALLIMORE, No. 678, *ante*.

739. —— —— Tenant under obligation to pay.]—Where a man mortgages his estate, although there may be notice that there is such a mtge., all persons who are indebted to the mtgor. in any way, in respect of that estate, must go on & deal with all contracts which have been entered into with the mtgor., just as if no such mtge. had taken place ; unless, indeed, the mtgee., having a right to interfere, does interfere, saying, "Pay no longer." It is upon this principle that tenants are not only at liberty to pay, but are bound to pay their rents to the mtgor. until the mtgee. interferes to stop them (LORD CRANWORTH).—ROSE *v.* WATSON (1864), 10 H. L. Cas. 672 ; 3 New Rep. 673 ; 33 L. J. Ch. 385 ; 10 L. T. 106 ; 10 Jur. N. S. 297 ; 12 W. R. 585 ; 11 E. R. 1187, H. L. ; *affg.* S. C. *sub nom.* WATSON *v.* ROSE (1862), 6 L. T. 804.

Annotations :—**Mentd.** Aberaman Ironworks *v.* Wickens (1868), 4 Ch. App. 101 ; McCreight *v.* Foster (1870), 5 Ch. App. 604 ; Shaw *v.* Foster (1872), L. R. 5 H. L. 321 ; Torrance *v.* Bolton (1872), 41 L. J. Ch. 643 ; Lysaght *v.* Edwards (1876), 2 Ch. D. 499 ; Mycock *v.* Beatson (1879), 13 Ch. D. 384 ; Beddington *v.* Atlee (1887), 35 Ch. D. 317 ; Levy *v.* Stogdon, [1898] 1 Ch. 478 ; Cornwall *v.* Henson, [1899] 2 Ch. 710 ; Dodson *v.* Downey, [1901] 2 Ch. 620 ; Fleming *v.* Loe (1901), 70 L. J. Ch. 805 ; Whitbread *v.* Watt, [1902] 1 Ch. 835 ; Ridout *v.* Fowler, [1904] 1 Ch. 658 ; *Re* Stucley, Stucley *v.* Kekewich, [1906] 1 Ch. 67.

740. —— —— Not affected by Judicature Act, 1873 (c. 66), s. 25—Or by Conveyancing Act, 1881 (c. 41), s. 10.]—The principle of *Moss* v. *Gallimore*, No. 678, *ante*, & *Rogers* v. *Humphreys*, No. 785, *post*, that the mtgor. is in possession & receives the rents of the mortgaged property only by leave of the mtgee., & the mtgee. is the reversioner expectant on leases of the mortgaged property & is entitled on taking possession of it to all arrears of rent in respect of leases made before the date of the mtge., or subsequently thereto by authority of the mtgee., is not affected by the provisions of Jud. Act, 1873 (c. 66), s. 25 (5), or of Conveyancing Act, 1881 (c. 41), s. 10, which deal with procedure only.

A co. issued debenture stock secured by a trust deed whereby certain freehold & leasehold properties were specifically mortgaged to the trustees of the deed, & a floating charge was created in their favour on all the assets of the co. Subsequently the co. assigned to W. & H. certain book debts, including rents in arrear in respect of leases, some of which were specifically included in the trust deed, & also certain drawbacks owing to the co. by the Crown in respect of beer exported by the co. on which the co. was entitled to receive payments equal to the amount of the excise brewing duty paid thereon. W. & H. gave notice of their assignment to the tenants from whom rents were due & to the shipping agents who had been employed by the co. to export the beer ; but gave no notice to the Crown. A receiver & manager of the assets & undertaking of the co. was appointed on behalf of the debenture-holders. He gave notice of his appointment to the tenants & to the Crown :—*Held :* the rents in arrear in respect of property not specifically charged belonged to W. & H., but the rents of properties specifically mortgaged belonged to the debenture-holders inasmuch as they had taken possession by the appointment of a receiver & giving notice ; the drawbacks were only subject to the floating charge & could be dealt with by the co. ; & as the co. had this power by their contract with the debenture-holders, the latter could not, with notice of the assignment, obtain priority to the assignees by giving notice to the Crown.—*Re* IND, COOPE & CO., LTD., FISHER *v.* THE CO., KNOX *v.* THE CO., ARNOLD *v.* THE CO., [1911] 2 Ch. 223 ; 80 L. J. Ch. 661 ; 105 L. T. 356 ; 55 Sol. Jo. 600.

See, now, Law of Property Act, 1925 (c. 20), ss. 98, 141.

741. Right to give notice to quit—In own name.]—Where a mtge. deed, for securing payment of an annuity, conveyed the land in trust, among other things, to permit the mtgor. to receive the rents until default made for sixty days in payment of the annuity :—*Held :* the conveyance operated as a redemise to the mtgor. until default ; & a notice to quit, given by him in his own name to a tenant let into possession by him before the mtge. enabled him to recover in ejectment on his own demise.—DOE d. LYSTER *v.* GOLDWIN (1841), 2 Q. B. 143 ; 1 Gal. & Dav. 463 ; 10 L. J. Q. B. 275 ; 114 E. R. 57.

Annotations :—**Consd.** Doe d. Parsley *v.* Day (1842), 2 Q. B. 147. **Reid.** Jones *v.* Phipps (1868), L. R. 3 Q. B. 567. **Mentd.** Doe d. Pulker & Whichelo *v.* Walker (1845), 14 L. J. Q. B. 181 ; Dibbins *v.* Dibbins, [1896] 2 Ch. 348.

742. Tenancy at will—Whether determined by mortgage.]—C., the purchaser of land, was let into possession before execution of a conveyance. He let in his son as tenant at will. The son occupied, & built, a cottage on, the land. Afterwards C. took a conveyance from the vendor ; & some time after, he mortgaged the land. The son continued to occupy the premises in all respects as at first, till his death, which happened within twenty one years of his entry. The son's widow continued to occupy till the expiration of twenty one years from her husband's entry :—*Held :* the tenancy at will was not determined by the father's

PART VI. SECT. 5, SUB-SECT. 1.

l. Whether mortgagor's tenant holds adversely—To title of mortgagee.]—The possession of a tenant of a mtgor., under a tenancy, created prior to the mtge., is not adverse to the title of the mtgee.—COLONIAL BANK OF AUSTRALASIA *v.* RABBAGE (1879), 5 V. L. R. (L.) 462.—**AUS.**

m. Tenancy at will—Whether notice necessary before ejectment.]—In eject-

Sect. 5.—Leases and tenancies: Sub-sects. 1, 2 & 3.]

taking a conveyance; & if it had, in point of law, been so determined by that event, or by the mtge., a tenancy by sufferance must be deemed to have commenced from such determination, there being no evidence of a new tenancy at will: & the tenancy, altogether, had continued more than twenty years from the end of the first year.—DOE d. GOODY *v.* CARTER (1847), 9 Q. B. 863; 18 L. J. Q. B. 305; 8 L. T. O. S. 409; 11 Jur. 285; 115 E. R. 1505.

Annotations:—**Refd.** Doe d. Palmer *v.* Eyre (1851), 17 Q. B. 366; Randall *v.* Stevens (1853), 2 E. & B. 641. **Mentd.** Doe d. Carter *v.* Barnard (1849), 18 L. J. Q. B. 306; Wimbledon & Putney Commons Conservators *v.* Nicol (1894), 10 T. L. R. 247.

743. —— ——.] — Deft. was admitted, as tenant at will, to certain land by A. & remained in possession more than twenty years, without any payment of rent or acknowledgment of the title of any person. After his tenancy had commenced, the land was mortgaged by A. to the lessor of pltf. A. continued to pay interest upon the mortgage money to the lessor of pltf., until within two years of this action being brought. A sufficient demand of possession had been made upon deft.:—*Held:* the title of the lessor of pltf. was not barred by the length of time of deft.'s possession.—DOE d. PALMER *v.* EYRE (1851), 17 Q. B. 366; 20 L. J. Q. B. 431; 17 L. T. O. S. 221; 15 Jur. 1031; 117 E. R. 1320.

Annotations:—**Consd.** Doe d. Baddeley *v.* Massey (1851), 17 Q. B. 373. **Apld.** Ford *v.* Ager (1863), 2 New Rep. 366. **Consd.** Thornton *v.* France, [1897] 2 Q. B. 143. **Refd.** Hemming *v.* Blanton (1873), 42 L. J. C. P. 158.

744. —— ——.]—Where A. mortgaged land of which B. was in possession to C. for one thousand years & B. continued in possession for upwards of twenty years from the mtge. without having paid rent to A. or to any one but interest was paid under the mtge. within twenty years from the time of ejectment brought:—*Held:* under 7 Will. 4 & 1 Vict. c. 28, the title of those claiming under C. was not based by virtue of the operation of Real Property Limitation Act, 1833 (c. 27).—FORD *v.* AGER (1863), 2 H. & C. 279; 2 New Rep. 366; 32 L. J. Ex. 269; 8 L. T. 546; 9 Jur. N. S. 804; 11 W. R. 1073; 159 E. R. 117.

Annotation:—**Refd.** Hemming *v.* Blanton (1873), 42 L. J. C. P. 158.

745. —— —— **Tenant with notice of mortgage.**] — JARMAN *v.* HALE, No. 746, *post.*

746. —— —— **Tenant remaining in possession—New tenancy created.**]—(1) A tenancy at will is determined by a mtge. of the premises by the landlord, such mtge. being brought to the knowledge of the tenant.

(2) Where the tenant remains in possession, the new tenancy, necessary to prevent Real Property Limitation Act, 1833 (c. 27), running against the landlord, is sufficiently created by estoppel, & the fact that he had by the mortgage parted with his reversion is immaterial.—JARMAN *v.* HALE, [1899] 1 Q. B. 994; 68 L. J. Q. B. 681.

747. Prepayment of rent — Validity against mortgagee.]—B. having leased his land to pltf. at a rent payable quarterly, subsequently mortgaged the land to defts., who allowed B. to remain in receipt of the rent. Subsequently to the mtge., B. applied to pltf., who was not aware of the mtge., to pay him a year's rent in advance, & pltf. did so. After the payment, & before the rent had become due, defts. gave notice to pltf. to pay the rent to them, & pltf. refusing to pay it, defts. distrained for it:—*Held:* in an action for an illegal distress, that payment of the rent before it became due was not a good payment as against defts., the mtgees., & pltf. was still liable to pay them the rent.—DE NICHOLLS *v.* SAUNDERS (1870), L. R. 5 C. P. 589; 39 L. J. C. P. 297; 22 L. T. 661; 18 W. R. 1106.

Annotations:—**Consd.** Cook *v.* Guerra (1872), L. R. 7 C. P. 132; Green *v.* Rheinberg (1911), 104 L. T. 149; Ashburton *v.* Nocton, [1915] 1 Ch. 274. **Mentd.** Glyn Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591.

748. —— ——.] — In July, 1864, L. demised premises to deft. for five years at a rent of £55 per annum, payable quarterly. Immediately after the grant of the lease, deft. advanced to L. £170 on account of rent; & in Sept. 1865, L. mtged. the premises to pltf. In May, 1866, B., who claimed under a prior mtge. from L. dated in Sept. 1858, through C., his attorney, commenced an action of ejectment against deft. to recover possession of the premises, but did not proceed with it; & on Nov. 1, 1866, pltf.'s attorney wrote to deft.: "Mr. C. has written to say his clients are no longer entitled to receive your rent, I therefore request that you will have the kindness to pay the same here by Monday next":—*Held:* the prepayment of rent was no bar to pltf.'s claim to the rent accruing after deft. had notice that pltf. was grantee of the reversion; & that the above letter, coupled with the circumstances known to deft., that he was raising money by mortgaging his reversion, & that the pltf.'s claim for rent, could hardly be founded upon any other alleged right than one resulting from a grant of the reversion, would warrant a jury in inferring that deft. had notice that pltf. was such grantee.—COOK *v.* GUERRA (1872), L. R. 7 C. P. 132; 41 L. J. C. P. 89; 26 L. T. 97; 20 W. R. 367.

Annotation:—**Refd.** Ashburton *v.* Nocton, [1915] 1 Ch. 274.

749. —— —— **Agreement to pay lump sum—Mortgagee with notice of lease.**]—By a lease in writing a house was demised to deft. for a term of four years at a yearly rent payable quarterly; & deft. entered under the lease. Soon after the commencement of the term the lessor agreed to accept, & deft. paid, a lump sum in satisfaction of all rent reserved by the lease during the term. The lessor then mortgaged the premises to pltf. Pltf. knew nothing of the payment of rent in advance by deft., & had only seen the counterpart lease; but she had made no inquiry of deft. before the mtge. was completed:—*Held:* pltf. was bound by the arrangement made between deft. & the lessor, & could not recover from deft. any part of the rent reserved by the lease.—GREEN *v.* RHEINBERG (1911), 104 L. T. 149, C. A.

Annotation:—**Refd.** Ashburton *v.* Nocton, [1915] 1 Ch. 274.

Right of mortgagee on giving notice.]—*See* Part IX., Sect. 2, sub-sect. 4, *post.*

Enforcement of covenant.]—*See* Sub-sect. 8, *post.*

Distress by mortgagor.]—*See* Sub-sect. 7, *post.*

SUB-SECT. 2.—CREATED AFTER MORTGAGE.

By mortgagor & mortgagee jointly.]—*See* Sub-sect. 3, *post.*

Under express powers.]—*See* Sub-sect. 4, *post.*

Under statutory powers.]—*See* Sub-sect. 5, *post.*

By mortgagor ultra vires.]—*See* Sub-sect. 6, *post.*

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ment brought upon a mtge. it appeared that before the mtge. was given deft. became a tenant of the mtgor. for a year:—*Held:* at the end of that time his right ceased, & the mtgees. could eject him without notice.—CANADA PERMANENT BUILDING & SAVINGS SOCIETY *v.* ROWELL (1860), 19 U. C. R. 124.—**CAN.**

SUB-SECT. 3.—BY MORTGAGOR AND MORTGAGEE JOINTLY.

See, now, Law of Property Act, 1925 (c. 20), s. 99.

750. Mortgagee under covenant to ratify — Whether binding on assigns.]—VINCENT *v.* ENNYS (1730), 2 Eq. Cas. Abr. 665; 22 E. R. 559.

Annotation :—**Consd.** Walmesley *v.* Butterworth (1835), 4 L. J. Ch. 253.

751. —— Leases under extinguished power — Whether mortgagee bound to satisfy.]—VINCENT *v.* ENNYS (1730), 2 Eq. Cas. Abr. 665; 22 E. R. 559.

Annotation :—**Refd.** Walmesley *v.* Butterworth (1835), 4 L. J. Ch. 253.

752. Covenants with mortgagor alone — Right of mortgagee to enforce—Assignee of mortgagee.]—If mtgor. & mtgee. make a lease, in which the covenants for the rent & repairs are only with the mtgor. & his assigns, the assignee of the mtgee. cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, & therefore do not run with it.—WEBB *v.* RUSSELL 1789), 3 Term Rep. 393; 100 E. R. 639.

Annotations :—**Consd.** Baker *v.* Gostling (1834), 1 Bing. N. C. 19. **Distd.** Sturgeon *v.* Wingfield (1846), 15 L. J. Ex. 212; Magnay *v.* Edwards (1853), 1 C. L. R. 141. **Refd.** Keppel *v.* Bailey (1834), 2 My. & K. 517; Rogers *v.* Hosegood, [1900] 2 Ch. 388; Manchester Brewery Co. *v.* Coombs, [1901] 2 Ch. 608. **Mentd.** Gibson & Johnson *v.* Minet & Fector (1791), 1 Hy. Bl. 569; Vernon *v.* Smith (1821), 5 B. & Ald. 1; Wakefield *v.* Brown (1846), 9 Q. B. 209; Bickford *v.* Parson (1848), 5 C. B. 920; Eccl. Comrs. for England *v.* Rowe (1880), 49 L. J. Q. B. 771.

753. —— —— Interests of mortgagor & mortgagee in assignee.]—A. being possessed of a term for years conveys it by way of mtge., & then joins with the mtgee. in a lease for a shorter term according to their respective estates & interests, & the lessee covenants with the mtgor. & his assigns to pay rent & keep the premises in repair during the lease; the term with all the estate & interest of mtgor. & mtgee. becomes vested in the assignee of the reversion, yet the mtgor. may afterwards maintain an action of covenant against the lessee, the covenants being in gross.—RUSSELL *v.* STOKES (1791), 1 Hy. Bl. 562; 126 E. R. 323, Ex. Ch.; *affg.* S. C. *sub nom.* STOKES *v.* RUSSELL (1790), 3 Term Rep. 678.

Annotations :—**Mentd.** Formby *v.* Barker, [1903] Ch. 539; L. C. C. *v.* Allen, [1914] 3 K. B. 642.

See, now, Law of Property Act, 1925 (c. 20), s. 141.

754. Covenant by mortgagor alone — For quiet enjoyment—No covenant by mortgagee implied.]—Where mtgor. & mtgee. join in a lease containing an express covenant by mtgor. only, for quiet enjoyment, no covenant by both for quiet enjoyment can be implied.—SMITH *v.* POCKLINGTON (1831), 1 Cr. & J. 445; 1 Tyr. 309; 148 E. R. 1497.

Annotation :—**Mentd.** Wakefield *v.* Brown (1846), 9 Q. B. 209.

755. Right of re-entry in mortgagor or mortgagee—Effect of re-entry—Estate revested in mortgagee.]—Where by lease mtgee. demised, & the extrix. of mtgor. demised & confirmed, & a power of re-entry was reserved to them or either of them :—*Held :* it operated as the demise of the mtgee. & the confirmation of the mtgor.'s representative; the re-entry enured to revest the estate in the mtgee.; & a count in ejectment laying the demise jointly in the two, was not sustainable.—DOE d. BARNEY *v.* ADAMS (1832), 2 Cr. & J. 232; 2 Tyr. 289; 1 L. J. Ex. 105; 149 E. R. 101.

Annotation :—**Refd.** Doe d. Campbell *v.* Hamilton (1849), 13 Q. B. 977.

756. —— Whether exercisable by mortgagor alone.]—A demise by a mtgor. & mtgee. of leasehold premises contained a proviso for re-entry by either of them if the lessee should assign without the mtgor.'s consent. After several mesne assignments with the mtgor.'s consent, the premises were assigned to M. by a deed to which S., assignee of the mtge., & the mtgor. were parties, & which contained a proviso for re-entry by the mtgor. on M. assigning without his consent. M. paid rent to the mtgor., & subsequently assigned without his consent, whereupon S. & the mtgor. brought ejectment :—*Held :* M. was not estopped from showing that the mtgor. was not the legal reversioner; & also, neither the mtgor. nor S. could recover, the one having only an equitable title to the premises, & the other having no right of re-entry reserved to him.—SAUNDERS *v.* MERRYWEATHER (1865), 3 H. & C. 902; 35 L. J. Ex. 115; 30 J. P. 265; 11 Jur. N. S. 655; 13 W. R. 814; 159 E. R. 790.

757. —— Reservation to mortgagor only in final assignment—Not exercisable by mortgagee.]—SAUNDERS *v.* MERRYWEATHER, No. 756, *ante.*

758. Demise by mortgagee — Confirmation by mortgagor—Does not operate as joint demise.]—DOE d. BARNEY *v.* ADAMS, No. 755, *ante.*

759. Rent & re-entry reserved to mortgagor—Declaration protecting estate of mortgagee—Bankruptcy of mortgagor—Mortgagee entitled to rent.]—Mtgee. of leaseholds, held for a term of years, joined with the mtgor. in leasing part of the property to A. B. for the residue of the term, at a rent of £3 *per annum,* payable to the mtgor., his exors., administrators & assigns. The lease contained a clause reserving the right of re-entry, in case of non-payment of rent, to the mtgor., his exors., administrators or assigns. There was also a declaration that nothing therein contained should be construed to defeat, impeach or determine the estate of the mtgee. under the mortgage deed, so far as the same affected the entirety of the premises. After the execution of the deed the mtgor. became bkpt. :—*Held :* A. B. was entitled to the benefit of this lease, exempt from the mtge., but the mtgee., & not the assignee of the bkpt. mtgor., was entitled to the rent of £3 *per annum.*—EDWARDS *v.* JONES (1844), 1 Coll. 247; 63 E. R. 404.

760. Covenant for payment with mortgagor & mortgagee—Rent payable to mortgagee during mortgage—To mortgagor on repayment—Action by party entitled to rent.]—A. being possessed of a term of five thousand years created on Aug. 4, 1815, assigned to B., by indenture of Aug. 5, 1818, subject to redemption on payment by A. to B. of £1,200 & interest. On Aug. 17, 1820, B., by indenture, to which A. was a party, & executed by him, at the request of A., demised to C. for four thousand years; "*reddendum* to B., his exors., etc., during the continuance of the mtge., & after payment & satisfaction thereof, to A., his exors., etc., the yearly rent of £18 18*s.*" & C. covenanted "to & with A., his exors., etc., & also to & with B., his exors., etc., to pay the said yearly rent of £18 18*s.* on the several days & times & in the manner in which same was made payable." To an action of covenant by the assignee of B. against the assignee of C., for non-payment of this rent, deft. pleaded that before the rent became due, & during the continuance of the mtge., B. was paid & satisfied all the principal & interest due on the mtge., out of moneys arising by the sale of the demised premises & afterwards, by indenture executed by him, acknowledged himself to be so paid & satisfied, & released & discharged A. from all claims in respect thereof :—*Held :* (1) it sufficiently showed that the mtge. no longer continued; but (2) it was bad for

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duplicity, in averring both the payment of the mortgage money, & the execution of the release; (3) the covenant was capable of being read as several by reason of its being for payment of the rent at one period to A., & at another to B., & the action was therefore rightly brought by B. only.—WHITAKER *v.* HARROLD (1847), 11 Q. B. 163; 17 L. J. Q. B. 343; 12 Jur. 395; 116 E. R. 437, Ex. Ch.; *affg.* S. C. *sub nom.* HARROLD *v.* WHITAKER (1846), 11 Q. B. 147.

Annotations:—Generally, **Mentd.** Ryalls *v.* Brammall (1848), 1 Exch. 734; Ryalls *v.* R. (1849), 11 Q. B. 795; Graham *v.* Gibson (1850), 4 Exch. 768.

761. —— —— —— ——.] — CROSSLEY *v.* BROWN (1856), 27 L. T. O. S. 80.

762. Mortgaged & unmortgaged land in same lease—Action on joint demise.]—A. seised in fee of a moiety of certain premises & entitled to the equity of redemption in the other moiety of which B. was mtgee., joined with B. in demising the entirety of the premises to deft. by a lease, which stated that B. was mtgee. of one moiety, & that he demised by the direction of A.; the rent was reserved to A. & B. jointly, & a joint right of re-entry by them was provided for breach of the covenants. In ejectment, on the joint demise of A. & B.:—*Held:* the lessors of pltf. were entitled to recover against deft. who took under the deed containing a joint demise, & providing for a joint right of re-entry by them.—DOE d. CAMPBELL *v.* HAMILTON (1849), 13 Q. B. 977; 19 L. J. Q. B. 99; 14 Jur. 546; 116 E. R. 1536.

Annotation:—**Mentd.** Beer *v.* Beer (1852), 16 Jur. 223.

763. Alteration of premises with consent—Stipulation for consent of mortgagor—Consent by mortgagee invalid.]—On May 10, 1850, the tenant for life, by arrangement with the mtgees., demised the mines to the trustee for the mtgees. for forty years on an ordinary working lease, & the lease contained a covenant not to remove the pillars without the consent of the tenant for life, his heirs & assigns, or the person or persons for the time being entitled to the premises:—*Held:* the covenant was for the protection of the equity of redemption, & the mtgees. had no power to consent to the removal of the pillars by the lessee.—MOSTYN *v.* LANCASTER, TAYLOR *v.* MOSTYN (1883), 23 Ch. D. 583; 52 L. J. Ch. 848; 48 L. T. 715; 31 W. R. 686, C. A.

764. Title of lessee — Power of mortgagor in possession to give better title—Lessee bound by covenants binding mortgagor—In second mortgage.]—Where a lease is granted by a first mtgee. & the mtgor., the lessee must take by the better title. Since Conveyancing & Law of Property Act, 1881 (c. 41), the mtgor. if in possession can give the better title. Such a lessee will therefore be bound by the covenant of the mtgor. contained in a second mtge., & will not be deemed to take under the paramount title of the first mtgee.—JOHN BROTHERS ABERGARW BREWERY CO. *v.* HOLMES, [1900] 1 Ch. 188; 69 L. J. Ch. 149; 81 L. T. 771; 64 J. P. 153; 48 W. R. 236; 44 Sol. Jo. 132.

Annotation:—**Mentd.** Wilkes *v.* Spooner, [1911] 2 K. B. 473.

765. Apportionment of rent—Lease of houses & furniture therein—Mortgagee & judgment creditors of mortgagor.]—A mtgor. & mtgee. of houses joined in making a lease of the houses & of furniture in them which belonged to the mtgor. at an inclusive rent payable to the mtgor. until the mtgee. should give notice to the contrary. The mtgee. entered into receipt of the rents, & a judgment creditor of the mtgor. obtained the appointment of a receiver of the interest of the mtgor. in the rent reserved by the lease. The mtgor. was under covenant not to remove the furniture from the houses without the mtgee.'s consent:—*Held:* the creditor was entitled to have the rent apportioned as between the houses & the furniture, so that the receiver could recover the amount apportioned to the furniture.—HOARE (CHARLES) & CO. *v.* HOVE BUNGALOWS, LTD. (1912), 56 Sol. Jo. 686, C. A.

Distress by mortgagor.]—*See* Sub-sect. 7, *post.*

Enforcement of covenants by mortgagor.]—*See* Sub-sect. 8, *post.*

SUB-SECT. 4.—UNDER EXPRESS POWERS.

766. Lease to trustee for mortgagor—Valid.]—Until a mtgee. asserts his rights under his mtge. security, the power of ownership in the mtgor. remains wholly unfettered

A mtge. contained a power enabling the mtgor., until foreclosure, etc., to grant leases; & the mtgor., in exercise of the power, granted a lease to a trustee for himself:—*Held:* the lease was a valid exercise of the power.—BEVAN *v.* HABGOOD (1860), 1 John. & H. 222; 30 L. J. Ch. 107; 3 L. T. 209; 7 Jur. N. S. 41; 8 W. R. 703; 70 E. R. 728

Annotation:—**Dbtd.** Boyce *v.* Edbrooke, [1903] 1 Ch. 836.

767. Extension of statutory power — Not excluded by express power—In absence of special provision—Conveyancing Act, 1881 (c. 41), s. 18.]—A mtge. deed contained a declaration that the power of leasing conferred by law on a mtgor. should extend to a lease by the mtgors. for any term not exceeding one thousand years "provided that a counterpart of any such lease, duly executed by the lessee, be delivered to the mtgees., their exors., administrators & assigns, within one calendar month next after the execution thereof" & the consent thereto of the mtgees. should not be required:—*Held:* no intention to exclude sub-sect. 11 of above sect. was expressed by the mtge. deed, & consequently a lease under the extended power was valid, even if no counterpart was delivered to the mtgees.—PUBLIC TRUSTEE *v.* LAWRENCE, [1912] 1 Ch. 789; 81 L. J. Ch. 436; 106 L. T. 791; 56 Sol. Jo. 504.

See, now, Law of Property Act, 1925 (c. 20). s. 99.

SUB-SECT. 5.—UNDER STATUTORY POWERS.

See, now, Law of Property Act, 1925 (c. 20), s. 99.

768. Exclusion of statutory powers—Agreement for mortgage prior to operation of statute—Mortgagee not entitled.]—In a mtge. of land to be given in pursuance of an agreement made before Conveyancing Act, 1881 (c. 41), the mtgee. is not entitled to a provision to expressly exclude the operation of sect. 18 of the Act, under which a mtgor. in possession has power to make leases of the mtged. land.—*Re* NUGENT & RILEY (1883), 49 L. T. 132.

Annotation:—**Reld.** Farmer *v.* Pitt, [1902] 1 Ch. 954.

—— **Effect of express powers.**]—*See* No. 767, *ante.*

PART VI. SECT. 5, SUB-SECT. 4.

n. *Covenant to grant leases — Whether mortgagor can determine pre-existing tenancies.*] — A mtge. deed contained a power authorising the mtgor. to grant leases of any part of the mtged. premises that might be "out of lease," provided that the counterpart be delivered to the mtgee.: —*Held:* this power did not enable the mtgor. to determine pre-existing tenancies.—MILES *v.* MURPHY (1871), I. R. 5 C. L. 382.—**IR.**

769. Effect on estate of mortgagee—Converted to estate expectant on term.]—Where a lease is made by a mtgor. in possession under the powers given by Conveyancing & Law of Property Act, 1881 (c. 41), the mtgee., on giving notice to the tenant & going into possession, is by virtue of the Act entitled to enforce the covenants & conditions in the lease in same manner as if he had been a party to it, & such right cannot be affected by any collateral agreement between the lessor & the lessee.

The statute gives the mtgor power to create a term out of the estate of the mtgee., & so to convert that estate into one expectant on the term granted by the lease (FRY, L.J.).—MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY *v.* SMITH (1888), 22 Q. B. D. 70; 58 L. J. Q. B. 61; 37 W. R. 42; 5 T. L. R. 17, C. A.

Annotations :—**Consd.** Matthews *v.* Usher (1899), 68 L. J. Q. B. 988. **Apld.** Robbins *v.* Whyte, [1906] 1 K. B. 125.

770. —— Lease binding — Obstruction of tenant's light.]—A mtgor. in possession of land, laid out for building, granted a building lease of part of the land to A., pursuant to Conveyancing & Law of Property Act, 1881 (c. 41), s. 18, & the mtgees. were not parties to it. The lease was granted in consideration of buildings recently erected on the demised land. Subsequently the mtgees. conveyed a part of the land, adjoining the houses, to B., who used it as a cricket ground, & erected on his boundary, adjoining the houses, a hoarding to prevent the cricket ground being overlooked by the occupiers of the houses. The hoarding caused a substantial diminution of light to the basement windows of the houses. On action by A. to restrain B. from permitting the hoarding to remain :—*Held :* (1) the mtgees. were bound by the lease as though they had been parties to it; (2) A. was entitled to an unobstructed access of light to his houses, subject only, if at all, to restriction from buildings to be erected on other parts of the land.—WILSON *v.* QUEEN'S CLUB, [1891] 3 Ch. 522; 60 L. J. Ch. 698; 65 L. T. 42; 40 W. R. 172.

Annotations :—*As to* (1) **Refd.** Brown *v.* Peto, [1900] 2 Q. B. 653. *Generally*, **Mentd.** Boyce *v.* Paddington B. C., [1903] 1 Ch. 109.

771. Enforcement of covenants by mortgagee in possession—Collateral agreement between lessor & lessee—Right of mortgagee not affected.]—MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY *v.* SMITH, No. 769, *ante*.

772. What leases within powers—Lease renewable at lessee's option—Not binding on mortgagee—When mortgagor out of possession.]—DUNDAS *v.* VAVASOUR (1895), 39 Sol. Jo. 656.

773. —— Occupation lease of mortgaged house—With sporting rights over adjoining land—Furniture in house.]—A mtgor. of land while in possession leased for fourteen years the mtged. house, together with the furniture in it & land adjoining it, & the sporting rights over the remainder of the mtged. land, which had been let, before the mtge. was created, to agricultural tenants with a reservation of sporting rights, the mtgee. having foreclosed :—*Held :* the lease was valid as against the mtgee. under Conveyancing & Law of Property Act, 1881 (c. 41), s. 18.—BROWN *v.* PETO, [1900] 2 Q. B. 653; 69 L. J. Q. B. 869; 83 L. T. 303; 49 W. R. 324; 16 T. L. R. 561, C. A.

Annotations :—**Consd.** King *v.* Bird, [1909] 1 K. B. 837. **Mentd.** *Re* Knight & Hubbard's Underlease, Hubbard *v.* Highton, [1923] 1 Ch. 130.

774. —— Lease of mortgaged & unmortgaged land—One inclusive rent—Invalid.]—A lease made under the provisions of Conveyancing & Law of Property Act, 1881 (c. 41), s. 18, by a mtgor. in possession is valid as against the mtgee. notwithstanding that it contains an option for the lessee to determine the lease before, or to renew the lease after, the determination of the term.

But if the demised premises include land other than the mtged. land, & one inclusive rent only is reserved, the lease is invalid as against the mtgee. A deed of apportionment subsequently executed between the mtgor. & his lessee apportioning the rent as between the several parcels does not validate such a lease as against the mtgee.—KING *v.* BIRD, [1909] 1 K. B. 837; 78 L. J. K. B. 499; 100 L. T. 478.

775. —— Lease determined on lessee's option—Valid.]—KING *v.* BIRD, No. 774, *ante*.

Distress by mortgagor.]—*See* Sub-sect. 7, *post*.

Enforcement of covenants.]—*See* Sub-sect. 8, *post*.

SUB-SECT. 6.—BY MORTGAGOR ULTRA VIRES.

A. Validity against Mortgagor.

776. General rule—Good by estoppel.]—OMELAUGHLAND *v.* HOOD (1639), 1 Roll. Abr. 874; *sub nom.* EDWARDS *v.* OMELLHALLUM, March, 64; 82 E. R. 413.

Annotation :—**Consd.** Webb *v.* Austin (1844), 7 Man. & G. 701.

777. —— ——.]—Plea to an avowry of distress for rent arrear, "that before the lessor, who claimed title under a pretended agreement between him & R., had anything in the premises, & before the demise by the lessor to the lessee R. mortgaged them in fee to C.; that the mtge. being forfeited, notice of the forfeiture being given to the lessee, & the lessee having been required to attorn, & having attorned to the mtgee., he distrained for the rent, when the lessee paid him, to save the goods from being sold ":—*Held :* ill.—ALCHORNE *v.* GOMME (1824), 2 Bing. 54; 9 Moore, C. P. 130; 2 L. J. O. S. C. P. 118; 130 E. R. 225.

Annotations :—**Apld.** Dyer *v.* Bowley (1824), 2 Bing. 94. **Expld.** Pope *v.* Biggs (1829), 9 B. & C. 245. —— Johnson *v.* Jones (1839), 9 Ad. & El. 809. **Mentd.** Gravenor *v.* Woodhouse (1824), 9 Moore, C. P. 148; Hill *v.* Saunders (1824), 2 Bing. 112; Gregory *v.* Doidge (1826), 11 Moore, C. P. 394.

778. —— ——.]—If a lessor, who has only an equitable title, grants a lease, he has, as against his lessee, a good title by estoppel.—DOE d. MARRIOTT *v.* EDWARDS (1834), 6 C. & P. 208, N. P.; *subsequent proceedings*, 5 B. & Ad. 1065.

779. —— ——.]—Particulars of sale described the property as "a shop & a dwelling-house, with rooms & offices over, for many years occupied by a tenant under a twenty one years' lease, nine of which will be unexpired at Lady day, 1843, at a rent of £48, & held by lease for a term of sixty-four years, at a ground rent of £8 8*s*." By the abstract delivered, it appeared that A., by indenture of Sept. 30, 1817, demised the premises to B. for eighty nine years less twenty one days from Michaelmas, 1817, with various covenants to be performed by B., his heirs, etc.; that B., on Mar. 25, 1829, mortgaged the premises for the residue of the term, to secure £487 & interest to C.; & that, by indenture of Apr. 2, 1831, B. demised the premises to D. for twenty one years less eight days, at the rent of £48, with covenants on the part of D., similar to those of B. in the indenture of Sept. 1817. The mtgees. were willing to execute any conveyance that might be requisite for the purpose of making a good title to the purchaser :—*Held :* B. was in a situation to make a good title to the premises sold, the lease to D., though originally a lease by estoppel, being

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convertible into a lease in interest, by the concurrence of the mtgees.—WEBB *v.* AUSTIN (1844), 7 Man. & G. 701; 8 Scott, N. R. 419; 13 L. J. C. P. 203; 3 L. T. O. S. 282; 135 E. R. 282.

Annotations:—**Consd.** Cuthbertson *v.* Irving (1859), 4 H. & N. 742. **Refd.** Hickman *v.* Machin (1859), 28 L. J. Ex. 310. **Mentd.** Weld *v.* Baxter (1856), 11 Exch. 816.

780. —— ——.]—TRENT *v.* HUNT, No. 648, *ante*.

781. —— ——.]—An assignee of the reversion may establish his title against the lessee by way of estoppel.

B. being mtgor. in possession, on Feb. 22, 1848, by indenture executed by him & deft., demised to deft. certain premises for seven years, & deft. covenanted to repair. On Feb. 2, 1854, B. executed an indenture, whereby, after reciting the mtge. & that he had sold the equity of redemption to pltf., he "granted, bargained & sold, aliened, released, & surrendered the premises, & all his estate, right & title, both at law & in equity therein, to pltf.," etc. Pltf. sued deft. for a breach of the covenant to repair:—*Held:* deft. was estopped from denying that the lessor had such a legal estate as would warrant the lease; & as no other legal estate or interest was shown to have been in the lessor, it must be taken as against the lessee, by estoppel, that the lessor had an estate in fee.—CUTHBERTSON *v.* IRVING (1860), 6 H. & N. 135; 29 L. J. Ex. 485; 158 E. R. 56; *sub nom.* IRVING *v.* CUTHBERTSON, 3 L. T. 335; 6 Jur. N. S. 1211; 8 W. R. 704, Ex. Ch.

Annotations:—**Consd.** Morton *v.* Woods (1869), 38 L. J. Q. B. 81. **Refd.** Hartcup *v.* Bell (1883), Cab. & El. 19; Underhay *v.* Read (1887), 58 L. T. 457; David *v.* Sabin (1893), 62 L. J. Ch. 347; Onward Bldg. Soc. *v.* Smithson, [1893] 1 Ch. 1; Keith *v.* Gancia (1904), 73 L. J. Ch. 411.

782. —— —— **Estoppel mutual—Mortgagor liable on covenants.**]—The estoppel which enables a landlord, who is mtgor. without the legal estate to sue for rent, is mutual, & renders him liable on the covenants in the lease.—HARTCUP & CO. *v.* BELL (1883), Cab. & El. 19.

783. Assignment of equity by mortgagor—Title by estoppel—Right of assignee to enforce covenants.]—CUTHBERTSON *v.* IRVING, No. 781, *ante*.

Estoppel by deed.]—*See* ESTOPPEL, Vol. XXI., pp. 242-287, Nos. 700-1018.

Effect of estoppel on tenant.]—*See* Sub-sect. 6, (

B. Validity against Mortgagee.

(a) In General.

784. General rule—Void against mortgagee.]—POPE *v.* BIGGS, No. 817, *post*.

785. —— ——.]—If a lease be granted by a mtgor. prior to the mtge., the mtgee. has same rights against the lessee & those claiming under him that the mtgor. had, & no other than he had; & his remedy must be on the lease as assignee of the reversion, so long as the lease is in existence, & the tenant acknowledges his title. If, however, the lease be subsequent to the mtge., then the mtgee. may treat the lessee & all those who may be in possession as wrongdoers, & may bring ejectment, but he cannot distrain or bring any action for the rent they have contracted to pay, as there is no relation of landlord & tenant between them. If the tenant choose to pay the rent to the mtgee., & he accepts it, a relation of landlord & tenant is created between the mtgee. & the tenant; & the remedy of the mtgee. will depend upon the particular circumstances of each case.

No notice is necessary to be given by the mtgee. that he means to proceed against tenants when they have come in subsequently to the mtge., because in such cases their title is wrongful, as against the mtgee.; but there may be cases where, in consequence of the conduct of the mtgee., notice may become necessary.—ROGERS *v.* HUMPHREYS (1835), 4 Ad. & El. 299; 1 Har. & W. 625; 5 Nev. & M. K. B. 511; 5 L. J. K. B. 65; 111 E. R. 799.

Annotations:—**Apld.** *Re* Ind, Coope & Co., Fisher *v.* The Co., Knox *v.* The Co., Arnold *v.* The Co., [1911] 2 Ch. 223. **Mentd.** Yellowly *v.* Gower (1855), 24 L. J. Ex. 289.

786. —— ——.]—If a person who has an estate borrows money on it upon mtge., & the mtgor. afterwards grants a lease of the property to a tenant, *e.g.*, for twenty one years, that lease being made after the mtge., cannot be set up by the tenant to prevent the mtgee. from recovering the possession of the property, & the mtgee. may put the tenant out of possession by an ejectment, & the only remedy the tenant has for being thus put out of possession is against the mtgor. But if instead of the mtgee. turning the tenant out of possession, he consents to take the tenant as his tenant, the mtgee. will not thereby set up the twenty-one years lease, but will make the tenant his tenant from year to year only.—DOE d. HUGHES *v.* BUCKNELL (1838), 8 C. & P. 566, N. P.

787. —— ——.]—TRENT *v.* HUNT, No. 648, *ante*.

788. —— ——.]—GIBBS *v.* CRUIKSHANK, No. 711, *ante*.

789. Exceptions to rule—Lease authorised by mortgagee—Mortgagor in possession with authority to lease.]—(1) Where a mtgor. in possession makes a lease, after the mtge., reserving rent, the mtgee. cannot, by merely giving the lessee notice of the mtge., & that principal & interest are in arrear, & requiring such lessee to pay the rent to him, make the lessee his tenant, or entitle himself to distrain for rent subsequently accruing under the terms of the lease. Nor, if, after such mtgee.'s death, his exors. distrain for rent accrued before his death, but after the notice, & avow upon a holding by the lessee under the terms of the original lease, as tenant to the mtgee., will such avowry be supported by proof that, after the mtgee.'s death, the lessee paid the exors. rent, in sums & at periods corresponding to the reservation in the lease, & recognised them as his landlords by letter; such a recognition not having relation back to the notice.

PART VI. SECT. 5, SUB-SECT. 6.—A.

783 i. *Assignment of equity by mortgagor—Title by estoppel—Right of assignee to enforce covenants.*]—HASSARD *v.* FOWLER (1892), 32 L. R. Ir. 49.—**IR.**

o. Whether good by estoppel.]—Where, subsequently to a mtge., the mtgor. creates new tenancies, & submits rental to mtgee., who raises no objection, such tacit acquiescence does not suffice to create a new tenancy as against the mtgee.—*Re* O'ROURKE'S ESTATE (1889), 23 L. R. Ir. 497.—**IR.**

PART VI. SECT. 5, SUB-SECT. 6.—B. (a).

784 i. *General rule — Void against mortgagee.*]—MCKAY *v.* DAVIDSON (1867), 13 Gr. 498.—**CAN.**

784 ii. —— ——.]—CONTINENTAL TRUSTS CO. *v.* MINERAL PRODUCTS CO. (1904), 25 C. L. T. 67; 3 N. B. Eq. Rep. 28.—**CAN.**

784 iii. —— ——.]—FIRST NATIONAL INVESTMENT CO. *v.* ODDSON, FIRST NATIONAL INVESTMENT CO. *v.* ODDSON (Man.), [1919] 3 W. W. R. 591; 48 D. L. R. 732.—**CAN.**

784 iv. —— ——.]—A mtgee. purchasing under 1860 Act is not bound by any tenancy which the mtgor. may have created after the execution of the mtge. deed, unless he (the mtgee.) ratifies & confirms it.—YOUNG *v.* MCKINNON, Mac. 85.—**N.Z.**

784 v. —— ——.]—The mtgor. of land cannot, by a subsequent lease, confer on the lessee any rights which shall conflict with those of the prior mtgee.—DREYER'S TRUSTEE *v.* LUTLEY (1884), 3 S. C. 59.—**S. AF.**

784 vi. —— ——.]—Where land mortgaged has subsequently been

(2) *Qu.:* how far the mtgee. by his own conduct, as by permitting the mtgor. to remain in possession & to lease, without interfering, may preclude himself from treating the mtgor. & his lessee as trespassers.—EVANS *v.* ELLIOT (1838), 9 Ad. & El. 342; 1 Per. & Dav. 256; 1 Will. Woll. & H. 744; 8 L. J. Q. B. 51; 112 E. R. 1242.

Annotations:—*As to* (1) **Distd.** Burrowes *v.* Gradin (1843), 1 Dow. & L. 213; Poole Corpn. *v.* Whitt (1846), 16 L. J. Ex. 229; Kearsley *v.* Philips (1883), 11 Q. B. D. 621; Underhay *v.* Read (1887), 20 Q. B. D. 209. **Folld.** Towerson *v.* Jackson, [1891] 2 Q. B. 484. *As to* (2) **Distd.** Doe d. Parry *v.* Hughes (1847), 11 Jur. 698. *Generally*, **Mentd.** Evans *v.* Matthias (1857), 29 L. T. O. S. 209.

790. —— —— Mortgagee substantially a party.]—C., the owner of a leasehold estate which was subject to a mtge., entered without the privity of the mtgees. into an agreement with P. to grant him a lease for twenty one years, & in 1875 P. took possession under this agreement. On Mar. 25, 1881, the mtgees.' solrs. wrote to P. stating that they, on behalf of the mtgees., had withdrawn C.'s authority to receive the rents & asking him to pay the rent due that day & all future rent to them. P. wrote to ask C. whether he ought to pay according to the notice, & C. replied that he would be correct in doing so. P. consulted his solrs., who inspected the mortgage deed, & advised him that the mtgees. could claim rent from him. P. therefore paid the mtgees. the rent due on Mar. 25, & on June 22 gave them notice to determine his tenancy at Christmas. At the end of the year the mtgees. refused to accept possession, & in June, 1882, they & C. commenced this action to compel P. to take a lease according to the agreement:—*Held:* the notice by the mtgees. to the tenant to pay rent to them & the payment accordingly did away with the agreement between C. & P. & made P. tenant from year to year to the mtgees.

Evidence might have been given, if the facts were so, that the mtgees. were in substance parties to the agreement for the lease, that they authorised it, & that it was made by the mtgor. for them as well as for himself (LORD SELBORNE, C.).

But the paramount right of the mtgees. being asserted, the tenant has availed himself of the right which in that case the law gives him to consider himself as holding no longer from the mtgor., but as a tenant from year to year of the mtgees. (LORD SELBORNE, C.).

When a mtgee. intervenes by virtue of his paramount title, & claims rent, which he has a right to do without setting up any lease whatever, the rent if paid will be the previously existing rent, under a new tenancy from year to year under the mtgees. (LORD SELBORNE, C.).—CORBETT *v.* PLOWDEN (1884), 25 Ch. D. 678; 54 L. J. Ch. 109; 50 L. T. 740; 32 W. R. 667, C. A.

791. —— Adoption by mortgagee.]—WEBB *v.* AUSTIN, No. 779, *ante*.

—— **Acts of adoption.**]—*See* Sub-sect. 6, B. (*b*) i., *post*.

792. Legal & equitable estate uniting in same party—Whether lease binding—Party with notice of lease.]—A. made an equitable mtge. to B., & afterwards agreed to grant a lease to C., who had notice of the mtge.; B. afterwards purchased the equity of redemption, with notice of C.'s agreement, & took a conveyance to himself:—*Held:* B. was bound, out of his whole interest, to grant the lease to C.—SMITH *v.* PHILLIPS (1837), 1 Keen, 694; 6 L. J. Ch. 253; 48 E. R. 474.

793. —— —— After receiving rent from tenant.]—A. seised in fee, mortgaged in fee to B., & afterwards leased to deft. D. purchased the legal estate from B., & also the equitable estate from a party who derived it from A., which party also joined in the conveyance of the legal estate:—*Held:* D., though he had received rent from deft., was not bound by A.'s lease to him, but might recover against deft. in ejectment after expiration, of a notice to quit, or sue him for use & occupation after the payment & receipt of rent.—DOE d. DOWNE (LORD) *v.* THOMPSON, DOWNE (LORD) *v.* THOMPSON (1847), 9 Q. B. 1037; 8 L. T. O. S. 408; 11 Jur. 1007; 115 E. R. 1572.

See, also, No. 781. *ante*.

Right of mortgagee to eject.]—*See* Part IX., Sect. 2, sub-sect. 2, *post*.

(*b*) *Adoption of Tenancy.*

i. *Acts of Adoption.*

794. Acts in regard to rent—Claiming rent.]—The attorney for the mtgee., who was also attorney for the mtgor., having applied to the occupier of the land for rent to pay the interest of the mtge. with, & having threatened to distrain:—*Held:* the mtgee. could not treat the occupier as a trespasser, & eject him on a demise anterior to the application by his attorney as above.—DOE d. WHITAKER *v.* HALES (1831), 7 Bing. 322; 5 Moo. & P. 132; 9 L. J. O. S. C. P. 110; 131 E. R. 124.

Annotations:—**Distd.** Doe d. Rogers *v.* Cadwallader (1831), 2 B. & Ad. 473. **Consd.** Evans *v.* Elliot (1838), 9 Ad. & El. 342. **Refd.** Doe d. Wilkinson *v.* Goodier (1847), 10 Q. B. 957.

795. —— ——.]—A plea to an action of debt on a demise for rent, that long before the time of the demise made, pltf. had been discharged under an Insolvent Debtor's Act, & had been permitted by his assignee to remain in the possession & management of premises, & to make the demise in question; but that before any of the rent became due, the assignee gave a notice claiming to have the rent paid to him, whereby deft. became liable to pay to the assignee, the reversion not being vested in pltf., & his right having, by reason of the notice, become determined:—*Held:* bad on special demurrer.

Where a mtgor. is in possession &, after the mtge., makes a lease, notice by the mtgee. to the tenant to pay the rent to him will not of itself make him tenant to the mtgee., but the old tenancy created must be put an end to, & a new tenancy created by mtgees. receiving rent from the tenant.—PARTINGTON *v.* WOODCOCK (1835), 6 Ad. & El. 690; 1 Har. & W. 262; 5 Nev. & M. K. B. 672; 4 L. J. K. B. 239; 112 E. R. 266.

Annotation:—**Consd.** Towerson *v.* Jackson, [1891] 2 Q. B. 484.

796. —— ——.]—DOE d. DOWNE (LORD) *v.* THOMPSON, DOWNE (LORD) *v.* THOMPSON, No. 793, *ante*.

797. —— ——.]—CORBETT *v.* PLOWDEN, No. 790, *ante*.

798. —— **Receipt of rent.**]—ROGERS *v.* HUMPHREYS, No. 785, *ante*.

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leased, the mtgee. has the right to have the lease set aside as prejudicial to his rights.—ALBERTYN *v.* VAN DER WESTHUIZEN (1888), 5 S. C. 385.—**S. AF.**

792 i. *Legal & equitable estate uniting in same party—Whether lease binding—Party with notice of lease.*]—A mtgor. having made a lease of part of the mtged. premises, the mtgee., with notice of the lease, took from the mtgor. a conveyance of the equity of redemption, in such a way as that, instead of being kept distinct, it became united with the interest in the mtge.:—*Held:* the mtgee. was bound by the lease.—O'LOUGHLIN *v.* (1873), 7 I. R. Eq. 483.—**IR.**

PART VI. SECT. 5, SUB-SECT. 6.—B. (b) i.

798 i. *Acts in regard to rent—Receipt of rent.*]—PUFFER *v.* IRELAND (1905), 5 O. W. R. 447; 10 O. L. R. 87.—**CAN.**

Sect. 5.—Leases and tenancies: Sub-sect. 6, B. (b) i. & ii., & C. (a) & (b).]

799. —— ——.]—DOE d. BOWMAN *v.* LEWIS, No. 619, *ante*.

800. —— ——.]—B. demised, by an instrument not under seal, three windows in a factory to pltfs. & stipulated to supply steam power. B. at the time of the demise was mtgor. in possession. His mtgees. sold to deft., who did not accept rent from pltfs., but continued to supply steam power. Subsequently a dispute arose as to the terms upon which pltfs. should continue tenants of deft., who thereupon cut off the steam power. Pltfs. having sued deft. for cutting off the steam power:—*Held:* no action would lie against deft.—SMITH *v.* EGGINGTON (1874), L. R. 9 C. P. 145; 43 L. J. C. P. 140; 30 L. T. 521.

Annotation:—**Mentd.** Manchester Brewery Co. *v.* Coombs, [1901] 2 Ch. 608.

801. —— ——.]—In 1881, before the coming into operation of Conveyancing & Law of Property Act, 1881 (c. 41), leasehold premises were mortgaged by way of sub-demise to N. for the residue of a newly created term of sixty years, less the last three days thereof. In 1892 the mtgor. purported to underlet the premises to G. & co. for twenty one years at a rent of £140, & the deed contained a covenant not to sublet without the consent of the landlord. In 1895 N. foreclosed the mtgor., but did not get in the last three days of the term, & thenceforward G. & co. paid the rent to N. until his death in 1899. Subsequently G. & co. sublet the premises under a licence given by N.'s exors., who therein described themselves as being the reversioners on the underlease of 1892. Pltf., who claimed through N.'s exors., brought an action against G. & Co., & their sub-lessee to recover possession of the premises upon the footing that the underlease was not binding upon him:—*Held:* he was estopped as against both defts. from denying that he was the reversioner on the underlease.—KEITH *v.* GANCIA (R.) & Co., LTD., [1904] 1 Ch. 774; 73 L. J. Ch. 411; 90 L. T. 395; 52 W. R. 530; 20 T. L. R. 330; 48 Sol. Jo. 329, C. A.

Annotation:—**Mentd.** Anderson *v.* Equitabes Assce. Soc. of United States (1926). 134 L. T. 557.

—— **Notice of mortgage to tenant.**]—*See* Nos. 802–808, *post*.

802. Notice of mortgage to tenant.]—POPE *v.* BIGGS. No, 817, *post*.

803. ——.]—In *assumpsit* for use & occupation, under a plea of *non assumpsit*, deft. may show that he has received a notice to pay rent to a mtgee. of the premises. But if the action be for occupation enjoyed before the notice was received, then such a defence must be specially pleaded.

When the mtgee. gave notice that the future rent was to be paid, it follows, that deft. ceased to occupy by the permission of the mtgor., but by the permission of the mtgee. The mtgee. might have ejected deft. from the possession (TINDAL, C.J.).—WADDILOVE *v.* BARNETT (1836), 2 Bing. N. C. 538; 4 Dowl. 347; 1 Hodg. 395; 2 Scott, 763; 5 L. J. C. P. 145; 132 E. R. 210.

Annotations:—**Consd.** Evans *v.* Elliot (1838), 9 Ad. & El. 342; Wilton *v.* Dunn (1851), 17 Q. B. 294. **Refd.** Brook *v.* Biggs (1836), 2 Bing. N. C. 572; Hayselden *v.* Staff (1836), 5 Ad. & El. 153; Newport *v.* Harley (1845), 14 L. J. Q. B. 242; Mountney *v.* Collier (1853), 22 L. J. Q. B. 124. **Mentd.** Selby *v.* Browne (1845), 14 L. J. Q. B. 307.

804. ——.]—PARTINGTON *v.* WOODCOCK, No. 795, *ante*.

805. ——.]—A., after mortgaging in fee to B., demises to C. for years from Lady day, at a quarterly rent. A. afterwards sells the equity of redemption in parcel of the mortgaged premises to B. B. in Aug. gives notice of the mtge., & requires C. to pay to himself, & not to A., rents then due or thereafter to become due from C. in respect of the mtged. premises. B. then enters upon the parcel sold. In Dec. C. tenders to B. three quarters' rent, due upon the lease, at Michaelmas, which B. refuses to accept:—*Held:* this notice was sufficient to establish the affirmative of an issue taken upon an allegation, that B. demised to C. for one year from the date of the notice.

Mtgees. may adopt the act of the mtgor. in granting the lease; or at least he may create a tenancy from year to year according to the terms of the lease (TINDAL, C.J.).—BROWN *v.* STOREY (1840), 1 Man. & G. 117; 1 Scott, N. R. 9; 9 L. J. C. P. 225; 4 Jur. 319; 133 E. R. 270.

Annotations:—**Apld.** Underhay *v.* Read (1887), 20 Q. B. D. 209. **Dbtd.** Towerson *v.* Jackson, [1891] 2 Q. B. 484. **Refd.** Webb *v.* Austin (1844), 7 Man. & G. 701; Keith *v.* Gancia, [1904] 1 Ch. 774.

806. ——.]—A notice was sent by mtgees. to the occupier of the premises mortgaged demanding payment of rent to them instead of the mtgor., & threatening distress upon non-payment. There was no evidence of a previous tenancy between the occupier & the mtgor., & it appeared that the occupier never paid any rent before or after the receipt of the notice, nor did anything to show his assent to the notice:—*Held:* this notice was not sufficient to create a tenancy between the mtgees. & the occupier, so as to require a notice to quit before ejectment could be brought by the mtgees.—BINER *v.* WALTERS (1869), 20 L. T. 326; *sub nom.* BIUER *v.* WALTERS, 17 W. R. 649.

807. —— **Claim by executors of mortgagee—Claiming under mortgagor.**]—EVANS *v.* ELLIOT, No. 789, *ante*.

808. —— **Tenant remaining in possession.**]—Mtgor. let the mtged. premises subsequently to the mtge. Mtgees. gave a notice to the tenant informing him of the existence of the mtge. & requiring him to pay to them the rent thereafter to accrue due. The tenant continued in possession after the receipt of the notice, but there was no other circumstance from which an agreement for a tenancy could be inferred:—*Held:* the mere fact of the tenant remaining in possession after notice to payment to the mtgees. was not evidence of an agreement that he should become tenant to the mtgees.—TOWERSON *v.* JACKSON, [1891] 2 Q. B. 484; 61 L. J. Q. B. 36; 65 L. T. 332; 56 J. P. 21; 40 W. R. 37, C. A.

Annotation:—**Consd.** Dunlop *v.* Macedo (1891), 8 T. L. R. 43.

809. Permission to mortgagor to lease.] —EVANS *v.* ELLIOT, No. 789, *ante*.

810. Permitting repairs of premises — Privy to expenditure on improvements.]—Where a mtgor. who continues in possession of the mtged. premises with the consent of the mtgee., makes a lease to a third party who expends money in improving them, the circumstance of the mtgee's having occasionally gone to look at the improvements, is not of itself evidence for a jury that he has accepted the lessee as tenant.—DOE d. PARRY *v.* HUGHES (1847), 9 L. T. O. S. 82; 11 Jur. 698.

811. Receipt of interest.]—In ejectment by a mtgee., the mere fact of his having received interest on the mtge. down to a time later than the day of the demise in the declaration, does not amount to a recognition by him that the mtgor. or his tenant was in lawful possession of the premises till the time when such interest was paid, & consequently is no defence to the ejectment.—DOE d. ROGERS

v. CADWALLADER (1831), 2 B. & Ad. 473; 109 E. R. 1218.
Annotations:—**Refd.** Evans *v.* Elliot (1838), 9 Ad. & El. 342; Doe d. Wilkinson *v.* Goodier (1847), 10 Q. B. 957.

ii. *Nature of Tenancy Created.*

812. Yearly tenancy only.]—DOE d. BOWMAN *v.* LEWIS, No. 619, *ante*.

813. —— Term created by mortgagor not set up.]—DOE d. HUGHES *v.* BUCKNELL, No. 786, *ante*.

814. —— Whether application of terms of lease implied.]—BROWN *v.* STOREY, No. 805, *ante*.

815. —— ——.] — KEITH *v.* GANCIA (R.) & CO., LTD., No. 801, *ante*.

816. —— At previously existing rent.] — CORBETT *v.* PLOWDEN, No. 790, *ante*.

C. Effect of Estoppel on Tenant.
a) In General.

817. May treat mortgagor as landlord — Until mortgagee interferes.]—(1) Mtgee. having given notice to the tenants holding the mtged. premises under leases granted by the mtgor. after the mtge., is entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards. Where such rents had been received by the agent of the mtgor. after his bkpcy., & were not actually paid over:—*Held:* the agent might retain such rents in order to pay the interest accruing due on the mtge. to the mtgee., who had required him to do so, & the assignees could not recover them.

I have no doubt, that in point of law, a tenant who comes into possession under a demise from a mtgor., after a mtge. executed by him, may consider the mtgor. his landlord so long as the mtgee. allows the mtgor. to continue in possession & receive the rents; & that payment of the rents by the tenant to the mtgor., without any notice of the mtge., is a valid payment. . . . The mtgor. cannot dispute the title of the mtgee. When the mtgor. occupies the premises, he holds under the mtgee., who may put an end to the rights of the mtgor. (BAYLEY, J.).

(2) Mtgee. by giving notice of the mtge. to the tenant may thereby make him his tenant & entitle himself to receive the rents (BAYLEY, J.).

(3) Any lease granted by the mtgor. after the mtge. is void as against the mtgee. (LITTLEDALE, J.).—POPE *v.* BIGGS (1829), 9 B. & C. 245; 4 Man. & Ry. K. B. 193; 7 L. J. O. S. K. B. 246; 109 E. R. 91.
Annotations:—*As to* (1) **Consd.** Partington *v.* Woodcock (1835), 6 Ad. & El. 690; Waddilove *v.* Barnett (1836), 2 Bing. N. C. 538. **Refd.** Boodle *v.* Campbell (1844), 7 Man. & G. 386. *As to* (2) **Consd.** Evans *v.* Elliot (1838), 9 Ad. & El. 342. *Generally.* **Refd.** Braithwaite *v.* Watts (1832), 2 Tyr. 293; Burrows *v.* Grayden (1843), 7 Jur. 942; Turner *v.* Cameron's Coalbrook Steam Coal Co. (1850), 5 Exch. 932; Wilton *v.* Dunn (1851), 17 Q. B. 294; Rusden *v.* Pope (1868), L. R. 3 Exch. 269.

818. Paying of rent to mortgagor—No notice by mortgagee.]—POPE *v.* BIGGS, No. 817, *ante*.

819. Covenant to deliver up fixtures—Notice of mortgagee's title after expiry of term.]—Deft. was tenant to pltf., who was owner of the equity of redemption, under lease whereby deft. covenanted to deliver up to pltf., at the expiration of the term, the premises & all fixtures therein. The term expired on Apr. 1, 1855; & on Apr. 10, pltf. demanded possession, which was not given. On Apr. 13, the mtgee. gave notice to deft. to pay the rent & deliver up the premises to him. Pltf. having sued deft. for a breach of his covenant in not delivering up the fixtures:—*Held:* deft. was not estopped from setting up the title of the mtgee., & pltf. could not recover the value of the fixtures, but only the actual damage sustained by him in consequence of their detention from Apr. 10, to Apr. 13.—WATSON *v.* LANE (1856), 11 Exch. 769; 25 L. J. Ex. 101; 26 L. T. O. S. 260; 2 Jur. N. S. 119; 4 W. R. 293; 156 E. R. 1042.
Annotations:—**Refd.** Delaney *v.* Fox (1857), 2 C. B. N. S. 768; Hodgson *v.* McCreagh (1923), 93 L. J. Ch. 339.

Payment to mortgagee.]—*See* Sub-sect. 6, C. (*b*), *post*.

(b) Defence to Claim of Mortgagor for Rent.

820. Payment to mortgagee.] — In 1796, H. demised to S. for sixty-eight years, premises which in 1793 had been mortgaged to F. S. assigned to N., who underlet to D. In 1818, H. conveyed the premises in fee to R. N., who was also agent of H., paid the interest on the mtge. to F. from 1816 to 1820 to the amount of the rent reserved. R. distrained for rent in 1820:—*Held:* D., who replevied at the instigation of N., might, under the plea of *riens in arriere*, avail himself of these payments.—DYER *v.* BOWLEY (1824), 2 Bing. 91; 9 Moore, C. P. 196; 2 L. J. O. S. C. P. 129; 130 E. R. 240.
Annotations:—**Refd.** Johnson *v.* Jones (1839), 8 L. J. Q. B. 124; Wheeler *v.* Branscombe (1843), 5 Q. B. 373.

821. —— After demand.] — ALCHORNE *v.* GOMME, No. 777, *ante*.

822. — ——.] — To an avowry of a distress for rent pltf. pleaded that, before deft. had any interest in the premises, they were mortgaged in fee; that the mtgor. remained in possession, & demised to deft.; that deft., the mtge. money being still due, demised to pltf.; that afterwards, the mtge. money being still due, & interest thereon, & £14 avowed for by deft., being also in arrear, the mtgee. gave notice to pltf. to pay the £14 to him instead of to deft., & threatened, in case of non-payment, to put the law in force, & was then about to put the law in force, wherefore pltf. necessarily paid that sum to the mtgee., & so the said sum was not in arrear; concluding with a verification:—*Held:* the plea was good, being a plea of payment, & not of *nil habuit, in tenementis;* it was not bad for setting out the circumstances of the payment, or for concluding with a verification.—JOHNSON *v.* JONES (1839), 9 Ad. & El. 809; 1 Per. & Dav. 651; 8 L. J. Q. B. 124; 112 E. R. 1421.
Annotations:—**Consd.** Carpenter *v.* Parker (1857), 3 C. B. N. S. 206. **Folld.** Underhay *v.* Read (1887), 20 Q. B. D. 209. **Refd.** Boodle *v.* Campbell (1844), 7 Man. & G. 386.

823. —— ——.]—Plea, that the premises in question had been mortgaged to S. to secure the repayment of £200 & interest in six months. That before deft. began to use & occupy the said premises, the said six months had elasped, without the repayment of the said sum of £200 which still remained due. That until the commencement of the suit, the mtgor. continued the control & management of the premises. That before the commencement of the suit, deft. was required by notice to pay to the assignee of the mtgee. the amount sought to be recovered, & that from the time of the giving of such notice deft was liable to pay same to such assignee:—*Held:* the plea was no answer to the action.

Semble: if payment had actually been made

PART VI. SECT. 5, SUB-SECT. 6.—C. (a).

817 i. *May treat mortgagor as landlord — Until mortgagee interferes.*]—MCFARLANE *v.* BUCHANAN (1862), 12 C. P. 591.—**CAN.**

p. *When tenant in — Acquiescence in* was mortgaged by A., with the consent & approval of B., who was in possession:—*Held:* B. was estopped from setting up any title founded on possession before the execution of mtge.—BOYS *v.* WOOD (1876), 39 U. C. R. 495.—**CAN.**

Sect. 5.—Leases and tenancies: Sub-sect. 6, C. (b), & D.; sub-sects. 7, 8 & 9. Sect. 6.]

under a claim by the mtgee., such payment might have been pleaded as a defence to the action.—WILTON *v.* DUNN (1851), 17 Q. B. 294; 21 L. J. Q. B. 60; 17 L. T. O. S. 155; 15 Jur. 1104; 117 E. R. 1292.

Annotation:—**Refd.** Hickman *v.* Machin (1859), 4 H. & N. 716.

824. —— ——.]—A mtgor. let the mortgaged premises subsequently to the mtge. During the quarter ending at Michaelmas the mtgees. gave a notice to the tenant informing him of the existence of the mtge., & that the principal sum was still due & owing together with an arrear of interest, & requiring him to pay the rent thereafter to accrue due to them. The rent which became due at Michaelmas being still unpaid, an order was made in an action against the mtgor. appointing pltf., who had recovered judgment, receiver of the rents of the premises, "without prejudice to the rights of any prior incumbrances who may think proper to take possession of the same by virtue of their respective securities." Subsequently the mtgees. threatened the tenant with legal proceedings unless he paid the rent to them, & the tenant thereupon paid them the quarter's rent due at Michaelmas. The receiver claimed payment of such rent from the tenant:—*Held:* the tenant's occupation after notice to pay rent to the mtgees. was evidence from which a tenancy to the mtgees. ought to be inferred, & therefore he was justified in paying the rent to them, & could not be liable for same rent to the mtgor. or any one claiming under him. —UNDERHAY *v.* READ (1887), 20 Q. B. D. 209; 57 L. J. Q. B. 129; 58 L. T. 457; 36 W. R. 298; 4 T. L. R. 188, C. A.

Annotation:—**Dbtd.** Towerson *v.* Jackson, [1891] 2 Q. B. 484.

825. —— **In respect of occupation before notice —Must be specially pleaded.**]—WADDILOVE *v.* BARNETT, No. 803, *ante*.

826. Notice to pay from mortgagee.]—WADDILOVE *v.* BARNETT, No. 803, *ante*.

827. —— **Apportionment — Between rent of furniture and house—Lease of furnished house.**]—The owner of a house, having mortgaged it in fee, & continuing in possession let it as a ready furnished house to deft. He afterwards became bkpt. & then, with the assent of this assignees, let the house ready furnished to deft., by the week, who, after three weeks' occupation, received notice from the mtgee. to pay rent to him:—*Held:* in an action brought by the assignees for use & occupation of the house & furniture, the rent of the house & furniture might be apportioned.—SALMON *v.* MATTHEWS (1841), 8 M. & W. 827; 11 L. J. Ex. 59; 151 E. R. 1275.

Annotation:—**Apld.** Hoare *v.* Hove Bungalows (1912), 56 Sol. Jo. 686.

828. —— **Without actual payment.**] — Where the lessor of premises at a rent payable quarterly had given a written authority to a mtgee. to receive rent from the lessee, & the mtgee. had given notice to the lessee to pay such rent to no one but him, & the lessee had paid the mtgee. such rent from time to time, & there was still an arrear of interest due from the lessor on the mtge.:—*Held:* these facts furnished no defence, under *non tenuit & riens in arrière*, pleaded by the lessee to an avowry of the lessor in respect of a quarter's rent which the lessee had not paid to any one.—WHEELER *v.* BRANSCOMBE (1843), 5 Q. B. 373; Dav. & Mer. 406; 13 L. J. Q. B. 83; 2 L. T. O. S. 187; 7 Jur. 1131; 114 E. R. 1290.

Annotation:—**Refd.** Underhay *v.* Read (1887), 58 L. T. 457.

829. —— ——.]—WILTON *v.* DUNN, No. 823, *ante*.

830. —— ——.] — In 1856, B., a mtgor. in possession, agreed that he & all necessary parties would execute, & deft. agreed to take, a lease of certain premises; deft., until the lease should be granted, to have the use & occupation thereof as tenant from year to year. There was a provision for payment of costs of B. & the mtgees. The mtgees. assented to the agreement though they were not parties to it. Deft. entered & paid rent to B. up to Michaelmas, 1857. On Dec. 12, 1857, B. assigned to pltf. In Apr. 1858, the mtgees. gave notice to deft. to pay the rent due to them, but no rent was in fact paid to them by deft. Pltf. sued for the rent due from Christmas, 1857:—*Held:* the notice by the mtgees. to deft. to pay rent to them was no answer to the action for the rent due either before or since the notice.—HICKMAN *v.* MACHIN (1859), 4 H. & N. 716; 28 L. J. Ex. 310; 33 L. T. O. S. 206; 5 Jur. N. S. 576; 157 E. R. 1023.

Annotations:—**Refd.** Mitchell *v.* Lee (1867), L. R. 2 Q. B. 259; Underhay *v.* Read (1887), 20 Q. B. D. 209.

Right of mortgagee after notice.] —*See* Part IX., Sect. 2, sub-sect. 4, *post*.

D. Remedy of Tenant ejected by Mortgagee.

831. Against mortgagor — Not against mortgagee.]—DOE d. HUGHES *v.* BUCKNELL, No. 786, *ante*.

832. Damages against mortgagor—Covenant for quiet enjoyment.]—By a deed of settlement made by deft. in 1842, under a power contained in his father's will, a term of one thousand years in certain estates was limited to T. & W., in trust, by mtge., sale or otherwise to raise a sum not exceeding £10,000 for payment of deft.'s debts; & in 1843 the trustees assigned the term by way of mtge. to A. & B., deft. being a party to the deed, covenanting for payment of the principal & interest, & also for title in the trustees, & for quiet enjoyment by the mtgees. in case of default. His assignment contained a power to deft. to lease, by & with the consent & approbation of the mtgees., their heirs, etc. In 1846 deft. without having obtained the consent of the mtgees. granted a lease of part of the lands to pltf. with a covenant for quiet enjoyment during the term, "without the let, suit, trouble, denial, eviction, molestation or disturbance of the lessor his heirs or assigns or any person or persons claiming or deriving or to claim or derive, by, from or under him, them, or any of them." Pltf. in 1851 received a notice from the surviving mtgee., informing him of the mtge. & that the principal & interest were unpaid & in arrear, & requiring pltf. to pay rent to him. Having consulted his attorney & finding that he could not successfully resist the claim of the mtgee., pltf. consented to give up possession of the land to him, & the mtgee. entered & took possession, paying pltf. £75 as a compensation for certain improvements:—*Held:* pltf. was entitled to maintain an action upon the covenant for quiet enjoyment, the facts showing an eviction or at all events a molestation & disturbance of pltf., by one claiming title, by, from, or under deft.—CARPENTER *v.* PARKER (1857), 3 C. B. N. S. 206; 27 L. J. C. P. 78; 30 L. T. O. S. 166; 22 J. P. 7; 6 W. R. 98; 140 E. R. 718.

Annotations:—**Refd.** *Re* Emery & Barnett (1858), 4 C. B. N. S. 423. **Mentd.** Eastern Counties Ry. *v.* Dorling (1859), 5 C. B. N. S. 821.

833. —— **Contract to grant lease.**]—A mtgor. entered into a contract to grant a lease, which the mtgee. refused to ratify:—*Held:* specific

performance could not be enforced, but the ct., under 21 & 22 Vict. c. 27, s. 2, assessed the damages sustained.—HOWE *v.* HUNT (1862), 31 Beav. 420; 32 L. J. Ch. 36; 7 L. T. 124; 26 J. P. 563; 8 Jur. N. S. 834; 10 W. R. 813; 54 E. R. 1201.

Annotation:—**Refd.** Middleton *v.* Magnay (1864), 2 Hem. & M. 233.

834. Contract to grant lease—Specific performance not granted.]—HOWE *v.* HUNT, No. 833, *ante*.

SUB-SECT. 7.—DISTRESS.

See DISTRESS, Vol. XVIII., p. 279, Nos. 154–159.

SUB-SECT. 8.—ENFORCEMENT OF COVENANTS BY MORTGAGOR IN POSSESSION.

See, now, Law of Property Act, 1925 (c. 20), ss. 98, 141.

835. Under Judicature Act, 1873 (c. 66), s. 25 (5)—Action for breach of covenant.]—A mtgor. in receipt of the rents & profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mtged. property without joining the mtgee.

F., being owner of copyhold land, covenanted with S. to stand seised thereof in trust for him & his heirs, subject to a rent, & subject to a covenant by S. not to use any building erected thereon as a beerhouse. All the estate of S. vested in deft. F. sold the land to pltf., B. advancing the purchase money, & it was conveyed to B., subject to a proviso for conveyance to pltf. upon payment by him to B. of the amount advanced. Deft. used the building erected upon the land as a beerhouse:—*Held:* upon the general principles of equity, pltf. was entitled to restrain deft. by injunction from using the building for that purpose without joining B. *Qu.:* whether Jud. Act, s. 25 (5), would have entitled pltf. to an injunction in his own name.

If by that sub-section [sub-sect. 5] the mtgor. may sue for possession on rents & profits or in respect of trespass or other wrong, meaning wrong independent of any contract or duty, it is possible that the mtgor. may sue for rents & profits, but not for breach of covenant to insure against fire or to repair (BRAMWELL, L.J.).—FAIRCLOUGH *v.* MARSHALL (1878), 4 Ex. D. 37; 48 L. J. Q. B. 146; 39 L. T. 389; 27 W. R. 145, C. A.

Annotations:—**Folld.** Bennett *v.* Hughes (1886), 2 T. L. R. 715. **Apld.** Van Gelder, Apsimon *v.* Sowerby Bridge United District Flour Soc. (1890), 44 Ch. D. 374. **Consd.** Matthews *v.* Usher (1899), 68 L. J. Q. B. 988; Turner *v.* Walsh, [1909] 2 K. B. 484. **Refd.** Allen *v.* I. R. Comrs., [1914] 2 K. B. 327. **Mentd.** *Re* Hoyles, Row *v.* Jagg, [1911] 1 Ch. 179.

836. ——— ———.]—Conveyancing & Law of Property Act, 1881 (c. 41), s. 10, gives to a mtgor. entitled to possession or to receipt of the rents & profits of land subject to a lease whose mtgee. has neither taken possession nor given notice of his intention to take possession the right to sue the lessee for damages for breach of a covenant to repair contained in the lease.

Jud. Act, s. 25 (5), gives the mtgor. no such right.

In the absence of any special agreement the damages when recovered undoubtedly belonged to the mtgor. (FARWELL, L.J.).—TURNER *v.* WALSH, [1909] 2 K. B. 484; 78 L. J. K. B. 753; 100 L. T. 832; 25 T. L. R. 605, C. A.

Annotation:—**Refd.** Allen *v.* I. R. Comrs., [1914] 2 K. B. 329.

837. ——— **Re-entry for breach of covenant—No right.**]—Jud. Act, 1873 (c. 66), s. 25 (5), does not give to a mtgor. in possession of land, subject to a lease, the right to re-enter for breach of the covenants of the lease.—MATTHEWS *v.* USHER, [1900] 2 Q. B. 535; 69 L. J. Q. B. 856; 83 L. T. 353; 49 W. R. 40; 16 T. L. R. 493; *sub nom.* MATHEWS *v.* USHER, No. 1, 44 Sol. Jo. 606, C. A.

Annotations:—**Apld.** Molyneux *v.* Richard, [1906] 1 Ch. 34. **Refd.** Turner *v.* Walsh, [1909] 2 K. B. 484. **Mentd.** Jolly *v.* Brown, [1914] 2 K. B. 109.

838. ——— ———.]—Pltf. asked for possession & for damages in respect of breaches of the covenants in the lease. . . . There is a distinct authority of the Ct. of Appeal in the case of *Matthews* v. *Usher*, No. 837, *ante*, that the action was not maintainable (KEKEWICH, J.).—MOLYNEUX *v.* RICHARD, [1906] 1 Ch. 34; 75 L. J. Ch. 39; 93 L. T. 698; 54 W. R. 177; 22 T. L. R. 76.

See, now, Law of Property Act, 1925 (c. 20), s. 98.

839. Under Conveyancing & Law of Property Act, 1881 (c. 41), s. 10 Action for breach of covenant.]—TURNER *v.* WALSH, No. 836, *ante*.

See, now, Law of Property Act, 1925 (c. 20), s. 141.

SUB-SECT. 9.—SURRENDER OF LEASES TO MORTGAGOR.

See LANDLORD & TENANT, Vol. XXXI., p. 508, Nos. 6557, 6558; Law of Property Act, 1925 (c. 20), ss. 99, 100.

SECT. 6.—ACTION TO RESTRAIN INJURY TO PROPERTY.

See Law of Property Act, 1925 (c. 20), s. 98.

840. Who may maintain proceedings—Agent of mortgagor—No authority from principal—No personal interest.]—HUNTER *v.* NOCKHOLES (1846), 7 L. T. O. S. 41; 10 Jur. 771, L. C.

841. ——— **Mortgagor in receipt of rent—Premises let to tenant—Whether reversion sufficient.**]—Where a mtgor., who had let the property to a tenant subsequent to the mtge., brought an action against a railway co. for erecting a shed, in which they repaired their engines, so near to the mtgor.'s premises as to be a nuisance, & diminish the value of his premises:—*Held:* the supposed nuisance from the alleged noise & hammering in repairing the engines was not of such a permanent nature as to enable pltf. to support this action as an injury to his reversion. *Qu.:* whether pltf. as mtgor., the premises being let by him to a tenant, had such a reversion to

PART VI. SECT. 5, SUB-SECT. 6.—D.

834 i. *Contract to grant lease—Specific performance not granted.*]—COSTIGAN *v.* HASTLER (1804), 2 Sch. & Lef. 160.—**IR.**

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q. *General rule.*]—The mtgor. of property, where the mtge. deed contains a clause providing for the retaining possession until default (such default not having taken place), is entitled so long as the mtge. continues in force without default, to maintain an action for an injury done to the reversion.—ROGERS *v.* DICKSON (1861), 10 C. P. 481.—**CAN.**

r. Who may maintain action—Mortgagor—Whether mortgagee need be party to proceedings.]—MCMULLEN *v.* FREE (1887), 13 O. R. 57.—**CAN.**

t. ——— ——— *Trespass.*]—Under Jud. Act (N. S.) the owner of the equity of redemption can maintain an action for trespass to mtged. property &

6.—Action to restrain injury to property. Sect. 7. Part VII. Sects. 1 & 2.]

entitle him to bring the action.—MUMFORD *v.* OXFORD, WORCESTER & WOLVERHAMPTON RY. CO. (1856), 1 H. & N. 34; 25 L. J. Ex. 265; 27 L. T. O. S. 58; 156 E. R. 1107; *sub nom.* MOUNTFORD *v.* OXFORD, WORCESTER & WOLVERHAMPTON RY. CO., 4 W. R. 457.

Annotations:—**Apld.** Mott *v.* Shoolbred (1875), L. R. 20 Eq. 22; Rust *v.* Victoria Graving Dock Co. & London & St. Katharine Dock Co. (1887), 36 Ch. D. 113. **Refd.** Simpson *v.* Savage (1856), 1 C. B. N. S. 347; Tancred *v.* Allgood (1859), 4 H. & N. 438; Cooper *v.* Crabtree (1881), 19 Ch. D. 193; Byass *v.* Bettam (1885), 2 T. L. R. 88.

842. —— —— Without joining mortgagee.]—FAIRCLOUGH *v.* MARSHALL, No. 835, *ante*.

843. —— —— How sufficiency of possession determined.]—No action will lie for the erection of a building which causes a chimney to smoke in premises upon adjoining land; & a demise of a dwelling house does not by implication grant any right to the free passage of air or smoke from the same over adjoining land of the grantor. The question whether a mtgor. is in such possession of rents & profits of land as will entitle him, under Jud. Act, 1873 (c. 66), s. 25 (5), to bring an action in respect of such land is to be determined by reference to all the circumstances of the case, & by the possibility of doing justice upon the existing record between all parties interested. Where the owner of the equity of redemption suing for damages for obstruction to light & air had granted a second mtge. with power to the mtgee. to collect the rents, & both mtgees., though declining to be joined in the action, had expressed their readiness to give all requisite discharges to deft.:—*Held:* the mtgor. could maintain the action in his own name, but the damages recovered must be paid into ct., to await the execution by the mtgees. of a discharge of all claims by them against deft.—BENNETT *v.* HUGHES (1886), 2 T. L. R. 715, D. C.

844. —— Mortgagor not in possession of rents—Mortgagees declining to join—Willing to give requisite discharge.]—BENNETT *v.* HUGHES, No. 843, *ante*.

845. Infringement of patent—Right of mortgagor—Mortgagee registered "as mortgagee"—Mortgagee declining to join.]—V., the registered assignee of a patent, mortgaged it, & the mtgee. was registered "as mtgee." After this, V. sued an infringer without making the mtgee. a party. Deft. pleaded that V. was not the proprietor & could not sue. The mtgee. declined to be made a co-pltf., & was not added as deft.:—*Held:* as the mtgee. was not registered as assignee or proprietor, Patents, Designs & Trade Marks Act, 1883 (c. 57), did not apply, & the case must be decided according to the general law as to mtges., & V. could sue without making the mtgee. a co-pltf.—VAN GELDER, APSIMON & CO. *v.* SOWERBY BRIDGE UNITED DISTRICT FLOUR SOCIETY (1890), 44 Ch. D. 374; 59 L. J. Ch. 583; 63 L. T. 132; 38 W. R. 625; 6 T. L. R. 338; 7 R. P. C. 208, C. A.

846. Benefit of covenant running with land—Made with mortgagor alone.]—Where on a sale the benefit of a covenant restricting the use of the purchaser's land is clearly annexed to all or any part of land retained by the vendor, it passes by assignment of that land or any part thereof, & may be said to run with it, as well in contemplation of equity as of law, without proof of any special bargain or representation on the assignment, & even though the assignee is ignorant of the existence of the covenant. In such a case it runs not because the conscience of either party is affected, but because the assignee has acquired something which adhered in or was annexed to the land. As in contemplation of equity a mtgor. is the true owner of the land, the benefit of such a covenant will run with the land in equity where it is made with a mtgor. alone, notwithstanding the rule at law according to which a mtgor. for this purpose was treated as a stranger to the land.—ROGERS *v.* HOSEGOOD, [1900] 2 Ch. 388; 69 L. J. Ch. 652; 83 L. T. 180; 48 W. R. 659; 16 T. L. R. 489; 44 Sol. Jo. 607, C. A.

Annotations:—**Mentd.** Kimber *v.* Admans, [1900] 1 Ch. 412; Muller *v.* Trafford, [1901] 1 Ch. 54; Weatheritt *v.* Cantlay (1901), 84 L. T. 768; Humphery *v.* Young (1902), 87 L. T. 551; Formby *v.* Barker, [1903] 2 Ch. 539; Ilford Park Estates *v.* Jacobs, [1903] 2 Ch. 522; Woodall *v.* Clifton, [1905] 2 Ch. 257; *Re* Nisbet & Potts' Contract, [1906] 1 Ch. 386; Forster *v.* Elvert Colliery Co., Quin *v.* Same, Seed *v.* Same, Morgan *v.* Same, [1908] 1 K. B. 629; Reid *v.* Bickerstaff, [1909] 2 Ch. 305; Ricketts *v.* Enfield, [1909] 1 Ch. 544; Wilkes *v.* Spooner, [1911] 2 K. B. 473; Long *v.* Gray (1913), 58 Sol. Jo. 46; L. C. C. *v.* Allen, [1914] 3 K. B. 642; Millbourn *v.* Lyons, [1914] 2 Ch. 231; Day *v.* Waldron (1919), 88 L. J. K. B. 937; Ives *v.* Brown, [1919] 2 Ch. 314; Westhoughton U. C. *v.* Wigan Coal & Iron Co., [1919] 1 Ch. 159; Northbourne *v.* Johnston, [1922] 2 Ch. 309; Chambers *v.* Randall, [1923] 1 Ch. 149; Kelly *v.* Barrett, [1924] 2 Ch. 379.

Right of mortgagee to protect security.]—*See* Part IX., Sect. 1, sub-sect. 2, *post*.

SECT. 7.—OTHER CASES.

847. Money paid into court on compulsory purchase—Petition by tenant for life—Need not be served on incumbrancers.]—Tenant for life, empowered under Lands Clauses Consolidation Act, 1845 (c. 18), to treat for the fee, contracted to sell lands to a railway company.

The vendor presented a petition for the investment of the purchase-money, which had been paid into ct., in stock & payment of the dividends to himself. The co. then brought to the knowledge of the ct. that petitioner had mortgaged & otherwise incumbered his life estate, & suggested that the incumbrancers should have been served & the petition stood over for that purpose. *Semble:* unnecessary to serve the incumbrancers, petitioner being mtgor. in possession quite undisturbed by the incumbrancers.—*Re* HUNGERFORD, *Re* RUGBY & STAMFORD RAILWAY ACT, 1846 (1855), 1 K. & J. 413; 1 Jur. N. S. 845; 69 E. R. 520.

Annotation:—**Distd.** *Re* Hatfield's Estate, *Re* Leeds Waterworks Acts, 1852, 1856 (1861), 29 Beav. 370.

848. —— —— ——.]—Upon a petition for payment to petitioner of the income of a fund arising from the sale of land to a railway co., petitioner being in possession at the time of the sale as tenant for life, subject to mtges. created by himself, the ct. will make an order, without requiring the mtgees. to be served with the petition. But *semble:* such service could not have been dispensed with, in case the tenant for

injury to the freehold though after the trespass & before action brought he has parted with his equity.—BROOKFIELD *v.* BROWN (1893), 22 S. C. R. 398.—**CAN.**

a. —— —— ——.]—Deft. entered on pltf.'s lands which pltf. had mtged. & removed therefrom & sold two greenhouses & one boiler. Deft. alleged that in so doing he acted as agent of the mtgee. whose security was scanty. In subsequent foreclosure proceedings credit was given for the proceeds. Pltf. was held entitled to recover from deft. damages for trespass, as the mtgee. or his agent had no right to make such removal or sale.—[illegible] *v.* HARDY, [1923] 1 W. W. R. 1483; 32 B. C. R. 78.—**CAN.**

PART VI. SECT. 7.

b. *Ejectment—Necessity for notice.*]—Pltf. (mtgee.) covenanted with deft. (mtgor.) that no sale of the land & premises or any lease should be made until one month's notice in writing should be given:—*Held:* deft. was

life had been out of possession at the date of the sale.—*Re* HUNGERFORD'S TRUST (1857), 3 K. & J. 455; 69 E. R. 1188.

Annotation :—**Folld.** *Re* Gore Langton's Estates (1875), 10 Ch. App. 328.

849. Liability for repair of sea bank—Mortgagor not in actual possession—In receipt of rents & profits.]—A mtgor. not in actual possession but in receipt of the rents & profits of lands charged with repair of a sea bank is liable for default of reparation.—R. *v.* BAKER (1867), L. R. 2 Q. B. 621; 36 L. J. Q. B. 242; 31 J. P. 692; 15 W. R. 1144.

850. Recovery of possession of land—Procedure by action—Not originating summons.]—HILL *v.* STEPHENS (1887), cited in Halsbury's Laws of England, Vol. XXI., p. 151.

Annotation :—**Folld.** Wallis *v.* Griffiths, [1921] 2 Ch. 301.

851. Enforcement of restrictive covenants—Against mortgagee—& purchase from him—Building estate.]—On the sale of a building estate in lots the purchaser of each lot entered into a covenant with the vendor & with the purchasers of the other lots not to build upon his lot beyond a specified building line. The purchaser of one lot mortgaged a part of his lot. The mtgee. had notice of the covenant, but no express restriction as to the use of the land was imposed on him by the mtgor. The mtgee. afterwards foreclosed & sold the mortgaged land, part of which ultimately became vested in defts. by purchase. Defts., as well as the sub-purchasers through whom they claimed, took with notice of the restrictive covenant:—*Held :* there was no implied obligation as between the mtgor. & the mtgee. restricting the use of the land, & the mtgor. was not entitled to enforce the restrictive covenant as against defts.—KING *v.* DICKESON (1889), 40 Ch. D. 596; 58 L. J. Ch. 464; 60 L. T. 785; 37 W. R. 553.

Mortgage of shares.]—*See* COMPANIES, Vol. IX., pp. 412–414, Nos. 2658–2673.

Part VII.—Equity of Redemption.

SECT. 1.—IN GENERAL.

Necessity for proviso for redemption.]—*See* Part I., Sect. 4, *ante*.

Proviso for redemption.]—*See* Part IV., Sect. 3, *ante*.

SECT. 2.—NATURE.

See, now, Law of Property Act, 1925 (c. 20), ss. 85–87.

852. Equitable estate—Transmissible as such—Inter vivos or on death.]—ANON. (undated), 2 Eq. Cas. Abr. 594, n.; 22 E. R. 499.

853. —— —— ——.]—(1) Where a woman, mtgor., marries, & not having redeemed, dies, her husband is entitled to be tenant by curtesy of the mtged. premises.

(2) An equity of redemption is an estate in the land.

(3) Foreclosure of an equity of redemption is considered as a new purchase of the land.—CASBURNE *v.* INGLIS (1738), 2 Jac. & W. 194; Lee *temp.* Hard. 399; 2 Eq. Cas. Abr. 728; 37 E. R. 600; *sub nom.* CASBORNE *v.* SCARFE, West *temp.* Hard. 221; 1 Atk. 603, L. C.

Annotations :—*As to* (1) **Refd.** Copestake *v.* Hoper, [1907] 1 Ch. 366. *As to* (2) **Refd.** Burgess *v.* Wheate, A.-G. *v.* Wheate (1759), 1 Eden, 177; Downe *v.* Morris (1844), 3 Hare, 394; *Re* Hoyles, Row *v.* Jagg, [1911] 1 Ch. 179. *As to* (3) **Refd.** Heath *v.* Pugh (1881), 6 Q. B. D. 345. *Generally*, **Refd.** Cholmondeley *v.* Clinton (1821), 4 Bli. 1; Matthews *v.* Usher (1899), 68 L. J. Q. B. 988; Turner *v.* Walsh, [1909] 2 K. B. 484. **Mentd.** Hearle *v.* Greenbank (1749), 1 Ves. Sen. 298; Parker *v.* Carter (1845), 4 Hare, 400; Stanhouse *v.* Gaskell (1852), 17 Jur. 157; Stone *v.* Godfrey (1853), 18 Jur. 162; Smith *v.* Adams (1854), 5 De G. M. & G. 712; *Re* Norman, Thackray *v.* Norman (1914), 111 L. T. 903.

854. ——.]—Though the word heir is inserted, yet after forfeiture the exor. shall have the money, for the forfeiture has left the matter at large, as if no *designatio* were, & then certainly the exor. shall have the money. I conceive that a mtge. is not merely a trust, but a title in equity (HALE, C.B.).—PAWLETT *v.* A.-G. (1667), Hard. 465; 145 E. R. 551.

Annotations :—**Consd.** Burgess *v.* Wheate, A.-G. *v.* Wheate (1759), 1 Eden, 177. **Expld.** R. *v.* Mildmay (1833), 5 B. & Ad. 254. **Consd.** Downe *v.* Morris (1844), 3 Hare, 394. **Refd.** Reeve *v.* A.-G. (1741), 2 Atk. 223. **Mentd.** De Bode *v.* R. (1851), 6 State, Tr. N. S. 237; Dyson *v.* A.-G., [1911] 1 K. B. 410; Esquimalt & Nanaimo Ry. *v.* Wilson, [1920] A. C. 358.

855. ——.]—It is true that an equity of redemption is an interest in real estate (LEACH, V.-C.).—LLOYD *v.* LANDER (1821), 5 Madd. 282; 56 E. R. 903.

Annotations :—**Mentd.** Gilbert *v.* Lewis (1862), 2 John. & H. 452; Welse *v.* Wardle (1874), L. R. 19 Eq. 171.

856. ——.]—No agreement to convey an equity of redemption will be binding unless in writing, because a ct. of equity treats the equity of redemption as the land itself—at all events as an interest in land (ROLFE, B.).—MASSEY *v.* JOHNSON (1847), 1 Exch. 241; 17 L. J. Ex. 182; 10 L. T. O. S. 84.

Annotation :—**Mentd.** Horsey *v.* Graham (1869), L. R. 5 C. P. 9.

857. ——.]—(1) A tenant for years under an agreement for lease made subsequently to a mtge. on the demised property, & by which the mtgee. is not bound is entitled to redeem the mtge.

(2) The cts. have construed that right to have the property back as an estate in the land comprised in the conveyance it is just as much an interest or estate as the fee simple is, & has, in legal phrascology become known as the equity of redemption (KEKEWICH, J.).—TARN *v.* TURNER (1888), 57 L. J. Ch. 452; 58 L. T. 558; 4 T. L. R. 375; *affd.*, 39 Ch. D. 456, C. A.

858. ——.]—SANTLEY *v.* WILDE, No. 1, *ante*.

859. Not subject to dower.]—Husband seized in fee, mortgages for years, & marries, the mtgee. never enters; the wife on the death of her husband shall be endowed.—HAMILTON (DUKE) *v.* MOHUN (LORD) (1710), 1 P. Wms. 118; 1 Eq. Cas. Abr.

not entitled to a month's notice before bringing ejectment. — STEVENSON *v.* CULBERTSON (1862), 12 C. P. 79.—**CAN.**

c. —— *When maintainable—Conditions of mortgagee not performed—Necessity for reconveyance.*]—MAHON *v.* GANNON (1886), 19 N. S. R. (7 R. & G.) 218.—**CAN.**

PART VII. SECT. 2.

852 i. *Equitable estate—Transmissible as such—Inter vivos or on death.*]—The owner of the equity of redemption is, in equity, considered the owner of the estate; it descends to his heir; may be made the subject of settlement or will; limited in the same manner, & those limitations barred in the same manner as the legal estate, the mtgee. being considered in equity as a mere incumbrancer. — BLAKE *v.* FOSTER (1814), 2 Ball. & B. 389; *revsd.* (1823), 4 Bli. 140, n.; 2 Mol. 357, n.—**IR.**

Sect. 2.—Nature. Sect. 3: Sub-sects. 1 & 2.]

90, pl. 6; 1 Salk. 158; 2 Vern. 652; 24 E. R. 319, L. C.

Annotations:—**Expld.** R. *v.* Northweald Bassett (1824), 2 B. & C. 724. **Mentd.** Law *v.* Law (1735), Cas. *temp.* Talb. 140; Wright *v.* Proud (1806), 13 Ves. 136; Hermann *v.* Charlesworth (1905), 74 L. J. K. B. 620.

860. ——.]—CASBURNE *v.* INGLIS, No. 853, *ante.*

861. ——.]—A widow is not dowable of an equity of redemption.—DIXON *v.* SAVILLE (1783), 1 Bro. C. C. 326; 28 E. R. 1160.

Annotation:—**Mentd.** Smith *v.* Adams (1854), 5 De G. M. & G. 712.

See, now, Administration of Estates Act, 1925 (c. 23), s. 45.

862. Not chose in action.]—CASBURNE *v.* INGLIS, No. 853, *ante.*

863. Gives rise to tenancy by curtesy.]—CASBURNE *v.* INGLIS, No. 853, *ante.*

864. Estate subject of seisin.]—The equity of redemption in this ct. is the fee simple of the land; will descend, may be granted, devised & entailed, & barred by a common recovery; which proves that in consideration of this ct., it is such an estate as there may be seisin of.—BURGESS *v.* WHEATE, A.-G. *v.* WHEATE (1759), 1 Eden, 177; 1 Wm. Bl. 123; 28 E. R. 652.

Annotations:—**Reld.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Gordon *v.* Gordon (1821), 3 Swan. 400; A.-G. *v.* Leeds (1833), 2 My. & K. 343; Downe *v.* Morris (1844), 3 Hare, 394; Beale *v.* Symonds (1853), 16 Beav. 406. **Mentd.** Middleton *v.* Spicer (1780), 1 Bro. C. C. 201; Barclay *v.* Russell (1797), 3 Ves. 424; Craufurd *v.* Hunter (1798), 8 Term Rep. 13; Williams *v.* Lonsdale (1798), 3 Ves. 752; Dolder *v.* Bank of England (1805), 10 Ves. 352; Mackreth *v.* Symmons (1808), 15 Ves. 329; Langley *v.* Sneyd (1822), 1 L. J. O. S. Ch. 14; Doe d. Shelley *v.* Edlin (1836), 4 Ad. & El. 582; Taylor *v.* Haygarth (1844), 14 Sim. 8; *Re* Reay (1847), 8 L. T. O. S. 476; Davall *v.* New River Co. (1849), 3 De G. & Sm. 394; Onslow *v.* Wallis (1849), 1 Mac. & G. 506; Wythes *v.* Lee (1855), 3 Drew. 396; Cox *v.* Parker (1856), 25 L. J. Ch. 873; Barrow *v.* Wadkin (1857), 24 Beav. 1; Haywood *v.* Cope (1858), 25 Beav. 140; Masulipatam (Collector) *v.* Cavaly Vencata Narrainapah (1861), 8 Moo. Ind. App. 529; Sweeting *v.* Sweeting (1863), 3 New Rep. 240; Delacherois *v.* Delacherois (1864), 4 New Rep. 501; Brookman *v.* Smith (1871), L. R. 6 Exch. 291; *Re* Gosman (1880), 15 Ch. D. 67; *Re* Van Hagan, Sperling *v.* Rochfort (1880), 16 Ch. D. 18; Bradlaugh *v.* Clarke (1883), 8 App. Cas. 354; Gallard *v.* Hawkins (1884), 27 Ch. D. 298; *Re* Bond, Panes *v.* A.-G. (1900), 82 L. T. 612; Talbot *v.* Jevers, [1917] 2 Ch. 363.

865. Not estate in technical legal sense.]—It is a misapplication of words to call an equity of redemption an estate in the proper technical legal sense.—PAGET *v.* EDE (1874), L. R. 18 Eq. 118; 43 L. J. Ch. 571; 30 L. T. 228; 22 W. R. 625.

Annotations:—**Reld.** *Re* Hawthorne, Graham *v.* Massey (1883), 23 Ch. D. 743; British South Africa Co. *v.* De Beers Consolidated Mines (1910), 80 L. J. Ch. 65.

866. Distinguished from equity to redeem—After failure to exercise contractual right of redemption.]—KREGLINGER *v.* NEW PATAGONIA MEAT & COLD STORAGE CO., LTD., No. 20, *ante.*

Liability to tithe rentcharge.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 481, No. 3398.

Whether assets in hand of personal representatives.]—*See* EXECUTORS & ADMINISTRATORS, Vol. XXIII., p. 340, Nos. 4048–4049; p. 346, Nos. 4120–4142.

Right of grantor of bill of sale.]—*See* BILLS OF SALE, Vol. VII., p. 132, Nos. 754–755.

Whether subject to heriot custom.]—*See* COPYHOLDS, Vol. XIII., p. 97, No. 1236.

Disposal inter vivos & devolution.]—*See* Sect. 6, *post.*

Necessity for equity of redemption in mortgage.]—*See* Part I., Sect. 4, *ante.*

Rights & liabilities of mortgagor.]—*See* Part VIII., *post.*

SECT. 3.—WHO MAY REDEEM.

SUB-SECT. 1.—IN GENERAL.

See Law of Property Act, 1925 (c. 20), ss. 85–87.

867. General rule—Any person interested.]—(1) A mtgee. is not bound to convey the legal estate in the mtged. property & to deliver up the title deeds to a person from whom he has accepted payment of principal, interest & costs, if that person has only contracted to purchase a part of the mtged. estate & has not accepted the title. On tender by a person having partial interest giving a right to redeem the mtgee. is bound to convey, but the conveyance should reserve the equities of the other persons interested.

(2) Any person interested in the equity of redemption is entitled to redeem (LORD HATHERLEY, C.).

(3) It would be very mischievous to mtgees. if the ct. were to hold that they were bound to inquire into the titles of all the persons who have got other interests in the equity of redemption (LORD HATHERLEY, C.).—PEARCE *v.* MORRIS (1869), 5 Ch. App. 227; 39 L. J. Ch. 342; 22 L. T. 190; 18 W. R. 196, L. C.

Annotations:—*As to* (1) **Consd.** Hall *v.* Heward (1886), 32 Ch. D. 430. **Reld.** Magnus *v.* Queensland National Bank (1887), 36 Ch. D. 25; Kinnaird *v.* Trollope (1888), 39 Ch. D. 636; Flint *v.* Howard, [1893] 2 Ch. 54; Corbett *v.* National Provident Institution (1900), 17 T. L. R. 5; *As to* (2) **Folld.** Tarn *v.* Turner (1888), 39 Ch. D. 456. *As to* (3) **Reld.** Tarn *v.* Turner (1888), 39 Ch. D. 456.

868. Right confined to mortgagor & his heirs—In absence of collusion.]—Mtgor. or his heirs only can sue the mtgee. for an account & redemption, unless it can be shown that there is collusion between them & the mtgees.—WHITE *v.* PARNTHER (1829), 1 Knapp, 179; 12 E. R. 288, P. C.

869. The mortgagor.]—CLARKE *v.* JEVON (1684), Freem. Ch. 89; 22 E. R. 1076.

870. Party with interest foreclosed—Under foreclosure suit—Subsequent accrual of interest in same estate—From stranger to foreclosure suit.]—A party to a suit in which a decree of foreclosure has been made in the absence of another party interested in the estate whose interest was not disclosed on the pleadings is, notwithstanding the imperfection of the suit, bound by the decree of foreclosure. A party to a foreclosure suit whose interest is thereby foreclosed, & who afterwards becomes entitled to an interest in the same estate, by devise or otherwise, from another person who was not a party to the foreclosure, may bring his bill of redemption. Relief will not be given in such a case on a claim for redemption, stating only that pltf. is entitled to the equity of redemption under certain instruments, but not stating any of the proceedings in the suit for foreclosure, or the grounds on which pltf. seeks to set it aside.—BROMITT *v.* MOOR (1851), 9 Hare, 374; 22 L. J. Ch. 129; 68 E. R. 552.

Annotation:—**Mentd.** Goode *v.* West (1851), 9 Hare, 378.

PART VII. SECT. 3, SUB-SECT. 1.

869 i. *The mortgagor.*]—BUCKNELL *v.* VICKERY (1876), 13 N. S. W. S. C. R. (Eq.) 34.—**AUS.**

869 ii. ——.]—A mtgee. of land adjoining a highway is one of the persons in whom the ownership of it is vested for the purpose of Consolidated Municipal Act, 1892, s. 550 (9), & as such is entitled to pre-emption thereunder, subject to the right of the mtgor. to redeem it along with the mtge.—BROUN *v.* BUSHEY (1894), 25 O. R. 612.—**CAN.**

869 iii. ——.]—ERUSAPPA MUDALIAR *v.* COMMERCIAL & LAND MORTGAGE BANK (1899), I. L. R. 23 Mad. 377.—**IND.**

d. Party with interest foreclosed—Under foreclosure suit.]—READ *v.* SMITH (1867), 16 Gr. 52.—**CAN.**

871. Any person liable for interest.]—By a mtge. deed the debtor covenanted to pay principal & interest, & a surety covenanted to pay the interest in default. The debtor afterwards, by deed, assigned his property to a trustee on trust to sell & divide the proceeds amongst his creditors; the creditors releasing the debtor from the debts due to them respectively; but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by debtor:—*Held:* this deed only amounted to a covenant not to sue the debtor, & the surety was not released, but the surety could pay off the principal to the creditor & recover the amount from the debtor. Where there is a mtge., of course, any person under a liability to pay interest would be at liberty to redeem (LORD HATHERLEY, C.).—GREEN *v.* WYNN (1869), 4 Ch. App. 204; 38 L. J. Ch. 220; 20 L. T. 131; 17 W. R. 385, L. C.

Annotations:—**Refd.** Forbes *v.* Jackson (1882), 19 Ch. D. 615. **Mentd.** Bateson *v.* Gosling (1871), L. R. 7 C. P. 9; *Re* Whitehouse, Whitehouse *v.* Edwards (1887), 37 Ch. D. 683.

Necessary parties to action to redeem.]—*See* Sect. 8, Sub-sect. 4, A., *post.*

Necessary parties to foreclosure action.]—*See* Sect. 5, sub-sect. 5, *post.*

Disposal inter vivos & devolution.]—*See* Sect. 6, *post.*

Mortgagor of shares.]—*See* COMPANIES, Vol. IX., pp. 412–413, 425, Nos. 2658–2661, 2748.

SUB-SECT. 2.—ON BANKRUPTCY OR INSOLVENCY OF MORTGAGOR.

See Law of Property Act, 1925 (c. 20), ss. 85–87.

872. Mortgagor—May not redeem.]—Bill by the assignee of a person, who had made a general conveyance in trust for his creditors, & afterwards taken the benefit of an insolvent act, in respect of the surplus against the assignee, the trustee & the mtgees., dismissed with costs.

A bkpt. cannot file a bill certainly. He does not want a bill against his assignees; but where he has a clear interest & the assignees refuse, the Lord Chancellor will, upon petition, & an offer of indemnity compel them to let him use their names (ARDEN, M.R.).—SPRAGG *v.* BINKES (1800), 5 Ves. 583; 31 E. R. 751; *subsequent proceedings, sub nom.* TROUGHTON *v.* BINKES (1801), 6 Ves. 573.

Annotations:—**Distd.** Fray *v.* Drew (1865), 11 L. T. 730. **Refd.** Benfield *v.* Solomons (1803), 9 Ves. 77; Heath *v.* Chadwick (1848), 2 Ph. 649; Rochfort *v.* Battersby (1849), 2 H. L. Cas. 388. **Mentd.** Smith *v.* Moffatt (1865), L. R. 1 Eq. 397.

873. —— May petition for redemption—On refusal of assignee.]—SPRAGG *v.* BINKES, No. 872, *ante.*

874. —— Bankruptcy prior to purchase of mortgaged estate.]—Where a bill is filed by a bkpt. for redemption of real estate, which he had purchased & mortgaged, a plea that pltf. is an uncertificated bkpt., & that all his real estates were duly conveyed by the comrs. to the assignees, by indenture of bargain & sale, bearing date anterior to the time of his purchasing the estate in question, cannot be sustained.—WROE *v.* CLAYTON (1839), 9 L. J. Ch. 107; 4 Jur. 82, L. C.

875. Creditor.]—FRANCKLYN *v.* FERN (1740), Barn. Ch. 30; 27 E. R. 542.

Annotation:—**Apld.** Troughton *v.* Binkes (1801), 6 Ves. 573.

876. —— In deed of arrangement—Not entitled—Except in special cases.]—Creditors under a deed of trust cannot have a decree for redemption against a mtgee., unless a special case, as collusion; that the trustee refuses, etc. In this case the bill by creditors prayed, not a redemption but a sale; to which the mtgee. would not consent, but submitted to be redeemed, & the bill was dismissed.—TROUGHTON *v.* BINKES (1801), 6 Ves. 573; 31 E. R. 1202.

Annotations:—**Apld.** White *v.* Parnther (1829), 1 Knapp, 179; Gordon *v.* Horsfall (1846), 5 Moo. P. C. C. 393. **Distd.** Fray *v.* Drew (1865), 11 Jur. N. S. 130; National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391.

—— **In bankruptcy.**]—*See* BANKRUPTCY & INSOLVENCY, Vol. V., p. 1018, Nos. 8310–8312.

Trustee in bankruptcy.]—*See* BANKRUPTCY & INSOLVENCY, Vol. IV., p. 371, Nos. 3426–3434.

877. Joint mortgage of wife's property—Bankruptcy of husband—Right of wife to redeem—Subject to right of assignees.]—At the hearing of a suit instituted by the wife of a bkpt. for redemption of a mtge. executed by the husband & wife of the wife's real estate, the assignees of bkpt., who were co-defts. with the mtgee., disclaimed their right to redeem, & a decree was made giving the first equity of redemption to the wife. After this decree, the Comr. in Bkpcy. allowed the mtgee. to prove against the estate of bkpt. for the full amount of his principal & interest. Upon appeal to the Lord Chancellor:—*Held:* the disclaimer of the assignees operated only in acceleration of the wife's right to redeem, but if she did not exercise the right, then, the purpose for which the disclaimer was given having ceased to exist, the assignees' equity of redemption would continue as before. Consequently, the mtgee. could only be admitted to prove, subject to the condition that in the event of the bill being dismissed as against him, the interest of bkpt. in the mtged. premises should be sold, & proof admitted for the residue of the mtge. debt, after deducting the proceeds; or, in the event of redemption by the wife, the proof should be admitted subject to the same being expunged, or remaining wholly or partially for the benefit of the person paying the mtge. debt.

Explanation of the rule that a dismissal of a bill for redemption operates as a decree for foreclosure.

If the bill of the party entitled to it be dismissed & that dismissal precludes any further claim, then the equity of redemption ceases to exist merely for the reason that it is no longer capable of being enforced. But that only applies to the individual who has filed the bill, & it would be impossible upon that ground, & on the effect of that reasoning, to say that the right to redeem belonging to deft., the equity of redemption of deft. is equally lost (LORD WESTBURY, C.).—*Re* GLEAVES, *Ex p.* PAINE (1863), 3 De G. J. & Sm. 458; 32 L. J. Bcy. 65; 8 L. T. 190; 9 Jur. N. S. 701; 11 W. R. 553; 46 E. R. 712, L. C.

878. Beneficiaries under secret declaration of trust.]—The solr. to a trust misappropriated the trust fund & subsequently signed a secret declaration of trust stating that he had appropriated property of his own in mtge. to defts. to meet the liability. He died insolvent, & the beneficiaries now claimed to redeem the mtge.:—*Held:* they were entitled to do so.—RADCLIFFE *v.* ABBEY ROAD & ST. JOHN'S WOOD PERMANENT BUILDING

PART VII. SECT. 3, SUB-SECT. 2.

e. Trustee in bankruptcy.]—MATHEWS *v.* HOLMES (1855), C. R. 2 A. C. 230.—**CAN.**

f. ——.]—A. held a bond for a deed, & assigned it absolutely to B., but for the purpose of security only. B. sold the property to C., & C. sold to others. C. before his purchase had no notice that the bond to B. was a security merely. A. having become bkpt., his assignee applied to redeem, & was held entitled, in the absence of any evidence that C. was a purchaser

Sect. 3.—*Who may redeem: Sub-sects.* 2, 3, 4, 5 & 6, *A., B. & C.*]

SOCIETY (1918), 87 L. J. Ch. 557 ; 119 L. T. 512 ; 62 Sol. Jo. 667 ; [1918–19] B. & C. R. 84.

SUB-SECT. 3.—INFANTS, LUNATICS AND PERSONS OF UNSOUND MIND.

Infants.]—*See* INFANTS, Vol. XXVIII., p. 195, No. 533.

Lunatics.]—*See* LUNATICS, Vol. XXXIII., p. 168, No. 542.

SUB-SECT. 4.—JUDGMENT CREDITORS.

See Law of Property Act, 1925 (c. 20), ss. 85–87.

879. Entitled to redeem—Mortgagee with notice of judgment.]—Lands charged with a judgment were sold to a purchaser who had notice of the judgment ; the purchaser afterwards bought in mtges. to protect his purchase :—*Held :* the judgment creditor paying those mtges. which are precedent to his judgment, shall be admitted to redeem.—BACON *v.* ASHBY (1678), Cas. *temp.* Finch, 366 ; 23 E. R. 201.

880. —— ——.] — GRESWOLD *v.* MARSHAM (1685), 2 Cas. in Ch. 170 ; 22 E. R. 898.

Annotations :—**Apld.** Ingram *v.* Pelham (1752), Amb. 153 ; Toulmin *v.* Steere (1817), 3 Mer. 210. **Consd.** Manks *v.* Whiteley, [1911] 2 Ch. 448. **Reld.** Watts *v.* Symes (1851), 1 De G. M. & G. 240 ; Adams *v.* Angell (1877), 5 Ch. D. 634.

881. —— Priority of assignee in bankruptcy.]—A. in 1692, confessed a judgment, but it was not to take place till after the death of a woman who lived till 1726 ; the estate subject to this judgment descended to B., who mortgaged it to deft. ; & in 1721 became a bkpt., five years before the judgment was to take place :—*Held :* the representative of judgment creditor, & not the assignee under the commission, is entitled to redeem the mtge., & to have the estate of A. exonerated out of B.'s estate, if sufficient.—STONEHEWER *v.* THOMPSON (1742), 2 Atk. 440 ; 26 E. R. 665, L. C.

882. —— Must take out execution—Leasehold estate.]—A judgment creditor, before he is entitled to redeem a mtge. of a leasehold estate & bond creditor, must take out execution.—SHIRLEY *v.* WATTS (1744), 3 Atk. 200 ; 26 E. R. 917.

Annotations :—**Reld.** Scott *v.* Scholey (1807), 8 East, 467. **Mentd.** Leith *v.* Pope (1780), 2 Dick. 575.

883. ——.]—Before execution on a judgment obtained against D. on an action upon a promise of marriage, he by mtge. conveys his whole effects to deft. ; the ct. would carry it no further than to allow pltf. to redeem deft.—KING *v.* MARISSAL (1744), 3 Atk. 192 ; 26 E. R. 912, L. C.

Annotation :—**Apld.** Shirley *v.* Watts (1744), 3 Atk. 200.

884. ——.] — An equity of redemption of a mtge. in fee is not equitable assets, at least, as against judgment creditors ; who have a right to redeem.—SHARPE *v.* SCARBOROUGH (EARL) (1799), 4 Ves. 538 ; 31 E. R. 276, L. C.

Annotation :—**Reld.** Dollond *v.* Johnson (1854), 18 Jur. 767.

885. —— Judgment not affecting land at date of foreclosure decree—Charge acquired on land by writ of elegit.]—Judgment creditors of a mtgor., whose judgments do not affect the mtged. land at the date of the decree in a foreclosure suit, are entitled to redeem, if they acquire a charge on the lands by issuing writs of *elegit*, & obtaining a return from the sheriff, within six months from the date of the decree.—MILDRED *v.* AUSTIN (1869), L. R. 8 Eq. 220 ; 20 L. T. 939 ; 17 W. R. 638.

Annotation :—**Consd.** Cork *v.* Russell (1871), L. R. 13 Eq. 210.

886. —— Action for redemption & foreclosure.]—On a bill filed against mtgees. & mtgor., who was also a judgment creditor who had issued a writ of *elegit* against the goods & hereditaments of judgment debtor, but the execution of which in consequence of the mtges., could not be proceeded with, for accounts, redemption, & foreclosure, the ordinary redemption & foreclosure decree was made, notwithstanding Judgments Act, 1864 (c. 112).—BECKETT *v.* BUCKLEY (1874), L. R. 17 Eq. 435 ; 22 W. R. 294.

Whether necessary parties to foreclosure action.]—*See* Nos. 2960–2968, *post.*

Liability of equity of redemption to execution.]—*See* Sect. 7, *post.*

SUB-SECT. 5.—AS BETWEEN HUSBAND AND WIFE.

See Law of Property Act, 1925 (c. 20), ss. 85–87.

887. Mortgage of lands subject to articles for settlement—Death of husband without executing settlement—Mortgagee without notice—Right of wife to redeem.]—HAYMER *v.* HAYMER (1678), 2 Vent. 343 ; 86 E. R. 476.

Annotation :—**Consd.** Jones *v.* Meredith (1739), 2 Com. 661.

888. Mortgage to secure debt of husband — Settlement of equity of redemption on wife—Bankruptcy of husband.]—*Re* GLEAVES, *Ex p.* PAINE, No. 877, *ante.*

Joint mortgage.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 158, Nos. 1279–1282.

Husband's equity of exoneration.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 153–157, Nos. 1236–1278.

Repayment by husband—Right to recoupment.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 148, No. 1197.

SUB-SECT. 6.—ON DEATH OF MORTGAGOR.

A. Mortgagor Dying before 1898.

See, generally, EXECUTORS, Vol. XXIII., pp. 307–317, Nos. 3720–3817.

889. Heir at law — On presumption of death of mortgagor.]—ANON. (undated), 2 Eq. Cas. Abr. 594, n. ; 22 E. R. 499.

890. —— ——.]—MASTEN *v.* COOKSON (1734), 2 Eq. Cas. Abr. 414 ; 22 E. R. 352, L. C.

891. —— Of devisee of equity of redemption.]—COOPER *v.* COOPER (1689), Nels. 153 ; 21 E. R. 813.

892. ——.] — DUNCOMBE *v.* HANSLEY (1720), 3 P. Wms. 333, n. ; 24 E. R. 1089.

for value.—CHERRY *v.* MORTON (1860), 8 Gr. 402.—**CAN.**

PART VII. SECT. 3, SUB-SECT. 4.

883 i. *Entitled to redeem.*]—In a suit to redeem, pltf. was a judgment creditor with execution in the hands of the sheriff against the lands of deft. S., which lands were subject to a mtge. to L., whose exors. were also defts. At the hearing the ct. declared pltf. entitled to the same relief as upon a bill by a puisne incumbrancer against a prior mtgee. & the mtgor.—CHAMBERLIN *v.* SOVAIS (1881), 28 Gr. 404.—**CAN.**

g. —— *Usurious transaction.*]—Where a mtge. had been made, upon a usurious agreement :—*Held :* a judgment creditor of the mtgor. was entitled to file a bill to redeem upon paying the amount actually advanced before the expiration of the time appointed for payment.—ISHERWOOD *v.* DIXON (1855), 5 Gr. 314.—**CAN.**

h. —— *& to benefit of collateral securities.*]—A judgment creditor coming in to redeem a mtge. incumbrancer is entitled, upon payment of the amount due to the mtgee., to an assignment not only of the mtged. premises, but of all collateral securities, whether the same be subject to the lien of the creditor under the judgment or not.—GILMOUR *v.* CAMERON (1857), 6 Gr. 290. —**CAN.**

893. ——.] — A suit for the redemption of a mtge. having been instituted by a party claiming as heir-at-law of the mtgor., who had died intestate, against a party who also claimed to be the heir-at-law, & who had got possession of the estate by obtaining an assignment of the mtge. term after notice of pltf.'s. claim; the ct., at the hearing, made an immediate decree for redemption, refusing deft. an issue to try the pltf.'s title, although it depended upon a long & complicated pedigree, the pedigree being established to the satisfaction of the ct. by documentary evidence, & deft. having entered into no evidence in support of his own claim to the heirship. *Semble:* the ct. would have in like manner refused an issue had the pltf. made out only a *primâ facie* case in support of his title, inasmuch as deft., having obtained possession as mtgee., was, in this suit, to be considered as filling that character only, & a decree against him in that character would not preclude him from asserting his title as heir-at-law in another proceeding.—LLOYD *v.* WAIT (1842), 1 Ph. 61; 6 Jur. 45; 41 E. R. 554, L. C.

Annotation:—**Mentd.** Lancashire *v.* Lancashire (1847), 1 De G. & Sm. 288.

894. Devisee—Term.]—SAUNDERS *v.* HAWKINS (1716), 8 Vin. Abr. 156, L. C.

895. —— **General devise of all realty—Direction to executor to pay mortgage—Terms preserved for benefit of beneficiary.**]—Land mortgaged for two several terms of one thousand years, was afterwards settled to A. in tail, remainder to B. in tail, remainder to A. in fee, whereby A. & B. had successively an equity of redemption incident to their estates. A. by his will appointed the mtge. to be paid off, & the terms to be assigned to M. & by the same will devised all his lands being seised of other lands in fee to C. & his heirs. A. & B. both died without issue, whereby the estate tail was spent; & upon a question, whether the equity of redemption passed to M. by the will of A. & was thereby severed from the reversion:—*Held:* it did not; & M. stood only in the place of the mtgee., & was liable to be redeemed by C.—AMHERST *v.* LYTTON (1729), 5 Bro. Parl. Cas. 254; Mos. 211; 2 E. R. 661, H. L.; *affg.* S. C. *sub nom.* AMMURST *v.* LITTON, LITTON *v.* AMMURST, 1 Barn. K. B. 217, L. C.

Annotations:—**Refd.** Lytton *v.* Lytton (1793), 4 Bro. C. C. 441. **Mentd.** Sheffield *v.* Orrery (1745), 3 Atk. 282.

896. Personal representative—Not entitled.]—The administratrix of a mtgor. of real estate, who has died intestate & without heirs, cannot alone file a bill to redeem the mtged. property.—CATLEY *v.* SAMPSON (1864), 33 Beav. 551; 4 New Rep. 205; 34 L. J. Ch. 96; 10 L. T. 519; 10 Jur. N. S. 993; 12 W. R. 927; 55 E. R. 483.

Annotation:—**Distd.** Hall *v.* Heward (1886), 32 Ch. D. 430.

897. —— ——.]—Where a pltf. being one of six tenants in common, beneficially interested under the will of a testator who died in 1839, in an estate which was subject to a charge & was devised by a testator to trustee charged with the payment of debts, in 1852 obtained letters of administration with the will annexed, & in 1856 filed a bill for redemption, in which the other tenants in common refused to join as pltfs. & were made defts., which bill contained no statement as to the condition of the assets, & afterwards before decree, took the benefit of Insolvent Debtors Act:—*Held:* in a suit so constituted, pltf. had no right to a decree for a redemption.—FRAY *v.* DREW (1865), 11 L. T. 730; 11 Jur. N. S. 130; 13 W. R. 367.

898. —— **On conversion of real estate.**]—Conveyance of the equity of redemption of real estate to trustees, for sale, for the benefit of creditors of the author of the deed & upon trust, if there should be any surplus, to pay the same to him, his exors., administrators, & assigns, to & for his & their own absolute use & benefit:—*Held:* to be a conversion of the real estate into personalty, as between the real & personal representatives of the author.—GRIFFITH *v.* RICKETTS, GRIFFITH *v.* LUNELL (1849), 7 Hare, 299; 19 L. J. Ch. 100; 14 Jur. 166; 68 E. R. 122.

Annotations:—**Mentd.** Hope *v.* Liddell (1855), 7 De G. M. & G. 331; Clarke *v.* Franklin (1858), 4 K. & J. 257; Lee *v.* Angas (1866), L. R. 2 Eq. 59; Clissold *v.* Cork (1872), 27 L. T. 143; Jones *v.* James (1878), 39 L. T. 54; *Re* Grimthorpe, Beckett *v.* Grimthorpe, [1908] 1 Ch. 666.

See, further, EQUITY, Vol. XX., pp. 335–402.

899. —— **Mortgage of realty & personalty—Heir at law unknown.**]—Real & personal estate were mortgaged together. The mtgor. died leaving a will of personalty, but intestate as to real estate. It was not known who was the heir-at-law & the mtgee. never entered into possession. The extrix. of the mtgor. claimed to redeem the whole of the mtged. property which claim was resisted by the mtgee. who insisted that her only right was to redeem the mtged. personalty on payment of a proportionate part of the mtge. debt. The extrix. brought an action for redemption & BACON, V.-C., made a decree for the usual accounts as against a mtgee. in possession, directing that on payment of what was found due the mtgee. should convey & assign the mtged. properties, real & personal, to pltf., subject to such equity of redemption as might be subsisting therein in any other person or persons. Deft. appealed:—*Held:* (1) this decree was right, for that the owner of the equity of redemption of one or two estates comprised in the same mtge. cannot insist on redeeming that estate separately, & cannot be compelled to redeem it separately, his right being to redeem the whole, subject to the equities of the other persons interested; (2) although the heir-at-law, if known, ought to have been a party, the ct. would not delay making a decree until he was ascertained & made a party.—HALL *v.* HEWARD (1886), 32 Ch. D. 430; 55 L. J. Ch. 604; 54 L. T. 810; 34 W. R. 571, C. A.

Annotations:—**Refd.** Kinnaird *v.* Trollope (1889), 42 Ch. D. 610; Heath *v.* Chinn (1908), 98 L. T. 855. **Mentd** Ledbrook *v.* Passman (1888), 57 L. J. Ch. 855; Carlton Main Colliery Co. *v.* Clawley, [1917] 2 K. B. 691.

Equity of redemption in copyholds.] — *See* COPYHOLDS, Vol. XIII., pp. 114, 151, Nos. 1449–1454, 1967.

Devolution of equity of redemption.] — *See* Sect. 6, *post.*

B. Mortgagor Dying after 1897 *and before* 1926.

See Land Transfer Act, 1897 (c. 65), ss. 1, 2, 24, repealed by Law of Property Act, 1922 (c. 23), s. 156 (ii.), Land Registration Act, 1925 (c. 21), s. 147; EXECUTORS, Vol. XXIII., p. 317, Nos. 3818, 3819.

900. General rule.]—*Re* HARROWBY & PAINE'S CONTRACT, [1902] W. N. 137.

901. Equitable estate in copyholds.] — An equitable estate or interest in copyholds devolves, on the death of the owner, on his personal representatives as if it were a chattel real vesting in him or them.—*Re* SOMERVILLE & TURNER'S CONTRACT, [1903] 2 Ch. 583; 72 L. J. Ch. 727; 89 L. T. 405; 52 W. R. 101; 47 Sol. Jo. 727.

Devolution of equity of redemption.] — *See* Sect. 6, sub-sect. 1, *post.*

C. Mortgagor Dying since 1925.

See Administration of Estates Act, 1926 (c. 23), ss. 1–3, 33, 39.

Sect. 3.—Who may redeem: Sub-sect. 6, D.; sub-sects. 7, 8 & 9.]

D. Administrator as Mortgagor.

Redemption by administrator de bonis non.]—*See* EXECUTORS, Vol. XXIII., p. 192, No. 2207.

Devolution of equity of redemption.]—*See* Sect. 6, *post*.

SUB-SECT. 7.—PART OWNERS.

See Law of Property Act, 1925 (c. 20), ss. 85–87.

902. General rule — No right to redeem part separately.]—WELMAN *v.* WARREN (1709), 2 Eq. Cas. Abr. 595; 22 E. R. 500, L. C.

903. —— ——.]—REYNOLDS *v.* LOWE (1748), cited in 1 Hov. Supp. p. 280; 34 E. R. 789, L. C.

904. —— ——.]—Two estates being mortgaged together, on the death of the mtgee., the equity of redemption of the one devolves on A., that of the other on B.; B. is a necessary party to a bill by A. for a redemption.

The owner of part of the estate in mtge. cannot separately redeem his part. The mtgee. is entitled to insist, that the whole of the mtged. estate shall be redeemed together; & for this purpose that all the persons interested in the several parts of the estate as mtgors. should be made parties to the bill seeking the account & the redemption (PLUMER, M.R.).—CHOLMONDELEY (MARQUIS) *v.* CLINTON (LORD) (1820), 2 Jac. & W. 1; 37 E. R. 527; *on appeal* (1821), 4 Bli. 1, H. L.

Annotations:—**Refd.** Pearce *v.* Morris (1869), 5 Ch. App. 227; Bolton *v.* Salmon, [1891] 2 Ch. 48. **Mentd.** Dillon *v.* Parker (1822), Jac. 505; Bennett *v.* Colley (1832), 5 Sim. 181; Ashton *v.* Milne (1833), 6 Sim. 369; Doe d. Pilkington *v.* Spratt (1833), 5 B. & Ad. 731; Leith *v.* Irvine (1833), 1 My. & K. 277; Parrott *v.* Palmer (1834), 3 My. & K. 632; Grenfell *v.* Girdlestone (1837), 2 Y. & C. Ex. 662; Bent *v.* Young (1838), 2 Jur. 202; Sturgis *v.* Champneys (1839), 5 My. & Cr. 97; Davies *v.* Quartermain (1840), 4 Y. & C. Ex. 257; Anderson *v.* Wallis (1842), 12 L. J. Ch. 291; Boldell *v.* Golightly (1842), 12 L. J. Ch. 187; Sayer *v.* Wagstaff (1843), 2 Y. & C. Ch. Cas. 230; Farr *v.* Sheriffe, Dykes *v.* Farr (1845), 4 Hare, 512; Fulham *v.* M'Carthy (1848), 1 H. L. Cas. 703; Baboo Kasi Persad Narain *v.* Mussumat Kawalbasi Kooer (1851), 5 Moo. Ind. App. 146; A.-G. *v.* Murdoch (1852), 1 De G. M. & G. 86; Stone *v.* Godfrey (1854), 5 De G. M. & G. 76; Cottrell *v.* Hughes (1855), 3 C. L. R. 496; Penny *v.* Allen (1857), 7 De G. M. & G. 409; Robertson *v.* Norris (1858), 1 Giff. 421; Wing *v.* Angrave (1860), 8 H. L. Cas. 183; Hornby *v.* Toxteth Park Burial Board (1862), 31 Beav. 52; Marshall *v.* Smith (1865), 5 Giff. 37; Warner *v.* Jacob (1882), 20 Ch. D. 220; Magnus *v.* Queensland National Bank (1887), 36 Ch. D. 25; Farrar *v.* Farrars (1888), 40 Ch. D. 395; Soar *v.* Ashwell, [1893] 2 Q. B. 390; Turner *v.* Walsh, [1909] 2 K. B. 484.

905. —— ——.]—HALL *v.* HEWARD, No. 899, *ante*.

906. Right to redeem whole—Subject to equities of parties interested.]—PEARCE *v.* MORRIS, No. 867, *ante*.

907. Tenants in common — Right of one to redeem—Redemption as assignee of other tenant.]—Tenant in common of a moiety having obtained a decree for redemption of his moiety, afterwards takes a conveyance of the equity of redemption of the other tenant in common, & then files a supplemental bill for a redemption as to that, stating that a prior conveyance of that equity of redemption by the assignees of that tenant in common who had been a bkpt., & in which conveyance bkpt. had joined, was void as against bkpt., having been improperly made. Bill dismissed, being supported by the evidence of bkpt. alone.—WAUGH *v.* LAND (1815), Coop. G. 129; 35 E. R. 503, L. C.

908. —— ——.]—HALL *v.* HEWARD, No. 899, *ante*.

909. —— ——.]—Where a mtgee. is also tenant for life of the mtged. estate, Stat. Limitations does not begin to run against the mtge. title until his death, & the same rule applies where the mtgee. is a tenant in common, with others, of the mtged. estate.

One tenant in common of the equity of redemption may redeem (LORD COTTENHAM, C.). —WYNNE *v.* STYAN (1847), 2 Ph. 303; 41 E. R. 959, L. C.

Right of purchasers of parts on consolidation.]—*See* Nos. 913, 914, *post*.

SUB-SECT. 8.—PURCHASERS OF EQUITY OF REDEMPTION.

See Law of Property Act, 1925 (c. 20), ss. 85–87.

910. Under contract to purchase—Whether entitled to redeem.]—When a bill for specific performance is filed by a person who has contracted to purchase the absolute legal & equitable interest in a mtged. estate from the supposed owner of the equity of redemption, neither the mtgee. nor a person who claims an interest in the equity of redemption, but has not joined in the contract, can be made a deft.; & the circumstance that the mtgee. does not object to being made a party, but requires the sanction of the person so claiming an interest in the equity of redemption before joining in the conveyance, does not make that person a proper party.

P. is merely a mtgee. against whom no bill can properly be filed except for the purpose of redeeming his mtge., & that by a party entitled to redeem the bill does not pray any redemption of P.'s mtge. & if it had pltf. would not be entitled to file such a bill. He is only connected with the property by having contracted to purchase the equity of redemption & until that purchase is

PART VII. SECT. 3, SUB-SECT. 7.

902 i. *General rule — No right to redeem part separately.*]—DAVIS *v.* WHITE (1869), 16 Gr. 312.—**CAN.**

902 ii. —— ——.]—Where an undivided interest in land is mortgaged by the owner thereof, a co-owner has no right to redemption.—NICHOL *v.* ALLENBY (1889), 17 O. R. 275.—**CAN.**

906 i. *Right to redeem whole—Subject to equities of parties interested.*]—*Held*: any one of the three co-owners might redeem, but on redemption he must pay the entire debt; &, after redemption, he could not set up the mtge. as against his co-owners; he could set up against them only the amount of their respective shares, & he would be entitled to tack to another owner's share of the mtge. any balance due to him by that owner on the accounting with respect to advances, & would be bound to give credit for any balance due by him.—ADAMS *v.* KEERS (1920), 46 O. L. R. 523; 17

906 ii. —— ——.]—The purchaser of the equity of redemption of part of an estate under mtge. is entitled to redeem the whole of the mtged. estate if the mtgee. insists on his right to have it so redeemed. — ASANSAB RAVUTHAN *v.* VAMANA RAU (1879), I. L. R. 2 Mad. 223.—**IND.**

906 iii. —— ——.]—The owner of a portion of the equity of redemption is not entitled as matter of right to redeem the whole of the mtge. & recover possession of the whole of the mtged. property, on payment of the whole of the mtge. amount against the will of the mtgee. in possession & of the vendee of another portion of the equity of redemption who was put in possession of some of the lands by the mtgee. on payment of an aliquot portion of the mtge. amount.—RATHNA MUDALI *v.* PERUMAL REDDY (1912), I. L. R. 38 Mad. 310.—**IND.**

PART VII. SECT. 3, SUB-SECT. 8.

910 i. *Under contract to purchase—Whether entitled to redeem.*]—Pltf. claimed to have an interest in certain lands under an agreement for the purchase thereof, made with a railway co., which was assigned to defts. as security for advances made by them, notwithstanding subsequent agreements & transactions with defts.:—*Held*: upon the documents & oral evidence, pltf. had forfeited his interest, & was not entitled to redeem.—

completed he cannot redeem the mtge. To him it is immaterial, upon repayment of the money, whether the mtgor.'s title was good or bad. He is not at liberty to dispute it (LORD COTTENHAM, C.). —TASKER *v.* SMALL (1837), 3 My. & Cr. 63; 7 L. J. Ch. 19; 1 Jur. 936; 40 E. R. 848, L. C.

Annotations:—**Refd.** Roberts *v.* Marchant (1843), 13 L. J. Ch. 56; I. R. Comrs. *v.* Angus, Same *v.* Lewis (1889), 23 Q. B. D. 579. **Mentd.** Cutts *v.* Thodey (1844), 2 L. T. O. S. 474; Nelthorpe *v.* Holgate (1844), 1 Coll. 203; West Midland Ry. *v.* Nixon (1863), 1 Hem. & M. 176; Bird *v.* G. E. Ry. (1865), 19 C. B. N. S. 268; De Hoghton *v.* Money (1866), 2 Ch. App. 164; Aberaman Iron Works *v.* Wickens (1868), 4 Ch. App. 101; Fenwick *v.* Bulman (1869), L. R. 9 Eq. 165; Lumley *v.* Timms (1873), 28 L. T. 157.

911. —— ——.]—PEARCE *v.* MORRIS, No. 867, *ante*.

912. Plaintiff in creditor's suit—After decree for sale.]—Pltf. in a creditor's suit, after a decree for sale of the real estate, may sustain a suit for redemption against a mtgee., or a party entitled to a lien on the title deeds.—CHRISTIAN *v.* FIELD (1842), 2 Hare, 177; 67 E. R. 74.

Annotations:—**Refd.** *Re* Hawkes, Ackerman *v.* Lockhart, [1898] 2 Ch. 1. **Mentd.** *Re* Rapid Road Transit Co., [1909] 1 Ch. 96.

913. Purchasers of parts — On consolidation by mortgagee — In order of purchases.] — Where mtges. of different properties by the same mtgor. have been consolidated by a mtgee., & the mtgor. has conveyed the equity of redemption in some of the properties to purchasers by deeds of various dates, upon foreclosure by the mtgee., a first right of redeeming all the mtges. will be given to the first purchaser of part in point of date, with successive rights of redemption, in default, to the subsequent purchasers of other parts in order of date, as in the case of first, second & third mtgees. —BEEVOR *v.* LUCK. BEEVOR *v.* LAWSON (1867), L. R. 4 Eq. 537; 36 L. J. Ch. 865; 15 W. R. 1221.

Annotations:—**Folld.** Loveday *v.* Chapman (1875), 32 L. T. 689. **Consd.** Baker *v.* Gray (1875), 1 Ch. D. 491; Jennings *v.* Jordan (1881), 6 App. Cas. 698; Harter *v.* Colman (1882), 19 Ch. D. 630; Lewis *v.* Aberdare & Plymouth Co. (1884), 53 L. J. Ch. 741; Pledge *v.* White (1896), 65 L. J. Ch. 449. **Refd.** Wellesley *v.* Mornington (1869), 17 W. R. 355; Bradley *v.* Riches (No. 2) (1878), 39 L. T. 78; Cummins *v.* Fletcher (1880), 14 Ch. D. 699; Minter *v.* Carr (1894), 7 R. 558; Riley *v.* Hall (1898), 79 L. T. 244.

914. —— —— ——.] — Where a mtgee. has consolidated several mtges. of different properties made by the same mtgor., who has conveyed away the respective equities of redemption to various purchasers, upon foreclosure by the mtgee., the earliest purchaser of any part in point of time, or a subsequent purchaser of that part from him who stands in his shoes, will have the first right of redeeming the whole; & if he does not do so then the purchasers of other parts will be entitled successively in order of date to redeem the whole. If the first purchaser of a part has bought that part subject to a mtge. debt he, or whoever stands in his place at the time of consolidation & redemption, must pay that mtge. debt.—LOVEDAY *v.* CHAPMAN (1875), 32 L. T. 689.

915. Mortgage of other property subsequent to sale of equity—Mortgage to same mortgagee—Redemption of first mortgage only.]—The mtgor. of one property assigned the equity of redemption, & afterwards mortgaged another property to the mtgee. of the first. The assignees of the equity of redemption having brought an action to redeem the first property, the mtgee. claimed to consolidate the mtges.:—*Held:* (1) the right of the purchaser of an equity of redemption cannot be affected by a mtge. created after the purchase, & the assignee was entitled to redeem the first mtge. without redeeming the second; (2) under R. S. C. Ord. 16, r. 7, trustees of an equity of redemption sufficiently represent their *cestui que trust* in a redemption suit, no direction to the contrary having been made by the ct.—JENNINGS *v.* JORDAN (1881), 6 App. Cas. 698; 51 L. J. Ch. 129; 45 L. T. 593; 30 W. R. 369, H. L.; *varying* S. C. *sub nom.* MILLS *v.* JENNINGS (1880), 13 Ch. D. 639, C. A.

Annotations:—*As to* (1) **Consd.** Harter *v.* Colman (1882), 19 Ch. D. 630; Hughes *v.* Britannia Permanent Benefit Bldg. Soc., [1906] 2 Ch. 607. **Refd.** Andrews *v.* City Permanent Benefit Bldg. Soc. (1881), 44 L. T. 641; Atherley *v.* Barnett (1885), 52 L. T. 736; Bird *v.* Wenn (1886), 33 Ch. D. 215; Mutual Life Assce. Soc. *v.* Langley (1886), 32 Ch. D. 460; Harris *v.* Tubb (1889), 60 L. T. 699; Griffith *v.* Pound (1890), 45 Ch. D. 553; Minter *v.* Carr, [1894] 3 Ch. 498; Pledge *v.* Carr, [1894] 2 Ch. 328; Riley *v.* Hall (1898), 79 L. T. 244. *As to* (2) **Apld.** Doble *v.* Manley (1885), 54 L. J. Ch. 636. **Distd.** Francis *v.* Harrison (1889), 43 Ch. D. 183. **Consd.** Wavell *v.* Mitchell (1891), 64 L. T. 560. *Generally.* **Refd.** Biddulph *v.* Billiter-street Offices Co. (1895), 72 L. T. 834; Pledge *v.* White, [1896] A. C. 187.

Disposal of equity of redemption inter vivos.]—*See* Sect. 6, sub-sect. 2, *post*.

SUB-SECT. 9.—SUBSEQUENT D

See Law of Property Act, 1925 (c. 20), ss. 85–87.

916. General rule.]—JONES *v.* MEREDITH (1739), 2 Com. 661; Bunb. 346; 2 Eq. Cas. Abr. 594, n.; 92 E. R. 1257.

Annotations:—**Mentd.** Harrison *v.* Southcote & Moreland (1751), 2 Ves. Sen. 389; Arnold *v.* Revoult (1819), 4 Moore, C. P. 66; Shrewsbury *v.* Scott (1859), 6 C. B. N. S. 1.

917. ——.] — A. mortgaged some property to B.; he subsequently mortgaged it to C., who covenanted not to bring any suit, etc. within ten years, for obtaining possession or foreclosing: —*Held:* by this covenant, C. was precluded from redeeming B. within the ten years.

The only relief to which a second mtgee. is entitled, is to a decree for the redemption of the first mtgee. & for the foreclosure or redemption of the mtgor. He has no right to compel the first mtgee. to transfer to him his first mtge., on payment of what is due; or to call on the mtgor. to join in such transfer.

There cannot be an adverse redemption, between mtgees., in the absence of the mtgor.; if therefore, by contract, or other circumstances, a

GRANT *v.* CARR (Man.) (1911), 18 W. L. R. 415.—**CAN.**

k. *Purchaser without notice of prior* ——— d. ——
BALD (1836), 4 O. S. 330.—**CAN.**

l. *Execution purchaser.*]—*Held:* the purchaser at sheriff's sale of a reversion in lands mortgaged for a term of years, is entitled to redeem the mtge. for his own benefit.—WATERS *v.* SHADE (1851), 2 Gr. 457.—**CAN.**

m. ——.]—An execution purchaser of an equity of redemption is entitled to redeem only upon payment of the whole arrears of principal & interest legally recoverable from the mtgor., & twenty years of such arrears are recoverable under the usual covenant to pay.—KEARY *v.* MASON (1891), 2 ——— ——.

PART VII. SECT. 3, SUB-SECT. 9.

916 i. *General rule.*]—A subsequent mtgee. is not entitled to redeem the prior mtge. by simply paying the price for which the prior mtgee. may have purchased the mtged. property at an auction-sale held in execution of a decree obtained by him without joining the subsequent mtgee. as a party; but such subsequent mtgee. must, if he wishes to redeem, pay to the prior the full amount due on his mtge.—DIP NARAIN SINGH *v.* HIRA (1897), I. L. R. 19 All. 527.—**IND.**

n. *Successive incumbrancers.*]—Where the master appointed a time for all the subsequent incumbrancers who proved before him to redeem pltf., one of whom at the time appointed paid the amount & took the assignment:—*Held:* the incumbrancers who could not redeem were entitled to three months' further time before the co-defts. could obtain a final foreclosure

Sect. 3.—Who may redeem: Sub-sects. 9, 10 & 11.]

second mtgee. is precluded from bringing, or is unable to bring, the mtgor. before the ct., a suit by such second mtgee., to redeem the first, cannot proceed.—RAMSBOTTOM *v.* WALLIS (1835), 5 L. J. Ch. 92.

Annotations :—**Refd.** Wicks *v.* Scrivens (1860), 1 John & H. 215 ; Cummins *v.* Fletcher (1879), 28 W. R. 272 ; Morgan *v.* Jeffreys (1910), 79 L. J. Ch. 360.

918. ——.]—First mtgee. ought without a judicial proceeding to accept payment from a second mtgee., & thereupon to convey to him the mtged. estate, with or without the concurrence of the mtgor.—SMITH *v.* GREEN (1844), 1 Coll. 555 ; 63 E. R. 541.

Annotations :—**Refd.** Paynter *v.* Carew (1854), Kay, App. xxxvi ; Wicks *v.* Scrivens (1860), 1 John. & H. 215 ; Pearce *v.* Morris (1869), 5 Ch. App. 227. **Mentd.** Harmer *v.* Priestley (1853), 16 Beav. 569.

919. ——.]—An equitable second mtgee. commenced an action against the liquidation trustee of the mtgor., & the first mtgees., claiming an equitable charge on the property, redemption against the second mtgees., &, if necessary, foreclosure.

Order of county ct. in bkpcy., restraining the action, discharged.

His right is to redeem the first mtge. &, if necessary, to foreclose the mtgor. . . . He has a right to come into the ct. of bkpcy. . . . or to bring an action which will be equivalent to filing a bill in chancery (BACON, C.J.).—*Re* WHERLY, *Ex p.* HIRST (1879), 11 Ch. D. 278 ; 27 W. R. 788.

Annotation :—**Consd.** Sharp *v.* McHenry, Sharp *v.* Brown (1836), 55 L. T. 747.

920. Right when mortgagor foreclosed.]—Subsequent incumbrancers may redeem the first mtgee., though the mtgor. is foreclosed by a decree ; & the account taken in the suit where such decree was obtained will not bind the subsequent incumbrancers.—MORRET *v.* WESTERNE (1710), 2 Vern. 663 ; 1 Eq. Cas. Abr. 164 ; 23 E. R. 1031.

921. Successive incumbrancers — Right in succession.]—TEEVAN *v.* SMITH, No. 509, *ante*.

Sale by mortgagee restrained on offer to redeem.]—*See* No. 2376, *post*.

Right in foreclosure action.]—*See* Part VIII., Sect. 5, *post*.

SUB-SECT. 10.—SETTLED ESTATES.

See Law of Property Act, 1925 (c. 20), ss. 85–87.

922. Tenant for life — Proportion to be contributed by remainderman.]—Lands in mtge. devised to A. for life, remainder to B. in fee. A. takes an assignment of this mtge. in a trustee's name. B. may compel A. to contribute a third of the mtge. in respect of his estate for life.—CLYAT *v.* BATTESON (1686), 1 Vern. 404 ; 1 Eq. Cas. Abr. 117 ; 23 E. R. 546.

Annotation :—**Refd.** Ballet *v.* Spralinger (1696), Prec. Ch. 62.

923. —— **Must hold equity on trusts of settlement.**]—AYNSLY *v.* REED (1754), 1 Dick. 249 ; 21 E. R. 264.

Annotation :—**Refd.** Wicks *v.* Scrivens (1860), 1 John. & H. 215.

924. —— ——.]—Where property, subject to a mtge., & settled, the tenant for life is entitled to redeem, & to have the legal estate conveyed to himself, but must hold the equity of redemption subject to the trusts of the settlement.—WICKS *v.* SCRIVENS (1860), 1 John. & H. 215 ; 70 E. R. 726.

Annotation :—**Refd.** Pearce *v.* Morris (1869), 5 Ch. App. 227.

925. —— **Cannot compel remainderman to redeem him.**]—Taking the simple case of an equity of redemption devised to one for life with remainders over, the right of the tenant for life to redeem the mtge. has been long established ; although it was formerly considered that he had no such right. But it is clear that a tenant for life redeeming the mtge. cannot compel those in remainder to redeem him (KINDERSLEY, V.-C.).—RILEY *v.* CROYDON (1864), 2 Drew. & Sm. 293 ; 5 New Rep. 160 ; 11 L. T. 591 ; 10 Jur. N. S. 1251 ; 13 W. R. 223 ; 62 E. R. 633.

926. Remainderman — Whether entitled to redeem against tenant for life.]—The reversioner is not entitled forcibly to redeem the tenant for life (ALEXANDER, C.B.).—RAVALD *v.* RUSSELL (1830), You. 9 ; 159 E. R. 884.

Annotations :—**Apld.** Prout *v.* Cock, [1896] 2 Ch. 808. **Refd.** Raffety *v.* King (1836), 1 Keen, 601 ; Wicks *v.* Scrivens (1860), 1 John. & H. 215.

927. —— ——.]—Testator, having mortgaged land in fee, devised it to his wife during the minority of his two sons, & directed that when they were of age the property should be equally divided between his wife & children, whichever of them might be living at that time. After testator's death the widow mortgaged her interest under the will to the original mtgee. & died while the sons were still infants. The infants, by a next friend, brought an action against the mtgee. to redeem testator's mtge. :—*Held :* during the continuance of the widow's limited estate, pltfs. were not entitled to redeem testator's mtge. without the consent of the mtgee. as owner of the limited estate. —PROUT *v.* COCK, [1896] 2 Ch. 808 ; 66 L. J. Ch. 24 ; 75 L. T. 409 ; 45 W. R. 157.

928. Tenant in tail.]—A father, tenant for life, & a son, tenant in tail, in 1835, joined in mortgaging the estate, to secure payment of a debt of the son, under an agreement between them to suffer a recovery, & resettle the estate, as to the remainder after the death of the tenant for life, in case the father should at any time be obliged to pay any part of the interest of the mtge. debt, or the son should not pay off that debt by a certain day, & the father should then pay it off & release the son therefrom, to the use of the father in fee ; the father covenanting to convey or devise a seventh part of the estate to the son ; &, in case the son should pay off the mtge. by the time mentioned, then to the son & the heirs of his body, charged with £500, for such persons as the father should by deed or will appoint. The son did not pay off the mtge. debt, nor did the father pay it off, or release the son therefrom, but the father paid the interest until his death in 1841, & after his death his devisees paid off the mtge. :—*Held :* neither party having performed the agreement, or apparently acted upon it, in the lifetime of the father, ct. would not, after the death of the father, enforce the specific performance of the agreement ; as the agreement could not be specifically performed, the original rights of the parties remained ; & the son was therefore entitled to redeem the estate, upon repayment of the mtge. debt & the interest.—PLAYFORD *v.* PLAYFORD (1845), 4 Hare, 546 ; 5 L. T. O. S. 89 ; 67 E. R. 764.

See, also, REAL PROPERTY ; SETTLEMENTS.

against them.—ARDAGH *v.* WILSON (1856), 2 Ch. Ch. 70.—**CAN.**

o. *Lease subject to two mortgages—Lessee with right to redeem first mortgage—Second mortgagee's right to redeem.*]—A lease of land, subject to two mtges., contained a covenant by the lessor & the second mtgee. with the lessee, that the lessee might, if he desired to do so, redeem the first mtge., & that in that case the sum paid for redemption should be a first charge on the land :—*Held :* the second mtgee.'s right to redeem the first mtge., after its acquisition by the lessee, was not taken away.—BREWER *v.* CONGER (1900), 27 A. R. 10.—**CAN.**

SUB-SECT. 11.—OTHER CASES.

See Law of Property Act, 1925 (c. 20), ss. 85–87.

929. Jointress.] — HOWARD *v.* HARRIS (1683), 1 Vern. 190; 2 Cas. in Ch. 147; Freem. Ch. 86; 1 Eq. Cas. Abr. 312; 23 E. R. 406.

Annotations:—**Refd.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. **Mentd.** Newcombe *v.* Bonham (1681), Freem. Ch. 67; Jones *v.* Meredith (1739), 2 Com. 661; Bunning *v.* Bunning (1822), 1 L. J. O. S. Ch. 56; Clay *v.* Willis (1823), 1 L. J. O. S. K. B. 144; Rice *v.* Noakes, [1900] 2 Ch. 445.

930. ——.] — A man marries a jointress of houses which are burnt down, & they borrow £1,500 to rebuild, & levy a fine *sur concess*, & by deed between the husband & consusee the equity of redemption is reserved to the husband & his heirs; he lays out £3,000 in building & dies. Decreed the wife & not the heir to redeem.—BREND *v.* BREND (1683), 1 Vern. 213; 23 E. R. 421; *sub nom.* BROAD *v.* BROAD, 2 Cas. in Ch. 161.

Annotations:—**Consd.** Jackson *v.* Innes (1819), 1 Bli. 104. **Refd.** Jackson *v.* Parker (1770), Amb. 687; Clinton *v.* Hooper (1791), 1 Ves. 173; Ruscombe *v.* Hare (1818), 6 Dow, 1. **Mentd.** Trulock *v.* Robey (1847), 2 Ph. 395.

931. ——.]—In a foreclosure action pltfs. were first mtgees., & also third mtgees. Defts. were the second incumbrancer, who was a jointress, & several subsequent incumbrancers whose priorities had not been ascertained. An order was made on the hearing of the action giving the jointress a period of six months within which to redeem.—SMITHETT *v.* HESKETH (1890), 44 Ch. D. 161; 59 L. J. Ch. 567; 62 L. T. 802; 38 W. R. 698.

932. Dowress.] — JONES *v.* MEREDITH (1739), 2 Com. 661; Bunb. 346; 2 Eq. Cas. Abr. 594, n.; 92 E. R. 1257.

Annotations:—**Mentd.** Harrison *v.* Southcote & Moreland (1751), 2 Ves. Sen. 389; Arnold *v.* Revoult (1819), 4 Moore, C. P. 66; Shrewsbury *v.* Scott (1859), 6 C. B. N. S. 1.

933. ——.]—A dowress has a right to redeem a mtge., & hold over till satisfied.—PALMES *v.* DANBY (1700), Prec. Ch. 137; 1 Eq. Cas. Abr. 219; 24 E. R. 66.

Annotation:—**Refd.** Banks *v.* Sutton (1732), 2 P. Wms. 700.

934. ——.] — A wife married before Dower Act, 1833 (c. 105), joined, for the purpose of releasing her dower, with her husband in mortgaging his freehold estate to secure his debt. By the mtge. deed the equity of redemption was reserved to the husband:—*Held*: the wife's right to dower was extinguished in equity as well as at law, & she had no right to redeem the estate.—DAWSON *v.* BANK OF WHITEHAVEN (1877), 6 Ch. D. 218; 46 L. J. Ch. 884; 37 L. T. 64; 26 W. R. 34, C. A.

Annotation:—**Expld.** Meek *v.* Chamberlain (1881), 8 Q. B. D. 31.

See, now, Administration of Estates Act, 1925 (c. 23), s. 45.

935. Grantee of voluntary deed—Prior to mortgage—Deed declared fraudulent.]—RAND *v.* CARTWRIGHT (1664), 1 Cas. in Ch. 59; Nels. 101; 22 E. R. 694; *sub nom.* RAMM (RAND) *v.* CARTWRIGHT, Freem. Ch. 183.

Annotation:—**Refd.** Jones *v.* Meredith (1739), 2 Com. 661.

936. Tenant by curtesy.]—JONES *v.* MEREDITH (1739), 2 Com. 661; Bunb. 346; 2 Eq. Cas. Abr. 594, n.; 92 E. R. 1257.

Annotations:—**Mentd.** Harrison *v.* Southcote & Moreland (1751), 2 Ves. Sen. 389; Arnold *v.* Revoult (1819), 4 Moore, C. P. 66; Shrewsbury *v.* Scott (1859), 6 C. B. N. S. 1.

937. Tenant by elegit.] — JONES *v.* MEREDITH (1739), 2 Com. 661; Bunb. 346; 2 Eq. Cas. Abr. 594, n.; 92 E. R. 1257.

Annotations:—**Mentd.** Harrison *v.* Southcote & Moreland (1751), 2 Ves. Sen. 389; Arnold *v.* Revoult (1819), 4 Moore, C. P. 66; Shrewsbury *v.* Scott (1859), 6 C. B. N. S. 1.

See, now, Administration of Estates Act, 1925 (c. 23), s. 45.

938. Claim involving fraud—Fraudulent title.] —If a fine be gained by fraud from a *feme covert* under age, who dies, & her heir buys in a prior mtge., & then levies a fine, & five years pass, & then those who claim under the fine bring a bill to redeem, etc. Equity will not assist them claiming under such fraudulent title, & also by reason of the fine & non-claim.—PACKINGTON *v.* BARROW (1703), Prec. Ch. 216; 2 Eq. Cas. Abr. 474; 24 E. R. 106.

939. —— Possession obtained by fraud—Must be restored before redemption.]—LANT *v.* CRISP (1719), 2 Eq. Cas. Abr. 599; 5 Bro. Parl. Cas. 200; 22 E. R. 503.

940. Sequestrator.] — FAWCET *v.* FOTHERGILL (1705), 1 Dick. 19; 21 E. R. 173.

941. Trustee upon trust to sell & pay off debts—Debts satisfied.]—A trustee in receipt of the rents & profits of a mtged. estate, under an old conveyance of the equity of redemption, upon trust to sell & pay off certain debts which had been long since satisfied, is not entitled to redeem the mtge.—JAMES *v.* BIOU, OWEN *v.* FLACK (1826), 2 Sim. & St. 600; 4 L. J. O. S. Ch. 202; 57 E. R. 475.

Annotation:—**Mentd.** Flack *v.* Longmate (1845), 8 Beav. 420.

942. Purchaser from building society — Purchaser of one of several lots—Recoupment by other purchasers.]—PETO *v.* HAMMOND, No. 1137, *post*.

943. Vendor of equity of redemption—When sale set aside—Right to substituted policy.]—A mtge. transaction comprised two policies of insurance on the life of the mtgor., which [illegible] authorised, but not compelled, to keep on foot. The mtgor. sold his equity of redemption at an undervalue, & an assignee of the purchaser substituted for them another policy on the mtgor.'s life, in lieu of the original ones, which were dropped, & assigned the same to the mtge. The assignee of the purchaser paid off the mtge., & continued to pay the premiums. The sale of the equity of redemption was afterwards set aside at the instance of the exors. of the mtgor.:—*Held*: the substituted policy formed part of the equity of redemption, & the exor. of the mtgor. was entitled to redeem such substituted policy in the same way that he could have redeemed the original policies.—NESBITT *v.* BERRIDGE, BUTLER *v.* BERRIDGE (1863), 4 De G. J. & Sm. 45; 3 New Rep. 53; 9 L. T. 588; 10 Jur. N. S. 53; 12 W. R. 283; 46 E. R. 831, L. C.

944. Tenant for years—Lease without consent of mortgagee.]—TARN *v.* TURNER, No. 857, *ante*.

945. Party in occupation—Claiming under possessory title.]—FLETCHER *v.* BIRD (1896), Fisher's Law of Mortgage, 6th ed. p. 1025.

PART VII. SECT. 3, SUB-SECT. 11.

932 i. *Dowress.*]—CASNER *v.* HAIGHT (1884), 6 O. R. 451.—**CAN.**

932 ii. ——.]—The wife of a mtgor., who has joined in the mtge. for the purpose of barring her dower, to the extent of the mtge. only, has the right to redeem during her husband's lifetime, & is a necessary party to an action of foreclosure in the first instance.—BLONG *v.* FITZGERALD (1893), 15 P. R. 467.—**CAN.**

932 iii. ——.]—Pltf. joined with her husband in executing a mtge. of land, & released her dower in due form. Deft. took an assignment of the mtge., &, subsequently, received from pltf.'s husband a release of his equity of redemption, in which pltf. did not join:—*Held*: pltf. could not assert a claim of dower against deft. as long as the mtge. remained on foot, her only remedy being to redeem.—THOMPSON *v.* THOMPSON (1904), 37 N. S. R. 242.—**CAN.**

936 i. *Tenant by curtesy.*]—ANDERSON *v.* HANNA (1889), 19 O. R. 58.—**CAN.**

p. *Claim involving fraud.*] — KERR *v.* MURRAY (1857), 6 Gr. 343.—**CAN.**

944 i. *Tenant for years—Lease without consent of mortgagee.*]—The right of a tenant for years to redeem a mtge. is absolute, & the ct. has no discretion to grant or refuse redemption. Where a tenant for years under a demise made subsequently to a mtge., sought to redeem the lands in the hands of the

Sect. 3.—*Who may redeem: Sub-sect.* 11. *Sect.* 4 *Sub-sect.* 1.]

Surety.]—*See* GUARANTEE, Vol. XXVI., p. 108 Nos. 751–753.

Assignee pendente lite.]—*See* Part VIII., Sect. 5, sub-sect. 5, *post.*

Right on escheat of copyholds.]—*See* COPYHOLDS, Vol. XIII., pp. 150, 151, Nos. 1955, 1967.

Mortgage of presentation to living.]—*See* LAW, Vol. XIX., p. 378, Nos. 1986, 1987.

SECT. 4.—RESTRICTIONS ON RIGHT TO REDEEM.

SUB-SECT. 1.—IN

946. General rule — Once a mortgage always a mortgage.]—NEWCOMBE *v.* BONHAM (1681), Freem. Ch. 67; 2 Cas. in Ch. 58; 1 Vern. 7; 1 Eq. Cas. Abr. 313; 22 E. R. 1063, L. C.; *on appeal, sub nom.* BONHAM *v.* NEWCOMB (1684), 2 Vent. 364; 1 Vern. 232; (1689), 1 Vern. 233, n., H. L.

Annotations:—**Consd.** Croft *v.* Powell (1738), 2 Com. 603; Mellor *v.* Lees (1742), 2 Atk. 494; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. **Relfd.** *Re* Carshalton Park Estate, Graham *v.* The Co., Turnell *v.* The Co., [1908] 2 Ch. 62. **Mentd.** Trulock *v.* Robey (1847), 2 Ph. 395.

947. —— ——.]—ANON. (1681), Freem. Ch. 84; 22 E. R. 1073, L. C.

948. —— ——.]—PRICE *v.* PERRIE, No. 997, *post.*

949. —— ——.]—JENNINGS *v.* WARD, No. 998, *post.*

950. —— ——.]—MELLOR *v.* LEES, No. 55, *ante.*

951. —— ——.]—Absolute conveyance, & a deed of defeasance, on payment of mtge. money, during the joint lives of mtgor. & mtgee., held a restraint upon mtgor.

A mtge. once redeemable continues so till some act is done afresh by the mtgor. to extinguish the redemption, & a man will not be suffered in conscience to fetter himself with a limitation or restricted of his time of redemption (LORD NORTHINGTON, LORD KEEPER).—SPURGEON *v.* COLLIER (1758), 1 Eden, 55; 28 E. R. 605.

Annotations:—**Mentd.** Warden *v.* Jones (1857), 2 De G. & J. 76; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360.

952. —— ——.]—SETON *v.* SLADE, HUNTER *v.* SETON, No. 18, *ante.*

953. —— ——.]—TEEVAN *v.* SMITH, No. 509, *ante.*

954. —— ——.]—Trustees of an insurance society advanced £10,000 to C. on the security of a reversionary interest to which C. was entitled contingently on his surviving his father. As part of the loan transaction the trustees insured the life of C. against that of his father for £34,500 in the society of which they were trustees, & paid the premiums till C.'s death. C. executed a bond charging the reversion with principal, premiums, & interest on principal & premiums. By written agreements the interest & premiums were to accumulate at compound interest for five years. The agreements contained special clauses providing, *inter alia*, to whom the policy in certain specified events should belong, & declared that in the event of C. paying the whole sum due before the death of his father the trustees should be bound to assign the policy to C., & that if C. should pre-decease his father without having paid all principal moneys, interest, & costs the policy should belong absolutely to the trustees, they being bound in that event to impute to the debt all moneys they might receive in respect of the policy. C. died in his father's lifetime, having never paid anything:—*Held:* upon the true construction of the documents the contract was, not that the policy should be effected for the trustees' protection only & for their sole benefit, subject to an option for C. to make it his own in the event of his paying off the debt in his lifetime, but that the policy was mortgaged to the trustees & was the property of C. subject to the charge; therefore that in accordance with the equitable doctrine against fettering a mtgor.'s right of redemption C.'s representatives were entitled to the policy moneys after deducting all sums due.

There is a further equitable rule which seems to be this: that this right of redemption shall not even by bargain between creditor & debtor be made more burdersome to debtor than the original debt, except so far as additional interest & expenses consequent on the debt not having been paid at the time appointed may have occurred or arisen: that any agreement making such right of redemption is void (LORD BRAMWELL).—SALT *v.* NORTHAMPTON (MARQUESS), [1892] A. C. 1; 61 L. J. Ch. 49; 65 L. T. 765; 40 W. R. 529; 8 T. L. R. 104; 36 Sol. Jo. 150, H. L.; *affg.* S. C. *sub nom.* NORTHAMPTON (MARQUESS) *v.* POLLOCK (1890), 45 Ch. D. 190, C. A.

Annotations:—**Consd.** The Bernwell Tower (1895), 72 L. T. 664. **Apld.** Booth *v.* Salvation Army Bldg. Assocn. (1897), 14 T. L. R. 3. **Distd.** Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307. **Consd.** London & Globe Finance Corpn. *v.* Montgomery (1902), 18 T. L. R. 661;

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mtgee., who had obtained an order for foreclosure in a suit to which the present pltf. was not a party:—*Held:* pltf. had a right to redeem in the event of the mtgee. refusing to accept him as a tenant.—MARTIN *v.* MILES (1883), 5 O. R. 404.—**CAN.**

q. *Heir.*]—WARREN *v.* MCKENZIE (1850), 1 Gr. 436.—**CAN.**

r. ——.]—RYMAL *v.* ASHBERRY (1862), 12 C. P. 339.—**CAN.**

t. ——.]—KAY *v.* WILSON (1876), 24 Gr. 212.—**CAN.**

a. ——.]—If a testator bequeaths property, & there are mtges. thereon, it will be for the heir to redeem the property, & not for the legatee, unless a contrary intention appears from the will.—RATHFELDER *v.* RATHFELDER (1874), Buch. 9.—**S. AF.**

b. *Devisees.*]—Upon a judgment obtained against the exors. of a mtgor., a writ against the lands of the testator was sued out, under which his interest in the mtged. premises was sold; & afterwards the purchaser at sheriff's sale obtained a conveyance of the legal estate from the mtgee., all which transactions took place after the passing of 7 Will. 4, c. 2:—*Held:* under such circumstances the devisees of the mtgor. were entitled to redeem.—WALTON *v.* BERNARD (1851), 2 Gr. 344.—**CAN.**

c. *Assignee of mortgage.*]—ROGERS *v.* LEWIS (1866), 12 Gr. 257.—**CAN.**

d. *Annuitant.*]—LONG *v.* LONG (1870), 17 Gr. 251.—**CAN.**

e. *Widow of mortgagor.*]—MONK *v.* KYLE (1870), 17 Gr. 537.—**CAN.**

f. *Son of mortgagor.*]—Testator was seised of certain lands which were subject to incumbrances, & by his will directed the same to be sold if his sons in succession should not redeem. One of the sons, R., to whom the first privilege of redeeming was given, availed himself thereof, & redeemed the property:—*Held:* R. had acquired a good title free from any claim of his brothers.—STEVENSON *v.* STEVENSON (1881), 28 Gr. 232.—**CAN.**

g. *Execution creditor.*]—CANADIAN BANK OF COMMERCE *v.* FORBES (1885), 10 P. R. 442.—**CAN.**

PART VII. SECT. 4, SUB-SECT. 1.

946 i. *General rule—Once a mortgage always a mortgage.*]—In an action for redemption, the parties cannot in the instrument of mtge. itself or by a contemporaneous agreement, limit the mtgor.'s right of redemption.—MANITOBA LUMBER CO., LTD. *v.* EMERSON (1913), 18 B. C. R. 96.—**CAN.**

946 ii. —— ——.]—A ct. of equity will not permit any device or contrivance designed or calculated to prevent or impede redemption although it may be impossible to lay down any general rule as to what should not be regarded as an improper restraint or fetter on the right of redemption.—SARBDAWAN SINGH *v.* BIJAI SINGH (1914), I. L. R. 36 All. 551.—**IND.**

946 iii. —— ——.]—BROWNE *v.* RYAN, [1901] 2 I. R. 653.—**IR.**

Noakes *v.* Rice, [1902] A. C. 24; Samuel *v.* Jarrah Timber & Wood Paving Corpn., [1904] A. C. 323; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. **Refd.** Eyre *v.* Wynn-Mackenzie, [1894] 1 Ch. 218; Bradley *v.* Carritt, [1903] A. C. 253.

955. —— ——.] — SANTLEY *v.* WILDE, No. 1, *ante*.

956. —— ——.] — NOAKES & CO., LTD. *v.* RICE, No. 19, *ante*.

957. —— ——.]—A mtgee. is not allowed at the time of the loan to enter into a contract for the purchase of the mtged. property. A limited co. borrowed money upon the security of their debenture stock subject to the lender having the option to purchase the stock at 40 per cent. within twelve months; the loan to become due & payable with interest at thirty days' notice on either side. Within the twelve months & before the co. gave notice of their intention to repay the loan, the lender claimed to purchase the stock at the agreed price:—*Held:* the option was void, & the co. was entitled to redeem the loan on payment of principal, interest, & costs.

The doctrine "once a mtge. always a mtge." means that no contract between a mtgor. & mtgee. made at the time of the mtge. & as part of the mtge. transaction, or in other words, as one of the terms of the loan, can be valid if it prevents the mtgor. from getting back his property on paying off what is due on the security. Any bargain which has that effect is invalid, & is inconsistent with the transaction being a mtge. . . . Debenture stock is usually a sum of money charged on the assets of the co., issuing it. . . . It can be mortgaged as well by the co. which issues it as by an ordinary holder. I can discover no reason for treating a mtge. of debenture stock as something so different from other mtges. as to render the principle once a mtge. always a mtge. inapplicable to it (LORD LINDLEY).—SAMUEL *v.* JARRAH TIMBER & WOOD PAVING CORPN., [1904] A. C. 323; 73 L. J. Ch. 526; 90 L. T. 731; 52 W. R. 673; 30 T. L. R. 536; 11 Mans. 276, H. L.; *affg.* S. C. *sub nom.* JARRAH TIMBER & WOOD PAVING CORPN., LTD. *v.* SAMUEL, [1903] 2 Ch. 1, C. A.

Annotations:—**Distd.** De Beers Consolidated Mines *v.* British South Africa Co., [1912] A. C. 52. **Consd.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. **Refd.** Haji Abdul Rahman *v.* Mahomed Hassan, [1917] A. C. 209.

958. —— ——.] — It is now fully established by the House of Lords that the old rule that a mtge. cannot be made irredeemable still prevails, & that equity will not permit any clause or contrivance, being part of the mtge. transaction or contemporaneous with it, to prevent or impede redemption.

Applt., in consideration of a mtge. of licensed premises granted to him by resps., borrowed £500, to be repaid by 208 monthly instalments. The mtgor. was not to be at liberty to pay off the debt otherwise than by instalments without the express consent in writing of resps., & the premises, which were to be a tied house during the continuance of the security, were held for a term of years which exceeded by six weeks only the actual expiration of the lease. On the failure of the resps. on one occasion to supply beer in accordance with their covenant, applt. assumed to treat the tie as at an end, & resps. brought an action for damages & an injunction. Applt. counterclaimed to redeem:—*Held:* the mtge. being obviously meant to be irredeemable, the provision as to repayment of the debt could not be enforced, & applt. was entitled to redeem.—FAIRCLOUGH *v.* SWAN BREWERY CO., LTD., [1912] A. C. 565; 81 L. J. P. C. 207; 106 L. T. 931; 28 T. L. R. 450, P. C.

959. Effect of lapse of time — Settlement by original mortgagee—Quiet possession for over seventy years—Plea of purchase for value without notice.]—The heir of a mtgor. files his bill to redeem an old mtge. made by demise for 999 years, under a rent of 20*s.* & redeemable at any time on paying £1,200 at one entire payment. Deft. pleads his title as a purchaser for a valuable consideration, under a marriage settlement, without notice of the mtge. The settlement was made by the original mtgee., & there was a quiet possession of 70 years. The plea was allowed. Where a pltf. replies to a plea, he admits it to be a good bar, if the facts therein alleged are true; & therefore cannot afterwards complain of the order made for allowing the plea, but must proceed to examine witnesses to falsify it.—DUNSANY (LORD) *v.* SHAW (1732), 5 Bro. Parl. Cas. 262; 2 E. R. 667, H. L.

960. Restriction imposed by limited company—Not distinguishable from restriction by individual.] —SAMUEL *v.* JARRAH TIMBER & WOOD PAVING CORPN., No. 957, *ante*.

961. Restriction must refer to mortgage—Independent agreement as to commission.]—Pltfs. advanced to a firm of contractors for public works sums of money by instalments, upon condition that such instalments should be repaid within six months from the date when the same should be advanced, & that, if any instalment should not be repaid at the time it should become due, the contractors should pay interest, at the rate agreed upon, until the same should be repaid, & also a commission of 1 per cent. for every month, or part of a month, that might elapse between the due date & the date of repayment of such instalment, upon the whole amount of such instalment. The repayment of the advances was secured by the promissory notes or acceptances of the contractors, &, collaterally by the deposit of a number of foreign stocks & securities. In an action for foreclosure or sale of these securities the question was raised whether pltfs. were entitled to claim the commission of 1 per cent. per month on unpaid instalments in addition to interest, or whether such commission was contrary to law as being in the nature of a penalty:—*Held:* the contract to pay commission was wholly separate from the payment of interest, it being an independent undertaking to pay something on the happening of a particular event, & could not be considered an illegal charge; the account of what was due upon the securities must be taken on the footing of the validity of the stipulation: & payment must be made on a fixed day, or, if not, then foreclosure, with liberty for any parties to apply in chambers for a sale.—GENERAL CREDIT & DISCOUNT CO. *v.* GLEGG (1883), 22 Ch. D. 549; 52 L. J. Ch. 297; 48 L. T. 182; 31 W. R. 421.

Annotations:—**Consd.** Mainland *v.* Upjohn (1889), 41 Ch. D. 126. **Apld.** The Benwell Tower (1895), 72 L. T. 664. **Refd.** Sadler *v.* Worley, [1894] 2 Ch. 170.

962. —— **Sale with part of purchase money remaining on mortgage—Restriction referring only to contract of sale.**]—Pltf. agreed to sell an estate to defts. for £51,086, £5,000 of the purchase money to be paid in cash & the balance to remain on mtge. for two years. Clause 5 of the agreement was as follows:—The purchasers shall give the vendor the option of finding one-third of the capital of any co. . . . which they may form for the purpose of developing the said brine land. In the event of their failing to give him the said option . . . within a period of two years from the completion of the purchase they shall pay the vendor the sum of £5,000 over & above the mtge. debt of £46,086 & interest. The purchase was

Sect. 4.—Restrictions on right to redeem: Sub-sects. 1 & 2, A. & B. (a), (b) & (c), & C.]

completed in accordance with the agreement on Sept. 2, 1907, & in July, 1908, a private co. was formed for the purpose of working the estate. The whole of the capital, £100,000, was issued & no opportunity was given to pltf. to find one-third, but in Dec. 1908, he was informed by the co. that it was proposed to increase its capital to £120,000, & offering him in accordance with the terms of the said agreement one-third of that amount, viz., 4,000 £10 shares. Pltf. refused this offer, & alleged that under the agreement he was entitled to an option to find one-third of the original capital, & not having had such option he claimed the extra £5,000 under the agreement:—*Held:* (1) the offer actually made to pltf. did not satisfy the option to which he was entitled; (2) the clause in the agreement providing for payment of the extra £5,000 formed part of the agreement to purchase, & was not a clog on the equity of redemption; (3) pltf. was entitled to recover the £5,000. The doctrine [of clogging the equity of redemption] entirely depends on its being a bargain by the mtgee. in his relation as mtgee. towards the mtgor. & had nothing to do with a bargain which a vendor made in dealing with his own property. . . . It was impossible to say that this bargain was a term of the mtge. (COZENS-HARDY, M.R.).—DAVIES *v.* CHAMBERLAIN (1909), 26 T. L. R. 138, C. A.

Annotation:—**Refd.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co. (1913), 109 L. T. 802.

Right to redeem essential to mortgage.]—*See* Part I., Sect. 4, sub-sect. 1, *ante*.

Application of rule to debentures of companies.]—*See* COMPANIES, Vol. X., pp. 781, 782, Nos. 4890–4896.

SUB-SECT. 2.—WHAT AMOUNTS TO "CLOGGING."

A. Agreement for Collateral Benefit.

Validity generally.]—*See* Part IV., Sect. 6, *ante*.

963. General rule.] — CHAMBERS *v.* GOLDWIN, No. 1071, *post*.

964. Right of pre-emption of output.] — A covenant in a mtge. of property in the West Indies to consign the produce of the mtged. estate to the mtgee. is not usurious.—SAYERS *v.* WHITFIELD (1829), 1 Knapp, 133; 12 E. R. 271, P. C.

Annotations:—**Refd.** Henckell *v.* Daly (1828), 1 Moo. P. C. C. 51; Leith *v.* Irvine (1833), 1 My. & K. 277; Faulkner *v.* Daniel (1843), 3 Hare, 199. **Mentd.** Bertrand *v.* Davies (1862), 31 Beav. 429.

965. —— During fixed period.]—Merchants in London agreeing to become sureties for a West India planter, on being secured by a conveyance of his plantation in trust, with a covenant that they should be continued as consignees till the expiration of five years after the reimbursement of what they might advance:—*Held:* entitled to the benefit of this covenant.—BUNBURY *v.* WINTER (1820), 1 Jac. & W. 255; 37 E. R. 372, L. C.

Annotations:—**Consd.** Sayers *v.* Whitfield (1829), 1 Knapp, 133. **Refd.** Henckell *v.* Daly (1828), 1 Moo. P. C. C. 51; Leith *v.* Irvine (1833), 1 My. & K. 277; Faulkner *v.* Daniel (1843), 3 Hare, 199.

966. —— ——.] — KREGLINGER *v.* NEW PATAGONIA MEAT & COLD STORAGE CO., LTD., No. 20, *ante*.

967. Restrictive covenant — To buy exclusively from mortgagee—During continuance of mortgage.]—BIGGS *v.* HODDINOTT, HODDINOTT *v.* BIGGS, No. 993, *post*.

968. —— —— Not limited to continuance of mortgage—Not binding after redemption.]—NOAKES & CO., LTD. *v.* RICE, No. 19, *ante*.

969. —— —— —— ——.]—MORGAN *v.* JEFFREYS, No. 510, *ante*.

970. Agreement for share of profits—Notwithstanding redemption.]—SANTLEY *v.* WILDE, No. 1, *ante*.

971. Mortgagee to be employed as broker—To continue "always thereafter."] — A holder of shares in a tea co. mortgaged the shares to secure a loan & agreed to use his best endeavours to secure that "always thereafter" the mtgee. should have the sale of all the co.'s teas as broker, & in the event of the co.'s teas being sold otherwise than through the mtgee. to pay him the amount of the commission he would have earned if the teas had been sold through him. The mtge. was paid off & the co. afterwards changed their broker. The *quondam* mtgee. having brought an action against the shareholder for breach of the above agreement:—*Held:* the agreement was not binding, & the action could not be maintained.—BRADLEY *v.* CARRITT, [1903] A. C. 253; 72 L. J. K. B. 471; 88 L. T. 633; 51 W. R. 636; 19 T. L. R. 466; 47 Sol. Jo. 534, H. L.; *revsg.* S. C. *sub nom.* CARRITT *v.* BRADLEY, [1901] 2 K. B. 550, C. A.

Annotations:—**Apld.** Samuel *v.* Jarrah Timber & Wood Paving Corpn., [1904] A. C. 323. **Distd.** Davies *v.* Chamberlain (1909), 25 T. L. R. 766. **Apld.** British South Africa *v.* De Beers Consolidated Mines, [1910] 1 Ch. 354. (*See* [1912] A. C. 52.) **Consd.** Morgan *v.* Jeffreys, [1910] 1 Ch. 620. **Distd.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. **Consd.** *Re* Rainbow Syndicate, Owen *v.* Rainbow Syndicate, [1916] W. N. 178. **Mentd.** Bouchard *v.* Prince's Hall Restaurant (1904), 20 T. L. R. 574.

Option to purchase equity of redemption.]—*See* Nos. 996–1003, *post*.

Bonus depending on success of action.]—*See* No. 595, *ante*.

Commission on sale—Auctioneer mortgagee.]—*See* AUCTION & AUCTIONEERS, Vol. III., p. 32, Nos. 233–235.

Redemption of debentures.]—*See* COMPANIES, Vol. X., p. 782, Nos. 4892–4896.

B. Increase of Amount Repayable.

(*a*) *Bonus.*

972. Whether amounting to clog.] — A mtge. was executed for £1,000, but £700 only was

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PART VII. SECT. 4, SUB-SECT. 2.—A.

968 i. *Restrictive covenant—To buy exclusively from mortgagee—Not limited to continuance of mortgage—Not binding after redemption.*]—A mtge. of a brewery of an hotel deed upon a lease, contained a covenant by the mtgor. that during the continuance of the lease he would deal exclusively with the mtgee. for all colonial beer sold upon the mtged. premises. At the same time as this mtge. was executed the mtgor. executed a separate deed of covenant to the same effect:—*Held:* the deed of covenant & the mtge. both constituted a clog upon the equity of redemption; the mtgor. was entitled upon payment of all moneys due under the mtge. to have a reconveyance of the property freed from the deed of covenant.—PERTH BREWERY CO. *v.* SIMMS (1903), 3 W. A. L. R. 24.—**AUS.**

968 ii. —— —— —— ——.]—M., a publican, purchased from S., a brewer, the lease of a hotel, & gave him a mtge. of the lease to secure the purchase money. The mtge. contained a covenant by M. that he would "at all times during the continuance of the term of years granted by the said memorandum of lease" purchase from S. all colonial ale & stout, etc., "at any time during the said term of years" used or consumed or sold upon the demised premises:—*Held:* this covenant ceased to be binding on payment of all moneys secured by the mtge., notwithstanding that the term of the lease had not yet come to an end.—STAPLES *v.* MACKAY (1892), 11 N. Z. L. R. 258.—**N.Z.**

968 iii. —— —— —— ——.]—MACARTHY *v.* KELLIHER (No. 3) (1897), 16 N. Z. L. R. 88.—**N.Z.**

PART VII. SECT. 4, SUB-SECT. 2.—B. (a).

972 i. *Whether amounting to clog.*]—The proviso for redemption in a mtge. to secure an advance of £3,500, was

advanced. The mtgee. alleged that, in consequence of the unsatisfactory nature of the security, he had agreed to advance only £700, the remaining £300 being a bonus for the risk & hazard. The evidence supported this allegation. Upon a bill filed to redeem, upon payment of £700:—*Held:* pltf. could only be entitled to a decree upon payment of the full sum of £1,000.—POTTER *v.* EDWARDS (1857), 26 L. J. Ch. 468; 5 W. R. 407.

Annotations:—**Folld.** Mainland *v.* Upjohn (1889), 41 Ch. D. 126. **Distd.** Northampton *v.* Pollock (1890), 45 Ch. D. 190. **Apld.** Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307. **Apprvd.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. **Refd.** Eyre *v.* Wynn-Mackenzie, [1894] 1 Ch. 218; Santley *v.* Wilde, [1899] 2 Ch. 474; Carritt *v.* Bradley, [1901] 2 K. B. 550.

973. ——.]—Pltf. was entitled to a life estate in possession in certain property, subject (*inter alia*) to a jointure charge payable during the life of an old lady; & in consideration of £1,000 he mortgaged his life estate to deft., to secure £3,300 payable within three months of the old lady's death. He also by an agreement, signed afterwards, tacked to this security, a charge of £400, with interest at £5 per cent. per month:—*Held:* pltf.'s interest, with regard to the jointure charge, was not reversionary so as to bring the case under the rule applicable to mtges. of reversionary interest. The mere fact that a borrower was in great want of money, & the lender exacted exorbitant interest, will not induce the ct. to interfere on behalf of the former.

The mtge. deed provided for satisfaction & reconveyance upon pltf.'s paying £1,500 by a certain day, a year later, with interest, etc.

Semble: the additional £500 could not be regarded as a penalty.—WEBSTER *v.* COOK (1867), 2 Ch. App. 542; 36 L. J. Ch. 753; 16 L. T. 821; 15 W. R. 1001, L. C.

Annotations:—**Dbtd.** Tyler *v.* Yates (1870), L. R. 11 Eq. 265. **Refd.** Wyatt *v.* Cook (1868), 18 L. T. 12; Aylesford *v.* Morris (1872), 42 L. J. Ch. 146; Nevill *v.* Snelling (1880), 15 Ch. D. 679.

974. ——.]—PILKINGTON *v.* BAKER, BRITISH MUTUAL INVESTMENT CO. *v.* PILKINGTON, [1877] W. N. 210.

975. ——.]—JAMES *v.* KERR, No. 595, *ante*.

976. —— **No oppressive dealing—Commission on loan.**]—Where there is no oppression or unfair dealing, a mtgee. is at liberty to bargain with the mtgor. for a commission on the amount of the loan; & the circumstance that the mtgee. deducts & retains the amount of such commission from the sum advanced to the mtgor. is equivalent to payment of that amount to him by the mtgor.—MAINLAND *v.* UPJOHN (1889), 41 Ch. D. 126; 58 L. J. Ch. 361; 60 L. T. 614; 37 W. R. 411.

Annotations:—**Apld.** Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307. **Refd.** Field *v.* Hopkins (1889), 59 L. J. Ch. 174; Eyre *v.* Wynn-Mackenzie, [1894] 1 Ch. 218; The Benwell Tower (1895), 72 L. T. 664; Santley *v.* Wilde, [1899] 2 Ch. 474; Rice *v.* Noakes, [1900] 2 Ch. 445; Carritt *v.* Bradley, [1901] 2 K. B. 550; Cheese *v.* Keen, [1908] 1 Ch. 245.

Premium charged by building society.]—*See* BUILDING SOCIETIES, Vol. VII., p. 480, No. 159.

(b) Costs.

See Mortgagees Legal Costs Act, 1895 (c. 25).

977. Mortgagees Legal Costs Act, 1895 (c. 25), s. 3—Not retrospective.]—A solr. mtgee. who had, by a judgment given before the passing of above Act, been held not to be entitled to charge profit costs against his mtgor., applied after the passing of the Act for an extension of the time for appealing against the judgment, on the ground that above sect. is retrospective in its operation:—*Held:* above Act was not intended to affect judgments given before it was passed, & there was no ground for extending the time.—EYRE *v.* WYNN-MACKENZIE, [1896] 1 Ch. 135; 65 L. J. Ch. 194; 73 L. T. 571; 44 W. R. 273; 40 Sol. Jo. 148, C. A.

Annotation:—**Folld.** Day *v.* Kelland, [1900] 2 Ch. 745.

978. —— ——.]—Where a foreclosure order has been made prior to above Act, finally settling the terms of redemption on payment of principal, interest, & costs, a solr. mtgee. will not be entitled to the benefit of above sect. because the taxation of his costs takes place under an order made after above Act has come into force.—DAY *v.* KELLAND, [1900] 2 Ch. 745; 70 L. J. Ch. 3; 83 L. T. 447; 49 W. R. 66; 45 Sol. Jo. 10, C. A.

(c) Other Cases.

979. Arrears of interest converted into capital—Agreement by trustee for payment of debts—Binding on owner of equity of redemption.]—The equity of redemption of a mtged. estate, was conveyed to A. in trust for the payment of debts, & the surplus to B. A. agrees with the mtgee. to turn the interest in arrear into principal. B. is bound by this agreement, though no party to it.—CONWAY *v.* SHRIMPTON (1710), 5 Bro. Parl. Cas. 187; 2 E. R. 617, H. L.

980. —— **Accumulation—Covenant void.**]—A covenant in a mtge., that at the end of every year, if the interest is not paid within three months after it becomes due, it shall bear interest, is a void covenant. Or, that on non-payment of the interest at the day, it should be turned into principal, & bear interest.—BROADWAY *v.* MORECRAFT (1729), Mos. 247; 25 E. R. 377, L. C.

Annotation:—**Refd.** Bosanquet *v.* Dashwood (1734), Cas. *temp.* Talb. 38.

981. Sum let repayable by instalments—Whole sum & interest repayable on notice—Instalments paid repayable after redemption.]—BOOTH *v.* SALVATION ARMY BUILDING ASSOCN., LTD. (1897), 4 T. L. R. 3.

C. Limited Time for Redemption.

982. Three years—If mortgagor so long live.]—JASON *v.* EYRES (1681), Freem. Ch. 69; 2 Cas. in Ch. 33; 22 E. R. 1064.

Annotation:—**Refd.** Newcombe *v.* Bonham (1681), Freem. Ch. 67.

983. Life of mortgagor.]—PRICE *v.* PERRIE, No. 997, *post*.

984. ——.]—One for £800 consideration grants a rentcharge of £48 a year in fee, upon condition that if the grantor during his life shall give notice, & pay in the £800 by instalments, viz. £100 at the end of every six months, & shall do this during his own lifetime, the grant to be void: the mtge. was made about sixty years since, when the legal interest of money was 8 per cent. Decreed not redeemable. In case of a mtge., no clause can confine the equity of redemption to the lifetime of the mtgor., or to him & the heirs male, or heirs

the payment of £6,000 & a transfer of £5,000 in shares in a co. to be promoted by the mtgor. The principal money advanced was applied in the purchase of mtged. premises, which the co. were to develop & work:—*Held:* the proviso for redemption was not unreasonable.—BUCHANAN *v.* HARVIE (No. 2) (1904), 3 N. R. Eq. Rep. 61; 25 C. L. T. 76.—**CAN.**

PART VII. SECT. 4, SUB-SECT. 2.—B. (c).

h. ***Further charge by mortgagor after assignment.***]—A mtgor. who has sold the equity of redemption in property mortgaged by him cannot afterwards charge such property with a further debt so as to render the purchaser of the equity of redemption liable to pay such debt before he can redeem.—BHAGWAN DAS *v.* SHAM DAS (1901), I. L. R. 23 All. 429.—**IND.**

Sect. 4.—Restrictions on right to redeem: Sub-sect. 2, C., D., E. & F. Sect. 5.]

only of his body.—FLOYER *v.* LAVINGTON (1714), 1 P. Wms. 268; 24 E. R. 384, L. C.

Annotations:—**Refd.** Mellor *v.* Lees (1742), 2 Atk. 494; Whiting *v.* White (1792), 2 Cox, Eq. Cas. 290. **Mentd.** Woodhouse *v.* Shepley (1742), 2 Atk. 535.

985. —— Mortgagor dying in lifetime of father.]—SALT *v.* NORTHAMPTON (MARQUESS), No. 954, *ante*.

986. —— Intention to benefit mortgagee.]—BONHAM *v.* NEWCOMB (1684), 2 Vent. 364; 1 Vern. 232; 86 E. R. 488; *sub nom.* NEWCOMB *v.* BONHAM, 1 Eq. Cas. Abr. 313; *affd.* (1689), 1 Vern. 233, n., H. L.

Annotations:—**Refd.** Croft *v.* Powel (1738), 2 Com. 603; Mellor *v.* Lees (1742), 2 Atk. 494; *Re* Carshalton Park Estate, Graham *v.* The Co., Turnell *v.* The Co., [1908] 2 Ch. 62. **Mentd.** Fisher *v.* Wigg (1700), 1 P. Wms. 14.

987. Joint lives of mortgagor & mortgagee.]—SPURGEON *v.* COLLIER, No. 951, *ante*.

D. Postponement of Redemption.

988. Postponement of fixed period.]—TEEVAN *v.* SMITH, No. 509, *ante*.

989. Thirty years.]—TALBOT *v.* BRADDIL, No. 277, *ante*.

990. Twenty years—Agreement between solicitor & client.]—The ct. will not give effect to a stipulation contained in a mtge. by a client to his solr., whereby the client is restricted from paying off the mtge. money for so long a period as twenty years.—COWDRY *v.* DAY (1859), 1 Giff. 316; 29 L. J. Ch. 39; 1 L. T. 88; 5 Jur. N. S. 1199; 8 W. R. 55; 65 E. R. 936.

991. —— Debt repayable by instalments—At stated intervals.]—FAIRCLOUGH *v.* SWAN BREWERY CO., LTD., No. 958, *ante*.

992. Five to seven years.]—TEEVAN *v.* SMITH, No. 509, *ante*.

993. Five years.]—Mtgee. may stipulate for a collateral advantage at the time & as a term of the advance, provided the equity of redemption is not thereby fettered, & the bargain is a fair & reasonable one, entered into between the parties while on equal terms, without any improper pressure, unfair dealing, or undue influence.

Mtge. of an hotel to a brewer contained a covenant by the mtgors. that during the continuance of the security they would deal exclusively with the mtgee. for all beer & malt liquor sold on the mtged. premises. The deed also contained the usual provisos for the continuance of the loan for five years. The mtgors. having ceased to purchase beer of the mtgee. he now moved for an injunction to restrain the breach of this covenant; the mtgors. also claimed to be entitled to redeem before the expiration of the five years:—*Held:* as the covenant entered into by the parties for the purchase & supply of beer during the continuance of the security was a reasonable one, which did not in any way clog the redemption or give the mtgee. any undue advantage, it ought to be enforced by injunction.—BIGGS *v.* HODDINOTT, HODDINOTT *v.* BIGGS, [1898] 2 Ch. 307; 67 L. J. Ch. 540; 79 L. T. 201; 47 W. R. 84; 14 T. L. R. 504, C. A.

Annotations:—**Apld.** Santley *v.* Wilde, [1899] 2 Ch. 474. **Expld.** Noakes *v.* Rice, [1902] A. C. 24. **Consd.** Bradley *v.* Carritt, [1903] A. C. 253. **Distd.** Morgan *v.* Jeffreys, [1910] 1 Ch. 620. **Consd.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25.

994. Twenty-eight years—No restriction on calling in money.]—MORGAN *v.* JEFFREYS, No. 510, *ante*.

995. Covenant by second mortgagee—Not to redeem within ten years—Precluded from redeeming first mortgagee.]—RAMSBOTTOM *v.* WALLIS, No. 917, *ante*.

E. Purchase by Mortgagee.

996. Option to purchase—Part of mortgage transaction—At fixed price.]—WILLETT *v.* WINNELL (1687), 1 Vern. 488; 23 E. R. 611, L. C.

Annotation:—**Distd.** Bunning *v.* Bunning (1822), 1 L. J. O. S. Ch. 56.

997. —— —— ——.]—It was held, that if an estate mtged. be once redeemable, it shall always be so till released or foreclosed: as if a mtge. be made with a condition, that if the mtgor. pays the money at any time during his life, the mtgee. shall reconvey. This may be redeemable by his heir after his decease, notwithstanding the redemption is limited to the mtgor. during his life only. So if a mtge. be made redeemable, upon payment of the mtge. money at a certain day, but if the money be not then paid, that if the mtgee. will pay a further sum to the mtgor., that then his estate shall be absolute, or that he will make him a further conveyance, or any thing to that effect, this estate is notwithstanding redeemable after the day of payment, & the mtgee. cannot enforce the mtgor., after default, to make him an absolute estate, until he forecloses him.—PRICE *v.* PERRIE (1702), Freem. Ch. 258; 22 E. R. 1195, L. C.

998. —— —— ——.]—A man shall not have interest for his money on a mtge. & a collateral advantage besides for the loan of it; or clog the redemption with any by-agreement.

A. lends money to B. on a mtge., & takes a covenant from B. by another deed, that if A. should think fit, B. should convey to A. so much of the mtged. estate, as should be of the value of the money lent at twenty years' purchase. Covenant decreed to be set aside as unconscionable.—JENNINGS *v.* WARD (1705), 2 Vern. 520; 23 E. R. 935.

Annotations:—**Distd.** Bunning *v.* Bunning (1822), 1 L. J. O. S. Ch. 56. **Consd.** James *v.* Kerr (1889), 40 Ch. D. 449. **Expld.** Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. **Refd.** Field *v.* Hopkins (1890), 44 Ch. D. 524; Santley *v.* Wilde, [1899] 2 Ch. 474; Carritt *v.* Bradley, [1901] 2 K. B. 550.

999. —— —— ——.]—SAMUEL *v.* JARRAH TIMBER & WOOD PAVING CORPN., No. 957, *ante*.

1000. —— —— Whether impeachable after sale.]—Equity will not interpose on a covenant that a mtgee. shall have the benefit of pre-emption, if it be not insisted on until after the estate is sold.—ORBY *v.* TRIGG (1722), 9 Mod. Rep. 2; 2 Eq. Cas. Abr. 599; 88 E. R. 276.

PART VII. SECT. 4, SUB-SECT. 2.—D.

k. *Eight years.*]—*Re* HONE'S ESTATE (1873), 8 I. R. Eq. 65.—**IR.**

l. *Ten years.*]—*Re* FORTESQUE'S ESTATE, [1916] 1 I. R. 268.—**IR.**

PART VII. SECT. 4, SUB-SECT. 2.—E.

996 i. *Option to purchase—Part of mortgage transaction—At fixed price.*]—On an advance of money on the security of real estate, the lender cannot bargain for the purchase of the property at a specified sum in case of default in repaying the advance at the time stipulated.—FULLER *v.* KEENAN (1866), 12 Gr. 388.—**CAN.**

996 ii. —— —— ——.]—Although a mtgee. may as well as a stranger purchase lands of which he is mtgee., still, if he purchase as mtgee., & make his interest in the land a ground for being allowed to purchase, he cannot set up his title thus obtained against the mtgor.'s right to redeem.—KELLY *v.* MACKLEM (1867), 14 Gr. 29.—**CAN.**

996 iii. —— —— ——.]—A., mtgor., by a proviso in a mtge. deed, agreed in a certain event, to sell to B., the mtgee., for a fixed sum, part of the mtged. premises:—*Held:* the proviso, was totally void, as being an onerous engagement entered into at the time of the mtge.—*Re* EDWARDS' ESTATE (1861), 11 I. Ch. R. 367.—**IR.**

1001. —— ——.]—This Ct. will not suffer, in a deed of mtge., any agreement in it to prevail, that the estate become an absolute purchase of the mtgee. upon any event whatsoever (LORD HARDWICKE, C.).—TOOMES *v.* CONSET (1745), 3 Atk. 261 ; 26 E. R. 952, L. C.

Annotations :—**Consd.** Northampton *v.* Pollock (1890), 45 Ch. D. 190 ; Samuel *v.* Jarrah Timber & Wood Paving Corpn., [1904] A. C. 323. **Refd.** Morgan *v.* Jeffreys (1910), 79 L. J. Ch. 360.

1002. —— ——.]—A. having granted a mtge. of anticipation to B. of a West India estate, being found upon an account taken to be greatly indebted to him, releases the equity of redemption to B. & his heirs ; it not appearing, however, at the time to have been intended as an absolute sale, & B. having both by letter & in conversation, stated himself as being only mtgee. in possession, a redemption was decreed.

This ct. as a ct. of conscience is very jealous of persons taking securities for a loan, & converting such securities into purchases. Therefore I take it to be an established rule, that a mtgee. can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, & the conveyance absolute (LORD HENLEY, C.).—VERNON *v.* BETHELL (1762), 2 Eden, 110 ; 28 E. R. 838, L. C.

Annotations :—**Consd.** Samuel *v.* Jarrah Timber & Wood Paving Corpn., [1904] A. C. 323 ; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25.

1003. —— **Subsequent & independent transaction.**]—A mtgor. & mtgee. may by a separate & independent transaction subsequent to the mtge., make a valid agreement which gives the mtgee. the option of purchasing the mtged. property, & thus may have the effect of depriving the mtgor. of his right to redeem.—REEVE *v.* LISLE, [1902] A. C. 461 ; 71 L. J. Ch. 768 ; 87 L. T. 308 ; 51 W. R. 576 ; 18 T. L. R. 767, H. L. ; *affg.* S. C. *sub nom.* LISLE *v.* REEVE, [1902] 1 Ch. 53, C. A.

Annotation :—**Expld.** Samuel *v.* Jarrah Timber & Wood Paving Corpn., [1904] A. C. 323.

Sale with option of re-purchase—Whether absolute sale or mortgage.]—*See* Part I., Sect. 6, subsect. 1, *ante*.

F. Other Cases.

1004. Restriction as to persons entitled to redeem—Mortgagor & heirs of his body—Invalid.]—No agreement in a mtge. can make it irredeemable, either after the death of the mtgor., or upon failure of issue male of his body.—HOWARD *v.* HARRIS (1683), 1 Vern. 190 ; 2 Cas. in Ch. 147 ; Freem. Ch. 86 ; 1 Eq. Cas. Abr. 312 ; 23 E. R. 406.

Annotations :—**Consd.** Newcombe *v.* Bonham (1681), Freem. Ch. 67. **Distd.** Bunning *v.* Bunning (1822), 1 L. J. O. S. Ch. 56. **Consd.** Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. **Refd.** Jones *v.* Meredith (1739), 2 Com. 661 ; Rice *v.* Noakes, [1900] 2 Ch. 445. **Mentd.** Clay *v.* Willis (1823), 1 L. J. O. S. K. B. 144.

1005. —— —— ——.]—ANON. (1681), Freem. Ch. 84 ; 22 E. R. 1073, L. C.

1006. —— —— ——.]—FLOYER *v.* LAVINGTON, No. 984, *ante*.

Loan by building society—Alteration of rules.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 457, 459, Nos. 19, 20, 30, 31.

—— **Amount payable on redemption.**]—*See* BUILDING SOCIETIES, Vol. VII., pp. 474–477, Nos. 124–141.

Forfeiture of shares under lien for debts.]—*See* COMPANIES, Vol. IX., p. 425, No. 2748.

Clog on redemption of debenture.]—*See* COMPANIES, Vol. X., p. 782, Nos. 4892–4896.

SECT. 5.—AMOUNT REPAYABLE.

1007. General rule.]—(1) A mtgee. who is a solr. & who in that capacity acts on his own behalf in proceedings relating to the mtge. debt or the mtge. security cannot, in the absence of express contract, charge against the mtgor., as part of his costs, charges & expenses incurred as mtgee., profit costs in respect of professional services so rendered, but will be limited to disbursements out of pocket.

(2) The case turns upon the effect of the ordinary contract which arises out of the relation between a mtgor. & his mtge. It is well settled that under the contract the mtgor. if he desires to redeem the mortgaged property, must pay : the principal debt ; the interest thereon ; all proper costs, charges, & expenses incurred by the mtgee. in relation to the mortgaged debt or the mtge. security ; the mtgee.'s costs of the redemption action (FRY, L.J.).—*Re* WALLIS, *Ex p.* LICKORISH (1890), 25 Q. B. D. 176 ; 59 L. J. Q. B. 500 ; 62 L. T. 674 ; 38 W. R. 482 ; 6 T. L. R. 291 ; 7 Morr. 148, C. A.

Annotations :—*As to* (1) **Apld.** Stone *v.* Lickorish, [1891] 2 Ch. 363 ; *Re* Doody, Fisher *v.* Doody, Hibbert *v.* Lloyd, [1893] 1 Ch. 129. **Refd.** Eyre *v.* Wynn-Mackenzie, [1894] 1 Ch. 218.

1001 i. —— ——.]—A covenant giving the mtgee. a right of pre-emption in respect of the mtged. property at a price fixed by reference to another share in the same village :—*Held : primâ facie* a good covenant & enforceable by the mtgee.—BIMAL JATI *v.* BIRANJA KUAR (1900), I. L. R. 22 All. 238.—**IND.**

1003 i. —— *Subsequent & independent transaction.*]—Pltf. advanced & paid to deft. $350, & took from deft. a promissory note therefor ; also an absolute transfer under seal of certain lands, in consideration of the $350 ; also an option under seal to purchase the lands for $6,000, in consideration of the $350. Pltf. accepted the option & sued for specific performance :—*Held :* the absolute assignment could not be viewed otherwise than as an equitable mortgage ; & the doctrine "once a mortgage always a mortgage" was fatal to pltf.'s exercise of the option.—ARNOLD *v.* NATIONAL TRUST CO. (1912), 22 W. L. R. 693 ; 3 W. W. R. 183 ; 7 D. L. R. 754.—**CAN.**

PART VII. SECT. 4, SUB-SECT. 2.—F.

m. *Insurance policy as collateral security—Premiums charged on the land.*]—WILTSE *v.* EXCELSIOR LIFE INSURANCE CO. (1916), 34 W. L. R. 1114.—**CAN.**

n. *Money bonds subsequent to mortgage—Provision for payment of bonds before redemption.*]—RAJMAL MOTIRAM *v.* SHIVAJI ANANDRAV (1902), I. L. R. 27 Bom. 154.—**IND.**

o. *Lease by mortgagor to mortgagee—Long lease.*]—A lease for nine hundred & ninety nine years, made by mtgor. to mtgee. set aside ; the policy of the law upon which the statutes of usury are founded not permitting such a transaction between persons standing in the relation of mtgor. & mtgee.—WEBB *v.* ROBKE (1806), 2 Sch. & Lef. 661.—**IR.**

p. —— *Fair rent.*]—A lease granted to a creditor on a further loan of money, at a stipulated rent, to be retained in discharge of the debt ; is a security in the nature of a mtge. ; & if the rent be at the fair value cannot be set aside.—MORONY *v.* O'DEA (1809), 1 Ball. & B. 109.—**IR.**

q. ——.]—BHIMRAO NAGO JIRAO PATANKAR *v.* SAKHARAM BIN SABAJI KANTAK (1921), I. L. R. 46 Bom. 409. —**IND.**

PART VII. SECT. 5.

r. *Memorandum by solicitors of sum due.*]—The solrs. of the mtgees. gave the mtgor. a memorandum of the amount due, & relying upon this, B. purchased the equity of redemption. Upon a bill to redeem, the ct. held the mtgees. not bound by this amount, the evidence showing that the solr. was not aware that the mtgor. had inquired on behalf of B.—MOFFATT *v.* BANK OF UPPER CANADA (1856), 5 Gr. 374.—**CAN.**

t. *Costs of mortgagee—In relation to debt—Purchase price of land in abortive sale.*]—The equity of redemption in mtged. lands was offered for sale under execution at law, & the mtgee. purchased the property for $200 ; but the sale proved to be inoperative :—*Held :* the mtgee. could not add the amount so paid to the amount of his mtge. debt.—PAUL *v.* FERGUSON (1868), 14 Gr. 230.—**CAN.**

s. —— —— *Costs of redemption action.*]—On proceeding with the reference under the decree pronounced on the hearing, the master of his report found that there was due to pltf. a sum which included costs incurred in

Sect. 5.—*Amount repayable. Sect.* 6: *Sub-sects.* 1, 2 & 3.]

1008. Terms similar to foreclosure action.]—A. mtged. three houses, 23, 26 & 27, to B., & afterwards contracted to sell 23, one of the houses, to C.; C. paid the purchase-money to A. under the contract, but without obtaining a conveyance, & with constructive notice of the prior mtge. to B. C. afterwards paid off what was due to B. upon his mtge., & having taken a transfer of the mtge., filed a bill against the devisee of A. & several mtgees., under subsequent mtges. made by A., which included the houses 26 & 27, & other property, & obtained a decree for the specific performance by the devisees of A. of the contract of sale as to the house 23, & for the successive foreclosure of all the subsequent mtgees., & the devisee of A., in default of their redemption of the houses 26 & 27.

The terms on which a mtgor. or those claiming under him are entitled to redeem must be the same, whether they are to be ascertained in a suit for redemption or for foreclosure (WIGRAM, V.-C.). —SOBER *v.* KEMP (1847), 6 Hare, 155; 67 E. R. 1120. *Annotation:*—**Consd.** Dingle *v.* Coppen, Coppen *v.* Dingle, [1899] 1 Ch. 726.

Foreclosure action.]—*See* Part XIII., Sect. 7, *post.*

1009. Costs of mortgagee.]—ANON. (1708), 2 Eq. Cas. Abr. 237; 22 E. R. 202, L. C.

Increase of amount repayable—Increase amounting to clog in equity.]—*See* Sect. 4, sub-sect. 2, B., *ante.*

1010. —— In relation to debt—Costs of redemption action.]—*Re* WALLIS, *Ex p.* LICKORISH, No. 1007, *ante.*

Costs, charges & expenses.]—*See* Part XVIII., *post.*

1011. Whole mortgage must be redeemed—Subsequent mortgagee.]—(1) A second mtgee. to redeem a prior mtge. must make the heir of the mtgor. a party; though the second mtge. is only of part of the estates comprised in the first, & under a different title.

(2) As far as possible the ct. endeavours to make a complete decree, embracing the whole subject & determining the rights of all parties interested in the estate.

(3) Subsequent mtgee. redeeming a prior mtge., must redeem it entirely.—PALK *v.* CLINTON (LORD) (1805), 12 Ves. 48; 33 E. R. 19.

Annotations:—*As to* (1) **Consd.** Ramsbottom *v.* Wallis (1835), 5 L. J. Ch. 92. **Refd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Jennings *v.* Jordan (1881), 6 App. Cas. 698. *As to* (2) **Refd.** Kensington *v.* Bouverie (1854), 19 Beav. 39. *As to* (3) **Refd.** Thorneycroft *v.* Crockett (1848), 2 H. L. Cas. 239. *Generally*, **Refd.** Page *v.* Cooper (1853), 16 Beav. 396. **Mentd.** Milligan *v.* Mitchell (1835), 4 L. J. Ch. 281; Watts *v.* Hyde (1847), 2 Ph. 406; Darnley *v.* L. C. & D. Ry. (1863), 1 De G. J. & Sm. 204.

1012. ——.]—CHOLMONDELEY (MARQUIS) *v.* CLINTON (LORD), No. 904, *ante.*

—— Redemption by part owners.]—*See* Sect. 7, *post.*

1013. Amount appearing in receipt clause—How far conclusive.]—C. & K., two proposed mtgees., gave £4,000 to W., their solr., to be paid to the mtgor. on completion of the transaction. W. paid to the solr. of the mtgor., who was not present £3,500 alleging that £500 must be retained until a question of title should be settled, but he received the title deeds & the mtge. deed, which was duly executed by the mtgor., & on which was indorsed the mtgor.'s receipt for the full sum of £4,000. W. retained the £500 in his hands, without informing his clients, & soon afterwards became bkpt.:—*Held:* the loss must fall upon C. & K. & the mtgor. was allowed to redeem on payment of £3,500 & interest & the ordinary costs of a redemption suit.—BOYD *v.* CRASTER (1864), 4 New Rep. 130; 10 L. T. 480; 12 W. R. 787.

.]—*See* DEEDS, Vol. XVII., pp. 370–373, Nos. 1807–1832; ESTOPPEL, Vol. XXI., pp. 265, 266, Nos. 848–856.

1014. Payment of interest.]—*Re* WALLIS, *Ex p.* LICKORISH, No. 1007, *ante.*

Redemption of advance by building society.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 474–478, Nos. 124–144.

Redemption of advances by industrial societies.]—*See* INDUSTRIAL SOCIETIES, Vol. XXVIII., p. 124, No. 53.

Redemption of policies of life insurance.]—*See* INSURANCE, Vol. XXIX., pp. 383 *et seq.*

Accounts between mortgagor & mortgagee.]—*See* Part XVI., *post.*

Right of mortgagee to consolidate.]—*See* Part X., *post.*

Method of payment.]—*See* Part XIV., Sect. 2, sub-sect. 1, *post.*

SECT. 6.—DISPOSAL OR DEVOLUTION INTER VIVOS OR AT DEATH.

SUB-SECT. 1.—IN GENERAL.

Nature of estate.]—*See* Sect. 1, *ante.*

1015. Transmitted as an estate in land.]—An equity of redemption has always been considered, in equity, as an estate in the land; it is such an interest in the land as will descend from ancestor to heir, & may be granted, entailed, devised, or mortgaged.—ANON. (undated), 2 Eq. Cas. Abr. 594, n.; 22 E. R. 499.

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the suit brought by him to redeem:—*Held:* pltf. was entitled to claim the costs so incurred.—PIERCE *v.* CANAVAN (1881), 29 Gr. 32.—**CAN.**

b. *Affidavit by mortgagee—How far conclusive.*]—A decree for redemption having been made, defts., on proving their claim in the master's office, produced their mtges., & filed an affidavit verifying their claim, & stating that a certain sum was due them for moneys advanced by them to the mtgor. & secured by the said mtges.:—*Held:* their claim was *primâ facie* proven, & the *onus* of reducing the amount of it rested on pltf.—COURT *v.* HOLLAND, *Ex p.* DORAN (1880), 8 P. R. 213.—**CAN.**

c. *Advances to contractors by mortgagee.*]—BLACK *v.* HIEBERT (1907), 38 S. C. R. 557.—**CAN.**

d. *Stipulation for bonus by mortgagor—Expropriation proceedings by Crown.*]—Where there is a mtge. upon property in which the mtgor. stipulates for a bonus to be paid him in case the principal is sought to be paid before the mtge. falls due, the Crown expropriating before that event must assume the payment of such bonus in addition to paying the value of the property taken.—R. *v.* MACPHERSON (1914), 15 Exch. C. R. 215; 20 D. L. R. 988.—**CAN.**

e. *Covenant entitling mortgagees to pay liens—Sums paid added to mortgage debt.*]—GREAT WEST PERMANENT LOAN CO. *v.* NATIONAL MORTGAGE CO. (B. C.), [1919] 1 W. W. R. 788.—**CAN.**

f. *Arrears of rent.*]—In a suit for redemption the mtgee. is not entitled to claim any arrears of rent with interest thereon in respect of the mtged. lands which were left in the possession of the mtgor. as tenant of the mtgee. under the terms of the mtge. deed, when the mtgee. has already sued & obtained a decree for such rent with interest & has allowed the decree to become barred by limitation.—MANJESHWAR MARAINA RAO *v.* SHIVU RAO (1918), I. L. R. 41 Mad. 1043.—**IND.**

PART VII. SECT. 6, SUB-SECT. 1.

g. *Conveyance by mortgagee—While assignee of equity of redemption in possession.*]—The assignee of a mtgor.'s interest, through the medium of a sheriff, after the mtge. has been satisfied, cannot be looked upon as a tenant at sufferance to the mtgee. & a conveyance made by the mtgee. while such an assignee is in possession, would be void.—DOE d. CAREY *v.* CUMBERLAND (1850), 7 U. C. R. 794.—**CAN.**

h. *What amounts to purchase of equity of redemption.*]—BURGESS *v.* CONWAY (1887), 14 S. C. R. 90.—**CAN.**

k. *Enforcement of covenants—Right of assignee.*]—CLARKE *v.* FREEHOLD

1016. ——.]—CASBURNE *v.* INGLIS, No. 853, *ante*.

1017. ——.]—BURGESS *v.* WHEATE, A.-G. *v.* WHEATE, No. 864, *ante*.

Who entitled to redeem.]—*See* Sect. 3, *ante*.

See, generally, REAL PROPERTY.

SUB-SECT. 2.—INTER VIVOS.

See, generally, REAL PROPERTY; SALE OF LAND.

Who is entitled to redeem.]—*See* Sect. 3, *ante*.

1018. Assignment of equity—Right of assignor to indemnity.]—No exoneration of the heir by the personal assets of a party, who never personally contracted; or not originally but only as a further security in a subsequent transaction, not intended to disturb the order of charge.

The same principle applies to the purchase of an equity of redemption; for the party means at the time of the contract to buy the estate subject to that mtge.; in relation to which mtge. the personal contract was entered into; & that was not his. If he enters into no obligation with the party, from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mtge., yet this ct., if he receives possession, & has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mtge.; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mtge. (LORD ELDON, C.).—WARING *v.* WARD (1802), 7 Ves. 332; 32 E. R. 136, L. C.

Annotations:—**Consd.** *Re* Law Court's Chambers Co. (1889), 61 L. T. 669. **Apld.** Bridgman *v.* Daw (1891), 40 W. R. 253. **Distd.** Mills *v.* United Counties Bank, [1912] 1 Ch. 231. **Reld.** Eastern Shipping Co. *v.* Quah Beng Kee, [1924] A. C. 177. **Mentd.** Vandeleur *v.* Vandeleur (1835), 9 Bli. N. S. 157; Dodson *v.* Downey, [1901] 2 Ch. 620; *Re* Bodega Co. (1903), 73 L. J. Ch. 198.

1019. —— ——.]—Independently of any contract, a ct. of equity will compel the purchaser of an equity of redemption to indemnify the vendor against the mtge. debt; & he may be required to covenant to do so.—BRIDGMAN *v.* DAW (1891), 40 W. R. 253.

Annotation:—**Mentd.** Dodson *v.* Downey, [1901] 2 Ch. 620.

1020. —— —— **Express limited covenant to indemnify.**]—Pltf. & his two brothers, who were partners in business, had mortgaged their respective contingent reversionary shares under their father's will to deft. bank to secure an overdraft due from the firm. Pltf. had further mortgaged his share to M. to secure a debt of his own. Upon the bank pressing for payment pltf. & his brothers agreed to sell their respective equities of redemption to the bank. By the deed of assignment the bank released pltf. & his brothers from all moneys owing to the bank on the security of their mtges., but the bank's mtges. were to be kept on foot as a protection, so far as regarded pltf.'s share, against M.'s mtge. The deed also provided that upon the realisation of pltf.'s share the bank should first pay themselves, & then, after satisfying M.'s mtge., should retain the surplus, if any. The bank also covenanted to pay all duties payable in respect of the shares & to indemnify pltf. & his brothers against the same. Before his share fell into possession, pltf. brought an action for a declaration that he was entitled to be exonerated by the bank from all liability in respect of M.'s mtge.:—*Held*: having regard to the existence in the deed of an express limited covenant of indemnity, no fuller indemnity could be implied; & on these grounds he dismissed the action.—MILLS *v.* UNITED COUNTIES BANK, LTD., [1912] 1 Ch. 231; 81 L. J. Ch. 210; 105 L. T. 742; 28 T. L. R. 40, C. A.

Annotation:—**Mentd.** Bradford *v.* Gammon, [1925] Ch. 132.

1021. —— **Payment of amount of mortgage debt into court.**]—A mtge. deed gave the mtgee. an option to purchase in case the debt was not paid on a day named. The trustees in bkpcy. of the mtgors. sold the mtged. property. A part of the purchase-money was deposited to provide against the mtge. Pending proceedings on the part of the trustees to set aside the mtge. on the ground of fraudulent preference, an order was made that the money deposited should be paid into ct., & on such further sum being paid in as would cover the principal & interest due, & 10 per cent. extra, the property should vest in the purchaser.—MILFORD HAVEN RAILWAY & ESTATE CO. *v.* MOWATT, *Re* LAKE & TAYLOR'S MORTGAGE, SPAIN *v.* MOWATT (1884), 28 Ch. D. 402; 54 L. J. Ch. 567; 33 W. R. 597.

1022. Agreement to convey equity—Necessity for writing.]—MASSEY *v.* JOHNSON, No. 850, *ante*.

Bankruptcy of mortgagor—Relation back of title of trustee.]—*See* BANKRUPTCY, Vol. V., p. 640, No. 5758.

—— **Money bond for further security.**]—*See* BANKRUPTCY, Vol. V., p. 674, No. 5964.

Leave to disclaim.]—*See* BANKRUPTCY, Vol. V., p. 913, No. 7717.

SUB-SECT. 3.—AT DEATH.

See Part VIII., Sect. 3, *post*.

Whether assets for payment of debts—Equity

LOAN & SAVINGS CO. (1888), 16 O. R. 598.—**CAN.**

l. *Relationship between mortgagee, mortgagor & assignee of equity of redemption.*]—BROWN & MATTHEWS *v.* PIKE (1917), 23 B. C. R. 246.—**CAN.**

PART VII. SECT. 6, SUB-SECT. 2.

1018 i. *Assignment of equity—Right of assignor to indemnity.*]—STEPHENS *v.* BOULTON (1863), 23 U. C. R. 16.—**CAN.**

1018 ii. —— ——.]—NICHOLS *v.* WATSON (1876), 23 Gr. 606.—**CAN.**

1018 iii. —— ——.]—CANAVAN *v.* MEEK (1883), 2 O. R. 636.—**CAN.**

1018 iv. —— ——.]—BOYD *v.* JOHNSTON (1890), 19 O. R. 598.—**CAN.**

1018 v. —— ——.]—BEATTY *v.* FITZSIMMONS (1893), 23 O. R. 245.—**CAN.**

1018 vi. —— ——.]—Although, when a mtgor. conveys his equity of redemption subject to the mtge. there is an implied obligation on the part of the purchaser to indemnify the mtgor. against the mtge. debt, evidence is admissible of an express agreement between the parties to the contrary.—BRITISH CANADIAN LOAN CO. *v.* TEAR (1893), 23 O. R. 664.—**CAN.**

1018 vii. —— ——.]—SHAVER *v.* SPROULE (1913), 24 O. W. R. 509; 4 O. W. N. 968; 9 D. L. R. 641.—**CAN.**

1018 viii. —— ——.]—CAMPBELL *v.* DOUGLAS (1916), 54 S. C. R. 28; 27 O. W. R. 129.—**CAN.**

1018 ix. —— ——.]—*Re* GUTHRIE & CO., *Ex p.* BANK OF AUSTRALASIA (1884), 2 N. Z. L. R. 425 (S. C.).—**N.Z.**

m. —— *At sheriff's sale—Right of mortgagor to indemnity.*]—There is no implied contract by the purchaser of an equity of redemption at a sheriff's sale to indemnify the mtgor. against the mtge. debt.—ROBERTSON *v.* BANK OF VICTORIA (1867), 4 W. W. & A'B. 85.—**AUS.**

n. —— *Whether privity of contract created between assignee & mortgagee.*]—AUSTRALIAN DEPOSIT & MORTGAGE BANK *v.* LORD (1876), 2 V. L. R. (L.) 31.—**AUS.**

o. —— ——.]—Where a mtgor. has assigned his equity of redemption, the assignee covenanting with him to pay the mtge. debt, though as between the mtgor. & the assignee the latter thus becomes primarily liable for the debt, this does not create any privity of contract between the assignee & the mtgee.—ALDOUS *v.* HICKS (1891), 21 O. R. 95.—**CAN.**

p. *Payment of rent to assignee of mortgagor—Agreement with mortgagee.*]—MURDIFF *v.* WARE (1861), 21 U. C. R. 68.—**CAN.**

Sect. 6.—Disposal or devolution inter vivos or at death: Sub-sect. 3. Sects. 7 & 8: Sub-sects. 1 & 2, A.]

charged with payment of debts.]—*See* EXECUTORS, Vol. XXIII., p. 340, Nos. 4048, 4049.

—— **Equity not charged with payment of debts.**]—*See* EXECUTORS, Vol. XXIII., p. 340, Nos. 4048, 4049.

Devolution in case of copyholds.]—*See* COPYHOLDS, Vol. XIII., pp. 114, 115, Nos. 1449–1454.

Escheat to Crown.]—*See* DESCENT, Vol. XVIII., p. 30, Nos. 299–301.

SECT. 7.—LIABILITY TO EXECUTION FOR DEBTS.

Right of judgment creditor to redeem.]—*See* Sect. 3, sub-sect. 4, *ante*.

1023. Writ of elegit—Not available.]—BECKETT *v.* BUCKLEY, No. 886, *ante*.

1024. —— ——.]—A creditor, who had recovered judgment in an action in the Ch. Div. for payment of a sum of money, sued out an *elegit* against his debtor, whose only interest in land was an equity of redemption in fee. The creditor then commenced an action in the Ch. Div. claiming to have it declared that he was entitled to a charge on the land, & to have such charge enforced by sale, foreclosure, delivery in execution, or otherwise as the ct. might direct, & asking for a receiver. Pltf. then moved for a receiver in the new action:—*Held:* Judgments Act, 1864 (c. 112), s. 1, did not take away the old right which a judgment creditor had before Judgments Act, 1838 (c. 110), to take proceedings in equity to obtain the benefit of a judgment which there were legal impediments to his enforcing at law, & pltf. was not obliged to wait till the trial, but might obtain a receiver on interlocutory application in the new action.—ANGLO-ITALIAN BANK *v.* DAVIES (1878), 9 Ch. D. 275; 47 L. J. Ch. 833; 39 L. T. 244; 27 W. R. 3, C. A.

Annotations:—**Apld.** *Re* Watkins, *Ex p.* Evans (1879), 13 Ch. D. 252. **Consd.** *Re* Pope (1886), 17 Q. B. D. 743. **Reid.** Bryant *v.* Bull, Bull *v.* Bryant (1878), 10 Ch. D. 153; Smith *v.* Cowell (1880), 6 Q. B. D. 75; *Re* Whiteley, Whiteley *v.* Learoyd (1887), 56 L. T. 846; Cadogan *v.* Lyric Theatre, [1894] 3 Ch. 338; R. *v.* Selfe, [1908] 2 K. B. 121; Ashburton *v.* Nocton, [1915] 1 Ch. 274; *Re* Pearce, Official Receiver *v.* Pearce (1918), 120 L. T. 334. **Mentd.** Oliver *v.* Lowther (1880), 42 L. T. 47; *Re* Peace & Waller (1883), 24 Ch. D. 405; Westhead *v.* Riley (1883), 25 Ch. D. 413; Holmes *v.* Millage, [1893] 1 Q. B. 551; Harris *v.* Beauchamp, [1894] 1 Q. B. 801; *Re* Jones & Judgments Act, 1864 (1895), 39 Sol. Jo. 671; Tyrrell *v.* Painton, [1895] 1 Q. B. 202; Thompson *v.* Gill, [1903] 1 K. B. 760.

1025. —— ——.]—S. recovered judgment for a debt against C. & issued an elegit. The sheriff returned that debtor had no lands which he could seize. C. had leasehold property which was subject to mtges. S. thereupon obtained the appointment of a receiver of the rents of the leasehold property without prejudice to the rights of the prior incumbrances. On the same day a petition for adjudication in bkpcy. was filed against C., & a receiver was appointed in bkpcy. a few minutes before the appointment of the receiver in the action. C. afterwards filed a petition for liquidation, the same receiver was appointed in the liquidation as had been appointed in the bkpcy., & resolutions were passed for liquidation of his affairs by arrangement. S. had not, until some days after the appointment of his receiver, any notice that C. had committed an act of bkpcy., or that any proceedings in bkpcy. were pending against him:—*Held:* as, at the time when S. obtained equitable execution, by the appointment of a receiver, the property was legally though not actually in the possession of the receiver appointed by the Ct. of Bkpcy., the equitable execution was ineffectual & was not protected by Bankruptcy Act, 1869 (c. 71), s. 95 (2).—SALT *v.* COOPER (1880), 16 Ch. D. 544; 50 L. J. Ch. 529; 43 L. T. 682; 29 W. R. 553, C. A.

Annotations:—**Reid.** Walmsley *v.* Mundy, *Ex p.* Goodenough (1884), 50 L. T. 317; *Re* Whiteley, Whiteley *v.* Learoyd (1887), 56 L. T. 846; Wills *v.* Luff (1888), 38 Ch. D. 197; *Re* Hearn, De Bertodano *v.* Hearn (1913), 108 L. T. 452. **Mentd.** Leggott *v.* Western (1884), 12 Q. B. D. 287; Brereton *v.* Edwards (1888), 21 Q. B. D. 226; Holmes *v.* Millage, [1893] 1 Q. B. 551; Harris *v.* Beauchamp, [1894] 1 Q. B. 801; Ponnamma *v.* Arumogam, [1905] A. C. 383.

——.]—*See, generally,* EXECUTION, Vol. XXI., pp. 556 *et seq.*

1026. Writ of extent—Available.]—An equity of redemption may be taken under an extent.—R. *v.* DE LA MOTTE (1801), For. 162; 145 E. R. 1146.

——.]—*See* CROWN PRACTICE, Vol. XVI., p. 225, No. 154.

Writ of fieri facias.]—*See* EXECUTION, Vol. XXI., pp. 483, 497, Nos. 630, 631, 728.

Equitable execution.]—*See* EXECUTION, Vol. XXI., pp. 666, 667, Nos. 2456, 2465, 2466, 2468.

SECT. 8.—ENFORCEMENT OF EQUITY OF REDEMPTION.

SUB-SECT. 1.—WHEN RIGHT ARISES.

1027. General rule—No right before day fixed for redemption—Interest tendered up to date for redemption.]—A bill to redeem a mtge., filed before the mtge. has become absolute at law, is demurrable, notwithstanding the mtgor. may have tendered to the mtgee. the principal money, together with interest up to the day named in the

PART VII. SECT. 7.

q. *Whether liable.*]—An equity of redemption in a term of years cannot be sold on an execution.—DOE d. WEBSTER *v.* FITZGERALD (1839), 2 Ont. Dig. 2647.—**CAN.**

r. ——.]—An equity of redemption of an estate of inheritance is not saleable under common law process.—SIMPSON *v.* SMYTH (1846), 2 O. S. 129; 1 E. & A. 9.—**CAN.**

t. ——.]—MCCABE *v.* THOMPSON (1857), 6 Gr. 175.—**CAN.**

a. ——.]—*Held:* 12 Vict. c. 73, s. 1, which authorises the sale under execution of an equity of redemption, applies only where the execution is against the mtgor. himself.—BANK OF UPPER CANADA *v.* BROUGH (1862), 2 E. & A. 95.—**CAN.**

b. ——.]—An equity of redemption in lands is not saleable under an execution issued against the exor. of the mtgor.—LOWELL *v.* BANK OF UPPER CANADA (1863), 10 Gr. 57.—**CAN.**

c. ——.]—HEWARD *v.* WOLFENDEN (1865), 14 Gr. 188.—**CAN.**

d. ——.]—*Qu.:* whether an equity of redemption can be sold upon an execution issued upon a judgment recovered at the suit of the mtgee., in an action upon the covenant contained in the mtge. for the payment of the mtge. debt.—VANNORMAN *v.* M'CARTY (1869), 20 C. P. 42.—**CAN.**

e. ——.]—The principle that the equity of redemption in mtged. premises is not saleable under execution where the same are subject to several mtges. in the hands of several mtgees., does not apply where the mtges. are by several owners of distinct portions of the estate, & the same are held by one & the same mtgee., or are in the same hand.—RATHBUN *v.* CULBERTSON (1875), 22 Gr. 465.—**CAN.**

f. ——.]—SMITH *v.* ELLIOTT (1878), 25 Gr. 598.—**CAN.**

g. ——.]—JOHNSON *v.* BENNETT (1882), 9 P. R. 337.—**CAN.**

h. ——.]—WARNE *v.* HOUSLEY (1886), 3 Man. L. R. 547.—**CAN.**

k. ——.]—KERR *v.* STYLES (1879), 26 Gr. 309.—**CAN.**

PART VII. SECT. 8, SUB-SECT. 1.

l. *General rule—No right before day fixed for redemption.*]—A suit for redemption of a mtge. cannot be brought before the time fixed by the mtge. for the payment of the mortgage-money.—SAKHARAM NARASIMHA SARDESAI *v.* VITHU LAKHA GOUDA (1866),

proviso for redemption.—BROWN *v.* COLE (1845), 14 Sim. 427; 14 L. J. Ch. 167; 5 L. T. O. S. 2; 9 Jur. 290; 60 E. R. 424.

Annotations:—**Consd.** Bovill *v.* Endle, [1896] 1 Ch. 648. **Refd.** Cowdry *v.* Day (1859), 1 L. T. 88; Harding *v.* Tingey (1864), 34 L. J. Ch. 13; *Re* Metropolis & Counties Permanent Investment Bldg. Soc., Gatfield's Case, [1911] 1 Ch. 698.

1028. Exception to rule—Trust for sale in case of non-payment—Proviso for payment before or after date fixed.]—HARDING *v.* TINGEY, No. 1152, *post.*

1029. —— Mortgagee enforcing security.]—BOVILL *v.* ENDLE, No. 1045, *post.*

1030. —— ——.]—Where a mtgee. has entered into possession or taken other steps for the purpose of realising his security, the ct. has jurisdiction upon payment of the debt, the interest then due, & the costs, to order the security to be given up (A. L. SMITH, L.J.).—*Ex p.* WICKENS, [1898] 1 Q. B. 543; 67 L. J. Q. B. 397; 46 W. R. 385; 5 Mans. 55; *sub nom.* WICKENS *v.* SHUCKBURGH, 78 L. T. 213, C. A.

Annotation:—**Distd.** *Ex p.* Ellis, [1898] 2 Q. B. 79.

Right of grantor of bill of sale.]—*See* BILLS OF SALE, Vol. VII., p. 131, Nos. 743–755.

Requirements as to notice.]—*See* Part IX., Sect. 7, sub-sect. 2, *post.*

Period of redemption allowed on order for sale.]—*See* Part X., Sect. 2, sub-sect. 5, *post.*

Period of redemption allowed on foreclosure order.]—*See* Part X., Sect. 5, sub-sect. 7, *post.*

Member of building society.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 498–499, Nos. 269–272.

SUB-SECT. 2.—NOTICE OR INTEREST IN LIEU THEREOF.

A. In General.

1031. Necessity for notice—Reasonable time.]—(1) As to a tender of mtge. money, there ought to be reasonable notice of paying it in; & if the tender be insisted on to stop interest, the money must be kept dead from that time, because the party is to be *uncore prist.*

(2) Six months notice given to pay in the mtge. money at Lincoln's Inn Hall, though this be not the place mentioned in the proviso of the deed, yet where money was lent in town, & no objection made to the notice, no reason for a personal tender, or to make a man carry a great sum to a person in the country.—GYLES *v.* HALL (1726), 2 P. Wms. 378; 24 E. R. 774, L. C.

Annotations:—*As to* (1) **Consd.** Kinnaird *v.* Trollope (1889), 42 Ch. D. 610. **Refd.** Bank of New South Wales *v.* O'Connor (1889), 14 App. Cas. 273; Yungmann *v.* Briesemann (1892), 67 L. T. 642.

1032. —— Six months' notice.]—SHRAPNELL *v.* BLAKE (1737), West *temp.* Hard. 166; 25 E. R. 876; *sub nom.* SHARPNELL *v.* BLAKE, 2 Eq. Cas. Abr. 603, L. C.

1033. —— —— Matter of practice not law.]—(1) Mtgee. is not bound to produce his mtge. deed to the devisee of the mtged. estate, until payment of principal & interest, notwithstanding the devisee may be ignorant of the amount of the interest, the time of payment, & all the other particulars of the security.

(2) It is the usual practice for a mtgor., when he intends paying off the mtge., to give a proper notice of his intention so to do; but I apprehend that there is no law of this or any other ct. which requires that to be done (SHADWELL, V.-C.).—BROWNE *v.* LOCKHART (1840), 10 Sim. 420; 9 L. J. Ch. 167; 4 Jur. 167; 59 E. R. 678.

Annotations:—*As to* (1) **Refd.** Owen *v.* Nickson (1861), 3 L. T. 737. *As to* (2) **Distd.** Fitzgerald's Trustee *v.* Mellersh, [1892] 1 Ch. 385.

1034. —— —— Or interest in lieu thereof.]—After default in payment of the mtge. money according to the proviso for redemption in the mtge. deed, the mtgor. is at liberty to pay off the mtge. money without giving the mtgee. six months' notice if he pays six months interest in advance in lieu of the notice.—JOHNSON *v.* EVANS (1889), 61 L. T. 18, C. A.

1035. —— —— —— Reversionary interest.]—SMITH *v.* SMITH, No. 1044, *post.*

1036. —— —— —— Mortgage by deed with proviso for redemption.]—An equitable mtgee. by deposit of title deeds of land accompanied by a memorandum of deposit is not entitled to six months notice before he is bound to accept a tender of the amount due, nor to six months' interest in lieu of notice.

In the case of a regular mtge. deed with a proviso for redemption the just inference is that the loan on mtge. is intended to be of a permanent character, & that the parties intended that after default the mtgee. should be entitled to a six months' notice; but where the just inference from the transaction is that the mtge. is merely temporary, as is the case where the mtge. is in the usual form by deposit merely, then it is not reasonable to infer that the parties intended that notice should be given.—FITZGERALD'S TRUSTEE *v.* MELLERSH, [1892] 1 Ch. 385; 61 L. J. Ch. 231; 66 L. T. 178; 40 W. R. 251; 8 T. L. R. 237; 36 Sol. Jo. 216.

Annotations:—**Consd.** London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515. **Mentd.** Jones *v.* Woodward (1917), 116 L. T. 378.

1037. —— Temporary mortgage—By deposit of title deeds—No notice necessary.]—FITZGERALD'S TRUSTEE *v.* MELLERSH, No. 1036, *ante.*

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1 Ind. Jur. N. S. 250; 2 Bom. 225.—**IND.**

m. —— ——.]—HUSAINI KHANAM *v.* HUSAIN KHAN (1907), I. L. R. 29 All. 471.—**IND.**

n. *Bill filed by second mortgagee—Default in payment—Redemption of first mortgage.*]—Where a second mtgee. files a bill of redemption, & makes default in paying at the time appointed, the mtgor., as well as the first mtgee., has the option of having a day thereupon appointed for redemption of the first mtge. by the mtgor.—MCKINNON *v.* ANDERSON (1871), 18 Gr. 684.—**CAN.**

o. *Whether right to redeem any time after maturity.*]—ARCHBOLD *v.* BUILDING & LOAN ASSOCN. (1888), 16 A. R. 1.—**CAN.**

p. *Redemption before expiry of term—Interest tendered up to date for redemption.*]—A mtgor. may at any time pay off a mtge. if he pays with the principal the whole of the interest thereon for the unexpired term of the mtge.—CRUMP *v.* REYNELL (1909), 29 N. Z. L. R. 366.—**N.Z.**

PART VII. SECT. 8, SUB-SECT. 2.—A.

1031 i. *Necessity for notice—Reasonable time.*]—CLARKE *v.* LITTLE (1855), 5 Gr. 363.—**CAN.**

1031 ii. —— ——.]—WRIGHT *v.* GILFOY (Alta.), [1922] 2 W. W. R. 955; 65 D. L. R. 189.—**CAN.**

1032 i. —— *Six months notice.*]—A mtgor. must, after default by him in payment of the principal money according to the proviso in the mtge. deed, give the mtgee. six calendar months' notice of his intention to pay off the mtge., unless the mtgee. has demanded or taken any steps to compel payment.—ARCHBOLD *v.* BUILDING & LOAN ASSOCN. (1888), 15 O. R. 237.—**CAN.**

1032 ii. —— ——.]—RICHARDSON *v.* MCCAFFREY (1919), 45 O. L. R. 573; 16 O. W. N. 247.—**CAN.**

1034 i. —— —— *Or interest in lieu thereof.*]—A mtgor. coming to pay off his mtge. after default must give the mtgee. six months notice or pay six months' interest.—CAPE *v.* SAVINGS BANK OF NEW SOUTH WALES TRUSTEES (1893), 14 N. S. W. Eq. 204; 10 N. S. W. W. N. 30.—**AUS.**

1034 ii. —— —— ——.]—MUTTLEBURY *v.* STEVENS (1886), 13 O. R. 29.—**CAN.**

1034 iii. —— —— ——.]—*Re* PAMBRUN & SHORT (1914), 27 W. L. R. 301; 6 W. W. R. 68; 16 D. L. R. 193; 7 Alta. L. R. 314.—**CAN.**

q. *Discretion of court to allow more than six years interest.*]—HOWEREN *v.* BRADBURN (1875), 22 Gr. 96.—**CAN.**

Sect. 8.—Enforcement of equity of redemption : Subsect. 2, A., B. & C.]

Compulsory purchase of land subject to mortgage.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 275, No. 2023.

1038. Waiver of notice—Consent of mortgagees to sale.]—*Re* FOWLER, BISHOP *v.* FOWLER, No. 1049, *post.*

B. Failure to Redeem on Expiration of Notice.

1039. Demand for payment made by mortgagee—Whether notice necessary.]—The rule, that in case of default of payment by the mtgor., six months' notice or interest must be given, applies when the mtgee. has required payment on a particular day & the money is not then paid.—BARTLETT *v.* FRANKLIN (1867), 36 L. J. Ch. 671 ; 17 L. T. 100 ; 15 W. R. 1077.

Annotations :—**Consd.** Edmondson *v.* Copland, [1911] 2 Ch. 301. **Refd.** Fitzgerald's Trustee *v.* Mellersh, [1892] 1 Ch. 385.

1040. —— ——.]—Deft., a mtgee., gave pltf., a mtgor., notice to pay off the mtge., & that in default of payment within three months she intended to sell the property. Before the expiration of the three months some correspondence took place as to the execution of the reconveyance, & the matter was not completed on the day when the three months expired, but a week later pltf. tendered the amount of principal & interest to date, which deft. refused to accept on the ground that pltf. must give a six months' notice to pay off or pay six months' interest in lieu thereof. Pltf. then took out a summons for redemption, upon which the common order was made. The master by his certificate found what was due upon the mtge. at the date of the tender, & that a good tender had been made by the mtgor. & refused by the mtgee. He also fixed the time & place for payment, not allowing any interest subsequent to the tender. Pltf. attended at the time & place with the money accordingly, but deft. failed to attend. On a summons to vary the certificate :—*Held :* (1) a good tender having been made, pltf. was not bound under the circumstances to give a fresh notice or pay six months' interest ; (2) pltf., who had not actually set the money aside, was liable for interest from the date of tender to the date of actual payment, he having had the use of the mtgee.'s money all that time.—EDMONDSON *v.* COPLAND, [1911] 2 Ch. 301 ; 80 L. J. Ch. 532 ; 105 L. T. 8 ; 27 T. L. R. 446 ; 55 Sol. Jo. 520.

Annotation :—**Refd.** Graham *v.* Seal (1918), 88 L. J. Ch. 31.

1041. Notice to pay off given by mortgagor—New notice necessary.]—One of the beneficiaries under a will mortgaged her interest in testator's estate. She gave the mtgees. six months' notice to pay off the mtge. on July 1, 1885, & on May 20, 1885, an order was made in an action to administer the estate on the application of the beneficiaries & in the presence of the mtgees. which directed (*inter alia*) payment to the mtgees. out of funds in ct. standing to the credit of the mtgor., of the mtge. debt with interest up to July 1, 1885. Owing to delay in the completion of the order the payment could not be made on July 1, & on July 2 the mtgees. took out a summons, claiming six months' additional interest in lieu of a fresh six months' notice to pay off the mtge. On July 20 the order was completed, & on July 21 the mtgees. took the sum mentioned in the order out of ct. :—*Held :* the mtgees. were only entitled to additional interest from July 1, to July 21, on the ground that by accepting the order, they assented to payment out of the fund in ct. subject to all the contingencies to which the completion of the order might be subject.

The contention is that the mtgees. agreed to accept payment on July 1, & that as the money was not paid to them, they are entitled to a fresh six months notice, or to six months' interest in lieu of notice. No doubt that is the ordinary rule where a mtgor. gives notice to pay off the mtgee., & he does not make the payment on the appointed day (PEARSON, J.).—*Re* MOSS, LEVY *v.* SEWILL (1885), 31 Ch. D. 90 ; 55 L. J. Ch. 87 ; 54 L. T. 49 ; 34 W. R. 59.

1042. Mortgagee consenting to be paid out of fund in court—Failure to redeem caused by delay in drawing up order.]—*Re* MOSS, LEVY *v.* SEWILL, No. 1041, *ante.*

C. Loss of Right.

1043. General rule—Action to enforce security—Subsequent notice of intention to redeem.]—A son who was residuary legatee under his father's will, mortgaged his interest under that will to H. The son died having made P. his exor. & A. his residuary legatee. A., as residuary legatee, & H., on behalf of himself & the other creditors, brought an action against the exors. of the son for administration of the son's estate, & H. brought an action against the exors. of the father for administration of the father's estate. Shortly after this P. gave notice to H. that he should pay off the mtge. in six calendar months, & this notice was accepted by H. :—*Held :* notwithstanding the giving & acceptance of the notice, H. having taken proceedings to recover his mtge. money was bound to accept in satisfaction of his claims his principal money & costs with interest up to the time of payment, though such payment was made before the expiration of the notice.—*Re* ALCOCK, PRESCOTT *v.* PHIPPS (1883), 23 Ch. D. 372 ; 49 L. T. 240, C. A.

Annotation :—**Refd.** Santley *v.* Wilde, [1899] 1 Ch. 747.

1044. —— ——.]—A mtge. was made of the mtgor.'s interest in a fund in ct. subject to a prior life interest. The fund was assigned by the mtge. deed to the mtgee. " to have, receive, & take the same," subject to the life interest & to the proviso for redemption. After the time appointed for redemption had expired the tenant for life died, & the trustee of a settlement of the fund made by the mtgor. presented a petition for the application of the fund in payment of the mtgee., & payment of the residue to the persons entitled thereto. The mtgee. had not demanded payment of the debt, or taken any steps to compel payment :—*Held :* notwithstanding the nature of the mtged. property & the form of the mtge. deed, the mtgee. was entitled to six months' interest from the date of the service of the petition on him.

If the mtgee. of a reversionary interest were to apply for & obtain payment of his debt when the reversion fell into possession, in such a case it may well be that he would not be entitled to any interest because it might be said that he had taken steps to compel payment of his debt (ROMER, J.).—SMITH *v.* SMITH, [1891] 3 Ch. 550 ; 60 L. J. Ch. 694 ; 65 L. T. 334 ; 40 W. R. 32.

Annotations :—**Refd.** Fitzgeralds' Trustee *v.* Mellersh, [1892] 1 Ch. 385 ; Bovill *v.* Endle, [1896] 1 Ch. 648.

1045. —— ——.]—The rule that a mtgee. who has demanded payment of his mtge. debt, or has taken steps to compel payment of it cannot refuse tender of his principal, interest & costs on the ground that he is entitled to six months' notice or six months' interest in lieu of notice, applies

whether the time fixed for payment by the proviso for redemption in the mtge. deed has expired or not; & the rule also applies where the mtgee. has entered into possession of the mtged. property, entry into possession being, in effect, a demand for payment.—BOVILL *v.* ENDLE, [1896] 1 Ch. 648; 65 L. J. Ch. 542; 44 W. R. 523.

Annotations:—**Refd.** Lisle *v.* Reeve, [1902] 1 Ch. 53. **Mentd.** *Ex p.* Wickens, [1898] 1 Q. B. 543.

1046. What amounts to enforcement of security—Ejectment by mortgagee.]—SHRAPNELL *v.* BLAKE (1737), West *temp.* Hard. 166; 25 E. R. 876; *sub nom.* SHARPNELL *v.* BLAKE, 2 Eq. Cas. Abr. 603, L. C.

1047. —— Proceedings in administration action—Proof of debt.]—(1) On the sale of an estate, subject to mtges. by trustees, one of the conditions was, that the purchaser should pay a deposit, & agree to pay the remainder of the purchase on or before Oct. 11, 1840; &, on payment thereof, the purchaser should be entitled to the rents from that day, up to which time all outgoings, including interest to the mtgees., was to be borne by the vendors; but if from any circumstance the money should not be paid at the time fixed, the purchaser should pay interest at 5 per cent. until the time of payment. The purchaser was ready with his money on the day appointed to complete his purchase, & also to pay off the mtgees., to whom he had given the usual notices; but the contract for sale could not be carried into effect on that day, in consequence of an order of the ct. made subsequently to the contract, & which was not contemplated at the time the contract was entered into, subjecting all contracts entered into by the trustees to the approbation of the ct.:—*Held:* under the above condition, the purchaser was bound to pay interest on his purchase-money at 5 per cent. from Oct. 11, 1840, & not from the time when the ct. ordered the contract to be carried into execution; & also to the mtgees. at 5 per cent., the rate payable on their mtges.; & he was not entitled to be relieved in these respects as against the vendors & the trust estate, although he had only made 3½ per cent. by his money pending the delay in procuring the approbation of the ct. to the contract, & would be obliged to give some of the mtgees. fresh notices.

(2) An equitable mtgee., who had proved his debt before the master, was ordered to reconvey to the purchaser, upon receiving his money, without the usual notice.—MATSON *v.* SWIFT, MATSON *v.* JAMES (1841), 5 Jur. 645.

Annotation:—**Refd.** *Re* Moss, Levy *v.* Sewill (1885), 31 Ch. D. 90.

1048. —— —— Consent to sale.]—In an administration suit an estate was ordered to be sold discharged of the mtge., if the mtgee. consented. The mtgee. consented to the sale:—*Held:* the mtgee. was only entitled to six months' interest from the date of his consent, if paid within that time, & to interest to the day of payment if paid afterwards, out of the proceeds of the sale.—DAY *v.* DAY (1862), 31 Beav. 270; 31 L. J. Ch. 806; 7 L. T. 122; 8 Jur. N. S. 1166; 10 W. R. 728; 54 E. R. 1142.

Annotation:—**Folld.** *Re* Fowler, Bishop *v.* Fowler (1922), 128 L. T. 620.

1049. Consent to sale by mortgagee—Whether sale out of court or in court.]—(1) There is no reason for differentiating the practice on a sale out of ct. with the mtgee.'s consent & a sale under the ct. with the same consent, & accordingly, on a sale out of ct. the same practice will be followed as was laid down by ROMILLY, M.R., in *Day* v. *Day*, No. 1048, *ante*.

(2) A proviso for twelve months' notice contained in the deed can be waived by the mtgees. consenting to the sale.—*Re* FOWLER, BISHOP *v.* FOWLER (1922), 128 L. T. 620; 66 Sol. Jo. 595.

1050. —— ——.]—W. in 1855 mortgaged a reversionary interest to which he was entitled under his father's will, & died in Mar. 1869, intestate, & there was no legal personal representative. Pltf., the mtgee., having filed a bill for the administration of the father's estate, was, on behalf of a surety of the mtgor., paid the principal & interest due on the mtge. security. & a sum for costs of suit. On motion to dismiss the bill:—*Held:* pltf. was not entitled to six months' interest in lieu of notice, but he was entitled to the costs of the motion, as he had been paid off in a summary way.—LETTS *v.* HUTCHINS (1871), L. R. 13 Eq. 176.

Annotations:—**Refd.** Smith *v.* Smith, [1891] 3 Ch. 550; Bovill *v.* Endle, [1896] 1 Ch. 648.

1051. —— ——.]—*Re* ALCOCK, PRESCOTT *v.* PHIPPS, No. 1043, *ante*.

1052. —— Sale by mortgagee.]—(1) The second mtgee. of a ship claimed an account against the first mtgee., who had sold the vessel upon the mtgor. becoming bkpt. Deft. offered to pay a specific amount. The action having been commenced more than six years after the sale, deft. pleaded Stat. Limitations. Pltf. set up an express trust as a bar to Stat. Limitations:—*Held:* there was no express trust; in case of an ascertained surplus the first mtgee. might be constructively a trustee of the surplus, but after six years, evidence could not be adduced to prove a surplus.

(2) Where the mtgee. of his own mere motion realised the mtged. property, he was held not to be entitled to interest in lieu of notice.—BANNER *v.* BERRIDGE (1881), 18 Ch. D. 254; 50 L. J. Ch. 630; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. L. C. 420.

Annotations:—*As to* (1) **Refd.** Dooby *v.* Watson (1888), 39 Ch. D. 178; Firth *v.* Slingsby (1888), 58 L. T. 481; The Benwell Tower (1895), 72 L. T. 664; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196. *Generally,* **Mentd.** Soar *v.* Ashwell, [1893] 2 Q. B. 390; Price *v.* Phillips (1894), 13 R. 191; Friend *v.* Young, [1897] 2 Ch. 421; Kessisoglu *v.* Balli (1903), 47 Sol. Jo. 738.

1053. —— Action for foreclosure—Effect of foreclosure order.]—An order for foreclosure having been made in the common form, & a certificate having also been made in the common form appointing the last day of six calendar months from the date of the certificate as the time for redemption, on payment of the principal money with interest up to that day & costs:—*Held:* the mtgor. could not claim to redeem on an earlier day on payment of the principal money with interest up to the time of payment only & the costs.

It is true that by bringing their action of foreclosure, pltfs. waived any right to require six months' notice of payment off, & at any time before the judgment pltfs. might have been tendered & required to accept what was due to them for principal & interest to date & costs properly incurred. But no such tender was made, & the foreclosure judgment was obtained by which all parties are now bound (ROMER, J.).—HILL *v.* ROWLANDS, [1897] 2 Ch. 361; 66 L. J. Ch. 689; 77 L. T. 34; 46 W. R. 26; 41 Sol. Jo. 639, C. A.

1054. Consent to sale by mortgagee—Whether sale out of court or in court.]—*Re* FOWLER, BISHOP *v.* FOWLER, No. 1049, *ante*.

Enforcing security before date fixed for redemption.]—*See* Nos. 1030, 1045, *ante*.

Sect. 8.—Enforcement of equity of redemption: Sub-sect. 3, A. & B. (a), (b) & (c); sub-sect. 4, A. (a), (b) & (c).]

SUB-SECT. 3.—TENDER.

A. In General.

1055. Who may make—Party on behalf of infant—Not guardian or having interest in land.]—WATKINS *v.* ASHWICKE (1585), Cro. Eliz. 132; 78 E. R. 389.

See, generally, CONTRACT, Vol. XII., pp. 319 *et seq.*

1056. Place of tender—Office of solicitor mortgagee—Tender to joint mortgagees.]—One of several mtgees. compelled to pay the costs, & another refused his costs, of a suit to redeem the mtge.; & the interest on the mtge. money declared to stop on the day of the tender.

Notice is given to pay off the debt at the time appointed by the deed. The notice is regularly served. The preliminary steps are all taken & completed before the day fixed by the notice & the deed. The day fixed is May 8, which fell on a Sunday, & it was therefore arranged that the meeting should be on Monday, May 9, & should be at the house of B., a solr., who was one of the devisees. . . . It is not disputed that on May 9, the money was produced & would have been paid if there had been parties to receive & give a discharge for it. . . . Under the circumstances, however, the loss may ultimately fall as between the three mtgees., that loss cannot fall upon debtor, who did all that was incumbent on him, & was prevented from discharging himself of the debt by the act of some or one of the joint mtgees. (KNIGHT BRUCE, V.-C.).—CLIFF *v.* WADSWORTH (1843), 2 Y. & C. Ch. Cas. 598; 7 Jur. 1008; 63 E. R. 268.

——.]—*See* CONTRACT, Vol. XII., p. 321, Nos. 2655–2657.

1057. What amounts to—Not letter stating willingness to pay.]—In 1799, B. lent F. the sum of £2,000 to raise which B. sold out the sum of £3,764 14*s.* 3*d.* £3 per cent. consols. F. gave his bond to secure the £2,000, & also by deed covenanted to convey certain lands to trustees, to secure the said sum of £2,000 & interest at £5 per cent. The following year, upon B. desiring to be paid off, an agreement, dated May 17, 1800, was executed, whereby, in consideration of B. allowing the £2,000 to remain secured at interest as aforesaid, F. agreed to pay her yearly the additional sum of £12 16*s.* 3*d.*, which, together with the interest at £5 per cent., would equal the dividends upon the sum of £3,764 14*s.* 3*d.* £3 per cent. consols; & also agreed, instead of paying the sum of £2,000, to repurchase the sum of £3,764 14*s.* 3*d.* £3 per cent consols, or pay B. such a sum of money as, at the time he might be so requested, would be sufficient to re-purchase that amount of stock. By an indenture made upon the marriage of B., in the year 1810, reciting the bond & deed of covenant of 1799, the debt due from F. was assigned to F. & another as trustees of the marriage settlement: but no notice was taken of the deed of 1800. The bill prayed specific performance of the agreement of 1800, & a foreclosure upon the footing of that agreement, & for further relief:—*Held:* a letter from F.'s solicitor to the solr. of B., stating his willingness to pay the money due upon the original transaction of 1799, & stating "Dr. B. now tenders," etc., but not actually tendering the amount, did not amount to a tender, although B.'s solr. treated it as a tender, & wrote in answer, "I decline your tender, & shall file the bill."—POWNEY *v.* BLOMBERG (1844), 14 Sim. 179; 13 L. J. Ch. 450; 8 Jur. 746; 60 E. R. 325.

1058. Tender under protest—Reservation of right to tax costs—& to review account.]—Mtgor. tendered a sum of money to the mtgees. for principal, interest, & costs, stating at the time that she reserved the right to tax the costs & review the figures:—*Held:* notwithstanding the reservation, the tender was unconditional, & entitled the mtgor. to a redemption decree in the form settled in *Harmer* v. *Priestley*, No. 4272, *post.*—GREENWOOD *v.* SUTCLIFFE, [1892] 1 Ch. 1; 61 L. J. Ch. 59; 65 L. T. 797; 40 W. R. 214, C. A.

——.]—*See* CONTRACT, Vol. XII., p. 331, Nos. 2772–2775.

Requisites of tender.]—*See* CONTRACT, Vol. XII., pp. 321–331, Nos. 2658–2777.

B. Effect of Refusal of Tender.

(a) Loss of Right to Interest.

See Part XVII., Sect. 14, *post.*

(b) Mortgagee Deprived of Costs.

See Part XVIII., Sect. 3, sub-sect. 4, *post.*

(c) Reconveyance Required by Mortgagor.

See, now, Law of Property Act, 1925 (c. 20), s. 105.

1059. Mortgagee entitled to reasonable time—To obtain advice on reconveyance.]—Where there are covenants in a deed of assignment on the part of a mtgee., he may refuse to take the principal & interest, though tendered, till he has had an opportunity of advising with his attorney whether he may safely execute.—WILTSHIRE *v.* SMITH (1744), 3 Atk. 89; 26 E. R. 854, L. C.

Annotations:—**Consd.** Joy *v.* Birch (1836), 10 Bli. 201; Jenkins *v.* Jones (1860), 2 Giff. 99. **Folld.** Webb *v.* Crosse, [1912] 1 Ch. 323. **Apld.** Graham *v.* Seal (1918), 88 L. J. Ch. 31.

1060. —— To procure execution of deed—Conveying parties not those to whom tender made.]—A mtgor. received notice to pay off the mtge. The disappearance of one of two joint mtgees. had made it impossible for the remaining mtgee. to get in the legal estate without a vesting order. The mtgor.'s solr. made a tender of principal & interest to the managing clerk of the mtgee.'s solr., who, in his employer's absence, had no instructions to receive it, the tender being accompanied by a demand for the immediate re-conveyance of the legal estate:—*Held:* a tender made under those conditions was not a valid tender for the purpose of relieving the mtgor. from payment of interest after date of tender.—WEBB *v.*

PART VII. SECT. 8, SUB-SECT. 3.—A.

r. *Demand by mortgagee of more than is due—Whether amounts to waiver of tender.*]—A demand by a mtgee. of more than is due will not relieve the mtgor. from the necessity of tendering what is actually due.—CAMPBELL *v.* COMMERCIAL BANKING CO. OF SYDNEY (1879), 2 N. S. W. L. R. 375, P. C.—**AUS.**

t. —— ——.]—MIDDLETON *v.* SCOTT (1902), 22 C. L. T. 369; 4 O. L. R. 459.—**CAN.**

a. *Revival of necessity for tender.*]—If a mtgee. who has stated he will not reconvey, afterwards makes a demand, the necessity for tender revives.—CAMPBELL *v.* COMMERCIAL BANKING CO. OF SYDNEY (1881), 2 N. S. W. L. R. (L.) 397.—**AUS.**

b. *Time for tender — Reasonable time before sale.*]—GENTLES *v.* CANADA PERMANENT & WESTERN CANADA MORTGAGE CORPN. (1900), 21 C. L. T. 143; 32 O. R. 428.—**CAN.**

c. *Whether tender must be absolute.*]—A tender by a mtgor. is ineffective unless absolute.—ARMSTRONG *v.* ROBINSON (1882), 8 V. L. R. (L.) 17.—**AUS.**

d. ——.]—BRENNAN *v.* PITT, SON, & BADGERY, LTD. (No. 2) (1901), 1 S. R. N. S. W. (Eq.) 92.—**AUS.**

e. ——.]—PERRS *v.* ALLEN (1872), 19 Gr. 98.—**CAN.**

f. ——.]—HAMMOND *v.* STRONG (Y. T.) (1908), 8 W. L. R. 362.—**CAN.**

CROSSE, [1912] 1 Ch. 323; 81 L. J. Ch. 259; 105 L. T. 867; 56 Sol. Jo. 177.
Annotation :—**Apld.** Graham *v.* Seal (1918), 88 L. J. Ch. 31.

1061. Mortgagee refusing to reconvey—Loss of interest from date of tender.]—It is the duty of a mtgee. on being paid by the mtgor. the principal, interest, & costs due upon the mtge., & contemporaneously with such payment, to hand to the mtgor. the title deeds with a duly executed reconveyance of the mtged. property.

Where a mtgor. who had given notice to the mtgee. that he would attend for that purpose made a tender of the amount due upon the mtge. & the mtgee. refused to hand over to the mtgor. then & there an indorsed reconveyance of the mtged. property with the title deeds, & an action for redemption was subsequently brought by the mtgor., the ct. refused to allow the mtgee. interest & costs subsequent to the date of the tender & ordered him to pay the costs of the action.—ROURKE *v.* ROBINSON, [1911] 1 Ch. 480; 80 L. J. Ch. 295; 103 L. T. 895.
Annotations :—**Distd.** Webb *v.* Cross, [1912] 1 Ch. 323. **Consd.** Graham *v.* Seal (1918), 88 L. J. Ch. 31. **Refd.** Edmondson *v.* Copland, [1911] 2 Ch. 301.

Duty of mortgagee to reconvey.]—*See* Part XI., Sect. 3, sub-sect. 1, *post.*

SUB-SECT. 4.—ACTION FOR REDEMPTION.

A. Parties.

(a) Trustees and cestuis que trust.

See, now, R. S. C., Ord. 16, r. 8.

1062. Trustee represents cestui que trust.]—JENNINGS *v.* JORDAN, No. 915, *ante.*

See, generally, TRUSTS & TRUSTEES.

Parties to foreclosure action, *see* Part XI., *post.*

(b) Heir or Personal Representative.

See Administration of Estates Act, 1925 (c. 23), ss. 1–3, 45.

1063. Personal representative—Of mortgagee—Action against heir.]—ANON. (1680), Freem. Ch. 52; 22 E. R. 1053, L. C.

1064. —— Of mortgagor.]—Testator, by his will, charged his debts & legacies upon his real & personal estate, & gave such real & personal estate to trustees upon trust for his nephew for life, to whom also he gave a legacy, with remainder to the first & other sons of the nephew successively in tail male, with remainder to the second & every other son of testator's brother successively, in tail male, remainder to testator's own right heirs; & added—" & upon this last-mentioned contingency, failing heirs male of my said brother, & of my said estate going to my right heirs more remote as aforesaid, then I do hereby charge, subject, & make liable my said estate with the payment of the sum of £5,000 to my niece." Testator died in 1775, leaving his brother his heir-at-law. The nephew entered into possession of the real estate, which consisted of a plantation in Jamaica, subject to a mtge. created by testator in 1765. The brother afterwards died, leaving the nephew, his only son, & then heir-at-law of testator; the nephew died in 1822, without issue male. The bill was filed in 1837 against the mtgees. & the devisees of the nephew to obtain payment of the niece's legacy of £5,000 :—*Held :* (1) an administrator of the nephew, to whom letters of administration had been granted limited to the purposes of the suit, was a sufficient representative of the personal estate of the nephew in the cause; (2) the heir-at-law of the survivor of the trustees appointed by testator, & the personal representative of testator, should properly be parties to the cause; but defts. not having, by plea or answer, objected that such heir or personal representative were necessary parties, the ct. would, under Ord. 40 of Aug. 1841, in the circumstances of the case, make a decree saving their rights.

Where the absent party was wanted only with a view to the interest of the parties to the record, as if he were a necessary party in respect of an interest of his own, which would not be prejudiced by a decree in his absence, & the objection was not taken by the answer, there was no reason why the ct. should not exercise a discretion as to making a decree in his absence (WIGRAM, V.-C.).—FAULKNER *v.* DANIEL (1843), 3 Hare, 199; 67 E. R. 355; *sub nom.* FALKNER *v.* DANIEL, 8 Jur. 29.
Annotations :—*As to* (1) **Consd.** Dowdeswell *v.* Dowdeswell (1878), 9 Ch. D. 294. **Refd.** Davis *v.* Chanter (1848), 2 Ph. 545. *Generally,* **Mentd.** Byam *v.* Sutton (1854), 19 Beav. 556.

1065. —— Of deceased life tenant—Sufficient representative of personal estate.]—FAULKNER *v.* DANIEL, No. 1064, *ante.*

1066. Heir—Of mortgagor—Action by devisee—Heir need not be party to bill by devisee to redeem.—LEWIS *v.* NANGLE (1752), 2 Ves. s. 431; 28 E. R. 275, L. C.
Annotations :—**Consd.** Boyse *v.* Rossborough (1856), 6 H. L. C. 2; De G. M. & G. 817. **Refd.** Anon. (1789), 1 Ves. 96; **Apld.** Anderson *v.* Blount (1843), 4 L. J. Ch. 1

1067. —— —— Effect of absence—Court unable to proceed.]—In a bill by a mtgee. to redeem the first mtgee., the mtgor. & heirs must be before the ct. The heir at law being abroad, the ct. cannot proceed.—FELL *v.* BROWN (1788), Bro. C. C. 276; 29 E. R. 151, L. C.
Annotations :—**Apld.** Falk *v.* Clinton (1855), 1 Jur. N. S. 92. **Refd.** Ramsbottom *v.* Wallis (1835), 5 L. J. Ch. 79; Shaw *v.* Shore (1835), 5 L. J. Ch. 79; Statther (1845), 2 Coll. 209. **Consd.** Brown (1844), 9 L. J. O. S. Ch. 74; Lyde *v.* Hale (1835), Jac. 280.
See, also, No. 1064, *ante.*

1068. —— —— Unascertained—Decree delayed.]—HALL *v.* HEWARD, No. 814, *ante.*

1069. —— Of surviving trustee—Of estate mortgagor.]—FAULKNER *v.* DANIEL, No. 1064, *ante.*

Parties to foreclosure action.]—*See* Part XI., Sect. 5, sub-sect. 5, *post.*

(c) Mortgagee after Assignment.

1070. Original mortgagee—Mortgagee not joining in assignment—Need not be party.]—The heir of mtgor. need not bring the original mtgee. before the ct., where he has assigned without the mtgor.'s joining.—HILL *v.* ADAMS (1742), 2 Atk. 39; 26 E. R. 420.

1071. Assignee in place of original mortgagee—Sufficient—Mesne assignees need not join.]—(1) Where there has been an assignment without the previous authority of the mtgor., or his declaration, that so much is due, it is enough to make that man a party, who has contracted to stand in the place of the original mtgee., & all assignees, till the title was got in by himself (LORD ELDON, C.).

(2) If an assignment of a mtge. is taken without the intervention of the mtgor., whatever the assignee pays, he can claim nothing under the assignment but what is actually due between the mtgor. & the mtgee. (LORD ELDON, C.).

(3) It is clear the mtgee. cannot originally covenant for a collateral advantage; also, if upon the true effect of the instrument, there is nothing more than that the mtgee. shall do what a mtgee. ought to do as a trustee, there is no pretence to say, the trust is distinct from the mtge. There is nothing unfair, or perhaps illegal, in taking a covenant originally, that, if interest is not paid at

Sect. 8.—Enforcement of equity of redemption: Sub-sect. 4, A. (c), (d), (e) & (f), & B.]

the end of the year, it shall be converted into principal. But this ct. will not permit that; as tending to usury; though it is not usury. So a mtgee. cannot stipulate to be receiver of the rents & profits with a commission. In one case that has been considered by the Ct. of K. B. usurious. But it has been long determined here, that though a mtgee. may stipulate for a receiver, to be paid by the mtgor., & may appoint a bailiff, etc., he cannot himself stipulate for any advantage beyond the interest; & though it seems to make little difference to the mtgor., who is receiver, yet this ct. considers it as tending to usury & oppression, & a collateral advantage; which a man contracting for a loan of money shall not make. So upon this contract; if a mtgee. stipulates to enter & take possession as trustee, & do a variety of acts he ought to do, whether he stipulates, or not, he not only shall not have any the advantage from it, but his stipulating for it might a mtgor. affect his right to the money lent. Upon what is a general rule also, independent of contract, account or trustee cannot charge any thing beyond GOLDWIN paid to the person, for whose estate he is 32 E. R. 6 (LORD ELDON, C.).—CHAMBERS *v.*

Annotations:—804), 9 Ves. 254; 1 Smith, K. B. 252; L. J. Ch. 31;
1 Knapp, 1;
Mainland *v.* *As to* (2) **Refd.** Ward *v.* Sharp (1884), 53
v. Daniel (18 *As to* (3) **Consd.** Sayers *v.* Whitfield (1829),
1 Giff. 421; E Leith *v.* Irvine (1833), 1 My. & K. 277;
v. Jacob (188 ohn (1889), 41 Ch. D. 126. **Refd.** Faulkner
Hoddinott *v.* , 3 Hare, 199; Robertson *v.* Norris (1858),
Africa Co. *v.* re *v.* Hughes (1876), 2 Ch. D. 148; Warner
L. J. Ch. 65;), 46 L. T. 656; Biggs *v.* Hoddinott,
Storage Co., [iggs, [1898] 2 Ch. 307; British South
Halton, [1921] De Beers Consolidated Mines (1910), 80
Beckford (1807 reglinger *v.* New Patagonia Meat & Cold
2 Mer. 68; D 914] A. C. 25; *Re* Morris, Mayhew *v.*
Blagrave *v.* Ro), 13 Ves. 377; Forrest *v.* Elwes (1816),
1 Ch. 172. *Generally*, **Mentd.** Quarrell *v.*

Parties to inton *v.* Davy (1836), 1 Moo. P. C. C. 15;
Sect. 5, sub-s uth (1856), 2 K. & J. 509.

foreclosure action.]—*See* Part X., (*d*) ct. 5, *post.*

1072. Part *Mortgage on Two Properties.*
estate.]—Th **ies interested in equity of each**
of other pre e original mtgor. having made a mtge.
debt, the without re nises to the same mtgee. for a distinct
parties int purchaser cannot redeem the first,
the second deeming the second mtge.; & the
—IRESON rested in the equity of redemption of
30 E. R. mtge. are necessary parties to the suit.
Annotation *v.* DENN (1796), 2 Cox, Eq. Cas. 425;
Distd. 197.

1073. *s:*—**Consd.** Vint *v.* Padgett (1858), 1 Giff. 446.
ante. ennings *v.* Jordan (1881), 6 App. Cas. 698.

1074. ——.]—PALK *v.* CLINTON (LORD), No. 1011, *ante.*

1074. ——.]—CHOLMONDELEY (MARQUIS) *v.* CLINTON (LORD), No. 904, *ante.*

Right of mortgagee to consolidate.]—*See* Part IX., Sect. 4, *post.*

Parties to foreclosure action.]—*See* Part X., Sect. 5, sub-sect. 5, *post.*

(*e*) *Action by Puisne Incumbrancer.*

1075. Mortgagor.]—WOODCOCK *v.* MAYNE (*circa* 1680), cited in 12 Ves. at p. 59; 33 E. R. 23, L. C.

Annotation:—**Consd.** Palk *v.* Clinton (1805), 12 Ves. 48.

1076. —— **Or his heirs.**]—FELL *v.* BROWN, No. 1067, *ante.*

1077. ——.]—PALK *v.* CLINTON (LORD), No. 1011, *ante.*

1078. ——.]—RAMSBOTTOM *v.* WALLIS, No. 917, *ante.*

1079. ——.]—The mtgor. is a necessary party to a bill by a second mtgee. to redeem the first mtge., & foreclose the equity of redemption.—FARMER *v.* CURTIS (1829), 2 Sim. 466; 57 E. R. 862.

Annotations:—**Apld.** Ramsbottom *v.* Wallis (1835), 5 L. J. Ch. 92. **Consd.** Anderson *v.* Stather (1845), 2 Coll. 209.

1080. ——.]—A judgment creditor, whose judgment was registered pursuant to 6 Ann. c. 20, & Judgments Act, 1838 (c. 110), filed a bill to redeem a prior mtgee. of lands in the West Riding, & to foreclose the mtgor. The mtgor. had confessed other judgments, & the conusees had registered them pursuant to Judgments Act, 1838 (c. 110), but not under 5 Ann. c. 20:—*Held:* those conusees were not necessary parties to the suit.

A second mtgee., filing a bill to redeem, is bound for the security of the first mtgee. & to prevent him from being called on to have the same account taken a second time against him, to bring before the ct. all the parties who might call for a redemption of the first mtgee.; that is the mtgor. & parties entitled under him to subsequent incumbrances (CRANWORTH, V.-C.).—JOHNSON *v.* HOLDSWORTH (1850), 1 Sim. N. S. 106; 20 L. J. Ch. 63; 15 Jur. 31; 61 E. R. 41.

Annotations:—**Refd.** Watts *v.* Porter (1854), 3 E. & B. 743; Benham *v.* Keane (1861), 3 De G. F. & J. 318. **Mentd.** Boughton *v.* Jervis (1861), 4 L. T. 486.

1081. Subsequent incumbrancers.]—JOHNSON *v.* HOLDSWORTH, No. 1080, *ante.*

1082. Prior incumbrancers—Splitting of charge on estate—Offer to pay amount due.]—A., being, tenant for life of an estate, & the owner of a charge of £20,000 thereon, mortgaged the £20,000 to B. for £14,000. He afterwards mortgaged it & other property to C. for £24,000. A. died, & the succeeding tenant for life prayed a redemption against C. on payment of such a sum as was due on account of the £6,000, thus splitting the charge of £20,000 into two portions:—*Held:* both B. & the exors. of A. were necessary parties to such a suit.

If in this case pltf. were willing to redeem by payment of £24,500, I should have no hesitation in saying that it was not necessary for him to make the prior incumbrancers parties; but here pltf. asks to redeem defts. on payment of so much of a charge on the estate as they may be properly entitled to. This amount must be ascertained, & I am of opinion that it cannot be ascertained, in the absence of parties interested in what the amount may be (ROMILLY, M.R.).—KENSINGTON (LORD) *v.* BOUVERIE (1852), 16 Beav. 194; 51 E. R. 752; *subsequent proceedings* (1859), 7 H. L. Cas. 557, H. L.

Parties to foreclosure action.]—*See* Part XIII., Sect. 7, sub-sect. 7, *post.*

(*f*) *Other Cases.*

1083. First tenant in tail—Sufficient.]—Rule established for convenience that it is sufficient to bring the first tenant in tail before the ct.—

PART VII. SECT. 8, SUB-SECT. 4.—A. (e).

1081 i. *Subsequent incumbrancers.*]—Where a prior mtgee. sues his mtgor. of the sale of the mtged. property without making the puisne mtgee. a party to the suit, the latter is in no way affected by the suit or its results.—PANDURANG *v.* SAKHARCHAND (1906), I. L. R. 31 Bom. 112.—**IND.**

g. Prior incumbrancers.]—PARSONS *v.* BANK OF MONTREAL (1868), 15 Gr. 411.—**CAN.**

h. ——.]—Although the rule is that a prior mtgee. can be made a party only to redeem him, still if such prior security has been created by a deed absolute in form, a subsequent mtgee. is at liberty to bring him before the ct. for the purpose of shewing his interest to be redeemable, without offering to redeem him.—MOORE *v.* HOBSON (1868), 14 [illegible] 3.—**CAN.**

LLOYD *v.* JOHNES (1804), 9 Ves. 37 ; 32 E. R. 514, L. C.

Annotations :—**Mentd.** Curtis *v.* Price (1805), 12 Ves. 89 ; Oldham *v.* Eboral (1833), Coop. *temp.* Brough. 27 ; A.-G. *v.* Foster (1842), 2 Hare, 81 ; A.-G. *v.* Foster (1843), 13 Sim. 282 ; Baker *v.* Sowter (1847), 10 Beav. 343 ; Cresswell *v.* Bateman (1858), 6 W. R. 220 ; Beioley *v.* Carter (1869), 4 Ch. App. 230 ; Egremont *v.* Thompson (1869), 17 W. R. 900.

1084. Part owners—Necessity of all parties interested.]—A bill for redemption cannot be sustained by a party having a partial interest in the equity of redemption, in the absence of the other parties interested in it. A person having a partial interest in a real estate which was subject to a mtge. alleging that such partial interest had been fraudulently acquired from him by deft., who had also got, from the mtgee. an assignment of the mtge. interest filed a bill for relief in respect of the fraud, & for a redemption :—*Held :* all the persons interested in the equity of redemption were necessary parties to the suit.—HENLEY *v.* STONE (1840), 3 Beav. 355 ; 49 E. R. 139.

1085. —— —— Tenants in common.]—Parties necessary to a redemption action by mtgees. of the interests of tenants in common, whether of an undivided share or of the entirety, stated.

All the four tenants in common, or those who claim the equity of redemption under them, are necessary parties to an action to redeem the charge on the entirety (CHITTY, J.).—BOLTON *v.* SALMON, [1891] 2 Ch. 48 ; 60 L. J. Ch. 239 ; 64 L. T. 222 ; 39 W. R. 589.

Annotation :—**Mentd.** Egbert *v.* National Crown Bank, [1918] A. C. 903.

See, also, No. 1067, *ante.*

1086. Absent party—Decree in absence—When interest protected by court.]—FAULKNER *v.* DANIEL, No. 1064, *ante.*

1087. Life tenant—Subject to term exceeding natural life—Two hundred years.]—A., having a life estate, with remainder over in strict settlement, subject to a mtge. of the settled property for a term of one thousand years, demised the property for a term of two hundred years if he should so long live. A purchaser of the term of two hundred years filed his bill to redeem the termor for one thousand years, who was the first mtgee. of the estate :—*Held :* A., the owner of the life estate, subject to the term of two hundred years, was a necessary party.—HUNTER *v.* MACKLEW (1846), 5 Hare, 238 ; 67 E. R. 902 ; *sub nom.* HUNTER *v.* HENDERSON, 8 L. T. O. S. 114.

Annotation :—**Mentd.** Lovell *v.* Andrew (1847), 15 Sim. 581.

1088. Transferee of mortgage—Transfer pendente lite.]—Pltf., in a bill to redeem, transferred the mtged. property *pendente lite :—Held :* the suit could not proceed in the absence of the transferee.—JOHNSON *v.* THOMAS (1849), 11 Beav. 501 ; 50 E. R. 911.

1089. Stranger—Working coal mine with consent of mortgagee.]—Pltf., being the owner in fee of certain hereditaments with a coal mine underneath, mortgaged same to deft. L. in fee. Pltf. covenanted to confirm any leases which L. might make, but L. was not authorised to work or lease the mine. Pltf.'s mine was surrounded on all sides by mines in the possession of defts. T. & J. E. Defts. E., without the knowledge of pltf., asked & obtained leave of L. to explore & work pltf.'s mine. Defts. E., without entering into any lease or agreement, explored & worked the mine & raised & sold coal to a large amount. On bill by pltf. to redeem :—*Held :* defts. E. were necessary parties to the suit.—HOOD *v.* EASTON (1856), 2 Giff. 692 ; 27 L. T. O. S. 295 ; 2 Jur. N. S. 729 ; 4 W. R. 575 ; 66 E. R. 290 ; *on appeal,* 2 Jur. N. S. 917, L. JJ.

Annotation :—**Mentd.** Elias *v.* Griffith (1878), 8 Ch. D. 521.

Parties to foreclosure action.]—*See* Part XIII., Sect. 7, sub-sect. 7, *post.*

B. Institution of Proceedings.

See, now, R. S. C., Ord. 55, r. 5A.

1090. By originating summons—Proceedings by action—Limitation of costs recoverable.] — Pltf. obtained judgment in a redemption action whe[re] deft. denied the tender, & disputed the pla[in] title to redeem :—*Held :* pltf. was entitled to [re]cover costs only as he would have been entitled [to] on an originating summons contested by [de]ft., attended by counsel, such costs to include [the] cost of the witnesses examined in ct. to prov[e] tende & pltf.'s title.—JOHNSON *v.* EVANS (1888) [60] L. 29 ; *on appeal* (1889), 61 L. T. 18, C. A.

1091. —— Questions of priority not determined.—The procedure by originating summons is only intended for the decision of simple questions between pltf. & deft. Therefore where a mtgee had taken out an originating summons for foreclosure or sale under R. S. C., Ord. 55, r. 5A, the ct. refused to decide the question of priority between two mtgees.

Rule 5A also was referred to, & it was argued that in order to work out a judgment for redemption or foreclosure effectually it was often necessary to decide on the priority of mtges., & therefore that the rule empowers that to be done. I do not agree with that (COTTON, L. J.).—*Re* GILES, REAL & PERSONAL ADVANCE CO. *v.* MICHELL (1890), 43 Ch. D. 391 ; 59 L. J. Ch. 226 ; 62 L. T. 375 ; 38 W. R. 273, C. A.

Annotation :—**Mentd.** Boake, Roberts *v.* Steven[s] [(1894)], 64 L. J. Ch. 261.

1092. By action in King's Bench—Discretion of Court of Appeal to make declaratory judgment—With liberty to proceed in Chancery.]—An English bank obtained a loan from a Russian bank on the security of certain bonds. A question having arisen upon the construction of the contract whether the loan was repayable in roubles or in sterling, the borrowers commenced an action against the lenders in the K. B. Div., which was transferred to the Commercial Ct., claiming a declaration that they were entitled to the possession of the bonds upon payment of the amount of the loan in roubles, & an injunction restraining the lenders from parting with the bonds save by

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PART VII. SECT. 8, SUB-SECT. 4.—A. (f).

1084 i. *Part owners—Necessity of all parties interested.*]—Where, after a mtge. being given, the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties.—BUCKLEY *v.* WILSON (1861), 8 Gr. 566.—**CAN.**

k. *Mortgagor — Where mortgagee trustee for mortgagor.*]—WATKINS *v.* MCKELLER (1859), 7 Gr. 584.—**CAN.**

l. —— *Suit by purchaser of part of premises.*]—DANIELS *v.* DAVIDSON (1862), 9 Gr. 173.—**CAN.**

m. *Judgment creditor of mortgagee.*]—G., a creditor of F. under a judgment recovered in 1856, filed his bill to redeem W., the alleged mtgee., under a deed of conveyance to him from F., absolute in form. A creditor of W., under a judgment recovered in 1859, & kept alive by *fi. fa.* lands, was made a party in the master's office, as an incumbrancer subsequent to pltf. :—*Held :* he could not properly be thus made a party.—GLASS *v.* FRECKELTON (1864), 10 Gr. 470.—**CAN.**

n. *Effect of death of one party.*]—Before a redemption suit one of the mtgor.'s surviving children died an infant & intestate :—*Held :* this suit enured to the benefit of those entitled to her share, including her mother as tenant for life, under R. S. O. 1877, c. 105, s. 27.—FAULDS *v.* HARPER (1882), 2 O. R. 405.—**CAN.**

o. *Subsequent tenant in tail.*]—An appeal lies at the suit of tenant in tail in remainder against a decree affecting his rights, had against a prior tenant in tail.—GIFFARD *v.* HORT (1804), 1 Sch. & Lef. 386.—**IR.**

Sect. 8.—Enforcement of equity of redemption: Subsect. 4, B., C., D., E. & F. (a), (b), (c) & (d) i.]

delivery of the same to the borrowers against such payment. The judge held: upon the construction of the correspondence as pleaded, that the loan was repayable in sterling & dismissed the action. The Ct. of Appeal, after allowing an amendment which let in some further correspondence, declared that the loan was repayable in roubles, & gave liberty to the borrowers to take proceedings in the Ch. Div. to redeem their securities, but granted no further relief in the action:—*Held:* the loan was repayable in roubles, &, notwithstanding the action, being an action for relief which was incidental to a redemption action, was brought in the wrong ct., there was in the circumstances no ground for interfering with the discretion of the Ct. of Appeal in making the declaration or in allowing the amendment.—RUSSIAN COMMERCIAL & INDUSTRIAL BANK *v.* BRITISH BANK FOR FOREIGN TRADE, LTD., [1921] 2 A. C. 438; 90 L. J. K. B. 733, 126 L. T. 35; 37 T. L. R. 919; 65 Sol. Jo. 645; *subsequent proceedings, sub nom.* BRITISH COMMERCIAL FOR FOREIGN TRADE, LTD. *v.* RUSSIAN COMMERCIAL & INDUSTRIAL BANK, 38 T. L. R. 65.

Annotations:—**Refd.** Prosperity *v.* Lloyds Bank (1923), 39 T. L. R. 372. **Mentd.** *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466; Anderson *v.* Equitable Life Assce. Soc. of United States (1926), 134 L. T. 557; Public Trustee *v.* [illegible]der, [1926] Ch. 776.

Jurisdiction of county court.]—*See* COURTS, Vol. XIII., p. 473, No. 230.

See Sect. 9, *post*. *Offer of Redemption.*

Right of mor *D. Discovery.*

documents of **tgagor to inspect & take extracts of** 1925 (c. 20), s. **title.**]—*See* Law of Property Act, **Liability of** 96.

See Part XIV. **mortgagee to produce title deeds.**]—**Production** ., Sect. 3, sub-sect. 2, *post*.

livered.]—*Se* **of documents—Before defence de-**No. 232. *e* DISCOVERY, Vol. XVIII., p. 65, **Interroga**

Vol. XVII **tories as to accounts.**]—*See* DISCOVERY, ., pp. 201, 222, Nos. 1490-1492, 1705.

See, no *E. Proof of Title.*

ss. 85–87 *v*, Law of Property Act, 1925 (c. 20), **1093.** .

a mtge. **Necessity for.**]—He that comes to redeem tion.— must show a title to the equity of redemp-E. R. LOMAX *v.* BIRD (1683), 1 Vern. 182; 23 **109** 402.

mtg **4.** ——.]—A party coming to redeem a ne ed. estate must prove, at his own costs, that is the individual entitled to the equity of redemption (LORD ELDON, C.).—JAMES *v.* BIOU (1819), 3 Swan. 234; 36 E. R. 844.

Annotations:—**Refd.** Rhodes *v.* Buckland (1852), 16 Beav. 212; Colyer *v.* Colyer, Pawley *v.* Colyer (1863), 3 De G. J. & Sm. 676; Pearce *v.* Morris (1869), 5 Ch. App. 227; Teevan *v.* Smith (1882), 47 L. T. 208. **Mentd.** Flack *v.* Longmate (1845), 8 Beav. 420.

1095. Sufficiency of—Primâ facie title.]—Upon a bill to redeem a *primâ facie* title is sufficient; & an issue shall not be directed though the title is complicated, if uncontradicted.—PYM *v.* BOWREMAN, BOWREMAN *v.* PYM (1793), 3 Swan. 241, n.; 36 E. R. 847.

1096. ——.]—LLOYD *v.* WAIT, No. 893, *ante*.

1097. Costs of proof—Borne by mortgagor.]—JAMES *v.* BIOU, No. 1094, *ante*.

1098. Whether mortgagee bound to investigate title.]—TASKER *v.* SMALL, No. 910, *ante*.

1099. ——.]—PEARCE *v.* MORRIS, No. 867, *ante*.

1100. Effect of notice of foreclosure—As estoppel from disputing title to redeem.]—Service of notice of foreclosure by the mtgee. on the occupant of the mtged. premises, does not estop the mtgee. from disputing the occupant's title to redeem.—PRANNATH ROY CHOWDRY *v.* RAMRUTTON ROY (1859), 8 W. R. 29, P. C.

F. Order for Redemption or Sale.

(a) Special Directions.

1101. Inquiry as to improper management of estate—By mortgagee in possession.]—(1) On a bill for redemption of mtged. property in the possession of the mtgee., the latter will be made to account for all loss & damage occasioned by his gross negligence in respect of bad cultivation & non-repair of the mtged. premises.

(2) Where an attorney had taken a mtge. from his client for his bill of costs in preparing that & another mtge., & the client, before the attorney's mtge. was executed, assented to the bill, but afterwards, on coming to redeem, questioned its accuracy, the ct. directed the master to examine the bill with a view to ascertaining the reasonableness of the charges, without entering into evidence as to whether the business charged for had been actually done.—WRAGG *v.* DENHAM (1836), 2 Y. & C. Ex. 117; 6 L. J. Ex. Eq. 38; 160 E. R. 335.

1102. Mortgage to secure solicitor's costs—Inquiry as to reasonableness of charges.]—WRAGG *v.* DENHAM, No. 1101, *ante*.

1103. Redemption by tenant for life—Decree settling equity of redemption.]—(1) A mtgee. cannot be compelled to place another person in his stead as mtgee., & he may therefore refuse to convey the mtged. premises to any person who should become mtgee. by that conveyance. In the absence of contract, he can only be called upon to reconvey to the mtgor. or his assignee. The petition of a tenant for life of an equity of redemption for a transfer of the first mtge. on payment by her into ct. of the moneys thereby, while a second mtgee. was in possession was dismissed with costs.

(2) The same tenant for life having filed her bill to redeem that & a second mtge., the case was considered as though pltf. were tenant in fee, & the usual decree was made, but with a direction that the reconveyance should be made according to the limitations of the will under which pltf. was tenant for life.—COLYER *v.* COLYER, PAWLEY *v.* COLYER (1863), 3 De G. J. & Sm. 676; 9 L. T. 214; 11 W. R. 1051; 46 E. R. 799, L. JJ.

(b) Redemption by Mesne Incumbrancer.

1104. Non-appearance of first mortgagee—Right to decree absolute.]—If, in a suit for redemption against several successive mtgees., the first mtgee. does not appear at the hearing, a subsequent mtgee. will be allowed to make the decree absolute against him.—COTTINGHAM *v.* SHREWSBURY (LORD) (1832), 5 Sim. 395; 58 E. R. 384.

1105. Cannot compel first mortgagee to transfer—Or require mortgagor to join in transfer—Rights confined to redemption & foreclosure.]—RAMSBOTTOM *v.* WALLIS, No. 917, *ante*.

1106. Redemption of two prior mortgages—Distinct parcels in same security—Right to redeem one

p. *Onus on plaintiff.*]—NELSON *v.* CHARLESON & BALLINGER (1914), 26 W. L. R. 865; 5 W. W. R. 995; 16 D. L. R. 237; 19 B. C. R. 100.—CAN.

mortgage.]—In a suit by a puisne mtgee. to redeem two prior mtges. of distinct portions of the estate comprised in pltf.'s security, & to foreclose the mtgor. on his default of redemption, if pltf. should redeem neither of the prior mtges., he is not entitled to any decree against the mtgor.; but pltf. in such a suit, defts. not having objected or not being able to object, that the suit is multifarious, may redeem one of the prior mtges., & obtain a decree for redemption or foreclosure against the mtgor. in respect of that estate, without redeeming the other mtge. & as to such other mtge. submitting to the dismissal of the bill.—PELLY *v.* WATHEN (1849), 7 Hare, 351; 18 L. J. Ch. 281; 14 Jur. 9; 68 E. R. 144; *on appeal* (1851), 1 De G. M. & G. 16, L. JJ.

Annotations :—**Refd.** Hallett *v.* Furze (1885), 31 Ch. D. 312. **Mentd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421; *Re* Long, *Ex p.* Fuller (1881), 44 L. T. 63; *Re* Llewellin, [1891] 3 Ch. 145; Brunton *v.* Electrical Engineering Corpn., [1892] 1 Ch. 434.

Failure to redeem.]—*See* Part VII., Sect. 8, subsect. 4, F. (*c*), *post.*

(*c*) *Failure to Redeem within Time Fixed.*

1107. General rule—Bill dismissed.]—CHOLMLEY *v.* OXFORD (COUNTESS), No. 1114, *post.*

1108. —— —— Motion of course.]—Upon a bill to redeem a mtge. & non-payment at the time appointed; it is a motion of course to dismiss the bill.—STUART *v.* WORRALL (1785), 1 Bro. C. C. 581; 28 E. R. 1310.

1109. —— ——.]—If pltf. in a suit for redemption does not pay the principal & interest at the time appointed, he will not be allowed to redeem, although before the motion to dismiss is made he has tendered the amount reported due, with the subsequent interest.—FAULKNER *v.* BOLTON (1835), 7 Sim. 319; 4 L. J. Ch. 81; 58 E. R. 860.

1110. —— ——.]—In an action by a second mtgee. to redeem the first mtgee. & to foreclose the mtgor., the proper form of judgment is, that in default of pltf. redeeming, the action is to stand dismissed with costs.—HALLETT *v.* FURZE (1885), 31 Ch. D. 312; 55 L. J. Ch. 226; 54 L. T. 12; 34 W. R. 225; 2 T. L. R. 208.

1111. —— No extension of time.]—The time not enlarged upon a bill of redemption; as upon a bill of foreclosure.—NOVOSIELSKI *v.* WAKEFIELD (1811), 17 Ves. 417; 34 E. R. 161, L. C.

1112. —— —— Amount tendered before dismissal—With subsequent interest.]—FAULKNER *v.* BOLTON, No. 1109, *ante.*

1113. Exception to rule—Failure due to honest mistake—Jurisdiction of court to extend time.]—In a redemption action an order was made giving pltf. leave to lodge the mtge. money in ct., & that "in default of such lodgment within two months from the date of this order, the action be dismissed with costs." Under a *bonâ fide* mistake pltf. failed to lodge the money in ct. until after the two months fixed by the order:—*Held:* notwithstanding the expiration of the two months, the action was not dead, but the ct. had jurisdiction, at the instance of pltf. to extend the time limited by the order so as to include the actual date of lodgment.—COLLINSON *v.* JEFFERY, [1896] 1 Ch. 644; 65 L. J. Ch. 375; 74 L. T. 78; 44 W. R. 311; 40 Sol. Jo. 296.

Annotation :—**Refd.** *Re* Macintosh, Dixon (1903), 88 L. T. 820.

Dismissal operating as foreclosure.]—*See* Subsect. 4, F. (*d*), *post.*

(*d*) *Effect of Dismissal.*

i. *Legal Mortgage.*

1114. Equivalent to foreclosure.]—Praying relief where a mtgee. is a party, is the same as praying to redeem; & if, on a reference to a master, they do not redeem him, the ct. will dismiss the bill, which is equivalent to a foreclosure.—CHOLMLEY *v.* OXFORD (COUNTESS) (1741), 2 Atk. 267; 26 E. R. 565, L. C.

Annotation :—**Refd.** Palk *v.* Clinton (1805), 12 Ves. 48.

1115. ——.]—Default of payment under a bill for redemption operates as a foreclosure.—WINCHESTER (BP.) *v.* PAINE (1805), 11 Ves. 194; 32 E. R. 1062.

Annotations :—**Mentd.** Metcalfe *v.* Pulvertoft (1813), 2 Ves. & B. 200; Landon *v.* Morris (1832), 5 Sim. 247; A.-G. *v.* Foster (1842), 2 Hare, 81; Irby *v.* Irby (No. 3) (1858), 25 Beav. 632; Anundo Moyee Dossee *v.* Dhonendro Chunder Mookerjee (1871), 14 Moo. Ind. App. 101; Wigram *v.* Buckley, [1894] 3 Ch. 483.

1116. ——.]—The effect of dismissing the bill under this decree would be the same as a decree of foreclosure; it would for ever shut out the interest of pltf. The last of the incumbrancers would become quasi mtgor., & the others would be the first & subsequent incumbrancers according to their priorities (WIGRAM, V.-C.).—COTTINGHAM *v.* SHREWSBURY (EARL) (1843), as reported in 3 Hare, 627; 67 E. R. 530; *on appeal* (1846), 15 L. J. Ch. 441, L. C.

Annotations :—**Refd.** Pelly *v.* Wathen (1849), 7 Hare, 351. **Mentd.** Lennard *v.* Curzon (1847), 1 De G. & Sm. 350.

1117. ——.]—Though the mtgor. might not be able to foreclose, yet if he had filed a bill to redeem, & his bill had been dismissed, he would have been foreclosed (JESSEL, M.R.).—*Re* ALISON, JOHNSON *v.* MOUNSEY (1879), as reported in 11 Ch. D. 284, C. A.

Annotations :—**Mentd.** Chapman *v.* Corpe (1879), 41 L. T. 22; Banner *v.* Berridge (1881), 29 W. R. 844; Sanders *v.* Sanders (1881), 19 Ch. D. 373; Warner *v.* Jacob (1882), 20 Ch. D. 220; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196; *Re* Loveridge, Drayton *v.* Loveridge, [1902] 2 Ch. 859; *Re* Metropolis & Counties Permanent Investment Bldg. Soc., Gatfield's Case, [1911] 1 Ch. 698; Nicholson *v.* England, [1926] 2 K. B. 93.

1118. —— Unless dismissed for want of prosecution.]—Dismission of a bill for redemption for want of prosecution has not the effect of foreclosure; not preventing another bill.—HANSARD *v.* HARDY (1812), 18 Ves. 455; 34 E. R. 389.

1119. ——.]—INMAN *v.* WEARING, No. 1150, *post.*

1120. Upon whom foreclosure binding—Party filing bill.]—*Re* GLEAVES, *Ex p.* PAINE, No. 877, *ante.*

1121. —— Alienee pendente lite.]—If during a suit to redeem, the mtgor. assigns the equity of redemption, & there is a decree against him, the assignee is bound by it.—GARTH *v.* WARD (1741), 2 Atk. 174; 26 E. R. 509, *sub nom.* GARTH *v.* CRAWFORD, Bam. Ch. 450, L. C.

Annotations :—**Consd.** Winchester (Bp.) *v.* Paine (1805), 11 Ves. 194. **Refd.** Metcalfe *v.* Pulvertoft (1813), 2 Ves. & B. 200; Bellamy *v.* Sabine (1857), 1 De G. & J. 566.

1122. —— ——.]—Pending a suit by a mtgor. for redemption, pltf. became an insolvent, & he also aliened the property. Neither his assignees nor his alienee were made parties, & in their absence an order was made foreclosing pltf.:—*Held:* the assignees in insolvency were not bound by it, the assignment to them by the insolvent being *in invitum*, but it was binding on the alienee *pendente lite* & those claiming under him; also, the latter could not avail themselves of the objection of the absence in the suit of the former.—WOOD *v.*

PART VII. SECT. 8, SUB-SECT. 4.—F. (d) i.

1114 i. *Equivalent to foreclosure.*]—When pltf. fails in an action for the redemption of a mtge. deft. is entitled to have a decree of foreclosure.—ROBERT *v.* MILLER (No. 3), 20 C. L. T. 411.—CAN.

Sect. 8.—Enforcement of equity of redemption: Subsect. 4, F. (d) i. & ii., (e) & (f), & G.; subsect. 5.]

SURR (1854), 19 Beav. 551; 2 W. R. 683; 52 E. R. 465.

1123. —— Successive mortgagees.]—COTTINGHAM *v.* SHREWSBURY (EARL), No. 1116, *ante*.

1124. —— Assignee in bankruptcy.]—WOOD *v.* SURR, No. 1122, *ante*.

1125. Cannot be turned into suit for account—Under general prayer of relief.]—A suit for redemption which fails, cannot, under the prayer for general relief, be turned into a suit for an account. —PATCH *v.* WARD (1862), 4 Giff. 96; 1 New Rep. 46; 7 L. T. 413; 9 Jur. N. S. 373; 11 W. R. 135; 66 E. R. 635; *subsequent proceedings* (1867), 3 Ch. App. 203, L. JJ.

ii. *Equitable Mortgage by Deposit of Deeds.*

1126. Does not act as foreclosure.]—The rule that the dismissal of the bill in a redemption suit operates as a foreclosure of the mtge. does not apply to an equitable mtge. by deposit of title deeds.

A mtgor. filed a bill for the redemption of a legal mtge. The mtgee., by his answer, alleged that he had advanced another sum of money on the deposit of the title deeds of another estate, & he claimed to hold both estates till both debts were paid. Pltf. amended his bill by stating the allegations made by deft., but before the bill came to a hearing he obtained an order, *ex parte*, dismissing the bill with costs. The mtgee. afterwards contracted to sell both the estates, & then filed a bill for the administration of the estate of the mtgor., who was dead, praying for permission to carry out the sale, & for payment of his whole debt out of the mtgor.'s estate:—*Held:* the equitable mtge. was not foreclosed, & pltf. was entitled to the relief prayed for. —MARSHALL *v.* SHREWSBURY (1875), 10 Ch. App. 250; 44 L. J. Ch. 302; 32 L. T. 418; 23 W. R. 803, L. JJ.

(*e*) *Order for Sale.*

See, now, Law of Property Act, 1925 (c. 20), s. 91 (1).

1127. Right to order for sale—Whether in discretion of court.]—CLARKE *v.* PANNELL (1884), 29 Sol. Jo. 147.

1128. —— ——.]—Under Conveyancing & Law of Property Act, 1881 (c. 41), s. 25, the ct. may make an order giving leave to a mtgor. to sell the mtged. estate out of ct., even though the mtgee. has given the mtgor. notice to pay off, & the time limited by the notice has expired, provided it appears that the sale will probably be more successfully conducted by the mtgor.; but in making the order the ct. will limit the time within which the mtgor. may sell, will require a reserved price to be fixed sufficient to cover what is due for principal, interest & costs, & will further require the mtgor. to deposit a certain sum in ct. as security for costs.—BREWER *v.* SQUARE, [1892] 2 Ch. 111; 61 L. J. Ch. 516; 66 L. T. 486; 40 W. R. 378; 36 Sol. Jo. 328.

1129. Order for sale out of court—Proceeds paid into court.]—(1) Under Conveyancing & Law of Property Act, 1881 (c. 41), s. 25, the ct. has power in a redemption action to order a sale of the mtged. property on an interlocutory application made before the trial of the action by a person interested in the equity of redemption.

In an action by the owner of the equity of redemption of property subject to several mtges. for the redemption of the mtges., pltf., soon after the issue of the writ, applied by summons for an order giving him liberty to sell the mtged. property, & asking that he might have the conduct of the sale. The first & second mtgees. opposed the application, the others supported it:—*Held:* an order for sale ought to be made, but that a reserved price must be fixed large enough to cover what was due on the first & second mtges. & pltf. must give security for the costs of the sale. The conduct of the sale was given to pltf. on the ground that he was more interested than the first or second mtgees. in obtaining as large a price as possible for the property.

It was ordered that the sale should take place out of ct., & that the proceeds of sale should be paid into ct.—WOOLLEY *v.* COLMAN (1882), 21 Ch. D. 169; 51 L. J. Ch. 854; 46 L. T. 737; 30 W. R. 769.

Annotations:—**Consd.** Davies *v.* Wright (1886), 32 Ch. D. 220; Brewer *v.* Square, [1892] 2 Ch. 111. **Refd.** Sadler *v.* Worley, [1894] 2 Ch. 170.

1130. Order made on interlocutory application—By person interested in equity of redemption.]—WOOLLEY *v.* COLMAN, No. 1129, *ante*.

1131. Conduct of sale—Given to mortgagor.]—WOOLLEY *v.* COLMAN, No. 1129, *ante*.

1132. —— ——.]—BREWER *v.* SQUARE, No. 1128, *ante*.

1133. Duty of court to fix reserve price—Sufficient to cover amount due.]—WOOLLEY *v.* COLMAN, No. 1129, *ante*.

1134. —— ——.]—BREWER *v.* SQUARE, No. 1128, *ante*.

1135. Security for costs.]—WOOLLEY *v.* COLMAN, No. 1129, *ante*.

1136. ——.]—BREWER *v.* SQUARE, No. 1128, *ante*.

Sale as remedy of mortgagee.]—*See* Part X., Sect. 2, *post*.

(*f*) *Other Cases.*

1137. Purchasers from building society—Society mortgagors for unpaid purchase-money—Failure by society to complete purchase.]—Purchasers of land from a building society must not delude themselves with the idea that the directors & the trustees of the society can convey a good & valid title; they are bound to call for the title deeds, as in the event of their taking a defective title they must bear all the consequential risks. A building society purchased a piece of freehold land, & the vendors upon the payment of one-fourth of the purchase-money conveyed the land to the trustees of the society in fee, & signed a receipt for the whole of the purchase-money. The directors of the society & the trustees at the same time signed an agreement to pay the remaining purchase-money by instalments, & declared that in the meantime the deed should remain in the hands of the vendors, & that in default of payment they would execute a legal mtge. to secure the unpaid purchase-money. Default was made, & an action was brought to recover the purchase-money, & on a claim filed, a decree was made to carry the agreement into effect. The society, immediately on the execution of the conveyance by the vendors, sold the land in lots

PART VII. SECT. 8, SUB-SECT. 4.—F. (f).

q. Who may be made parties—By ex parte order.]—An order to make persons interested in the equity of redemption parties in the master's office was granted *ex p.*—CUMMINGS *v.* HARRISON (*circa* 1862), 1 Ch. Ch. 369.—**CAN.**

—.]—An order to make persons interested in the equity of redemption parties in the master's office will not be granting *ex p.*—PENNER *v.* CANNIFF, SIMPSON *v.* DUGGAN, GRANT *v.* PATTERSON (1862), 1 Ch. Ch. 351.—**CAN.**

t. Contents of bill to redeem.]—A bill to redeem need not contain an

to divers persons, who, without looking into the title, paid their purchase-money & took a conveyance in fee from the trustees. The society omitted to pay the instalments of the purchase-money; & upon a bill filed by the original vendors against the whole of the allottees & sub-purchasers of the land:—*Held:* they were bound to pay the purchase-money & redeem the mtge., or otherwise that the whole of the estate must be sold; but if any party redeemed the land, the others must contribute towards the money paid for redemption, or otherwise that the land of the party omitting to pay his contribution must be sold to discharge what was due in respect of his allotment.—PETO *v.* HAMMOND (1861), 30 Beav. 495; 31 L. J. Ch. 354; 8 Jur. N. S. 550; 54 E. R. 981.

Annotations:—**Refd.** Oliver *v.* Hinton, [1899] 2 Ch. 264. **Mentd.** Morland *v.* Cook (1868), L. R. 6 Eq. 252.

1138. Action against mortgagee & sub-mortgagee—Form of order—Reconveyance on payment of amount due to mortgagee.]—In a suit against A., an incumbrancer, & B., a sub-incumbrancer, to redeem the securities:—*Held:* the proper form of decree was, that upon the amount due from pltf. to A. being paid into ct., both A. & B. should reconvey the estate & deliver the deeds to pltf., & that pltf. was not bound to wait until the accounts had been taken & the equities settled as between A. & B.—LYSAGHT *v.* WESTMACOTT (1864), 33 Beav. 417; 3 New Rep. 599; 55 E. R. 429.

1139. Order for preliminary accounts—R. S. C., Ord. 15, r. 1—Final redemption decree not added.]—Pltf., after issuing the writ in a redemption action, took out a summons for an account under above rule:—*Held:* the order under the summons must be limited to preliminary accounts, & that the usual terms of a final judgment for redemption ought not to be added without pltf.'s consent.—CLOVER *v.* WILTS & WESTERN BENEFIT BUILDING SOCIETY (1884), 53 L. J. Ch. 622; 50 L. T. 382; 32 W. R. 895.

See, also, Nos. 3105–3110, *post.*

G. Costs.

See Part XVIII., Sect. 2, *post.*

SUB-SECT. 5.—PROCEEDINGS TO IMPEACH MORTGAGE.

1140. Where no prayer for redemption—Redemption not allowed in same action.]—*Qu.:* Whether, where a bill, filed by pltfs., of whom some are infants, seeks to set aside a mtge. as fraudulent & void, & the ct. is of opinion that the mtge. is valid, a decree can properly be made in such a suit for the redemption of the mtge. by pltfs.—MARTINEZ *v.* COOPER (1826), 2 Russ. 198; 38 E. R. 309, L. C.

Annotations:—**Distd.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391. **Refd.** Gordon *v.* Horsfall (1846), 5 Moo. P. C. C. 393. **Mentd.** Jones *v.* Jones (1837), 8 Sim. 633; Hewitt *v.* Loosemore (1851), 9 Hare, 449; Dowle *v.* Saunders (1864), 2 Hem. & M. 242; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482; Brocklesby *v.* Temperance Bldg. Soc., [1895] A. C. 173.

1141. —— ——.]—A bill by assignees of a bkpt. prayed to set aside a mtge. executed to a creditor by a bkpt. on the eve of bkpcy., as being "in fraud of his general body of creditors," & it also prayed general relief. The bill failing on the ground of fraud:—*Held:* pltfs. were not entitled to a decree for redemption.—JOHNSON *v.* FESENMEYER (1858), 25 Beav. 88; 53 E. R. 569; *on appeal,* 3 De G. & J. 13, L. C.

Annotations:—**Distd.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391. **Mentd.** *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515; Pearson *v.* Benson (1868), 28 Beav. 598; The Heart of Oak (1869), 39 L. J. Adm. 15; Smith *v.* Pilgrim (1876), 2 Ch. D. 127; Ward *v.* Sharp (1884), 53 L. J. Ch. 313.

1142. —— ——.]—A bill prayed that a mtge. might be cancelled & for further relief, but it proved to be valid to some extent. The ct. refused the relief asked, or to make a decree for redemption on payment of what was properly due, & dismissed the bill with costs.—CRENVER, ETC. MINING CO., LTD. *v.* WILLYAMS (1866), 35 Beav. 353; 55 E. R. 932; *sub nom.* CREWER & WHEAL ABRAHAM UNITED MINING CO. *v.* WILLIAMS, 14 L. T. 93; 14 W. R. 444; *on appeal,* 14 W. R. 1003, L. JJ.

Annotation:—**Distd.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391.

1143. —— —— **Unless mortgagee sets up claim as absolute owner.**]—The privilege of a mtgee., not to be redeemed in a suit in which pltf. disputes the validity of the mtge. deeds & does not pray redemption, cannot be enjoyed by one who has by his acts abandoned that character, & sought in the suit to establish his title as absolute owner.—NATIONAL BANK OF AUSTRALASIA *v.* UNITED & BAND OF HOPE CO. (1879), 4 App. Cas. 391; 48 L. J. P. C. 50; 40 L. T. 697; 27 W. R. 889, P. C.

1144. Prayer for redemption—Joinder of alternative claims.]—A bill which seeks to set aside a number of mtges. as invalid & prays that pltf. may be at liberty to redeem such as are valid cannot be treated on demurrer for multifariousness as a redemption bill but must be taken as a bill to set aside the mtges. merely.—ERNEST *v.* PARTRIDGE (1863), 1 New Rep. 425.

1145. —— ——.]—Pltf. claimed a declaration that an alleged mtge. of land to deft. created no charge on the land comprised in it, & he claimed possession of the land. Pltf. claimed alternatively an account of what was due on the mtge. & redemption. Pltf. was a judgment creditor of the mtgor.; he had obtained an order appointing him receiver of the rents of the land, & the order had been registered. On a summons by deft. to stay all proceedings in the action, on the ground that no leave of the ct. had been obtained to join another cause of action with the action for the recovery of the land:—*Held:* pltf. was entitled without leave to ask for possession of the land in either alternative—immediate possession if the mtge. was invalid, & possession on payment of what should be found due if the mtge. was valid.—HUNT *v.* WORSFOLD, [1896] 2 Ch. 224; 65 L. J. Ch. 548; 74 L. T. 456; 44 W. R. 461; 40 Sol. Jo. 458.

offer to redeem, because the form given in the orders contains no such offer.—PEARSON *v.* CAMPBELL (1866), 2 Ch. Ch. 12.—**CAN.**

a. *Allowances to mortgagees — Costs of repairs.*]—In a redemption suit a mtgee. is entitled to credit for reasonable costs of repairs, if he renders an account of rents & profits.—LAKSHMAN BHISAJI SIRSEKAR *v.* HARI DINKAR DESAI (1880), I. L. R. 4 Bom. 584.—**IND.**

b. *Order for possession — When made.*]—BANK OF IRELAND *v.* SLATTERY, [1911] 1 I. R. 33.—**IR.**

PART VII. SECT. 8, SUB-SECT. 5.

c. *Where no prayer for redemption.*]—DICKINSON *v.* DUFFILL (1863), 10 Gr. 76.—**CAN.**

1144 i. *Prayer for redemption—Joinder of alternative claim.*]—KELLY *v.* MILLS (1851), 2 Gr. 253.—**CAN.**

d. *Delay of mortgagor in filing bill —Whether redemption allowed.*]—*Held:* pltf. was entitled to redeem on payment of deft.'s advances, although seven years had elapsed before pltf. filed his bill impeaching the transaction, the excuse assigned for the delay being his poverty, it appearing that the parties could be restored to their original positions without loss to defts.—BRADY *v.* KEENAN (1868), 14 Gr. 214.—**CAN.**

SECT. 9.—OFFER OF REDEMPTION.

1146. General rule—Necessity for.]—FARROW *v.* VIPAN (1836), Donnelly, 48 ; 47 E. R. 218.

1147. ——— ———.]—TASKER *v.* SMALL, No. 910, *ante*.

1148. ——— ———.]—A person entitled to an equity of redemption cannot make the mtgee. a party to a suit respecting the mtged. estate without offering to redeem ; but where a mtgor., by deed to which the mtgee. was not a party, had conveyed another estate to trustees to sell & pay off the mtge., so as to exonerate the mtge. estate, it was held that a person interested in the equity of redemption might file a bill, not offering to redeem, against the mtgee. & trustees, to have an execution of the trust.

An estate was charged with a mtge. & with portions, & a term was vested in trustees for securing the portions. A second estate was conveyed on trust to sell & pay the mtge. & portions. In a suit for the execution of the trusts, the mtgee. objected that the trustees of the term were not parties ; but the objection was overruled. —DALTON *v.* HAYTER (1844), 7 Beav. 313 ; 3 L. T. O. S. 72 ; 49 E. R. 1085.

Annotations :—**Apld.** Inman *v.* Wearing (1850), 3 De G. & Sm. 729. **Refd.** *Re* Nobbs, Nobbs *v.* Law Reversionary Interest Soc., [1896] 2 Ch. 830. **Mentd.** Boyse *v.* Rossborough (1853), Kay, 71 ; Chaffers *v.* Day (1855), 3 W. R. 263 ; Gilbert *v.* Lewis (1862), 32 L. J. Ch. 347 ; Brown *v.* Wales (1872), 27 L. T. 410 ; Jervis *v.* Berridge (1873), 21 W. R. 395.

1149. ——— ———.]—A judgment creditor cannot sustain a bill, for a general administration & account, against a prior incumbrancer, unless the bill contains an offer to redeem ; as redemption is the only relief, in equity, to which a subsequent incumbrancer is entitled, as against a prior mtgee. —GORDON *v.* HORSFALL (1847), 5 Moo. P. C. C. 393 ; 13 E. R. 542 ; *sub nom.* GORDON *v.* HORSFALL, HORSFALL *v.* DUNSTONE, 11 Jur. 569, P. C.

Annotation :—**Distd.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391.

1150. ——— ———.]—A bill was filed by a second mtgee. of three estates, each of which was subject to a distinct prior mtge., for a foreclosure against the mtgor., & an account against the prior mtgees. The bill also sought to impeach a sale made by one of the prior mtgees. as an improvident one. It did not seek or offer to redeem the prior incumbrances : —*Held :* (1) the bill was not multifarious, but was demurrable, on the ground that it contained no offer to redeem.

(2) The dismissal of a bill to redeem otherwise than for want of prosecution operates as a foreclosure (KNIGHT BRUCE, V.-C.).—INMAN *v.* WEARING (1850), 3 De G. & Sm. 729 ; 64 E. R. 680.

Annotations :—*As to* (1) **Distd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421 ; Ernest *v.* Partridge (1863), 1 New Rep. 425 ; National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391.

1151. ——— ———.]—In a suit for the administration of trust property, part of which had been properly, & part improperly included in a mtge. security :—*Held :* no relief could be given against the mtgee. unless pltf. offered to redeem him.—EATON *v.* HAZEL (1852), 1 W. R. 87.

Annotation :—**Refd.** Parker *v.* Watkins (1859), John. 133.

1152. ——— ———.]—Pltf. demised certain property to deft., to secure £4,500, & it was provided that if pltf. should pay the amount & interest on Apr. 2, following, in performance of the covenant therein contained, or on full payment thereof either previously or subsequently & before any execution of the trust or power of sale therein contained, the term should cease ; & it was declared that deft. should stand possessed of the property, upon trust, in case pltf. should not pay the amount on Apr. 2, to sell & apply the proceeds in such payment. The mtgor. filed a bill, on Apr. 1, praying an account of all dealings between himself & the mtgee., & that " on payment by pltf. to deft. of what, upon taking such accounts, might be found due," deft. might be ordered to reconvey the property, & for an injunction to restrain deft. from selling. Upon general demurrer for want of equity :—*Held :* (1) the demurrer was not sustainable upon the ground that the bill was filed before Apr. 2, this being a trust for sale in case of non-payment, & not a simple case of mtge., with proviso for redemption on a fixed day ; (2) the bill contained no sufficient offer to pay what might be found due ; & on this technical ground, the demurrer was allowed with leave to amend.—HARDING *v.* TINGEY (1864), 4 New Rep. 10 ; 34 L. J. Ch. 13 ; 10 L. T. 323 ; 10 Jur. N. S. 872 ; 12 W. R. 684.

1153. ——— ———.]—A bill by a person entitled to a mtged. estate, under the mtgor.'s will, against the mtgee. & the mtgor.'s representative, to have the mtgor.'s estate applied in payment of the mtge., cannot be sustained. A bill by a person claiming under a mtgor. against the mtgee. is irregular, unless it offers to redeem. Pltf. was entitled to an estate, subject to a mtge. created by his ancestor. He instituted a suit against the mtgee. & the representatives of his ancestor, praying to have the mtge. paid out of his assets or by a sale of the estate, & also for the delivery up of independent securities given by pltf. to deft. :—*Held :* the suit was multifarious, & a demurrer to it was allowed.—HUGHES *v.* COOK (1865), 34 Beav. 407 ; 55 E. R. 692.

1154. ——— ———.]—In an action of ejectment it appeared that pltf. had derived title by purchase from the mtgor. of the estate in question, & had covenanted with his vendor to pay all sums due on the mtge. ; while deft. had derived title & possession by a subsequent purchase at a fiscal sale obtained by the mtgee. in possession in proceedings to which pltf. was not a party :—*Held :* whether pltf. was bound by the fiscal sale or not, he could not in justice or in law eject deft. without at least paying to him the moneys due on the mtge. ; & whether he was entitled to redeem or not, there being no prayer for relief of that character, it could not be decreed to him in this action.—MURUGASER MARIMUTTU *v.* DE SOYSA, [1891] A. C. 69 ; 60 L. J. P. C. 26.

1155. Exception to rule—Enforcement of trusts relating to equity.]—DALTON *v.* HAYTER, No. 1148, *ante*.

1156. ——— ———.]—A mtgor. & his two incumbrancers, by a deed, conveyed the mtged. estates to trustees on trust to keep down the interest on the charges, & to accumulate the surplus rents & apply them in payment of principal, with an ultimate trust for the mtgor. ; & by the deed it was declared that nothing therein should derogate from the rights of the incumbrancers, & that, when they were paid off, the trusts of the deed should cease :—*Held :* a subsequent judgment creditor of the mtgor. could maintain a bill against all parties to the deed, & have the accounts taken under the deed without offering to redeem.—JEFFERYS *v.* DICKSON (1866), 1 Ch. App. 183 ;

1146 i. *General rule—Necessity for.*]—The rule is that a bill can only be filed against a mtgee. for the purpose of redeeming his mtge.—ROGERS *v.* WILLS (1866), 2 Ch. Ch. 13.—CAN.

35 L. J. Ch. 376 ; 14 L. T. 208 ; 12 Jur. N. S. 281 ; 14 W. R. 322, L. C.

Annotations :—**Mentd.** Gaskell *v.* Gosling, [1896] 1 Q. B. 669 ; Robinson Printing Co. *v.* Chic, [1905] 2 Ch. 123 ; Deyes *v.* Wood, [1911] 1 K. B. 806.

1157. —— Determination of question of construction—R. S. C., Ord. 54A, r. 1.]—Under Ord. 54A, r. 1, a mtgor. may apply by originating summons for the determination of a question of construction arising under the mtge. deed without offering to redeem. Where the mtgor. of a reversionary interest applied under Ord. 54, r. 1, for the determination of the question whether, according to the true construction of the mtge. deed, she was entitled to redeem during the period fixed by the deed for the continuance of the loan : —*Held :* the ct. was bound to decide the question, & ought not to put the mtgor. on the terms of offering to redeem.—*Re* NOBBS, NOBBS *v.* LAW REVERSIONARY INTEREST SOCIETY, [1896] 2 Ch. 830 ; 65 L. J. Ch. 906 ; 75 L. T. 309.

Annotation :—**Mentd.** Mason *v.* Schuppisser (1899), 81 L. T. 147.

—— **Application for sale.**]—*See* Law of Property Act, 1925 (c. 20), s. 91.

1158. What amounts to offer—Prayer for relief.] —CHOLMLEY *v.* OXFORD (COUNTESS), No. 1114, *ante*.

1159. Claim for account without offer to redeem —Sum found due to mortgagee—No power to order payment.]—A pltf., part owner of an equity of redemption, filed a bill against a mtgee., asking for an account, etc., but containing no offer to pay whatever might be found due to deft., nor did the decree contain a direction to that effect. Upon taking the account, a balance was found due to deft. :—*Held :* the ct. could not, under the decree, compel pltf. to pay deft., the balance found due to him.—HOLLIS *v.* BULPETT (1865), 12 L. T. 293 ; 13 W. R. 492.

SECT. 10.—LOSS OF RIGHT TO REDEEM.

By lapse of time.]—*See, generally,* LIMITATION OF ACTIONS, Vol. XXXII., pp. 471–482, 504, Nos. 1350–1454, 1650.

—— **Acknowledgment & payment of money charged upon or payable out of land.**]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 411–417, Nos. 898–944.

—— **Effect of disability on right to redeem.**]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 461, Nos. 1269–1271.

By sale of mortgagee.]—*See* Part X., Sect. 2, *post*.

By foreclosure.]—*See* Part X., Sect. 5, *post*.

Statute of Clandestine Mortgages, 1692 (c. 16), ss. 2, 3.]—*See, now,* Law of Property Act, 1925 (c. 20), s. 207, Sched. VII.

1160. By sale to mortgagee—Inadequacy of consideration.]—A. having deposited leases with B. to secure moneys borrowed at different times from 1805 to 1813, in the latter year signed an agreement, giving up all his interest to the mtgee. ; it was proved that the sum due to the mtgee. was a very inadequate consideration. On a bill to redeem, & that the agreement should stand only as a security :—*Held :* pltf. was not entitled to relief in equity, & bill dismissed.—PURDIE *v.* MILLETT (1829), Taml. 28 ; 48 E. R. 12.

1161. —— ——.]—(1) The circumstance that two parties stand to each other in the relation of trustee & *cestui que trust*, does not affect any dealing between them unconnected with the subject of the trust. Thus, the rule that the trustee cannot purchase from his *cestui que trust* does not extend to a purchase by a mtgee. from his mtgor.

(2) Inadequacy of price will not be sufficient ground to impeach a sale (LORD COTTENHAM, C.). —KNIGHT *v.* MARJORIBANKS (1849), 2 Mac. & G. 10 ; 2 H. & Tw. 308 ; 47 E. R. 1700, L. C.

Annotations :—*As to* (1) **Apld.** Kirkwood *v.* Thompson (1865), 2 Hem. & M. 392. **Distd.** Rushbrook *v.* Lawrence (1869), L. R. 8 Eq. 25. **Apprvd.** Melbourne Banking Corpn. *v.* Brougham (1882), 7 App. Cas. 307. *As to* (2) **Apprvd.** Melbourne Banking Corpn. *v.* Brougham (1882), 7 App. Cas. 307.

1162. —— ——.]—A mtgor. in embarrassed circumstances, in May, 1864, conveyed his equity of redemption in the mtged. property, under pressure, to the mtgee., for a sum considerably less than its value, & in June following he was, on his own petition, adjudicated bkpt. On bill by the assignee, the deed was set aside.—FORD *v.* OLDEN (1867), L. R. 3 Eq. 461 ; 36 L. J. Ch. 651 ; 15 L. T. 558.

1163. By release to mortgagee.]—In a suit by the resp., lately an insolvent, to set aside on the ground of misrepresentation or mutual mistake a release by the official assignee of the resps. equity of redemption of a certain mtge., for accounts against the appts., the mtgees., & in effect to have the benefit of a subsequent resale by the releasee's purchaser, it appeared that the official assignee had in the release admitted the truth of the representations made to him, & that the resp. had thereafter taken a conveyance from him of all the estate vested in him under the insolvency :—*Held :* where a mtgor. in consideration of the mtge. debt releases the equity of redemption to the mtgee., the parties should be regarded, until the contrary is shown by the party impeaching the deed, as on the ordinary footing of vendor & purchaser.—MELBOURNE BANKING CORPN. *v.* BROUGHAM (1882), 7 App. Cas. 307 ; 51 L. J. P. C. 65 ; 46 L. T. 603 ; 30 W. R. 925, P. C. ; *previous proceedings* (1879), 4 App. Cas. 156, P. C.

Annotation :—**Refd.** Mainland *v.* Upjohn (1889), 41 Ch. D. 126.

PART VII. SECT. 10.

e. *Discretion of court to refuse redemption.*]—By 7 Will. c. 2, s. 11, the right to redeem is in the discretion of the Ct. of Ch. in Canada.—SMYTH *v.* SIMPSON (1850), 7 Moo. P. C. C. 205 ; 13 E. R. 859.—**CAN.**

f. ——.]—ARKELL *v.* WILSON (1859), 7 Gr. 270.—**CAN.**

g. ——.]—The principle on which an equity of redemption is founded is relief against forfeiture ; & the equity is not to be allowed where the mtgee. has been guilty of no misconduct & from the dealings of the parties the allowance would work injustice, though twenty years have not elapsed since the right to redeem accrued.—SKAE *v.* CHAPMAN (1874), 21 Gr. 534.—**CAN.**

h. *By acquiescence.*]—STANTON *v.* MCKINLAY (1858), 1 E. & A. 265. —**CAN.**

k. ——.]—On a bill to redeem, it appeared that pltf.'s ancestors had executed an absolute conveyance under circumstances which entitled him to redeem, but that he had afterwards acquiesced in the grantee's claim of absolute ownership, & had thenceforward, & for ten years before his death, accepted from such grantee leases & paid him rents, making no claim to any other interest in the property :—*Held :* the grantor must be taken to have abandoned his equity, & that his heirs were not entitled to redeem.—ROACH *v.* LUNDY (1872), 19 Gr. 243.—**CAN.**

l. ——.]—When once it is established that the original relation of the parties was that of mtgor. & mtgee., the mtgor. cannot waive or abandon his right to redeem except by acts equivalent to a subsequent bargain to do so.—WHITLOW *v.* STIMSON (1909), 14 B. C. R. 321.—**CAN.**

m. *By estoppel.*]—Pltf.'s father mortgaged a lot of land to deft., & subsequently deft., with the consent & by the direction of his father, conveyed the lot in fee simple to M. After the death of the father pltf. brought suit under his will against deft. for the land :—*Held :* the father by consenting to the conveyance of the land in fee simple to M. was estopped from redeeming it, pltf. was in no better position than her father.—MCLEOD *v.* CAMPBELL (1874), 9 N. S. R. 456.—**CAN.**

Part VIII.—Assignment and Devolution of Mortgage.

SECT. 1.—TRANSFER.

SUB-SECT. 1.—RIGHT OF MORTGAGEE TO TRANSFER.

See, now, Law of Property Act, 1925 (c. 20), s. 114.

1164. General rule.]—Where the owner of shares borrows money & deposits with the lender certificates of his shares, & also transfers thereof signed by him, but with the date & name of the transferee left blank, the lender has implied power to fill up the blanks & the transfers will pass the legal interest if the arts. of assocn. do not require a deed, otherwise only an equitable interest.

C. like every other mtgee., has a right to reborrow, & transfer his security (JESSEL, M.R.).—*Re* TAHITI COTTON CO., *Ex p.* SARGENT (1874), L. R. 17 Eq. 273; 43 L. J. Ch. 425; 22 W. R. 815.

Annotations:—**Mentd.** *Re* Tees Bottle Co., Davies' Case (1876), 33 L. T. 834; *Re* Diamond Rock Boring Co., *Ex p.* Shaw (1877), 2 Q. B. D. 463; *Re* Lancaster, *Ex p.* Lancaster (1877), 5 Ch. D. 911; *Re* Shaw, *Ex p.* Piers (1877), 46 L. J. Q. B. 394; Ortigosa *v.* Brown (1878), 47 L. J. Ch. 168; France *v.* Clark (1884), 26 Ch. D. 257; *Re* Kimberley North Block Diamond Mining Co., *Ex p.* Wernher (1888), 58 L. T. 305; Moore *v.* North-Western Bank (1891), 64 L. T. 456; Ireland *v.* Hart, [1902] 1 Ch. 522; *Re* Keith, Prowse, [1918] 1 Ch. 487.

1165. Equitable mortgage—By deposit of deeds.]—Where a debtor deposits a title deed with his creditor, as security for a debt, the interest which the creditor thereby acquires in the deed may be assigned by him to a third person.—HOBSON *v.* MELLOND (1841), 2 Mood. & R. 342.

1166. —— ——.]—Equitable mtgee. by a deposit of a deed cannot pass his interest in the property by a parol voluntary gift accompanied by delivery of the deed; & as his interest in the deed is only incidental to his interest in the mtge. the donee of the deed has no right to retain it.—*Re* RICHARDSON, SHILLITO *v.* HOBSON (1885), 30 Ch. D. 396; 55 L. J. Ch. 741; 53 L. T. 746; 34 W. R. 286, C. A.

Annotations:—**Apld.** *Re* Hancock, Hancock *v.* Berrey (1888), 57 L. J. Ch. 793. **Refd.** Deverges *v.* Sandeman, Clark, [1902] 1 Ch. 579. **Mentd.** London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515.

1167. Legal mortgagee—Delivery of deed.]—By an indenture made in 1858 G. mtged. to his father a share of personal estate to which G. was entitled in reversion expectant on his mother's death. The father died in 1872, having made another son C. his exor. & residuary legatee. The mother died in 1887. C. shortly afterwards sent a letter to G. enclosing the indenture & stating that he handed it over to G. in compliance with the wish of their late mother. C. afterwards changed his mind & claimed the share under the mtge. No interest had ever been paid on the mtge. debt by G. & no acknowledgment given by him in respect of it:—*Held:* in the absence of any consideration the letter though coupled with delivery of the mtge. deed was not an effectual release & was uncomplete as a gift & did not amount to a declaration of trust & C. was entitled to the share.—*Re* HANCOCK, HANCOCK *v.* BERREY (1888), 57 L. J. Ch. 793; 59 L. T. 197; 36 W. R. 710.

Annotations:—**Mentd.** *Re* Lake's Trusts (1890), 63 L. T. 416; London & Midland Bank *v.* Mitchell, [1899] 2 Ch. 161; *Re* Stuceley, Stuceley *v.* Kekewich, [1906] 1 Ch. 67; *Re* Hazeldine's Trusts (1907), 77 L. J. Ch. 97.

1168. Trustee mortgagees—Bankruptcy of one—Power of court to vest securities in remaining trustees.]—One of four trustees of a settlement having been adjudicated bkpt. & having absconded, an action was brought by one of the *cestuis que trust* against the other three trustees, claiming to have the trusts carried into execution, & to have it declared that defts. were bound to make good any loss which might accrue on three mtges. on which part of the trust funds had been invested, & which pltf. alleged to be insufficient securities. He also alleged that the fourth trustee had acted fraudulently. The legal estate in the mtged. properties was vested in all the four trustees, & the stocks, in which the remainder of the trust funds had been invested, stood in the names of the four trustees. Before issue was joined in the action, the defts. in pursuance of an order of the ct. gave notice to call in two of the mtges., & one of the notices had expired. Owing to the pendency of the action no one could be found willing to accept the trusts in place of the bkpt.:—*Held:* in these circumstances, the ct. could properly appoint defts. trustees in the place of themselves & the bkpt.—DAVIES *v.* HODGSON (1886), 32 Ch. D. 225.

Annotation:—**Mentd.** *Re* Gardiner's Trusts (1883), 33 Ch. D. 590.

1169. —— **Effect of conviction as felon—Transfer without concurrence of administrator.**]—A trustee who is a mtgee. can transfer the mtged. trust property, even after a conviction for felony, without the concurrence of the administrator appointed under 33 & 34 Vict. c. 23.—*Re* LEVY & DEBENTURE CORPN.'S CONTRACT (1894), 42 W. R. 533; 38 Sol. Jo. 530; 8 R. 820.

See, further, TRUSTS & TRUSTEES.

Lunatic mortgagee—Power to order transfer.]—

PART VIII. SECT. 1, SUB-SECT. 1.

1164 i. *General rule.*]—JAMIESON *v.* LONDON & CANADIAN LOAN & AGENCY CO. (1897), 19 C. L. T. 373; 30 S. C. R. 14.—**CAN.**

1164 ii. ——.]—TRUSTS & GUARANTEE CO., LTD. *v.* MONK (Alta.), [1923] 1 W. W. R. 1217.—**CAN.**

n. *Trustee mortgagees.*]—A. & B., exors. & trustees under a will with power of sale, sold & took a mtge. to secure purchase-money, they being in the recital named as exors. B., without the knowledge or consent of A., assigned the mtge. & appropriated the consideration money to his own use:—*Held:* no estate passed under the assignment, except so far as the trust estate might be found debtor to B.—HENDERSON *v.* WOODS (1862), 9 Gr. 539.—**CAN.**

o. *Part of mortgage.*]—*Held:* the effect of the sale & transfer by the mtgees. of the portion of the mtged. property was to transfer to the purchasers a part of the mtge. debt, proportioned to the value of the property transferred, as compared with the whole property mtged.—MCLELLAN *v.* MAITLAND (1852), 3 Gr. 164.—**CAN.**

p. *Mortgagor having no interest.*]—A mtgee. who for a valuable consideration transfers the mtge., & all his estate in the land therein, & covenants that the mtge. at the time of the assignment is in full force, & valid & effectual in law, & not assigned, released, or otherwise made void, & that no part of the money thereby secured has been paid, is liable to the assignee though the mtgor. never had any interest in the premises professed to be mtged., & the mtge. never was any lien thereon.—POWELL *v.* BAKER (1863), 13 C. P. 194.—**CAN.**

q. *Joint mortgagors — Assignment by one.*]—A. & B., mortgaged to C., & afterwards sold & conveyed the same property to D., receiving back a mtge. for the purchase-money, which exceeded the amount due to C. A., without B.'s authority, assigned this mtge. to C. by way of further security for the debt due to him by A. & B. On a bill by B. against all parties:—*Held:* the proper decree was the same as if the purchaser had been the original owner, & had executed a first mtge. to C., & a mtge. to A. & B.—GRAHAME *v.* ANDERSON (1868), 15 Gr. 189.—**CAN.**

r. *Exchange of mortgages.*]—CLARKE *v.* JOSELIN (1888), 16 O. R. 68.—**CAN.**

t. *Agreement to assign—Specific performance.*]—An agreement to assign a mtge. on land by way of absolute transfer or sale, or, as in the present case, to assign a mtge. on land in pay-

See LUNATICS, Vol. XXXIII., p. 222, Nos. 1311–1315.

sub-mortgage.]—*See* Sect. 2, *post.*

Debentures.]—*See* COMPANIES, Vol. X., pp. 771–773, Nos. 4826–4833.

Mortgage to building society.]—*See* BUILDING SOCIETIES, Vol. VII., p. 471, Nos. 109, 110.

SUB-SECT. 2.—RIGHT TO CALL FOR TRANSFER.

See, now, Law of Property Act, 1925 (c. 20), s. 95.

1170. Right of tenant for life to call for assignment to nominee—Failure to keep down interest.]—A tenant for life of mtged. premises who has failed to keep down the interest & who has obtained the usual order permitting him to redeem the mtge. is not of right entitled under Conveyancing & Law of Property Act, 1881 (c. 41), s. 15, to require the mtgee. to transfer the mtge. debt & premises to a third person.—ALDERSON *v.* ELGEY (1884), 26 Ch. D. 567; 50 L. T. 505; 32 W. R. 632.

1171. Lien on shares—Amounting to equitable charge—Right of shareholder to call for transfer.]—The articles of assocn. of a co. provided that the co. should have a first & paramount lien upon the shares of each member for his debts to the co., & that, for the purpose of enforcing the lien, the directors might, on default in payment of a debt, sell the shares, & execute a transfer of the shares sold to the purchaser:—*Held:* this lien constituted a "charge" upon the shares within Conveyancing & Law of Property Act, 1881 (c. 41), s. 2 (6), for a debt due from the shareholder to the co., & consequently, sect. 15, applied, & entitled the shareholder to require the co., on payment of the sum due, to assign the debt & their lien on the shares to his nominee.—EVERITT *v.* AUTOMATIC WEIGHING MACHINE CO., [1892] 3 Ch. 506; 62 L. J. Ch. 241; 67 L. T. 349; 36 Sol. Jo. 732; 3 R. 34.

Annotation:—**Refd.** Hopkinson *v.* Mortimer, Harley, [1917] 1 Ch. 646.

SUB-SECT. 3.—ASSIGNMENT OF DEBT OR SECURITY SEPARATELY.

See, now, Law of Property Act, 1925 (c. 20), s. 114.

1172. Transfer of security—Transfers debt.]—He, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt. With regard to the mere bond or covenant, which perhaps may accompany the mtge., it is said, that all the ceremonies, declared to be necessary as to the debts in general, ought to be observed. But it is difficult to say the mtge. passes, & is well assigned to one person, & yet the debt remains in another. It is impossible that it can be so divided (GRANT, M.R.).—JONES *v.* GIBBONS (1804), 9 Ves. 407; 32 E. R. 659.

Annotations:—**Consd.** *Re* Buller, *Ex p.* Wornald (1860), 2 L. T. 544; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589. **Refd.** *Re* Rucker, *Ex p.* Rucker (1834), 3 L. J. N. S. Bcy. 104; Gardner *v.* Lachlan (1838), 4 My. & Cr. 129; *Re* Reay, *Ex p.* Barnett (1845), De G. 194; *Re* Southampton's Estate, Allen *v.* Southampton, Banfather's Claim (1880), 16 Ch. D. 178; Dixon *v.* Winch (1900), 82 L. T. 437; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Mentd.** Cooper *v.* Fynmore (1814), 3 Russ. 60; *Re* Frazer, *Ex p.* Monro (1818), Buck. 300; *Re* Severn, *Ex p.* Tennyson (1832), Mont. & B. 67; *Re* Selby, *Ex p.* Probyn (1857), 28 L. T. O. S. 258; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

1173. Transfer of debt reserving security—Right of transferor to foreclosure.]—A mtgee. who has assigned his mtge. debt, expressly reserving to himself the benefit of the mtge. security, is entitled to the common foreclosure decree.—MORLEY *v.* MORLEY (1858), 25 Beav. 253; 6 W. R. 360; 53 E. R. 633.

1174. —— Voluntary settlement of debt—Whether enforceable against settlor—Debt not recoverable by trustees.]—A. B. was entitled to £5,000 charged on a freehold. It was secured by the legal estate vested in her, but no one was personally liable to pay it. A. B. executed a voluntary settlement, by which she assigned the money to trustees, & gave them a power of attorney to recover it; but she retained the legal estate:—*Held:* as the money could only be recovered upon a reconveyance of the legal estate to the owner, which the trustees were unable to procure, the voluntary settlement was incomplete & could not be enforced against the settlor or her estate.—WOODFORD *v.* CHARNLEY (1860), 28 Beav. 96; 54 E. R. 102.

Annotations:—**Consd.** *Re* Patrick, Bills *v.* Tatham, [1891] 1 Ch. 82. **Refd.** Bizzey *v.* Flight (1876), 45 L. J. Ch. 852.

1175. —— —— —— ——.]—A voluntary settlement purported to comprise certain mtge. debts & bank shares but the mtges. & shares were not transferred to the trustees & some of the mtge. debts were received by the settlor. By her will the settlor confirmed her settlement but the settlement was not admitted to probate:—*Held:* the settlement was imperfect but was confirmed by the will & was made complete as regarded the shares though not as regarded the mtge. debt received by the settlor.—BIZZEY *v.* FLIGHT (1876), 3 Ch. D. 269; 45 L. J. Ch. 852; 24 W. R. 957.

Annotation:—**Consd.** *Re* Patrick, Bills *v.* Tatham, [1891] 1 Ch. 82.

1176. —— —— —— Debt recoverable by trustees.]—P. executed a voluntary settlement, by which he assigned certain personal property, including four debts which were due to him on

ment or part payment of other land sold by the proposed transferee to the proposed transferor, is a contract of which a ct. of equity would decree specific performance.—LYNCH *v.* WOOD, Cass. Dig., 2nd ed. 783.—**CAN.**

a. *Necessity for registration.*]—*Re* LAND TITLES ACT (Sask.), [1919] 1 W. W. R. 504.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 2.

b. *Right of mortgagor to call for transfer—To third party paying off mortgage.*]—Where a mtgor. of land conveyed his equity of redemption to several grantees, one of whom agreed to pay off the mtge., & some of whom also executed further mtges. upon the land, & the first mtgee. proceeding to foreclose & to sue the mtgor. upon his covenant, the latter requested him to assign his mtge. to a third party who had advanced the money & paid off the mtge.:—*Held:* the first mtgee. was bound to execute the assignment as asked, notwithstanding the subsequent incumbrances.—QUEEN'S COLLEGE *v.* CLAXTON (1894), 25 O. R. 282.—**CAN.**

c. *Second mortgagee holding assignment from first mortgagee.*]—GOODERHAM *v.* TRADERS BANK (1888), 16 O. R. 438.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 3.

1172 i. *Transfer of security—Transfers debt.*]—LEITCH *v.* LEITCH (1901), 21 C. L. T. 496; 2 O. L. R. 233.—**CAN.**

1172 ii. —— ——.]—SHORT *v.* GRAHAM (1908), 7 W. L. R. 787.—**CAN.**

1172 iii. —— ——.]—GREAT WEST LUMBER CO. *v.* MURRIN & GRAY (Alta.), [1917] 1 W. W. R. 945.—**CAN.**

1172 iv. ——.]—TRUSTS & GUARANTEE CO., LTD. *v.* STEPHENS (Alta.), [1919] 3 W. W. R. 410.—**CAN.**

1172 v. —— ——.]—A transferee of mtged. land is personally liable to the mtgee. under the covenant implied by Land Titles Act, s. 52, even though he has not executed the transfer, unless by agreement, express or implied, such implied covenant is modified or negatived.—TRUSTS & GUARANTEE CO., LTD. *v.* LANDREVILLE & SINGER (Alta.), [1922] 2 W. W. R. 586; 67 D. L. R. 59.—**CAN.**

d. *Voluntary transfer of security—By insolvent father to son—Duty of purchaser to make inquiries.*]—In case of a purchase of a mtge. security recently given on all his real estate by an insolvent father to his son, the purchaser, if he has notice of his

Sect. 1.—*Transfer: Sub-sects.* 3 & 4, *A., B., C., D., E. & F.; sub-sects.* 5, 6 & 7, *A.*]

the security of bills of sale, to trustees, with power to sue for the debts, upon trust to sell & convert into money the trust premises & execute & do such assurances & things as should be expedient, & to apply the proceeds for the benefit of his wife & other relatives. But he made no express assignment of the securities for the debts, nor did he give them up to the trustees. The settlor afterwards received payment of these four debts & died intestate. In an action for the administration of his estate & of the trusts of the settlement: —*Held:* the debts were completely assigned by the voluntary settlement & the trustees were entitled to prove as creditors against the estate of the intestate in respect of the debts received by him.—*Re* PATRICK, BILLS *v.* TATHAM, [1891] 1 Ch. 82; 60 L. J. Ch. 111; 63 L. T. 752; 39 W. R. 113; 7 T. L. R. 124; 32 Sol. Jo. 798, C. A.

Annotation:—**Mentd.** *Re* Griffin, Griffin *v.* Griffin, [1899] 1 Ch. 408.

SUB-SECT. 4.—FORM OF TRANSFER.

A. Necessity for Writing.

See, now, Law of Property Act, 1925 (c. 20), ss. 53–55, 114, 115, 156.

1177. Delivery of deeds—Insufficient to pass legal estate.]—If one trusts his scrivener, who puts out money for him, with the custody of his bond, & the scrivener receives the money, & delivers up the bond, the obligee is barred as against the obligor for ever; *secus* in case of a mtge. because a legal estate is vested, which cannot be divested without assignment.—MARTYN *v.* KINGSLY (1702), Prec. Ch. 209; 24 E. R. 102.

Annotations:—**Consd.** Wilkinson *v.* Candlish (1850), 5 Exch. 91. **Mentd.** Beaufort *v.* Neeld (1845), 12 Cl. & Fin. 248.

1178. —— Passes equitable interest of transferor.]—The London & South Western Bank, as against their advance of £3,500, got the title deeds, & thus obtained an equitable charge not, as was suggested in applt.'s argument, upon the documents of title, but upon the land which they represented. The two cos. who are resps. in this appeal advanced the money required to pay the claim of the bank, & the title deeds were handed over to them. Any equitable interest in the land which had previously pertained to the bank, in respect of the possession of the title deeds thus passed to resps. (LORD WATSON).—BROCKLESBY *v.* TEMPERANCE BUILDING SOCIETY, [1895] A. C. 173; 64 L. J. Ch. 433; 72 L. T. 477; 59 J. P. 676; 43 W. R. 606; 11 T. L. R. 297; 11 R. 159, H. L.

Annotations:—**Consd.** Rimmer *v.* Webster, [1902] 2 Ch. 163; Fry *v.* Smellie, [1912] 3 K. B. 282. **Reid.** Lloyds Bank *v.* Bullock, [1896] 2 Ch. 192; Jared *v.* Walke (1902), 18 T. L. R. 569; Thurstan *v.* Nottingham Permanent Benefit Bldg. Soc., [1902] 1 Ch. 1; Lloyd's Bank *v.* Cooke, [1907] 1 K. B. 794; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777. **Mentd.** Farquharson *v.* King, [1902] A. C. 325; Herdman *v.* Wheeler, [1902] 1 K. B. 361; Truman *v.* Attenborough (1903), 103 L. T. 218; Jones *v.* Waring & Gillow, [1926] A. C. 670.

As gift inter vivos.]—*See* GIFTS, Vol. XXV., p. 531, Nos. 215, 216.

—— **Whether operation as donatio mortis causa.**]—*See* GIFTS, Vol. XXV., p. 548, Nos. 336, 337.

1179. Mortgage by deposit of deeds—Change in partnership holding deeds.]—The title deeds of property belonging to one of two partners in trade are deposited with a banking firm, to secure the balance on the account current between the banking firm & the partnership. On a particular advance being afterwards made by the former to the latter, the partner to whom the deeds belong writes a letter to the effect, that the object of the deposit is to secure that "as well as any future advances." An alteration takes place in the members of the banking firm, but the new firm retain the deeds & continue to advance money to the partnership:—*Held:* the existing banking firm were entitled to the benefit of the security.—*Re* GYE & HUGHES, *Ex p.* SMITH (1841), 2 Mont. D. & G. 314.

1180. —— ——.]—*Re* WORTERS, *Ex p.* OAKES, No. 200, *ante.*

B. Mortgage to Married Woman.

See HUSBAND & WIFE, Vol. XXVII., p. 133, Nos. 1089, 1090.

C. Bill of Sale.

See BILLS OF SALE, Vol. VII., pp. 155–157, Nos. 829–841.

D. Mortgage to Trustees.

See Law of Property Act, 1925 (c. 20), ss. 112, 113.

1181. Recital that moneys held on joint account —Trust kept off title.]—*Re* HARMAN & UXBRIDGE & RICKMANSWORTH RY. CO., No. 457, *ante.*

See, also, Nos. 1168, 1169, *ante.*

Form of mortgage to trustees.]—*See* Part II., Sect. 3, sub-sect. 2, *ante.*

See, generally, TRUSTS & TRUSTEES.

E. Mortgage to Building Society.

Effect of statutory receipt—Legal estate vested in person best entitled.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 481, 482, Nos. 163–169.

F. Other Cases.

See, now, Law of Property Act, 1925 (c. 20), s. 114, Sched. III., Form I.

1182. Assignment of all personal estates & effects — Includes mortgage of leaseholds.] — A deed of assignment by A. of all his personal estate & effects whatsoever to trustees for the benefit of creditors, passes a deed of assignment of leasehold premises, made to A. by way of mtge. with power of sale.—WEST *v.* STEWARD (1845), 14 M. & W. 47; 153 E. R. 383.

1183. Assignment with benefit of mortgagee's powers—Power of sale.]—A mtge. contained a power of sale. The mtge. was transferred, with the benefit of all provisos, etc., contained therein.

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insolvency, should before completing his purchase satisfy himself by proper inquiries that the mtge. was *bonâ fide* & good against creditors.—TOTTEN *v.* DOUGLAS (1871), 18 Gr. 341.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 4.—A.

e. Assignment for value without notice.]—Mtge. held good in the hands of an assignee for value without notice, though the parties for whose benefit it was given were not named in it or shown by any writing.—MUIR *v.* DUNNET (1864), 11 Gr. 85.—**CAN.**

f. Agreement for sale of mortgage.] —CARSCADEN *v.* SHORE (1867), 17 C. P. 493.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 4.—F.

g. Assignment to pass estate in lands.]—A mtgee., by indorsement, assigned to M. "his exors., administrators, & assigns, all his right, title, & interest in & to the within mtge.":—*Held:* not to pass the land mtged.—MORAN *v.* CURRIE (1858), 8 C. P. 60.—**CAN.**

h. ——.]—"Assign, transfer, & set over" in an assignment of a mtge., are the proper technical words to pass an estate in lands & tenements.—WATTS *v.* FEADER (1862), 12 C. P. 254.—**CAN.**

k. ——.]—AUSTON *v.* BOULTON (1866), 16 C. P. 318.—**CAN.**

l. Necessity for consideration.]—The administratrix of a mtgee. executed an instrument purporting, in consideration of $1, to assign the mtge. to pltf., who was her brother, & he executed a bond binding him to pay her one-half of the mtge. money as received:—

The mtgor. concurred & covenanted to pay a different sum on a different day:—*Held:* the power of sale still existed, & a good title could be made upon a sale under the power.—YOUNG *v.* ROBERTS (1852), 15 Beav. 558; 51 E. R. 655.

1184. —— Protection against intervening incumbrancers.]—It is the common course of conveyancing, where a new mtgee. is advancing money for the purpose of paying off persons entitled to old securities, it take an assignment of all the existing mtge. debts, & also of all the securities, of all the remedies, of everything that the old mtgees. had, so as to keep them alive for the further security of himself as new mtgee. in order that he may be protected against any intervening incumbrances which may have been made by the mtgor. in the interval between the dates of the two deeds (JAMES, L.J.).—BOYD *v.* PETRIE (1872), 7 Ch. App. 385; 41 L. J. Ch. 378; 26 L. T. 460; 20 W. R. 513, L. JJ.

1185. By parol—Equitable mortgagee by deposits.]—*Re* RICHARDSON, SHILLITO *v.* HOBSON, No. 1166, *ante*.

1186. Use of statutory form of transfer—Mortgage not statutory.]—Before the commencement of Conveyancing & Law of Property Act, 1881 (c. 41), a lessee executed a mtge. of his leaseholds by sub-demise. Subsequently to the commencement of the Act the exors. of the mtgee. executed to one of themselves a transfer of the mtge. by supplemental deed in the statutory form (A.) in Part II. of Sched. III. to the Act, by which, after reciting the will of the mtgee., his death, & probate of his will, it purported to "convey & transfer all the benefit of the said mtge" to the transferee:—*Held:* the transfer did not operate either in terms or by intention, to pass the legal estate in the mtged. leaseholds.—*Re* BEACHEY, HEATON *v.* BEACHEY, [1904] 1 Ch. 67; 73 L. J. Ch. 68; 89 L. T. 685; 52 W. R. 309; 48 Sol. Jo. 116, C. A.

See, now, Law of Property Act, 1925 (c. 20), s. 118, Sched. IV.

SUB-SECT. 5.—TRANSFER OF REGISTERED CHARGE.

See, now, Law of Property Act, 1925 (c. 20), ss. 33, 64.

SUB-SECT. 6.—COLLATERAL SECURITIES.

1187. Promissory note as collateral security—Mortgage transferred for full value—Note indorsed to bonâ fide holder for value—Right of bonâ fide holder.]—The payee of a promissory note payable on demand, which had been given by deft. by way of security for a debt, had also taken from deft. as a further security for the same debt, a mtge. of certain property. He transferred the mtge. to another person, receiving on such transfer from the transferee a sum equal to the amount of the debt. He subsequently indorsed the promissory note which remained in his hands to pltf. for value, pltf. having no knowledge of the circumstances:—*Held:* the note, not having been paid or returned to the maker, was still current at the time of the indorsement, & pltf. as a *bonâ fide* indorsee for value was entitled to recover upon it.

As between deft. & the payee of the note, after the transfer of the mtge., in equity the right of the payee to sue on the note for his own benefit ceased, because he had parted with all his interest & could only hold the note as trustee for the mtgor. or for the transferee as the case might be, & the payee therefore could be restrained by injunction from suing on the note, unless he were entitled to sue as trustee for the transferee of the mtge., which would depend upon the agreement between the parties (LINDLEY, L.J.).—GLASSCOCK *v.* BALLS (1889), 24 Q. B. D. 13; 59 L. J. Q. B. 51; 62 L. T. 163; 38 W. R. 155; 6 T. L. R. 57, C. A.

1188. —— —— Note held as trustee for mortgagor—In absence of agreement with transferee.]—GLASSCOCK *v.* BALLS, No. 1187, *ante*.

SUB-SECT. 7.—TRANSFER FOR LESS THAN MORTGAGE DEBT.

A. General Rule.

1189. Right of assignee to whole amount due.]—Mtgor. must pay what due on incumbrances & not what assignee paid for them.—BAKER *v.* KELLET (1667), 3 Rep. Ch. 23; Nels. 117; 21 E. R. 717; *sub nom.* BARKER *v.* KELLET, Freem. Ch. 127.

1190. ——.]—Where a mtgee. buys in an incumbrance, he shall be allowed all that is due in it, although he bought it in for less. Otherwise, if an heir or trustee buys in an incumbrance.—DARCY *v.* HALL (1682), 1 Vern. 49; 23 E. R. 302.

Annotations:—**Refd.** Nelson *v.* Booth (1857), 5 W. R. 722; Kirkwood *v.* Thompson (1865), 5 New Rep. 445.

1191. ——.]—A stranger gets an assignment of a mtge. for less than is due. The mtgor. or his heir shall not redeem without paying the whole that is due.—PHILLIPS *v.* VAUGHAN (1685), 1 Vern. 336; 23 E. R. 501, L. C.

1192. ——.]—Mtgee. assigns his mtge. for less than is really due to him. The mtgor. shall not redeem without paying the whole money due on the mtge. where there are subsequent incumbrances or creditors in the case, a man that buys in a prior incumbrance shall be allowed only what he really paid. But otherwise it is as between him & the mtgor. or his heir.—WILLIAMS *v.* SPRINGFEILD (1687), 1 Vern. 476. 23 E. R. 602, L. C.

Annotation:—**Consd.** Morret *v.* Paske (1740), 2 Atk. 52.

1193. ——.]—Where a mtgee. assigns, all the money then due shall be principal.—ANON. (undated), 3 Salk. 241; 91 E. R. 801.

1194. ——.]—Trustee buying in debts for less than is due, shall not be allowed for the whole. Otherwise of one purchasing in his own right.—ANON. (1707), 1 Salk. 155; 91 E. R. 143.

1195. ——.]—Merger of a charge in the inheritance is not to be assumed if it would be contrary

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Held: as between pltf. & the mtgor., this was a valid assignment, being for consideration & not a gift.—SINCLAIR *v.* DEWAR (1870), 17 Gr. 621.—**CAN.**

m *Effect of mistake.*]—REAL ESTATE INVESTMENT CO. *v.* METROPOLITAN BUILDING SOCIETY (1883), 3 O. R. 476.—**CAN.**

n. "*Good & valid security.*"]—MCEWAN *v.* HENDERSON (1895), 10 Man. L. R. 503.—**CAN.**

o. ——.]—A covenant by the assignor in an assignment of mtge. that the mtge. assigned is a good & valid security does not mean that the mtge. is sufficient security for the debt, but only that it is a mtge. valid in law.—AGRICULTURAL SAVINGS & LOAN CO. *v.* WEBB (1907), 15 O. L. R. 213.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 6.

p. *Mortgage as security for bill of exchange—Priority over creditors.*]—A mtge. was given by the maker of certain notes as collateral security to an accommodation indorser, which notes were duly retired by the maker. Subsequently the mtgor. gave other notes to the mtgee., when it was verbally agreed that the mtge. should be retained by the indorser as an indemnity for such subsequent notes:—*Held:* the indorser was entitled to retain such security to the exclusion of other creditors of the mtgor.—MORRISON *v.* ROBINSON (1872), 19 Gr. 480.—**CAN.**

Sect. 1.—*Transfer: Sub-sect.* 7, *A., B. & C.; sub-sects.* 8 & 9, *A.*]

to the interest of the owner of the estate & charge. A. devised an estate to his heir, who, in his own right had a charge on it. The heir bought up an incumbrance on the estate amounting to £11,555, for £2,000 :—*Held :* he was entitled to the full amount, as against the other incumbrancers on the estate.

The question is simply this, whether the owner of the reversion in fee of an estate subject to two charges, neither of which was created by himself, is entitled to buy in the former of those two charges, & insist upon it as available against the second charge, or whether the owner of the second charge is entitled to have an account of what was actually paid for the purpose of getting in the former one, & making it stand simply as a security for that amount. I am of opinion the second mtgee. has no such equity against any stranger who might purchase the first charge & that the owner of the reversion, not having created the first or second charge is in this respect entitled to stand in the place of a mere stranger (ROMILLY, M.R.).—DAVIS *v.* BARRETT (1851), 14 Beav. 542 ; 51 E. R. 394.

Annotations :—**Refd.** Johnson *v.* Webster (1854), 4 De G. M. & G. 474 ; Nelson *v.* Booth (1857), 5 W. R. 722 ; Richards *v.* Richards (1860), John. 754 ; Kirkwood *v.* Thompson (1865), 5 New Rep. 445.

1196. ——.]—In the ordinary case of a subsequent mtgee. buying in a prior mtge. for less than the amount that is due upon it, he is entitled as against the mtgor. to hold the prior mtge. for its full amount (TURNER, L.J.).—SHAW *v.* BUNNY (1865), 2 De G. J. & Sm. 468 ; 34 L. J. Ch. 257 ; 11 L. T. 645 ; 11 Jur. N. S. 99 ; 13 W. R. 374 ; 46 E. R. 456, L. JJ.

Annotation :—**Refd.** Kirkwood *v.* Thompson (1865), 2 De G. J. & Sm. 613.

1197. —— **Unless mortgagor party to transfer.**]—CAR *v.* BOULTER (1697), Freem. Ch. 217 ; 22 E. R. 1169.

In whose favour rule applied.]—*See* Sub-sect. 7, B., *post.*

Against whom rule applied.]—*See* Sub-sect. 7, C., *post.*

B. In Whose Favour Rule Applied.

1198. Subsequent incumbrancer.]—DARCY *v.* HALL, No. 1190, *ante.*

1199. ——.]—If a second mtgee. should buy in the first mtge. for half its amount, or even obtain an assignment without consideration from the first mtgee., I can have no doubt he would be entitled to charge the mtgor. with the full amount of the first mtge. in addition to his own (WIGRAM, V.-C.).—DOBSON *v.* LAND (1850), 8 Hare, 216 ; 19 L. J. Ch. 484 ; 14 Jur. 288 ; 68 E. R. 337 ; *subsequent proceedings* (1851), 4 De G. & Sm. 575, L. JJ.

Annotations :—**Consd.** White *v.* City of London Brewery Co. (1888), 39 Ch. D. 559. **Refd.** Kirkwood *v.* Thompson (1865), 2 Hem. & M. 392 ; Banner *v.* Berridge (1881), 18 Ch. D. 254. **Mentd.** Bellamy *v.* Brickenden (1861), 2 John. & H. 137 ; Charles *v.* Jones (1887), 56 L. J. Ch. 745.

1200. ——.]—SHAW *v.* BUNNY, No. 1196, *ante.*

1201. Stranger.]—PHILLIPS *v.* VAUGHAN, No. 1191, *ante.*

1202. ——.]—ANON. (1707), No. 1194, *ante.*

1203. ——.]—DAVIS *v.* BARRETT, No. 1195, *ante.*

1204. ——.]—SHAW *v.* BUNNY, No. 1196, *ante.*

1205. Creditor.]—A prior creditor who buys in a puisne incumbrance, though he did not give the full value, shall be allowed the whole, otherwise as to a trustee, agent, heir-at-law or exor.—MORRET *v.* PASKE (1740), 2 Atk. 52 ; 26 E. R. 429, L. C.

1206. Owner of reversion—Not creating charge.]—DAVIS *v.* BARRETT, No. 1195, *ante.*

1207. Not person in confidential relationship—Transfer—Unless buying to protect incumbrancer.]—DARCY *v.* HALL (1682), 1 Vern. 49 ; 23 E. R. 302.

Annotations :—**Refd.** Nelson *v.* Booth (1857), 5 W. R. 722 Kirkwood *v.* Thompson (1865), 5 New Rep. 445.

1208. —— ——.]—ANON. (1707), No. 1194, *ante.*

1209. —— ——.]—MORRET *v.* PASKE, No. 1205, *ante.*

1210. —— ——.]—Pltf., a married woman, was entitled at the date of her marriage to a separate estate for life in hereditaments which were subject to a mtge. for £400. Her husband paid off this mtge. & took possession of the title deeds. He afterwards, without the privity of his wife, agreed with B., to whom a debt of £330 was owing for costs which had been incurred by him as their solr., in a suit which had been commenced by the wife previously to her marriage, that he would assign to him the hereditaments above mentioned by way of security for such claim. The husband afterwards became bkpt. & died. B. subsequently purchased from the original mtgee. for £40 a claim of £175, which the latter would have been entitled to add to his claim of £400 :—*Held :* the husband was entitled to charge the estate of his wife to an extent equal to the amount which had been paid by him ; & the agreement above mentioned, & also the purchase of the £175, were valid & binding upon the estate so far as they operated merely as securities for the amount actually paid by B. A solr. is not debarred by his position from obtaining from a client security for a *bonâ fide* debt.—NELSON *v.* BOOTH (1857), 27 L. J. Ch. 110 ; 3 Jur. N. S. 951 ; 5 W. R. 722.

1211. —— **Heir.**]—DARCY *v.* HALL, No. 1190, *ante.*

1212. —— ——.]—MORRET *v.* PASKE, No. 1205, *ante.*

1213. —— **Executor.**]—MORRET *v.* PASKE, No. 1205, *ante.*

1214. —— **Agent.**]—MORRET *v.* PASKE, No. 1205, *ante.*

1215. —— ——.]—Why is an agent precluded from taking the benefit of purchasing a debt which his principal was liable to discharge? Because it is his duty on behalf of his employer to settle the debt on the best terms he can obtain (LORD COTTENHAM, C.).—REED *v.* NORRIS (1837), 2 My. & Cr. 361 ; 6 L. J. Ch. 197 ; 1 Jur. 233 ; 40 E. R. 678, L. C.

1216. —— ——.]—C., a barrister, who had been for several years confidential & advising counsel to P., & had, by reason of that relation, acquired an intimate knowledge of his property & liabilities, & was particularly consulted as to a compromise of securities given by P. for a debt which C. considered to be recoverable to the full amount, purchased these securities for less than their nominal amount, without notice to P., after ceasing to be his counsel :—*Held :* C.'s purchase, while the compromise proposed by P. was feasible, was in trust for P. : & C. was entitled only to the sum he had paid, with interest according to the course of the ct.—CARTER *v.* PALMER (1841), 8 Cl. & Fin. 657 ; 8 E. R. 256, H. L.

Annotations :—**Refd.** Nelson *v.* Booth (1857), 3 Jur. N. S. 951 ; Macleod *v.* Jones (1884), 32 W. R. 660 ; Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500.

1217. —— **Solicitor.**]—NELSON *v.* BOOTH, No. 1210, *ante.*

1218. —— ——.]—A mtgee. consulted a solr. who turned her over to his clerk to assist her gratuitously. The clerk by reason of information derived during such employment bought up the mtge. for less that half the amount :—*Held :*

he was a trustee of the benefit for the mtgee.—HORDAY v. PETERS (No. 1) (1860), 28 [illegible] 29 L. J. Ch. 780; 2 L. T. 590; 6 Jur. N. S. 794; 8 W. R. 512; 54 E. R. 400.

1219. ——.]—He is not entitled to stand in the same position as the mtgees. whose securities he bought up. He did whatever he did as solr., & as a person in a fiduciary position to pltf., & all he is entitled to claim as against the property comprised in these securities is the amount which he on her behalf expended for the purpose of buying up those securities (COTTON, L.J.).—MACLEOD v. JONES (1883), 24 Ch. D. 289; 53 L. J. Ch. 145; 49 L. T. 321; 32 W. R. 43. C. A.

1220. —— **Director of limited company—Purchasing debentures.**]—The promoters of a co., who were also directors, purchased land & sold it to the co. at an increased price, retaining the difference for themselves. Part of the purchase-money was paid in debenture bonds. After the co. had gone into liquidation, L., a director, but not one of the promoters, purchased 100 of the debentures at 25 per cent., for which he claimed to prove:—*Held:* L., as a director, could not plead ignorance of the purchase by which the shareholders were defrauded; having been in the position of a trustee for the shareholders, he could not, by the purchase of debentures after the insolvency, make a profit out of a transaction which, as such trustee, he ought to have prevented.—*Re* IMPERIAL LAND CO. OF MARSEILLES, *Ex p.* LARKING (1877), 4 Ch. D. 566; 46 L. J. Ch. 235. C. A.

1221. Equitable assignee—Relief granted on equitable terms.]—I am only considering a case in which the co. had power to issue debentures which would be transferable at law, & where the equitable transferee had no reason to suspect any irregularity in the issue. It seems to me that both P. & T. are in this position. . . . But their rights being only equitable, relief must be given to them on equitable terms. In my opinion they ought to be allowed to recover, not the nominal amount of the debentures, but only such sum or other valuable consideration, not being greater than that amount as each of them may be able to prove he *bonâ fide* advanced or gave upon the security of the debentures he received (KAY, J.).—*Re* ROMFORD CANAL CO., POCOCK'S CLAIM, TRICKETT'S CLAIM, CAREW'S CLAIM (1883), 24 Ch. D. 85; 52 L. J. Ch. 729.

C. Against Whom Rule Applied.

1222. Mortgagor.]—BAKER v. KELLET, No. 1189, *ante.*

1223. ——.]—PHILLIPS v. VAUGHAN, No. 1191, *ante.*

1224. ——.]—WILLIAMS v. SPRINGFEILD, No. 1192, *ante.*

1225. ——.]—DOBSON v. LAND, No. 1199, *ante.*

1226. ——.]—SHAW v. BUNNY, No. 1196, *ante.*

1227. Heir of mortgagor.] — PHILLIPS v. VAUGHAN, No. 1191, *ante.*

1228. ——.]—WILLIAMS v. SPRINGFEILD, No. 1192, *ante.*

1229. Subsequent incumbrancers—Whether applicable.]—WILLIAMS v. SPRINGFEILD, No. 1192, *ante.*

1230. —— ——.]—DAVIS v. BARRETT, No. 1195, *ante.*

1231. Creditors—Whether applicable.]—WILLIAMS v. SPRINGFEILD, No. 1192, *ante.*

1232. Purchaser — Whether applicable.] — If an heir or any other buys in an incumbrance, he shall not be allowed, as against a purchaser, any more than he really paid for such incumbrance.—LONG v. CLOPTON (1687), 1 Vern. 464; 23 E. R. 590.

SUB-SECT. 8.—EFFECT OF TRANSFER ON ARREARS OF RENT AND INTEREST.

1233. Arrears of rent—Do not pass to transferee—Unless specially included.]—An assignment of a mtge. not containing any words of transfer beyond those incidental to a transfer of the mere mtge. does not pass rent then in arrear.

Men are in the daily habit of conveying estates, & if the bygone rents in arrear do not pass by a conveyance of the fee, what is the rule of law that makes a difference in the case of a mtge. (LORD TRURO, C.).—SALMON v. DEAN (1851), 3 Mac. & G. 344; 17 L. T. O. S. 205; 15 Jur. 641; 42 E. R. 293, L. C.

Annotation:—**Refd.** Gibbon v. Gibbon (1853), 13 C. B. 205.

Arrears of interest.]—*See* Part XVII., Sect. 11, *post.*

SUB-SECT. 9.—TRANSFER SUBJECT TO OUTSTANDING EQUITIES AND CHARGES.

A. In General.

See Law of Property Act, 1925 (c. 20), s. 136.

See CHOSES IN ACTION, Vol. VIII., pp. 488–496, Nos. 505–612.

1234. General rule—Transferee takes subject to all equities & charges.]—N. mortgaged to C. to secure £1,000; C. assigned the mtge. to M. to secure £700; but no notice of the assignment was given to N. On a bill by N. against M. to have the mtged. deeds delivered up:—*Held:* (1) C. was not a necessary party, as he had been examined as a witness, & admitted that N. had paid him his mtge. money; (2) that delivery of goods to C. by N. was a valid discharge of the mtge. debt, & was a good payment against M.; (3) an account was directed what part of mtge. money was paid, as C.'s evidence, from his conduct, could not be admitted as a sufficient proof.

(4) The principle is, that as against an assignee without notice, the mtgor. has the same rights as he has against the mtgee., & whatever he can claim in the way of set-off, or mutual credit, as against

PART VIII. SECT. 1, SUB-SECT. 9.—A.

1234 i. *General rule—Transferee takes* [illegible] 20 Gr. 194. —CAN.

1234 ii. —— ——.]—The rule in equity is, that the assignee of a mtge. takes it subject not only to the state of the account between the mtgor. & mtgee., but also to the same equities as affect it in the hands of the mtgee.—MCPHERSON v. DOUGAN (1862), 9 Gr. 258.—CAN.

1234 iii. —— ——.]—HENDERSON v. BROWN (1871), 18 Gr. 79.—CAN.

equities, as well those of those of the parties to the instrument.—ELLIOTT v. MCCONNELL (1874), 21 Gr. 276.—CAN.

1234 vi. —— ——.]—EGLESON v. HOWE (1879), 3 A. R. 566.—CAN.

1234 vii. —— ——.]—WILSON v. KYLE (1880), 28 Gr. 104.—CAN.

1234 viii. —— ——.]—ROSE v. PETERKIN, Cass. Dig. 2nd. ed. CAN.

1234 ix. —— ——.]—*Re* MANDEVILLE, HOGMAN & MCINTOSH (B. C.), [1917] 1 W. W. R. 1523.—CAN.

1234 x. —— ——.]—CAMPBELL v. KEAST (Sask.) (1922), 67 D. L. R. 315; [1922] 2 W. W. R. 979.—CAN.

1234 xi. —— ——.]—The transferee of a mtge. which becomes subject to succession duties will not be allowed to proceed with sale proceedings under Land Titles Act, R. S. S., 1920 (c. 67), until the succession duty on the mtge. is paid or the Crown lien therefor discharged or the amount thereof ascertained.—FIELD v. TOMPKINSON,

Sect. 1.—Transfer: Sub-sect. 9, A. & B.]

the mtgee., he can claim equally against the assignee (LEACH, V.-C.).—NORRISH *v.* MARSHALL (1821), 5 Madd. 475; 56 E. R. 977.

Annotations:—As to (4) **Apld.** Turner *v.* Smith, [1901] 1 Ch. 213. *Generally,* **Refd.** Bickerton *v.* Walker (1885), 31 Ch. D. 151; Dixon *v.* Winch, [1900] 1 Ch. 736; De Lisle *v.* Union Bank of Scotland, [1914] 1 Ch. 22.

1235. —— ——.]—Testator devised his estates charged with debts & legacies. The devisee mortgaged the estate to A. subject expressly to the legacies. A. having called in his money, & the devisee requiring a further advance, they join in mortgaging the estate to B. but not expressly subject to the legacies, & B. is informed falsely by the devisee that all the legacies had been paid: —*Held:* B. took the estate subject to the legacies. —ROGERS *v.* ROGERS (1833), 6 Sim. 364; 58 E. R. 630.

1236. —— ——.]—A purchaser of a chose in action takes it subject to all equities; &, therefore, where A. mortgaged a fund in ct. to B., & afterwards joined B. in a sub-mtge. to C., & it was decided that the mtge. to B. was fraudulent & void:—*Held:* it was void also as to C., & neither A.'s concurrence in the first or second mtge. prevented him from insisting on the invalidity of the transaction with B., he, A., not being cognisant of his rights.

It has not been disputed, nor can it be doubted, that the purchaser of a chose in action does not stand in the situation of a purchaser of real estate for valuable consideration without notice of any prior title, but that the purchaser of a chose in action takes the thing bought subject to all the prior claims upon it (ROMILLY, M.R.).—COCKELL *v.* TAYLOR, COLLETT *v.* PRESTON, PRESTON *v.* COLLETT (1851), 15 Beav. 103; 21 L. J. Ch. 545; 51 E. R. 475.

Annotations:—**Consd.** Barnard *v.* Hunter (1856), 28 L. T. O. S. 152. **Mentd.** Radcliffe *v.* Anderson (1860), E. B. & E. 819; Dickinson *v.* Burrell, Dickinson *v.* Burrell, Stourton *v.* Burrell (1866), L. R. 1 Eq. 337; *Re* Cambrian Mining Co. (1882), 48 L. T. 114; James *v.* Kerr (1889), 40 Ch. D. 449.

1237. —— ——.]—A *bonâ fide* transferee for value of a mtge., where the mtgor. does not join in the transfer, takes subject to equities of account between the mtgor. & mtgee. but not necessarily subject to any equity subsisting between the mtgor. & mtgee. under which the original security might be impeached.—JUDD *v.* GREEN (1875), 45 L. J. Ch. 108; 33 L. T. 597.

Annotation:—**Consd.** Nant-y-glo & Blaina Ironworks Co. *v.* Tamplin (1876), 35 L. T. 125.

1238. —— ——.]—Although the transferee of a mtge., without the mtgor.'s concurrence, takes it subject to the equities affecting the account between the mtgor. & mtgee., & can claim on his security no more than is justly due from the mtgor.; yet, if the transfer be for value & without notice of equitable grounds which render the security impeachable by the mtgor. as against the mtgee., then, as between the mtgor. & transferee, the latter has the better equity, & is entitled to what is due to him on his security.—NANT-Y-GLO & BLAINA IRONWORKS CO., LTD. *v.* TAMPLIN (1876), 35 L. T. 125.

1239. —— ——.]—By a marriage settlement in 1832 certain real estates were settled to the use of the husband for life, with remainder, subject to a long term of years for securing portions for younger children, to the use of his first & other sons successively in tail male, & he was thereby empowered by deed or will to charge a further sum for portions for younger children. By a disentailing deed in 1854 his eldest son, with his consent as protector of the settlement, assured the settled estates in fee simple, subject to the uses, estates, & terms limited in the settlement anterior to the limitations in tail male & all powers to such precedent estates belonging or annexed, to such uses as the father & son should by deed jointly appoint. They thereupon in exercise of the joint power created three mtges. upon the estates. Each mtge. deed contained (*inter alia*) a joint & several covenant by them for quiet enjoyment "free & clear & freely & clearly . . . released . . . & indemnified of from & against all & all manner of . . . portions, & especially" certain specified charges, but the power to appoint further portions was not specially mentioned. The father survived his son & died in 1896, having by his will charged the estates with the further sum for portions for younger children:—*Held:* upon the construction of the mtges. the power to appoint further portions had not been released, & therefore, the portions charge had priority over the mtges.—NOTTIDGE *v.* DERING, RABAN *v.* DERING, [1910] 1 Ch. 297; 79 L. J. Ch. 439; 102 L. T. 145, C. A.

Annotation:—**Mentd.** *Re* Evered, Molineux *v.* Evered (1910), 102 L. T. 694.

1240. —— ——.]—Pltf. mortgaged land to his solr. to secure an advance of £4,000, & by way of collateral security transferred to him a sum of £3,000, debenture stock. The solr. then fraudulently induced pltf. to execute a memorandum giving a security on the stock in favour of deft. bank not merely for the £4,000 but for all advances by the bank to the solr. & the stock was transferred into the names of trustees for the bank who had no notice of the fraud. The solr. afterwards submortgaged the land to the bank by way of equitable deposit to secure his general indebtedness to them. The bank then obtained from the solr. a written memorandum of deposit of which they gave notice to pltf., & afterwards took a legal transfer of the mtge. The solr. then became bkpt., owing the bank a sum far exceeding £4,000. In a redemption action against the bank, pltf. sought to redeem the mtge. on payment of £1,000, being the amount of the mtge. debt less the value of the collateral security. The bank contended that he could only redeem on payment of the full £4,000:—*Held:* the bank, being ignorant of the solr.'s fraud, were entitled as against pltf. to apply the stock towards the general indebtedness of the solr., but as regarded the mtge. of the land they were in no better position than their assignor, who could not have resisted pltf.'s right to redeem on payment of £4,000 less the value of the stock.—DE LISLE *v.* UNION BANK OF SCOTLAND, [1914] 1 Ch. 22; 83 L. J. Ch. 166; 109 L. T. 727; 30 T. L. R. 72; 58 Sol. Jo. 81.

Annotation:—**Mentd.** Jameson *v.* Union Bank of Scotland (1913), 109 L. T. 850.

1241. Right of mortgagor to set-off.]—NORRISH *v.* MARSHALL, No. 1234, *ante.*

1242. ——.]—A trustee of real estate became mtgee. of the trust estate, partly by taking an assignment of a prior mtge., partly by taking an assignment of a mtge. created by his co-trustee & himself under their power for the purposes of the trust, & partly for money which he lent to the *cestui que trust* of the equity of redemption, subject to charges created by the will. The mtgee. &

[1925] 3 D. L. R. 1151; [1925] 3 W. W. R. 113.—**CAN.**

1234 xli. —— ——.]—GOING *v.* FARRELL (1814), Beat. 472.—**IR.**

1234 xlii. —— ——.]—*Re* GWELO, MATABELELAND, EXPLORATION & DEVELOPMENT CO., WILLIAMSON'S CLAIM, [1901] 1 I. R. 38.—**IR.**

trustee filed his bill for foreclosure simply. The *cestui que trust* of the equity of redemption filed his bill for an account of the trust & of the mtges., & that the mtgees. might be ordered to stand as securities only for the balance due to the mtgee. & trustee upon the mtge. & trust accounts:—*Held:* the ct. might make one decree in both causes, so as to give the mtgor. any set-off he might be entitled to, or make a decree of foreclosure in the former suit, & a separate decree for an account against the trustee personally in the latter, according to the circumstances & justice of the case.—DODD *v.* LYDALL, LYDALL *v.* DODD (1841), 1 Hare, 333; 66 E. R. 1060.

Annotation:—**Mentd.** *Re* Taunton, Delmard, Lane, Christie *v.* Taunton, Delmard, Lane, [1893] 2 Ch. 175.

See, further, CHOSES IN ACTION, Vol. VIII., pp. 491–495, Nos. 587–608.

1243. Equity to set aside original security—Bonâ fide transferee for value not affected.]—JUDD *v.* GREEN, No. 1237, *ante*.

1244. —— ——.] — NANT-Y-GLO & BLAINA IRONWORKS CO., LTD. *v.* TAMPLIN, No. 1238, *ante*.

B. As regards Amount Originally Advanced.

See, now, Law of Property Act, 1925 (c. 20), s. 68.

1245. Receipt in body of, or indorsed on deed—Full amount not in fact paid—Whether conclusive against mortgagor.]—Mtgors. executed a mtge. assigning their interest in a sum of Consols standing in the names of trustees to secure a sum advanced to them by the mtgee. The receipt for this sum was indorsed on the mtge. deed, & was signed by the mtgors. The mtgee., before the time fixed for the payment of the sum advanced, assigned the mtge. debt to deft., who paid the full amount mentioned in the receipt, & had no notice of the existence of any equities between the mtgor. & mtgee. other than those appearing from the mtge. deed. As a matter of fact, the mtgors. had only received a portion of the money for which they had given their receipt:—*Held:* as between the mtgor. & assignee, the assignee had the better equity, & was entitled to be paid the full amount mentioned in the receipt indorsed on the mtge.

The assign is bound to give credit for all moneys received by an assignor before he has given notice of the assignment to the mtgor. (FRY, L.J.).—BICKERTON *v.* WALKER (1885), 31 Ch. D. 151; 55 L. J. Ch. 227; 53 L. T. 731; 34 W. R. 141, C. A.

Annotations:—**Apld.** Bateman *v.* Hunt, [1904] 2 K. B. 530. **Distd.** Powell *v.* Browne (1907), 97 L. T. 167. **Consd.** De Lisle *v.* Union Bank of Scotland, [1914] 1 Ch. 22. **Refd.** French *v.* Hope (1887), 56 L. J. Ch. 363; Taylor *v.* Russell, [1891] 1 Ch. 8; Lloyds Bank *v.* Bullock, [1896] 2 Ch. 192; Berwick *v.* Price, [1905] 1 Ch. 632; Burchell *v.* Thompson, [1920] 2 K. B. 80.

1246. —— —— ——.]—In Apr. 1883, pltf., in order to raise money, executed to his solr., H., a mtge. in fee to secure £200, a receipt for that sum being indorsed, but no money being paid to pltf. A few months afterwards H. deposited the mtge. & title deed with S. & co. to secure an advance of £100 to himself, S. & co. having no knowledge of the circumstances under which the mtge. was obtained by H.:—*Held:* as between pltf. & S. & co., the equity of the latter must prevail, & they were entitled to rely upon their security for the £100 & interest due from H.—FRENCH *v.* HOPE (1887), 56 L. J. Ch. 363; 56 L. T. 57.

1247. —— —— ——.]—A solr. was instructed by defts. to procure a loan of a specified amount on the security of property belonging to them. A mtge. deed was prepared & executed by defts., purporting to be in consideration of the specified amount, the receipt whereof was acknowledged in the body of the deed. The solr. himself advanced a sum of money the amount of which was disputed, but the deed was made out in the name of a clerk in the solr.'s office as mtgee. The mtge. debt was subsequently assigned to the solr. & by him, by way of sub-mtge., to pltfs.' testator, for whom he was also acting as solr. for the investment of money on mtge. The solr. & testator of pltfs. died without giving to defts. any notice of the assignments, but notice was subsequently given by pltfs. of both assignments, & this action was brought in their names upon the covenants in the principal deed to recover the amount specified therein:—*Held:* testator of pltfs. not having had actual or constructive notice that the amount specified in the mtge. deed had not been paid, pltfs. were entitled to rely on the acknowledgment contained in that deed, & to recover the amount therein stated to have been received.—BATEMAN *v.* HUNT, [1904] 2 K. B. 530; 73 L. J. K. B. 732; 91 L. T. 331; 52 W. R. 609; 20 T. L. R. 628, C. A.

Annotations:—**Consd.** Burchell *v.* Thompson, [1920] 2 K. B. 80. **Refd.** Powell *v.* Browne (1907), 97 L. T. 167.

1248. —— —— ——.]—On Feb. 3, 1906, pltf. mortgaged certain reversionary interests to B., his solr., for £2,500, which sum B. arranged to lend to another client of his at a higher rate of interest than the rate he charged pltf. This mtge. contained the usual receipt clause acknowledging that the sum of £2,500 had that day been advanced to the mtgor., pltf. In fact, no money was advanced by B. to pltf. B. then informed pltf. that his other client had executed a mtge. in favour of pltf. to secure the £2,500, & that he would hold the deeds on his behalf as his solr. No such mtge. was in fact ever executed. On Apr. 24, 1906, B. sub-mtged. the mtge. of Feb. 3, 1906, to deft., who knew that B. was the solr. of pltf. On this sub-mtge. & a collateral security B. obtained £1,200 from deft. The collateral security turned out to be a forgery & of no value, & in June, 1906, B. absconded. Deft. when he took the sub-mtge. of Apr. 24, 1906, did not inquire as to the state of account between pltf. & B. & no notice was given to pltf. of this sub-mtge., which pltf. first heard of after B. had absconded. Pltf. claimed that the mtge. of Feb. 3, 1906, was void as against him on the ground that it was obtained from him by fraudulent misrepresentation, & that no money was in fact advanced on it, & that the sub-mtge. was also void as against him, & he also claimed a re-assignment of the reversionary interests by deft.:—*Held:* it would be unduly extending the dictum of constructive notice if the claim of pltf. were allowed to be maintained; & the receipt clause contained in the mtge. deed operated as an estoppel.—POWELL *v.* BROWNE (1907), 97 L. T. 854; 24 T. L. R. 71; 52 Sol. Jo. 42, C. A.

1249. Recital in deed—No money in fact advanced—Conclusive against mortgagor.]—Comrs appointed by Act of Parliament for the improvement of a town, were authorised to levy rates & also to borrow money upon the credit of the rates, giving therefor mtge. securities in a form contained in the Act, which mtges. were by the Act made

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1245 i. *Receipt in body of or indorsed on deed—Full amount not in fact paid—Whether conclusive against mortgagor.*] —An assignee of a mtge. takes it subject to the actual state of the accounts between the mtgor. & mtgee., & cannot, even where it contains a formal receipt for the whole mtge. money, claim more in respect of it than has been advanced.—MANLEY *v.* LONDON LOAN CO. (1895), 23 A. R. 139; *affd.* (1896), 26 S. C. R. 443.—**CAN.**

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transferable. Money raised by virtue of the Act was, by sect. 123, to be applied, after payment of the costs, etc., of obtaining the Act, in payment of the interest upon any money borrowed upon credit of the rates, in carrying out the purposes of the Act, & then in discharge of the principal sums of money borrowed upon the credit of the rates. By other sects. of the Act any person who was himself a comr. was disqualified from entering into any contract with the comrs. & a penalty of £50 was inflicted upon any comrs. who did so.

H., himself one of the comrs. for improving the town, having supplied the comrs. with a quantity of bricks for the purposes of the Act received from the comrs. mtge. securities for the price, in the form provided by the Acts, the mtges. stating that they were given in consideration of sums of money, "advanced & lent by H. upon the credit & for the purposes of the said Act, & paid by him to the treasurer of the said comrs." no money having been in fact advanced or lent to them by H. Pltfs., as transferees of these securities, without knowledge of the nature of the transaction between H. & the comrs., having brought an action against the comrs.:—*Held:* defts., the comrs., were estopped by the recital in the mtge. securities from denying that they were given in consideration of sums of money "advanced & lent" by H. upon the credit & for the purposes of the Act & paid by him to the treasurer of the comrs.—WEBB *v.* HERNE BAY COMRS. (1870), L. R. 5 Q. B. 642; 39 L. J. Q. B. 221; 22 L. T. 745; 34 J. P. 629; 19 W. R. 241.

Annotations:—**Refd.** *Re* Hercules Insce., Brunton's Claim (1874), L. R. 19 Eq. 302; *Re* Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim (1883), 24 Ch. D 85. **Mentd.** R. *v.* Charnwood Forest Ry. (1884), 1 T. L. R. 161; Smith *v.* Chorley District Council, [1897] 1 Q. B. 532; *Re* Jubilee Cotton Mills, [1922] 1 Ch. 100.

C. Dealings with Mortgage Debt Prior to Transfer.

1250. Duty of transferee—To inquire as to state of account.]—BRADWELL *v.* CATCHPOLE (1700), 3 Swan. 90, n.; 36 E. R. 781.

Annotation:—**Mentd.** Munch *v.* Cockerell (1836), 8 Sim. 219.

1251. —— —— Or to make mortgagor a party.]—MATTHEWS *v.* WALLWYN, No. 224, *ante*.

1252. Where mortgagor not a party—Transferee takes subject to subsisting state of accounts.]—MATTHEWS *v.* WALLWYN, No. 224, *ante*.

1253. —— ——.]—CHAMBERS *v.* GOLDWIN, No. 1071, *ante*.

1254. —— ——.]—TURNER *v.* SMITH, No. 225, *ante*.

SUB-SECT. 10.—PAYMENT OF MORTGAGE DEBT BY MORTGAGOR WITHOUT NOTICE OF TRANSFER.

A. In General.

1255. Mortgagor entitled to benefit of payments made before notice.]—The mtgee. on her marriage settled the mtged. estate on herself for life, remainder to the issue of that marriage. The mtgor. brings a bill to redeem; deft. omits setting forth the settlement in her answer; the mtgor. has a decree to redeem & pays the mtge. money. Afterwards the issue of the mtgee. brings an ejectment on the settlement, & recovers the mtged. premises. The mtgor. relieved, having paid his money pursuant to the decree, & having been in no fault.—CHAPMAN *v.* DUNCOMBE (1690), 2 Vern. 142; 1 Eq. Cas. Abr. 146; 23 E. R. 699.

1256. ——.]—After an assignment of a mtge., payments to the mtgee. without notice must be allowed by the assignee, the registry, the premises being in Middlesex, is not notice for this purpose. Tender after the bill filed of the balance, deducting the payments to the mtgee. with costs, deprived the assignee of subsequent costs.—WILLIAMS *v.* SORRELL (1799), 4 Ves. 389; 31 E. R. 198, L. C.

Annotations:—**Refd.** Bickerton *v.* Walker (1885), 34 W. R. 141; Dixon *v.* Winch, [1900] 1 Ch. 736; Turner *v.* Smith, [1901] 1 Ch. 213.

1257. ——.]—*Re* FRAZER, *Ex p.* MONRO (1819), Buck, 300.

Annotations:—**Refd.** *Re* Severn, *Ex p.* Colville (1831), 9 L. J. O. S. Ch. 56; *Re* Gibbs, *Ex p.* Price (1844), 3 Mont. D. & De G. 586; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334. **Mentd.** Williams *v.* Thorp (1828), 2 Sim. 257; Leslie *v.* Guthrie (1835), 1 Bing. N. C. 697; Gardner *v.* Lachlan (1836), 5 L. J. Ch. 332; Gibson *v.* Overbury (1841), 10 L. J. Ex. 219; West *v.* Reid (1843), 2 Hare, 249; *Re* Wilson, *Ex p.* Assignees (1866), 14 L. T. 369.

1258. ——.]—Where a debt not legally assignable has been equitably assigned for value, & the debtor has had notice of the assignment all payments which he may thereafter make to the purchaser on account of the debt are well made so far as the debtor is concerned, although the purchaser may have sold the debt, provided the debtor has no notice of the sale; nor is it absolutely necessary for him on making such payment to require production of the original assignment.

A judgment debtor had left his residence in embarrassed circumstances. His brother in law paid the debt, took an assignment of it, & afterwards mortgaged it, but the mtgees. gave no notice of their security to the debtor, whose residence at that time it did not appear that they had the means of ascertaining. The brother in law possessed himself of property of the debtor, & a settlement of accounts took place between them, in which the judgment debt formed an item, ending with the payment of a balance to the judgment debtor, & a general mutual release of all claims, including the judgment debt. The judgment debtor had no notice of the mtge., but did not obtain or require the delivery up of the assignment of the judgment debt:—*Held:* the mtgees. had no claim upon him in respect of it.

If a ct. of equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment it would be impossible for a debtor safely to pay a debt to his creditor (TURNER, L.J.).

I see no substantial difference between actual payment & a release to the debtor founded upon a fair *& bonâ fide* arrangement (TURNER, L.J.).—STOCKS *v.* DOBSON (1853), 4 De G. M. & G. 11; 22 L. J. Ch. 884; 21 L. T. O. S. 189; 17 Jur. 539; 43 E. R. 411, L. JJ.

Annotations:—**Consd.** Berwick *v.* Price, [1905] 1 Ch. 632. **Refd.** Atterbury *v.* Wallis (1856), 8 De G. M. & G. 454.

1259. ——.]—A brother & sister entitled in moieties to a reversionary interest in a fund in ct. mortgaged it to secure a debt of the brother, the sister joining, & being described in the security as a surety for the brother. The mtgee. obtained a stop order, & afterwards on his marriage assigned the mtge. debt to trustees, who however neither obtained a stop order nor gave notice to the sister of the settlement. On a petition of the brother stating that the tenant for life had assigned to him her life interest in his share of the fund, & that he had paid a portion of the mtge. debt, & praying for a transfer of his share of the fund,

a solr. who had acted for the sister & for the mtgee. on the occasion of the mtge. took upon himself without authority to instruct counsel to appear for the sister & her husband, & also for the mtgee. who was abroad, & to consent to or not oppose the petition. Upon the hearing of this petition the fund was ordered to be, & was transferred out of ct. :—*Held :* the mtgee. was not bound or affected by the unauthorised appearance for him ; neither the omission of the trustees to obtain a stop order, nor any of the above circumstances, operated to discharge the liability of the surety's share, but it continued subject to the payment of the mtge. debt.

When a debt not legally assignable has been assigned in the only manner in which it can be, that is to say, equitably, & the debtor has not notice of the assignment, he may, of course, pay the assignor as safely & effectually for all purposes of the debtor as if the assignment had not been made (KNIGHT BRUCE, L.J.).—WHEATLEY *v.* BASTOW (1855), 7 De G. M. & G. 261 ; 3 Eq. Rep. 859 ; 24 L. J. Ch. 727 ; 25 L. T. O. S. 191 ; 1 Jur. N. S. 1124 ; 3 W. R. 540 ; 44 E. R. 102, L. JJ.

Annotations :—**Consd.** Strange *v.* Fooks (1863), 4 Giff. 408 ; Bolton *v.* Salmon, [1891] 2 Ch. 48. **Refd.** Bradford Old Bank *v.* Sutcliffe, [1918] 2 K. B. 833.

1260. ——.]—A. deposited deeds with his confidential solr. with a memorandum of deposit by way of equitable mtge. to secure the repayment of £3,000. The solr. handed the deeds & memorandum to B. as security for £2,000, together with a memorandum signed by himself that the £2,000, part of the annexed £3,000 security, then belonged to B., with interest at 5 per cent. The solr. afterwards obtained a return of the deeds from B. upon an assurance that in lieu thereof others of equal value should be deposited. Other deeds were subsequently deposited, which proved to be worthless. The mtge. of £3,000 was paid off by A.'s representatives, & the genuine deeds were given up to them by the solr. without the memorandum of deposit. No notice of B.'s security had been given to A. B. then claimed payment of the £2,000 against the estate of A., upon the ground of constructive notice to A. through his confidential solr. :—*Held :* B., by neglecting to give notice to A. of the transfer of the mtge. & by giving up the documents originally deposited with him, had lost any right he might have been against A.'s estate.—*Re* SOUTHAMPTON'S (LORD) ESTATE, ALLEN *v.* SOUTHAMPTON (LORD), BANFATHER'S CLAIM (1880), 16 Ch. D. 178 50 L. J. Ch. 218 ; 43 L. T. 687 ; 29 W. R. 231.

Annotations :—**Refd.** Dixon *v.* Winch, [1900] 1 Ch. 736 ; Turner *v.* Smith, [1901] 1 Ch. 213.

1261. ——.]—BICKERTON *v.* WALKER, No. 1245, *ante.*

1262. ——.]—DIXON *v.* WINCH, No. 1269, *post.*

B. What Amounts to Payment.

1263. Delivery of goods.]—NORRISH *v.* MARSHALL, No. 1234, *ante.*

1264. Release—Founded on fair & bonâ fide arrangement.]—STOCKS *v.* DOBSON, No. 1258, *ante.*

1265. Balance of account in favour of mortgagor—Appropriated to debt.]—In 1815 deft. P. became the purchaser from A. of a piece of land, the purchase-money to be paid in the years 1852 & 1855, as mentioned in the agreement. A. retained the title deeds of the land, & in 1851 deposited them with pltf. to secure the payment of a sum then advanced. Between deft. P. & A. there were various cash dealings, & in 1848, the amount due by P. in respect of the purchase-money, etc., was, by means of the money due to him, reduced. The accounts between the parties continued unsettled, & no appropriation of the balance due to P. was made by him by way of satisfaction of the residue of the purchase-money due to A., who in Dec. 1855, was adjudicated bkpt. The evidence as to when P. received notice of pltf.'s equitable mtge. was conflicting :—*Held :* pltf. was entitled to a decree against P. to the extent of the equitable interest which A. had in the land, no appropriation of the debt due to P. having been made before he had notice of the equitable lien of pltf.—RAYNE *v.* BAKER (1859), 1 Giff. 241 ; 6 Jur. N. S. 366 ; 65 E. R. 903.

1266. Not payment to person unauthorised by mortgagee.]—N. & T., who were mtgees., transferred their mtge. to pltf., who gave no notice to the mtgors. Afterwards the mtgors., intending to redeem, paid the amount secured by the mtge. to the solrs. of N. & T. without ascertaining that they were authorised to receive it ; the solrs. misappropriated the money. N. & T. executed a deed prepared by their solrs., but without perusing same or knowing its contents, which contained a recital acknowledging the receipt of the money, & purported to convey the property by the direction of the mtgors. to their nominees. There was no proper receipt indorsed on the deed. Pltf. filed a bill of foreclosure against the mtgors. :—*Held :* pltf. was entitled to the usual foreclosure decree.—WITHINGTON *v.* TATE (1869), 4 Ch. App. 288 ; 20 L. T. 637 ; 17 W. R. 559, L. C.

Annotation :—**Distd.** *Re* Southampton's Estate, Allen *v.* Southampton, Banfather's Claim (1880), 16 Ch. D. 178.

C. What Amounts to Notice.

1267. Not registration in Middlesex registry.]—WILLIAMS *v.* SORRELL, No. 1256, *ante.*

1268. Failure to call for title deeds when paying off mortgage.]—STOCKS *v.* DOBSON, No. 1258, *ante.*

1269. ——.]—The owner of real estate mortgaged it in fee to his solr. who shortly afterwards transferred the mtge. to a client, the title deeds & the mtge. deed, on which the transfer was indorsed, being handed over to the transferee. The transferee omitted to give notice of the transfer to the mtgor., & he was ignorant of it. Afterwards the property was sold & was conveyed as free from incumbrances by the mtgor. & the original mtgee. to the purchaser by a deed, prepared by the solr., which contained false recitals, the mtge. & the transfer of it being suppressed.

The purchase-money was received by the solr., who out of it retained the mtge. debt & interest, & paid over the balance to his client, the mtgor. The purchaser had no notice of the mtge. The mtgor. did not call for the title deeds or the mtge. deed when the mtge. was paid off, but left everything to his solr., the original mtgee., & signed what he told him to sign. The solr. paid the interest on the mtge. debt to the transferee until he absconded, when the fraud was discovered. The purchaser then claimed to hold the property free from the mtge. :—*Held :* as the mtgor. had been a party to the false recitals in the conveyance to the purchaser, & had not called for the title deeds when the mtge. debt was retained by the solr. out of the purchase-money, he could not claim as against the transferee the benefit of the ordinary rule that payments made by a mtgor. to a mtgee. without notice of a transfer are good as against the transferee ; & the purchaser had no better equity against the transferee. Inasmuch as the evidence showed the mtgor. had placed himself entirely in the hands of his solr., & constituted him his general agent in the transactions, the knowledge of the solr. must be imputed to him, & he must be

Sect. 1.—Transfer: Sub-sect. 9, B. & C.; sub-sect. 10, A., B. & C.]

transferable. Money raised by virtue of the Act was, by sect. 123, to be applied, after payment of the costs, etc., of obtaining the Act, in payment of the interest upon any money borrowed upon credit of the rates, in carrying out the purposes of the Act, & then in discharge of the principal sums of money borrowed upon the credit of the rates. By other sects. of the Act any person who was himself a comr. was disqualified from entering into any contract with the comrs. & a penalty of £50 was inflicted upon any comrs. who did so.

H., himself one of the comrs. for improving the town, having supplied the comrs. with a quantity of bricks for the purposes of the Act received from the comrs. mtge. securities for the price, in the form provided by the Acts, the mtges. stating that they were given in consideration of sums of money, "advanced & lent by H. upon the credit & for the purposes of the said Act, & paid by him to the treasurer of the said comrs." no money having been in fact advanced or lent to them by H. Pltfs., as transferees of these securities, without knowledge of the nature of the transaction between H. & the comrs., having brought an action against the comrs. :—*Held :* defts., the comrs., were estopped by the recital in the mtge. securities from denying that they were given in consideration of sums of money "advanced & lent" by H. upon the credit & for the purposes of the Act & paid by him to the treasurer of the comrs.—WEBB *v.* HERNE BAY COMRS. (1870), L. R. 5 Q. B. 642 ; 39 L. J. Q. B. 221 ; 22 L. T. 745 ; 34 J. P. 629 ; 19 W. R. 241.

Annotations :—**Reld.** *Re* Hercules Insce., Brunton's Claim (1874), L. R. 19 Eq. 302 ; *Re* Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim (1883), 24 Ch. D 85. **Mentd.** R. *v.* Charnwood Forest Ry. (1884), 1 T. L. R. 161 ; Smith *v.* Chorley District Council, [1897] 1 Q. B. 532 ; *Re* Jubilee Cotton Mills, [1922] 1 Ch. 100.

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1252. Where mortgagor not a party—Transferee takes subject to subsisting state of accounts.]—MATTHEWS *v.* WALLWYN, No. 224, *ante*.

1253. —— ——.]—CHAMBERS *v.* GOLDWIN, No. 1071, *ante*.

1254. —— ——.]—TURNER *v.* SMITH, No. 225, *ante*.

SUB-SECT. 10.—PAYMENT OF MORTGAGE DEBT BY MORTGAGOR WITHOUT NOTICE OF TRANSFER.

A. In General.

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1255 i. *Mortgagor entitled to benefit of payments made before notice.*]—NIOA *v.* BELL (1901), 27 V. L. R. 83.—**AUS.**

1255 ii. ——.]—MCDONOUGH *v.* DOUGHERTY (1862), 10 Gr. 42.—**CAN.**

1255 iii. ——.]—*Re* AMBROSE'S ESTATE, [1914] 1 I. R. 123.—**IR.**

a solr. who had acted for the sister & for the mtgee. on the occasion of the mtge. took upon himself without authority to instruct counsel to appear for the sister & her husband, & also for the mtgee. who was abroad, & to consent to or not oppose the petition. Upon the hearing of this petition the fund was ordered to be, & was transferred out of ct. :—*Held :* the mtgee. was not bound or affected by the unauthorised appearance for him ; neither the omission of the trustees to obtain a stop order, nor any of the above circumstances, operated to discharge the liability of the surety's share, but it continued subject to the payment of the mtge. debt.

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1260. ——.]—A. deposited deeds with his confidential solr. with a memorandum of deposit by way of equitable mtge. to secure the repayment of £3,000. The solr. handed the deeds & memorandum to B. as security for £2,000, together with a memorandum signed by himself that the £2,000, part of the annexed £3,000 security, then belonged to B., with interest at 5 per cent. The solr. afterwards obtained a return of the deeds from B. upon an assurance that in lieu thereof others of equal value should be deposited. Other deeds were subsequently deposited, which proved to be worthless. The mtge. of £3,000 was paid off by A.'s representatives, & the genuine deeds were given up to them by the solr. without the memorandum of deposit. No notice of B.'s security had been given to A. B. then claimed payment of the £2,000 against the estate of A., upon the ground of constructive notice to A. through his confidential solr. :—*Held :* B., by neglecting to give notice to A. of the transfer of the mtge. & by giving up the documents originally deposited with him, had lost any right he might have been against A.'s estate.—*Re* SOUTHAMPTON'S (LORD) ESTATE, ALLEN *v.* SOUTHAMPTON (LORD), BANFATHER'S CLAIM (1880), 16 Ch. D. 178 ; 50 L. J. Ch. 218 ; 43 L. T. 687 ; 29 W. R. 231.

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1261. ——.]—BICKERTON *v.* WALKER, No. 1215, *ante*.

1262. ——.]—DIXON *v.* WINCH, No. 1269, *post*.

B. What Amounts to Payment.

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The purchase-money was received by the solr., who out of it retained the mtge. debt & interest, & paid over the balance to his client, the mtgor. The purchaser had no notice of the mtge. The mtgor. did not call for the title deeds or the mtge. deed when the mtge. was paid off, but left everything to his solr., the original mtgee., & signed what he told him to sign. The solr. paid the interest on the mtge. debt to the transferee until he absconded, when the fraud was discovered. The purchaser then claimed to hold the property free from the mtge. :—*Held :* as the mtgor. had been a party to the false recitals in the conveyance to the purchaser, & had not called for the title deeds when the mtge. debt was retained by the solr. out of the purchase-money, he could not claim as against the transferee the benefit of the ordinary rule that payments made by a mtgor. to a mtgee. without notice of a transfer are good as against the transferee ; & the purchaser had no better equity against the transferee. Inasmuch as the evidence showed the mtgor. had placed himself entirely in the hands of his solr., & constituted him his general agent in the transactions, the knowledge of the solr. must be imputed to him, & he must be

Sect. 1.—*Transfer: Sub-sect.* 10, *C.; sub-sects.* 11, 12, 13, 14 *&* 15.]

treated as having had notice of the transfer of the mtge.; & consequently the payment of the mtge. debt to the solr. was not effectual as against the transferee, & the mtge. must be treated as still subsisting in her favour, & the purchaser must hold the property subject to it, but with a right to be indemnified against it by the mtgor.—DIXON *v.* WINCH, [1900] 1 Ch. 736; 69 L. J. Ch. 465; 82 L. T. 437; 48 W. R. 612; 16 T. L. R. 276; 44 Sol. Jo. 327, C. A.

Annotations:—**Refd.** Turner *v.* Smith, [1901] 1 Ch. 213; Berwick *v.* Price, [1905] 1 Ch. 632; Powell *v.* Browne (1907), 97 L. T. 854.

1270. Notice to mortgagor's solicitor.]—DIXON *v.* WINCH, No. 1269, *ante*.

1271. ——.]—Pltf. was the transferee under a deed of 1898 of a mtge. of an absolute share in trust premises by a deed dated in 1896. By deed dated in 1901, which recited that he had already charged his share with £350, the beneficiary assigned his equity of redemption in the trust premises to the solr. for deft. trustees, who was also solr. for the mtgee. & transferee. The trust funds becoming divisible, the trustees, believing the statement of the solr. that he was absolutely entitled, allowed the solr. to receive the whole of the share of the beneficiary in the trust funds. No notice of the mtge. or transfer was given to the trustees.

In an action by the transferee of the mtge. of 1896 against the trustees of the settlement comprising the trust premises claiming an account of principal, interest, & costs owing under the mtge.: —*Held:* in the circumstances the trustees were set on inquiry how the alleged assignee came to be such assignee, & in the course of such inquiry they would have discovered notice of something affecting the assignee's title, & must be held responsible to the holder of the mtge., not being able to shelter themselves from responsibility behind the fraudulent agent whom they employed to make the inquiry.—DAVIS *v.* HUTCHINGS, [1907] 1 Ch. 356; 76 L. J. Ch. 272; 96 L. T. 293.

Annotation:—**Mentd.** *Re* Allsop, Whittaker *v.* Bamford, [1914] 1 Ch. 1.

SUB-SECT. 11.—AUTHORITY TO RECEIVE MORTGAGE MONEY.

See Law of Property Act, 1925 (c. 20), ss. 23, 69.

1272. Payment by transferee—To solicitor in possession of transfer deed—Transfer executed by mortgagees.]—G. & H. were mtgees. for £1,000 on property of S. Their solrs., D. & P., who had the deeds in their custody, applied to deft., who was also a client of theirs, saying that they believed he had £1,000 to invest on mtge., & that G. & H. wanted £1,000 on a transfer of S.'s mtge. Deft. inspected the property, & being satisfied, he, on June 19, 1878, sent the £1,000 to D. & P., who gave him a receipt for it. In July, D. & P. fraudulently induced G. & H. to execute a deed of transfer to deft. with a receipt indorsed, which deed they stated to G. & H. to be a deed of reconveyance to S. on his paying off the mtge. D. & P. shortly afterwards handed this deed with the title deeds to deft., & went on paying him interest as if they had received it from S. who was in fact paying his interest to the agents of G. & H. G. & H. made no inquiry as to the mtge., & this went on till 1883, when D. & P. became bkpts., & the £1,000 received from deft., which had never been handed over to G. & H., was lost. G. & H. then brought their action against deft., asserting a right against the property in the nature of an unpaid vendor's lien:—*Held:* as pltfs. by the deed of transfer & receipt which they handed to D. & P. enabled them to represent to deft. that the £1,000 which he had previously handed to D. & P. had come to the hands of pltfs., they had raised a counter-equity which prevented their claiming a vendor's lien, though this would not have been the case if, D. & P. having no authority to receive money for pltfs. deft. had paid the £1,000 to D. & P. at the time when the deeds were delivered to him, since he would then have known that pltfs. had not received the money.—GORDON *v.* JAMES (1885), 30 Ch. D. 249; 53 L. T. 641; 34 W. R. 217, C. A.

Annotations:—**Consd.** National Provincial Bank of England *v.* Jackson (1886), 33 Ch. D. 1. **Expld.** Coupe *v.* Collyer (1890), 62 L. T. 927. **Consd.** London Freehold & Leasehold Property Co. *v.* Suffield, [1897] 2 Ch. 608.

SUB-SECT. 12.—EQUITABLE RIGHTS OF PERSON PAYING OFF MORTGAGE DEBT.

1273. General rule—Right as equitable transferee—Without actual transfer.]—A mtgee. of two estates, A. & B., of which A. was subject to a first mtge., in exercise of a power of sale in his mtge., sold the estate A. The first mtgee., to whom another debt was due upon an equitable deposit of a policy of assurance & other documents by the mtgor., refused to join in the conveyance to the purchaser, unless he received out of the purchase-money the amount due to him on both his mtges. That amount was paid to him accordingly, & the documents comprised in the equitable deposit were delivered to the second mtgee. The balance of the proceeds of sale was insufficient to discharge what was due to the second mtgee.: —*Held:* as the equitable mtge. was paid with money which, had the first mtgee. not claimed the right to consolidate, would have belonged to the second mtgee., it was in fact paid by the second mtgee., who by the fact of such payment became equitable transferee, & was entitled to consolidate that mtge. with his mtge. on estate B.

What then were the rights of pltf. as between them & the trustees in bkpcy. of the mtgor. As they had paid under compulsion of law this sum of £273 to T. they were entitled to stand in his place as against the mtge. of the securities, & in other words they were what we call equitable transferees even without a transfer being executed (JESSEL, M.R.).—CRACKNALL *v.* JANSON (1879), 11 Ch. D. 1; 40 L. T. 640; 27 W. R. 851, C. A.

Annotation:—**Mentd.** Wigan *v.* English & Scottish Law Life Assce. Assocn., [1909] 1 Ch. 291.

1274. Payment at request of mortgagor—Security kept alive—Doctrine of subrogation.]—Pltfs., at the request of trustees of a marriage settlement & of the tenant for life under the settlement, paid off £600 part of a mtge. debt of £1,000 on a leasehold house comprised in the settlement. There was no transfer of the £600 of the mtge. debt to pltfs. but interest was paid to them. On the death of the tenant for life the appointees

PART VIII. SECT. 1, SUB-SECT. 12.

q. *Discharge from liability.*]—On an assignment of a mtge., the mtgees. covenanted to pay the assignee all moneys secured by the mtge., according to its terms, in the event of default being made by the mtgors.:—*Held:* the original mtgees. were entitled upon payment forthwith after decree of principal, interest, & the costs of an undefended action at law against them upon their covenant, to be discharged

of the leasehold house obtained a transfer to themselves from the mtgee. of the remaining mtge. debt of £400, & of the premises, but subject to the equity of redemption, & they also obtained the title deeds. Pltfs. advanced the £600 out of trust money :—*Held :* (1) the mtge. was not discharged, but was kept alive to the extent of £600 ; (2) the doctrine of subrogation applied to the case, & pltfs. had a right to stand in the shoes of the trustees of the settlement.—PATTEN *v.* BOND (1889), 60 L. T. 583 ; 37 W. R. 373.

Annotations :—As to (1) **Apld.** Chetwynd *v.* Allen, [1899] 1 Ch. 353 ; Butler *v.* Rice, [1910] 2 Ch. 277.

1275. —— —— Charge on both properties in first mortgage.]—C. being entitled as a trustee for his wife to property X. & beneficially to property Y., mortgaged both properties, with the consent of his wife, to T. to secure £2,000. C. afterwards requested M. to lend him £1,200 to pay off an existing mtge. on X., promising to transfer the mtge. to him, but without disclosing the fact that X. belonged to his wife or informing him of the amount of, or that Y. formed part of the security for, the first mtge. M. advanced the £1,200, & C. applied £1,000 of that sum in paying off part of the £2,000 owing to T., & afterwards executed a mtge. of X. to M. to secure the £1,200 so advanced by him :—*Held :* (1) when M. advanced the £1,200 on the above promise by C., & the £1,000 was applied in part payment to T., the charge on both X. & Y. was kept alive in equity in favour of M. ; (2) M. did not lose the benefit of his charge by taking the equitable mtge. executed by C. on X., the charge thereby given not operating as a release or extinguishment of the prior charge & there being no reason for presuming a merger of the securities. —CHETWYND *v.* ALLEN, [1899] 1 Ch. 353 ; 68 L. J. Ch. 160 ; 80 L. T. 110 ; 47 W. R. 200 ; 43 Sol. Jo. 140.

Annotation :—As to (1) **Apld.** Butler *v.* Rice, [1910] 2 Ch. 277.

1276. Mortgagor ignorant of payment—Security kept alive.]—Mrs. R., the wife of C. L. R., was the owner of a leasehold house in Bristol & of property in Cardiff, which were together subject to a charge in favour of a bank to secure £450 & interest, & the title deeds of both properties were deposited with the bank. Mr. R. asked pltf. to lend him £450 for the purpose of paying off the mtge. Pltf. thought the mtged. property belonged to Mr. R. & did not know of the Cardiff property, & he agreed to advance the money upon having a legal mtge. for £300 on the Bristol property & a guarantee of £150 by Mr. & Mrs. R.'s solr., who was to hold the deeds for him in the meantime. Mrs. R. did not know of this transaction. The money was paid & the deeds of the Bristol property were now in the custody of the solr. as stakeholder. Mrs. R. refused to execute a mtge. in favour of pltf., & he brought this action against her, her husband, & the solr., for a declaration that he was entitled to a charge on the Bristol property for £450 & interest. The question was whether the mtge. must be presumed to have been kept alive in the pltf.'s favour :—*Held :* on the facts, it must be presumed that pltf. intended to keep the charge alive in his own favour.—BUTLER *v.* RICE, [1910] 2 Ch. 277 ; 79 L. J. Ch. 652 ; 103 L. T. 94.

Presumption as to merger.]—*See* Part XIV., Sect. 4, sub-sect. 2, G., *post.*

SUB-SECT. 13.—ASSURANCES FOR CHARITABLE PURPOSES.

See CHARITIES, Vol. VIII., pp. 267-270, Nos. 293-314, 325-351.

SUB-SECT. 14.—STAMP DUTY.

See, now, Stamp Act, 1891 (c. 39), s. 62, Sched. I. ; Law of Property Act, 1925 (c. 20), s. 112 ; &, *generally,* REVENUE.

1277. Transfer with further advance—Old equity of redemption extinguished.]—By an indenture in 1877, after reciting that by a mtge. in 1872, W., the mtgor., had conveyed certain hereditaments to secure £350 lent to him by the mtgees. with a proviso for redemption on payment of the £350, it was witnessed that in consideration of £350 paid by S. to the mtgees. at W.'s request in satisfaction of all moneys owing upon the recited mtge., the receipt of which £350 the mtgees. acknowledged, & therefrom released S. & W., & also in consideration of £120 paid by S. to W., the mtgees. conveyed & released, & W. released & confirmed to S. in fee, the hereditaments discharged from the said proviso for redemption ; with a proviso for redemption on payment by W. to S. of the two sums of £350 & £120, making together the sum of £470, & a covenant by W. for payment thereof to S. :—*Held :* though there was no formal assignment of the old debt of £350 & though that debt & the old equity of redemption were extinguished, the indenture of 1877 was as to the £350 in substance a "transfer of a mtge." within Stamp Act, 1870 (c. 97), sched. was therefore liable to be stamped as a transfer, with a further *ad valorem* duty on the fresh advance of £120, & was not liable to be stamped as a "mtge." for £470.—WALE *v.* INLAND REVENUE COMRS. (1879), 1 Ex. D. 270 ; 48 L. J. Q. B. 574 ; 41 L. T. 165 ; 27 W. R. 916.

*Annotations :—***Folld.** Humphreys *v.* I. R. Comrs. (1899), 81 L. T. 199. **Refd.** City of London Brewery Co. *v.* I. R. Comrs. (1898), 78 L. T. 39.

1278. Transfer of balance of mortgage—Old equity of redemption extinguished.]—HUMPHREYS *v.* INLAND REVENUE COMRS., No. 608, *ante.*

Mortgage to friendly society.]—*See* FRIENDLY SOCIETIES, Vol. XXV., p. 295, No. 47.

SUB-SECT. 15.—OTHER CASES.

1279. Mortgagee joining in transfer to pass legal estate—Liability on covenants.]—A mtgee. joining for the sake of passing the legal estate only is to be held as strictly to his covenant as any other covenantor.—CLIFFORD *v.* HOARE (1874), L. R. 9 C. P. 362 ; 43 L. J. C. P. 225 ; 30 L. T. 465 ; 22 W. R. 828.

*Annotations :—***Mentd.** Sketchley *v.* Berger (1893), 69 L. T. 754 ; Strick *v.* City Offices Co. (1906), 22 T. L. R. 607 ; Pettey *v.* Parsons, [1914] 2 Ch. 653.

1280. Security with proviso against assignment —Subsequent assignment by transferee—Lloyd's

from further liability, & to an assignment of pltf.'s securities upon payment of any costs he might have against the other parties.—TAYLOR *v.* SHARP (1885), 2 Man. L. R. 35.—**CAN.**

r. *Assignee of mortgaged property —Trustee for person paying off mortgagee.*]—WALCOTT *v.* CONDON (1853), 6 Ir. Jur. 15.—**IR.**

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t. *Transferor covenanting to pay on default.*]—On the transfer of a mtge. the mtgee. covenanted that if default were made in payment of the mtge. money, he would pay the same :—*Held :* this did not constitute him a surety.—CLARKE *v.* BEST (1860), 8 Gr. 7.—**CAN.**

a. *Effect of misrepresentation. — No estate passes by assignment.*]—HERCHIMER *v.* ELLIOTT (1887), 14 O. R. 714.—**CAN.**

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bond.]—SAMUEL MONTAGU & Co. *v.* WESTON, CLEVEDON & PORTISHEAD LIGHT RYS. Co. (1903), 19 T. L. R. 272.

—— **Mortgage insurance policy.**]—*See* INSURANCE, Vol. XXIX., p. 420, No. 3278.

Transfer to company taking land under compulsory powers.]—*See* COMPULSORY PURCHASE, Vol. XI., p. 250, No. 1536.

SECT. 2.—SUB-MORTGAGE.

SUB-SECT. 1.—RIGHTS AND LIABILITIES OF THE MORTGAGEE.

See, now, Law of Property Act, 1925 (c. 20), ss. 85, 86, 136, Scheds. I., VII. (4), VIII. (4).

1281. Right to sub-mortgage.]—It is admitted that the mtgee. may create such estates as he pleases; he may convey, by way of sub-mtge. to whom & in as many parcels as he pleases (LORD HERSCHELL).—TAYLOR *v.* RUSSELL, [1892] A. C. 244; 61 L. J. Ch. 657; 66 L. T. 565; 41 W. R. 43; 8 T. L. R. 463; 36 Sol. Jo. 379, H. L.

Annotations:—**Mentd.** Powell *v.* London & Provincial Bank, [1893] 1 Ch. 610; London & County Banking Co. *v.* Goddard, [1897] 1 Ch. 642; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231.

1282. Right to insist on recovery of money due from mortgagor.]—One assigning a mtge. in order to secure his own debt is in the situation of a surety; & may insist upon proceedings for the recovery of the money due, unless his creditor, the assignee, will relieve him from all claim beyond what the mtge. may produce.—GURNEY *v.* SEPPINGS (1846), 2 Ph. 40; 1 Coop. *temp.* Cott. 12; 15 L. J. Ch. 385; 7 L. T. O. S. 317; 47 E. R. 719, L. C.

Right to pledge security.]—*See* BANKERS & BANKING, Vol. III., pp. 271–275, Nos. 844–857.

SUB-SECT. 2.—RIGHTS AND LIABILITIES OF THE SUB-MORTGAGEE.

See, now, Law of Property Act, 1925 (c. 20), ss. 85, 86, 136, Scheds. I., VII. (4), VIII. (4).

1283. Exercise of power of sale—Bankrupt mortgagee—Equity of redemption purchased by bankrupt—Right to sale of whole interest.]—Bkpt. having a mtge. term deposited the mtge. deed with a party, by way of equitable mtge., & afterwards purchased the equity of redemption:—*Held:* the whole of bkpt.'s interest in the property must be sold, & his assignees join in the conveyance to the purchaser.—*Re* WATTS, *Ex p.* TUFFNELL (1834), 1 Mont. & A. 620; 4 Deac. & Ch. 29, Ct. of R.

1284. —— —— **Prior inquiry as to amount of original mortgage debt.**]—A person, to whom estates are mortgaged to secure the balance due from time to time on an account current, mortgages his interest under this mtge., & becomes bkpt. The sub-mtgee. cannot have an order for sale of the original mtge. debt, without a preliminary inquiry as to its amount. In such a case, it is not necessary to give notice of the sub-mtge. to the original mtgor., to take the mtge. debt out of the order & disposition of the original mtgee. Pending the enquiry the sub-mtgee. was permitted to enter a claim for the full amount.—*Re* WRIGHT, *Ex p.* MACKAY (1841), 1 Mont. D. & De G. 550, Ct. of R.

Annotation:—**Refd.** *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589.

1285. —— **Form of order for sale.**]—*Re* VAUGHAN, *Ex p.* POWELL (1847), De G. 405.

1286. Sub-mortgagee takes subject to equities.]—COCKELL *v.* TAYLOR, COLLETT *v.* PRESTON, PRESTON *v.* COLLETT, No. 1236, *ante.*

1287. —— **No notice given to mortgagor.**]—NORRISH *v.* MARSHALL, No. 1234, *ante.*

1288. —— ——.]—The bankers, who took an equitable mtge. by way of deposit of this mtge. to G., not having given notice, the mtgees. are bound by the subsequent transactions between the mtgor. & the original mtgee. in relation to that mtge. (LORD WESTBURY, C.).—REEVE *v.* WHITMORE, MARTIN *v.* WHITMORE (1863), 4 De G. J. & Sm. 1; 3 New Rep. 15; 33 L. J. Ch. 63; 9 L. T. 311; 9 Jur. N. S. 1214; 12 W. R. 113; 46 E. R. 814, L. C.

Annotations:—**Mentd.** Brown *v.* Bateman (1867), L. R. 2 C. P. 272; Cole *v.* Kernot, Thompson *v.* Cohen (1872), 41 L. J. Q. B. 221; *Re* Waugh, *Ex p.* Dickin (1876), 4 Ch. D. 527, n.; Leatham *v.* Amor (1878), 47 L. J. Q. B. 581; Reeves *v.* Barlow (1884), 12 Q. B. D. 436; Church *v.* Sage, Froy, Claimant (1892), 67 L. T. 800; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345; National Provincial & Union Bank of England *v.* Charnley, [1924] 1 K. B. 431.

1289. —— ——.]—DE LISLE *v.* UNION BANK OF SCOTLAND, No. 1240, *ante.*

-.]—*See* Sect. 1, sub-sect, 9, *ante.*

SECT. 3.—DEVOLUTION ON DEATH.

SUB-SECT. 1.—DEVOLUTION ON PERSONAL REPRESENTATIVE.

See, now, Administration of Estates Act, 1925 (c. 23), ss. 1, 3 (1) ii.

SUB-SECT. 2.—IN WHAT FORM DEVOLVING.

See Administration of Estates Act, 1925 (c. 23), ss. 1–3.

1290. Devolves as personalty.]—Mtge. money decreed to the exor. & not to the heir.—STANLEY *v.* MANDESLEY (1665), 1 Rep. Ch. 254; 21 E. R. 565.

1291. ——.]—OWEN *v.* WHITE (1667), Freem. Ch. 126; 3 Rep. Ch. 20; 22 E. R. 1102.

1292. —— **Limitation to heir.**]—PAWLETT *v.* A.-G., No. 854, *ante.*

1293. —— ——.]—RIGHTSON *v.* OVERTON (1677), Freem. Ch. 20; 2 Eq. Cas. Abr. 429; 22 E. R. 1030, L. C.

1294. —— ——.]—TURNER *v.* TURNER (1679), 2 Rep. Ch. 154; 21 E. R. 644.

1295. —— **No entry by mortgagee.**]—GORGE (LORD) *v.* DILLINGTON (1667), 1 Rep. Ch. 279; 21 E. R. 572.

Annotation:—**Consd.** Thornborough *v.* Baker (1675), 3 Swan. 628.

1296. —— ——.]—YATE *v.* HOOKE (1669), 2 Rep. Ch. 39; 21 E. R. 610.

1297. ——.]—SMITH *v.* SMOULT (1668), 1 Cas. in Ch. 88; 22 E. R. 708.

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b. *General rule.*]—The personal representative of a deceased mtgee. is entitled to the mtge. money, but the mtgor. is entitled to redeem upon payment to the real representative.—WALDUCK *v.* COLGIN (1868), 5 W. W. & A'B. 1.—**AUS.**

c. *Sale of mortgage by executor.*]—An exor. holding a mtge. given to testator, sold & assigned it, taking the purchaser's promissory notes payable to himself or order:—*Held:* upon an issue of *plene administravit*, this in law amounted to a receipt of the original debt, making the exor. chargeable with the mtge. as an asset in possession.—MACBETH *v.* MACBETH (1867), 26 U. C. R. 549.—**CAN.**

1298. ——.]—The exor., not the heir, of a mtgee. in fee, is entitled to the money secured by the mtge.—THORNBOROUGH *v.* BAKER (1675), 3 Swan. 628; 2 Eq. Cas. Abr. 428; 1 Freem. Ch. 143; 1 Cas. in Ch. 283; 36 E. R. 1000.

Annotations :—**Folld.** Tabor *v.* Tabor (1679), 3 Swan. 635; Taber *v.* Grover (1698), 2 Freem. Ch. 227.

1299. —— **After forfeiture.**]—A mtge. in fee, & forfeited, & the mtgee. in possession; the money was decreed to be still the personal estate of the mortgagee, & must go to his administrator.—NOY *v.* BESUSTANE (1677), Cas. *temp.* Finch 305; 23 E. R. 167; *sub nom.* NOY *v.* ELLIS, 2 Cas. in Ch. 220.

1300. —— ——.]—LITTLETON'S CASE (1681), 2 Vent. 351; 86 E. R. 480, L. C.

Annotation :—**Mentd.** Chester *v.* Chester (1730), 3 P. Wms. 56.

1301. —— ——.]—A forfeited mtge. in fee decreed to be personal estate, & to belong to the exor., & not to the heir.—CANNING *v.* HICKS (1686), 1 Vern. 412; 2 Cas. in Ch. 187; 23 E. R. 553, L. C.

1302. —— ——.]—A mtge., though forfeited, & though the heir buys in the equity of redemption; & though no defect of assets, yet shall go to the exor. But had the heir been in by descent of such forfeited mtge. when he bought the equity of redemption, & no defect of assets, equity would not take it from him.—FISK *v.* FISK (1690), Prec. Ch. 11; 2 Eq. Cas. Abr. 429; 24 E. R. 6.

1303. ——.]—Money due on a mtge. in fee, paid to the heir of the mtgee., was recovered from him by the exor.—TABOR *v.* TABOR (1679), 3 Swan. 636; 36 E. R. 1003.

1304. ——.]—Rentcharge in fee, subject to redemption, devised, the mtge. money is paid. Decreed, the administrator to have it, & not the heir.—STEWKLEY *v.* HENLEY (1679), 2 Rep. Ch. 166; 21 E. R. 647.

1305. —— **Equity released to heir.**]—Mtgor. releases to the heir of the mtgee. in fee, yet the exor. or administrator of the mtgee. shall have the benefit of the mtge. though there are no debts. So if a mtgee. in fee dies, & the mtgor. will not redeem; yet the exor. or administrator of the mtgee. shall have the benefit of the mtge. So he shall, though the mtge. be foreclosed, or be of so ancient a date as not to be redeemable, unless the mtgee. be in the actual possession.—AWDLEY AWDLEY (1690), 2 Vern. 192; 23 E. R. 725.

Annotations :—**Apld.** *Re* Loveridge, Drayton *v.* Loveridge, [1902] 2 Ch. 859. **Mentd.** A.-G. *v.* Allesbury (1887), 12 App. Cas. 672.

1306. —— ——.]—FISK *v.* FISK, No. 1302, *ante*.

1307. ——.]—A mtge. in fee, though two descents cast, & though more due upon it than the value, & though the mtgor. by answer says he will not redeem; yet it shall go to the exor., & not to the heir, the equity of redemption not being foreclosed, or released.—TABOR *v.* GROVER (1699), 2 Vern. 367; 1 Eq. Cas. Abr. 273, pl. 1; 23 E. R. 831; *sub nom.* TABER *v.* GROVER, Freem. Ch. 227.

1308. ——.]—Mtges. of lands to secure advances & money paid into ct. for redemption by a subsequent mtge. treated in equity as a chattel & passed to administrator.—FARREL *v.* WHITE (1701), Colles. 146; 1 E. R. 223, H. L.

1309. —— **Although redemption improbable.**]—A party died in 1830, having vested in him a mtge. in fee, & the lapse of time & circumstances were such, as to render it very improbable that any party could now establish any right to the equity of redemption:—*Held:* nevertheless, the widow was not entitled to dower.—FLACK *v.* LONGMATE (1845), 8 Beav. 420; 5 L. T. O. S. 35; 50 E. R. 165.

Annotation :—**Apld.** *Re* Loveridge, Drayton *v.* Loveridge, [1902] 2 Ch. 859.

1310. ——.]—Order made on a claim that the money to be received in respect of mtges., forming part of the personal estate of an intestate, should be got in by the administrator, & divided from time to time by him among the parties interested.—BULLIVANT *v.* BELLAIRS (1851), 20 L. J. Ch. 549; 18 L. T. O. S. 24.

1311. —— **Mortgagee intestate in possession—Equity statute barred after death of mortgagee.**]—Where a mtgee. of freeholds enters into possession of the mtged. land, & dies, leaving all his property to his widow for life but otherwise intestate, & the possession is continued by the widow, who is not solely entitled to the mtge. debt, until the equity of redemption is barred by Real Property Limitation Act, 1874 (c. 57), the mtged. land passes as personalty to his next of kin.

The estate in the land descended to the heir, but at the moment of testator's death the heir was, as it appears to me, only a trustee for the legal personal representative who was entitled to the debt & to the beneficial interest in the land in respect of the debt (BUCKLEY, J.).—*Re* LOVERIDGE, DRAYTON *v.* LOVERIDGE, [1902] 2 Ch. 859; 71 L. J. Ch. 865; 87 L. T. 294; 51 W. R. 232; 46 Sol. Jo. 701.

Devolution as an immovable.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 340-342, Nos. 290-301.

SUB-SECT. 3.—EFFECT OF DEVISE OF LAND.

1312. Bequest by mortgagee in possession—With limitations applicable to realty—Passes as realty.]—A man having mtges., one of which was a mtge. in fee of lands in D. on which he had entered, devises those lands to his two daughters & their heirs, & the other mtges. to them, their exors., etc.; one of the daughters dies. Her share of the land in D. shall go to the heir & not to her administrator, for testator might intend those lands to pass as real estate to his daughters, though as between him & the mtgor., they were but a mtge.—NOYS *v.* MORDAUNT (1706), 2 Vern. 581, Prec. Ch. 265; 23 E. R. 978; *sub nom.* NOYES *v.* MORDANT, Gilb. Ch. 2.

Annotations :—**Refd.** Kirkham *v.* Smith (1749), 1 Ves. Sen. 258; Lewis *v.* King (1789), 2 Bro. C. C. 600. **Mentd.** Mansell *v.* Mansell (1732), Cas. *temp.* Talb. 252; Hervey *v.* Desbouverie (1735), Cas. *temp.* Talb. 130; Streatfield *v.* Streatfield (1735), Cas. *temp.* Talb. 176; Jenkins *v.* Jenkins (1736), Belt's Sup. 250; Burgoyne *v.* Benson (1738), West *temp.* Hard. 340; Llovellyn *v.* Mackworth (1740), Barn. Ch. 445; Walpole *v.* Conway (1740), Barn. Ch. 153; Incledon *v.* Northcote (1746), 3 Atk. 430; Ayres *v.* Willis (1749), 1 Ves. Sen. 230; Goodwyn *v.* Goodwyn (1749), 1 Ves. Sen. 226; Hearle *v.* Greenbank (1749), 3 Atk. 695; Boughton *v.* Boughton (1750), 2 Ves. Sen. 12; East *v.* Cook (1750), 2 Ves. Sen. 30; Archer *v.* Pope (1754), 2 Ves. Sen. 523; Clark *v.* Guise (1755), 2 Ves. Sen. 617; Moore *v.* Moore (1755), 2 Ves. Sen. 596; Forrester *v.* Cotten (1760), Amb. 388; Arnold *v.* Kempstead (1764), Amb. 466; Villareal *v.* Galway (1769), Amb. 682; Frank *v.* Standish (1772), 15 Ves. 391, n.; Williams *v.* Williams (1782), 1 Bro. C. C. 152; Devese *v.* Portet (1785), 1 Cox, Eq. Cas. 188; Stratton *v.* Best (1791), 1 Ves. 285; Finch *v.* Finch (1792), 1 Ves. 534; Whistler *v.* Webster (1794), 2 Ves. 367; Broome *v.* Monck (1805), 10 Ves. 597; Thellusson *v.* Woodford (1806), 13 Ves. 209; Rancliffe *v.* Parkyns (1818), 6 Dow. 149; Gretton *v.* Haward (1819), 1 Swan. 409; Halford *v.* Dillon (1820), 2 Brod. & Bing. 12; Cooper *v.* Cooper (1874), L. R. 7 H. L. 53; *Re* Vardon's Trusts (1884), 28 Ch. D. 124; *Re* De Burgh Lawson, De Burgh Lawson *v.* De Burgh Lawson (1885), 53 L. T. 522; *Re* Anderson, Pegler *v.* Gillatt, [1905] 2 Ch. 70; *Re* Hancock, Hancock *v.* Pawson, [1905] 1 Ch. 16; Pitman *v.* Crum Ewing, [1911] A. C. 217.

1313. —— —— ——.]—J. W., being seised & possessed of considerable freehold, copyhold, &

Sect. 3.—Devolution on death: Sub-sects. 3 & 4.]

leasehold estates in the county of H., & in possession, as mtgee., of certain leasehold houses at K. in the county of M., but having no other property in the said county of M., & having other estates vested in him as mtgee., besides those at K., makes his will, devising "all his freehold, copyhold, & leasehold messuages, etc. in the county of H., & in the town of K.," to A. W. for life, &, after her death, "all & singular other his freehold, copyhold, & leasehold messuages," etc. in the counties of H. & M., or elsewhere, to E. W. & A. T. for their joint lives, &, after their several deceases, "all the said freehold, leasehold, & copyhold messuages," etc. unto & equally among their children; & gives to A. W. "all the residue of his real estate not before disposed of, & all other his estates & interests whatsoever, vested in him as mtgee., or trustee," etc. "& all the residue of his personal estate, ready money, & securities for money," etc. subject to the payment of debts & legacies:—*Held:* the mtged. premises at K. passed under the devise of all the freehold, copyhold, & leasehold messuages, etc. in the county of H., in the town of K.—WOODHOUSE *v.* MEREDITH (1816), 1 Mer. 450; 35 E. R. 739.

Annotations:—**Distd.** Bowen *v.* Barlow (1871), L. R. 11 Eq. 454; *Re* Clowes, [1893] 1 Ch. 214. **Apld.** *Re* Carter, Dodds *v.* Pearson, [1900] 1 Ch. 801.

1314. —— —— —— Includes mortgage debt.]—A mtgee. of two freehold houses & a stable entered into possession of the mtged. property in Nov. 1897, after the bkpcy. of the mtgor. & died in June, 1899, having devised & bequeathed all his real & personal estate to his widow & appointed her sole extrix. of his will. The widow proved the will & remained in possession of the mtged. property until her death in July 1899. By a codicil made on July 3, she disposed of it as follows: "I devise . . . my two houses & stable . . . to my friend J. D. in fee simple"; & she gave her residuary estate to P. It was admitted that the disposition in the codicil applied to the mtged. property.

On a summons taken out by J. D. for the determination of the question whether he was entitled to the moneys secured on the houses & stable, or whether these moneys formed part of the widow's residuary estate which was given to P.:—*Held:* the gift in the codicil passed to J. D. all the interest of the widow in the mtged. property, & he was entitled to the moneys secured thereon.—*Re* CARTER, DODDS *v.* PEARSON, [1900] 1 Ch. 801; 69 L. J. Ch. 426; 82 L. T. 526; 48 W. R. 417; 90 L. J. Ch. 298.—*Re* Richards, Jones *v.* Rebbeck (1921), 90 L. J. Ch. 298.

1315. Bequest after decree of foreclosure nisi—Treated as realty—Passes as realty.]—The mtgee. devises a mtge. of which he had got a decree of foreclosure *nisi*, by the name of his other freehold estate in A., this mtge. being devised as real estate, shall not go in satisfaction of a less debt, but if assets are deficient, shall be considered as personal estate, for payment of debts.

The lands in mtge. being devised as real estate should be considered as such between the devisor & devisee (LORD KING, C.).—GARRET *v.* EVERS (1730), Mos. 364; 25 E. R. 441, L. C.

1316. Testator entitled as reversioner of mortgaged premises—Bequest passes proprietary interest—Not mortgage debt.]—The lessee of a term of years in four houses assigned the term, by way of mtge., to the owner in fee, of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses Nos. 5, 6, 7, & 8, Stock Street," & was at the time of his death in possession as mtgee.:—*Held:* the mtge. debt did not pass under the devise, but formed part of testator's personal estate.—BOWEN *v.* BARLOW (1872), 8 Ch. App. 171; 42 L. J. Ch. 82; 27 L. T. 733; 21 W. R. 149, L. C.

1317. Sale after date of bequest—Subsequent reconveyance by way of mortgage—Mortgage debt does not pass.]—Testator, being absolutely entitled to a freehold estate, specifically devised it to H. Afterwards he sold the estate to a purchaser, & on the following day the property was reconveyed to him by way of mtge. for securing part of the purchase-money which was allowed to remain charged on the estate:—*Held:* the sum secured by the mtge. did not pass to the specific devisee.—*Re* CLOWES, [1893] 1 Ch. 214; 68 L. T. 395; 41 W. R. 69; 37 Sol. Jo. 25; 2 R. 115, C. A.

Annotations:—**Distd.** *Re* Carter, Dodds *v.* Pearson, [1900] 1 Ch. 801. **Refd.** *Re* Bick, Edwards *v.* Bush, [1920] 1 Ch. 488.

1318. —— —— ——.] — Testator bequeathed leasehold property by his will & subsequently sold it, advancing part of the purchase-money to the purchaser & taking a mtge. to secure the same. He afterwards made a codicil confirming his will, but made no mention of the leasehold property:—*Held:* the mtge. debt did not pass to the legatee of the leasehold property.—*Re* RICHARDS, JONES *v.* REBBECK (1921), 90 L. J. Ch. 298; 124 L. T. 597; 65 Sol. Jo. 342.

Bequest of mortgage debt.]—*See* Sub-sect. 4, *post.*

SUB-SECT. 4.—EFFECT OF BEQUEST OF MORTGAGE DEBT.

See, now, Law of Property Act, 1925 (c. 20), ss. 85–120.

1319. Specific bequest of debt—Carries land.]—Mtge. is a charge upon the land, & whatever words in a will would give the money, will carry the land along with it.—MARTIN d. WESTON *v.* MOWLIN (1760), 2 Burr. 969; 97 E. R. 658.

Annotations:—**Distd.** Doe d. Freestone *v.* Parratt (1794), 5 Term Rep. 652; Woodhouse *v.* Meredith (1816), 1 Mer. 450. **Expld.** Duffield *v.* Elwes (1827), 1 Bli. N. S. 497. **Mentd.** Roe d. Pye *v.* Bird (1779), 2 Wm. Bl. 1301.

1320. —— ——.]—Construction of a will, as passing an estate, originally a mtge., but foreclosed; testator's intention appearing to dispose of all his interest, though inaccurately mentioned, both as land mtged., & as money due on mtge.

Will of mtgee. disposing of the money carries his interest in land.—SILBERSCHILDT *v.* SCHIOTT (1814), 3 Ves. & B. 45; 35 E.

Annotations:—**Refd.** *Re* King's Mortgage (1852), 5 De G. & Sm. 644; Heath *v.* Pugh (1881), 6 Q. B. D. 345.

1321. —— ——.]—Gift of a mtge. security for money will pass the fee, if the estate be mortgaged in fee.—RENVOIZE *v.* COOPER (1822), 6 Madd. 371; 56 E. R. 1133.

Annotations:—**Consd.** Doe d. Guest *v.* Bennett (1851), 6 Exch. 892; *Re* King's Mortgage (1852), 5 De G. & Sm. 644. **Folld.** Rippen *v.* Priest (1862), 13 C. B. N. S. 308. **Refd.** Mather *v.* Thomas (1833), 6 Sim. 115.

1322. —— Carries arrears of interest at date of death.]—Testator by his will bequeathed as follows "To my son William I give all my interest & claim on household property in Percy Street etc. belonging to the successors of the late J. H. on which I have a mtge. of £1,500: also all my claims on the shops & houses situated etc. occupied by etc. likewise all moneys that I may have advanced for him at any time, to him his heirs & assigns for ever." At the time of testator's death there were certain arrears of interest outstanding on the mtge. of £1,500 which were claimed from the son, pltf., by deft. as extrix. She furthermore claimed a sum

for repairs of the mtged. property done in testator's lifetime :—*Held :* (1) the arrears of interest on the mtge. due at testator's death passed with the principal to the son, & not to deft. as extrix. ; (2) deft. as extrix., & not pltf. was liable for the repairs done in the lifetime of testator.—GIBBON *v.* GIBBON (1853), 13 C. B. 205 ; Saund. & M. 94 ; 22 L. J. C. P. 131 ; 20 L. T. O. S. 260 ; 17 J. P. 151 ; 17 Jur. 416 ; 138 E. R. 1176.

Annotations :—Generally, **Mentd.** Leidemann *v.* Schultz (1853), 14 C. B. 38 ; Foster *v.* Smith (1856), 18 C. B. 156 ; Schroder *v.* Ward (1863), 13 C. B. N. S. 410.

1323. —— Liability of legatee—For repairs to property done by testator.]—GIBBON *v.* GIBBON, No. 1322, *ante*.

1324. General bequest of all securities for money —Nothing to show intention to pass freehold estate.] —(1) Lands of which A. is mtgee. in fee will not pass under a general devise of all A.'s lands, if the devise be subject to uses which A. was not entitled to declare in respect of the mtged. lands.

(2) A bequest by A. to B., his exors., administrators, & assigns, of A.'s stock-in-trade, ready money, & securities for money, debts, personal estates & effects, will not carry A.'s legal estate in a mtge. in fee, although a trust be declared that B., his heirs, exors., administrators & assigns, shall invest the produce thereof, & of A.'s real estates, devised to B. by a separate clause, which does not affect the mtged. property, in the purchase of land, to be conveyed to certain uses in strict settlement.

The general rule is, that you must first have words sufficient to pass the mtge. property ; secondly, that it must not be limited to uses inapplicable to such property. . . . You have not persuaded me that the words "securities for money" are sufficient to pass the estate in lands in mtge., where the limitation is to the legatee, his exors., administrators & assigns, & whereon the face of the will there is nothing which denotes an intention that under these words a freehold interest should pass (BAILEY, J.).

(3) Mtgor. remaining in possession is the agent of the mtgee. (BAILEY, J.).—GALLIERS *v.* MOSS (1829), 9 B. & C. 267 ; 4 Man. & Ry. K. B. 268 ; 7 L. J. O. S. K. B. 109 ; 109 E. R. 99.

Annotations :—As to (2) **Distd.** *Re* Tyas, *Ex p.* Barber (1832), 5 Sim. 451 ; Mather *v.* Thomas (1833), 6 Sim. 115. **N.F.** *Re* King's Mortgage (1852), 5 De G. & Sm. 644 ; Knight *v.* Robinson (1856), 2 K. & J. 503. **Refd.** Doe d. Guest *v.* Bennett (1851), 6 Exch. 892.

1325. —— Coupled with trust for sale.]—Devise of all testator's freehold estates & all his farming stock, ready money, bills, bonds, notes & other securities for money, & all the residue of his personal estate to trustees, their heirs, exors., etc., in trust to sell his real estates, & to sell, get in & convert into money all his personal estate, will pass a mtge. in fee.—*Re* TYAS, *Ex p.* BARBER (1832), 5 Sim. 451 ; 58 E. R. 407.

*Annotations :—***Refd.** *Re* King's Mortgage (1852), 5 De G. & Sm. 644 ; Knight *v.* Robinson (1856), 2 K. & J. 503.

1326. —— Subject to payment of debts.]—A residuary devise of all testator's estate, personal & real, moneys & securities although made, subject to the payment of his debts, passes the legal estate in premises of which testator was mtgee. in fee.—*Re* FIELD'S MORTGAGE (1851), 9 Hare, 414 ; 21 L. J. Ch. 175 ; 15 Jur. 1004 ; 68 E. R. 570.

1327. —— ——.]—Testator, being a mtgee. of lands in fee, gave all his moneys, "securities for money," & all his personal estate & effects to his wife, her exors., administrators & assigns absolutely, she paying thereout all his debts ; & he appointed his wife extrix. Testator's heir at law was an infant. The mtgor. sold the estate. The mtgor. & the extrix. of the mtgee. petitioned the ct. asking that the mtged. lands might be legally vested in the extrix. to enable her to convey in the place of the infant heir :—*Held :* the legal estate passed to the extrix. by the will, & the ct. declined to make the order asked.—*Re* KING'S MORTGAGE (1852), 5 De G. & Sm. 644 ; 16 Jur. 1153 ; 64 E. R. 1281 ; *sub nom. Re* KING'S ESTATE, 21 L. J. Ch. 673.

*Annotations :—***Folld.** *Re* Walker's Estate (1852), 21 L. J. Ch. 674. **Apld.** *Ex p.* Cautley (1853), 22 L. J. Ch. 391. **Folld.** Knight *v.* Robinson (1856), 2 K. & J. 503 ; Rippon *v.* Priest (1862), 13 C. B. N. S. 308.

1328. —— ——.]—Testator devised to his wife & his friends L. & B., whom he also appointed extrix. & exors., "all that his copyhold estate, etc., & all moneys in the funds, & securities for money, debts on mtge., & all other his estate & effects," etc., subject to the payment of all his just debts & funeral & testamentary expenses, in trust for the wife for life, etc. Part of the property consisted of a mtge. in fee :—*Held :* the devisees took the fee in the mtged. land, notwithstanding there were in other parts of the will directions as to what the other two trustees were to do with the "mtge debt" after the decease of the wife. The legal interest in land mortgaged in fee will pass under the words "mtges. or securities for money." —RIPPEN *v.* PRIEST (1862), 13 C. B. N. S. 308 ; 32 L. J. C. P. 65 ; 9 Jur. N. S. 649 ; 143 E. R. 123.

*Annotation :—***Folld.** Garnham *v.* Skipper (1885), 53 L. T. 940.

1329. —— Subject to payment of debts & legacies.]—Testator by his will in 1832, gave all his money, securities for money, household furniture, etc., & all other the rest & residue of his personal estate & effects, subject to the payment of debts & legacies, to his wife, her exors., administrators & assigns absolutely :—*Held :* the legal estate of certain mtged. hereditaments, which was vested in testator at the date of his will, passed under the term "securities for money" ; & the concurrence of testator's heir was not necessary to make an effectual conveyance of the mtged. premises to a purchaser. *Galliers* v. *Moss*, No. 1324, *ante*, must be treated as overruled by subsequent decisions.—KNIGHT *v.* ROBINSON (1856), 2 K. & J. 503 ; 69 E. R. 881.

*Annotation :—***Refd.** Martin *v.* Laverton (1870), L. R. 9 Eq. 563.

1330. ——.]—By indentures of lease & release, A. mortgaged certain farms & lands to B. in fee. B., by will, after leaving an annuity charged on his real & personal estate, & other specific devises of real property, devised all his messuages or dwelling-houses, buildings, chattels real, ready money, securities for money, all debts owing & personal estate of any nature or kind whatsoever, save what were thereinbefore otherwise disposed of, to two trustees & the survivor, their heirs, exors., administrators, & assigns, upon trust to invest so much of the property as consisted of money, in the funds or real securities, & to pay the dividends, & also the rents & profits of the last devised chattels real, to C. for life ; &, after his decease, to divide the residue, or transfer the securities then subsisting for the same, unto & among the children of C. equally, share & share alike :—*Held :* the legal estate in the premises comprised in the indentures of mtge. passed under B.'s will to the trustees therein named, by the devise of testator's securities for money to them & their heirs ; & therefore it passed to the mtgor., under a conveyance by the surviving trustee under the will, upon the payment of the mtge. money & interest due thereon by such mtgor.—MATHER *v.* THOMAS (1833), 10 Bing. 44 ;

Sect. 3.—*Devolution on death: Sub-secs.* 4, 5 & 6. *Part IX. Sect.* 1: *Sub-sect.* 1, *A.* (*a*), (*b*) & (*c*).]

6 Sim. 115; 3 Moo. & S. 684; 2 L. J. C. P. 234; 131 E. R. 821.

Annotations:—**Consd.** Doe d. Guest *v.* Bennett (1851), 6 Exch. 892; *Re* King's Mortgage (1852), 5 De G. & Sm. 644.

1331. ——.]—Testator, a mtgee. in fee of real estate, gave & bequeathed to A. & B. all & singular his household furniture, goods, plate, linen & utensils whatsoever, & all & every other his goods & chattels, stock, stock-in-trade, moneys, debts & securities for money, & all & every other his personal estate & effects whatsoever & wheresoever, upon trust to get in his debts & sell his personal estate, & hold the money arising therefrom upon the trusts therein mentioned:—*Held:* under these words, the legal estate in the mtged. property passed to the trustees.—*Re* WALKER'S ESTATE (1852), 21 L. J. Ch. 674.

1332. ——.]—T. by her will gave all her "money & securities for money of every description":—*Held:* (1) these words did not carry Bank of England stock, shares in a canal co. or moneys invested on mtge. by & in the names of the trustees of the will of F., a prior testatrix, of whom T. was sole extrix., & to whose estate T. was entitled as a residuary legatee subject to an outstanding unpaid legacy; (2) the same words carried (*a*) moneys which had been advanced on mtge. by F. herself, & allowed by her trustees for sixteen years after her death to remain invested on the same mtge.; & (*b*) moneys which had been advanced by F. on mtge., & on the mtge. having been paid off after her death had been received by one of her trustees as agent for T.—OGLE *v.* KNIPE (1869), L. R. 8 Eq. 434; 38 L. J. Ch. 692; 20 L. T. 867; 17 W. R. 1090.

Annotations:—*As to* (1) **Consd.** *Re* Maitland, Chitty *v.* Maitland (1896), 74 L. T. 274; *Re* Hutchinson, Crispin *v.* Hadden (1919), 88 L. J. Ch. 352; *Re* Taylor, Taylor *v.* Tweedie (1922), 91 L. J. Ch. 801. **Refd.** *Re* Pringle, Walker *v.* Steuart (1881), 45 L. T. 11; *Re* Beavan, Beavan *v.* Beavan (1885), 53 L. T. 245; *Re* Rayner, Rayner *v.* Rayner, [1904] 1 Ch. 176.

1333. ——.]—A gift by will of all securities for money will pass the legal estate of mtges. held by testator.—GARNHAM *v.* SKIPPER (1885), as reported in, 53 L. T. 940.

1334. Bequest of moneys upon mortgage.]—A devise was as follows:—"I leave my wife R. H. to receive all moneys upon mtges., & on notes out at interest, &, at my wife's decease, I leave my niece, M. B. to bury my wife decently, & to pay all my wife's debts, & to take all that remains of my property, land or personal property":—*Held:* the lands held by testator as mtgee. passed to the wife under the words "all moneys upon mtges."—DOE d. GUEST *v.* BENNETT (1851), 6 Exch. 892; 20 L. J. Ex. 323; 155 E. R. 808.

Annotations:—**Distd.** *Ex p.* Cautley (1853), 22 L. J. Ch. 391. **Foll.** *Re* Arrowsmith's Trusts, *Re* Thompson (1858), 27 L. J. Ch. 704. **Refd.** *Re* King's Mortgage (1852), 5 De G. & Sm. 644; Knight *v.* Robinson (1856), 2 K. & J. 503.

1335. ——.]—The gift by the will of a mtgee. in fee of estates on trust for sale, & of money on securities, does not carry the legal estate in the mtged. property.—*Ex p.* CAUTLEY (1853), 22 L. J. Ch. 391; 1 W. R. 158; *sub nom. Re* CANTLEY, 17 Jur. 124.

1336. ——.]—B. gave all his real & personal estate & effects of what nature or kind soever to C. upon trust to pay to his wife for his life the rents of his real estate & the interest on all sums due to him on mtges., bond, note or other security & after her death to get in all debts owing to him upon any security & pay the same over to other persons. C. died intestate leaving E. his eldest son heir-at-law, a person of unsound mind & an infant:—*Held:* the legal estate in the mtged. property passed to C. & he was a trustee & persons were appointed to convey the property comprised in the mtges. to the purchasers thereof under Trustee Act, 1850 (c. 60), ss. 3, 20.—*Re* ARROWSMITH'S TRUSTS, *Re* THOMPSON (1858), 27 L. J. Ch. 704; 31 L. T. O. S. 243; 4 Jur. N. S. 1123; 6 W. R. 642, L. JJ.

Annotations:—**Mentd.** *Re* Edwards, M'Neile *v.* Chambers (1879), 48 L. J. Ch. 233; *Re* J. M. (1898), 79 L. T. 459; *Re* M., [1899] 1 Ch. 79.

1337. —— **Charge on estate not included.**]—A tenant for life of a real estate bequeathed all money due to him on mtge.:—*Held:* a charge on the estate of £10,000, to which testator was entitled & which was secured by means of a term vested in a trustee, did not pass as a mtge.—POULETT (EARL) *v.* HOOD (1866), 35 Beav. 234; 35 L. J. Ch. 253; 13 L. T. 783; 12 Jur. N. S. 85; 14 W. R. 298; 55 E. R. 885.

Gifts for charitable purposes.]—*See* CHARITIES, Vol. VIII., pp. 267–270, No. 293–314, 325–351.

SUB-SECT. 5.—EFFECT OF EXTINGUISHMENT OF EQUITY OF REDEMPTION.

1338. Effect of foreclosure—Whether passing as realty—Mortgagee not in possession.]—AWDLEY *v.* AWDLEY, No. 1305, *ante*.

1339. —— —— **Land described as mortgaged property.**]—SILBERSCHILDT *v.* SCHIOTT, No. 1320, *ante*.

1340. ——————.]—An estate, which testator holds as mtgee., will not pass under a general devise of all lands to uses in strict settlement although testator at the making of his will had obtained a decree for an account in a bill of foreclosure; for the estate does not lose the quality of a mtge. until the final order of foreclosure.

A devise of all lands which testator may hold in mtge. at his death, will not pass an estate which was held in mtge. by testator at the making of his will; but as to which he had obtained a final order of foreclosure before his death.

At the time of his will, the . . . estates were not mtges. for chattel interests; they had become the fee simple estates of testator, by the order of foreclosure of Feb. 5, 1807, & could not pass by any antecedent will (*per* CUR.).—THOMPSON *v.* GRANT (1819), 4 Madd. 438; 56 E. R. 767.

1341. —— **Foreclosure nisi.**] — GARRET *v.* EVERS, No. 1315, *ante*.

——.]—*See* Part X., Sect. 2, *post*.

1342. —— **Before death of mortgagee.**] — L. was the mtgee. in fee of land of which he took possession in 1861. He remained in possession till his death in 1864. By his will he made his widow extrix. & tenant for life, & subject thereto died intestate, leaving I. his heir. The widow & I. were entitled to L.'s personalty. On L.'s death his widow took possession, which she retained until her death in 1900. I. died in 1880, having been of unsound mind ever since the death of L. He died intestate, & P. was his administrator & A. & X. were his coheiresses:—*Held:* (1) the mtgor. was statute-barred on Jan. 1, 1879, when Real Property Limitation Act, 1874 (c. 57), s. 7, came into force; (2) the one-half share of the land in which I. was beneficially interested vested in him as realty & descended on his death to his coheiresses.—*Re* LOVERIDGE, PEARCE *v.* MARSH,

[1904] 1 Ch. 518; 73 L. J. Ch. 15; 89 L. T. 503; 52 W. R. 138; 48 Sol. Jo. 33.

1343. Equity statute barred—After death of mortgagee.]—*Re* LOVERIDGE, DRAYTON *v.* LOVERIDGE, No. 1311, *ante*.

SUB-SECT. 6.—MORTGAGE OF COPYHOLDS.

See, now, Law of Property Act, 1922 (c. 16), s. 128 (1); Administration of Estates Act, 1925 (c. 23), s. 1.

The mortgagor's estate.]—*See* COPYHOLDS, Vol. XIII., pp. 114, 115, Nos. 1447–1454.

The mortgagee's estate.]—*See* COPYHOLDS, Vol. XIII., p. 115, Nos. 1457–1459.

Right of lord to escheat—On death of mortgagee.]—*See* COPYHOLDS, Vol. XIII., p. 150, Nos. 1955–1957.

Part IX.—Rights and Liabilities of the Mortgagee.

SECT. 1.—RIGHT TO PROTECT SECURITY.

SUB-SECT. 1.—AGAINST MORTGAGOR.

A. As to Title.

(a) Right to have Title Perfected.

1344. Defective surrender of copyholds.]—A defective surrender of copyhold land for securing a sum of money, which was become void for want of being presented in due time, made good against a subsequent purchaser with notice.—BLENKARNE *v.* JENNENS (1708), 2 Bro. Parl. Cas. 278; 1 E. R. 943, H. L.; *affg.* S. C. *sub nom.* JENNINGS *v.* MOORE, 2 Vern. 609, L. C.

Annotations:—**Refd.** Ross *v.* Army & Navy Hotel Co. (1886), 34 Ch. D. 43. **Mentd.** Le Neve *v.* Le Neve (1747), Amb. 436; Dresser *v.* Norwood (1863), 14 C. B. N. S. 574.

1345. —— Purchaser with notice.]—OXWITH *v.* PLUMMER (1708), as reported in Gilb. Ch. 13; 25 E. R. 10, L. C.

Annotations:—**Mentd.** Jones *v.* Smith (1841), 1 Hare, 43; Barnhart *v.* Greenshields (1853), 9 Moo. P. C. C. 18 Holmes *v.* Powell (1856), 8 De G. M. & G. 572.

Enforcement of covenant to surrender.]—*See* COPYHOLDS, Vol. XIII., p. 115, Nos. 1460–1466.

Seizure under bill of sale.]—*See* BILLS OF SALE, Vol. VII., pp. 135 *et seq.*

(b) Right to Benefit of Title Subsequently Accrued to Mortgagor.

1346. General rule.]—The doctrine of the Ct. of Ch. is that if a man contracts to convey, or to mortgage, to settle an estate, & 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 (LORD CRANWORTH, C.).—SMITH *v.* OSBORNE (1857), 6 H. L. Cas. 375; 30 L. T. O. S. 57; 3 Jur. N. S. 1181; 6 W. R. 21; 10 E. R. 1340, H. L.

Annotations:—**Apld.** *Re* Harper's Settlmt., Williams *v.* Harper, [1919] 1 Ch. 270. **Mentd.** *Re* Keep's Will (1863), 32 Beav. 122; Ford *v.* Tynte (1865), 34 L. J. Ch. 452; Hurry *v.* Morgan (1866), L. R. 3 Eq. 152; *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252; Waite *v.* Littlewood (1872), 8 Ch. App. 70; *Re* Johnson, Hickman *v.* Williamson (1884), 53 L. J. Ch. 1116; Askew *v.* Askew (1888), 57 L. J. Ch. 629; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525; Powell *v.* Hellicar, [1919] 1 Ch. 138.

1347. Defective title of mortgagor—Title subsequently perfected.]—A. & his wife being assignees of a lease, mortgage to B.; A. becomes insolvent, & the title not being good, C. who had the real title, in compassion to A.'s wife, makes a lease in trust for her. Decreed the trustees to make a new mtge. to B.—SEABOURNE *v.* POWEL (1686), 2 Vern. 11; 23 E. R. 619.

Annotation:—**Refd.** Smith *v.* Osborne (1857), 6 H. L. Cas. 375.

1348. —— ——.]—The covenants for title in a mtge. of a freehold estate, whether read in connection with the word "grant" or not, do not amount to that precise averment that the mtgor. is seised of the legal estate which is necessary to create an estoppel as against him & persons claiming under him.

A., by deed, purported to grant a freehold estate to B. by way of mtge. The deed contained no recitals, but there were the usual mtgor.'s covenants for title, including a covenant that the mtgor. "had power to grant the premises in manner aforesaid."

The mtge. was accepted by B. on the faith of certain forged title deeds produced & handed to him by A. At the date of the mtge. A. had not the legal estate nor any interest whatever in the property. Subsequently, however, A. acquired the legal estate & mortgaged it to C.:—*Held*: inasmuch as the mtge. to B. contained no precise averment that A. was seised of the legal estate, no estoppel had been created in favour of B. as against C.—GENERAL FINANCE, MORTGAGE & DISCOUNT CO. *v.* LIBERATOR PERMANENT BENEFIT BUILDING SOCIETY (1878), 10 Ch. D. 15; 39 L. T. 600; 27 W. R. 210.

Annotations:—**Refd.** Low *v.* Bouverie, [1891] 3 Ch. 82; Onward Bldg. Soc. *v.* Smithson, [1893] 1 Ch. 1; Williams *v.* Pluckney (1897), 77 L. T. 700; Poulton *v.* Moore (1913), 83 L. J. K. B. 875. **Mentd.** Matthews *v.* Usher (1899), 68 L. J. Q. B. 988.

1349. Mortgage of share under will—Validity of will disputed—Acquisition of similar share by mortgagor under deed of family arrangement.]—*Re* GREGORY, GASCOIGNE *v.* GREGORY (1912), 134 L. T. Jo. 106.

Accretion to mortgaged property.]—*See* Part IV., Sect. 5, sub-sect. 4, *ante*.

(c) Restraint of Dealings with Legal Estate.

1350. Action to enforce equitable mortgage—Right to interim injunction.]—In an action by an equitable mtgee. for sale or foreclosure the ct. granted an interim injunction to restrain dealing with the legal estate till the next motion day, on an *ex parte* application by pltf.; there being ground for believing that defts. intended to part with the legal estate *pendente lite*.—LONDON & COUNTY BANKING CO. *v.* LEWIS (1882), 21 Ch. D. 490; 47 L. T. 501; 31 W. R. 233, C. A.

Annotation:—**Refd.** Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1901] 2 Ch. 37.

PART IX. SECT. 1, SUB-SECT. 1.—A. (a).

d. *Covenant for further assurance.*]—The extended covenant for further assurances under Land Titles Act, if applicable to a mtge. under the Act, can be so by analogy only, & the meaning thereof would seem to be that after default the mtgor. will do any act or execute any instrument necessary to perfect the security & support the mtge.—RITCHIE *v.* EDMONTON MILLING CO. (Alta.), [1918] 1 W. W. R. 537.—**CAN.**

Sect. 1.—*Right to protect security: Sub-sect.* 1, *B. & C.; sub-sect.* 2, *A., B., C. & D.*]

B. Preservation of Mortgaged Property.

Right to repair by mortgagee in possession.]—*See* Part XVI., Sect. 2, sub-sect. 4, B., *post.*

1351. Mortgage of tolls—Removal of toll gates by trustees—Under statutory powers.]—Trustees of an Act of Parliament, & under a general Act, were empowered to remove any gates, toll houses, etc., as they should think fit; but so long as any money should be due on mtge. of the tolls, the tolls should not be reduced without consent. The trustees determined on the removal of a certain gate, & a mtgee. of tolls filed a bill for an injunction to restrain them, but the motion was refused without costs.

The trustees derive their powers from the Acts of Parliament, local & general, which Acts give them very enlarged discretion as to the erection & removal of gates. It would be a monstrous injustice were the ct. to decide that public trustees, after having effected a security upon the tolls, should be thereby deprived of the powers granted to them, & which they are intrusted to exercise for the public benefit. Pltf., if right in his view of the law, may proceed in that jurisdiction by *mandamus* if he thinks proper (TURNER, V.-C.).—COOPER *v.* COOPER (1852), 18 L. T. O. S. 204.

Annotation :—**Expld.** Crewe *v.* Edleston (1857), 1 De G. & J. 93.

1352. —— ——.]—The trustees of a turnpike road called the Old Road, obtained Parliamentary powers to make another road called the New Road. The moneys to be received from the old road were to be applied in discharge of interest upon debts secured upon the old road, then in the maintenance of the old road, & finally in reducing the principal of the debts. The moneys to be received from the new road were to be applied in making & keeping the new road, then in paying interest, & finally in reducing the principal moneys secured upon the new road. Pltf. lent the trustees £2,000 to form the new road, which was secured by mtge. of the tolls. The trustees of the old road were also trustees of the new road. The interest on the £2,000 was paid for some time, when the trustees alleged that the tolls of the new road were insufficient to pay the interest, & they declined to pay any more. They also removed some bars on the old road, & reduced the rate of the tolls. Upon bill filed by pltf. :—*Held :* (1) his mtge. extended over the tolls, both of the new & old road; (2) he was entitled to an injunction to restrain the trustees from reducing the tolls, but not, upon the evidence, from removing the toll gates.—CREWE (LORD) *v.* EDLESTON (1857), 1 De G. & J. 93; 29 L. T. O. S. 241; 21 J. P. 579; 3 Jur. N. S. 1061; 44 E. R. 657, L. JJ.

1353. —— **Reduction of tolls by trustees.**]—CREWE (LORD) *v.* EDLESTON, No. 1352, *ante.*

1354. Mortgage of calls by company—Subsequent call including mortgaged call.]—A co. made a call on their shareholders, & then mortgaged the call to secure a debt. Before this call was fully paid by the shareholders, the co. was ordered to be wound up. A further call being necessary to pay the debts of the co., it was arranged that, in order to save the expense of bringing separate actions against each shareholder for the arrears of the first call, a new call should be made so as to include the first call, & the further sum required. This was accordingly done. A contributory paid, on account of this new call, a sum which did not amount to what he owed in respect of the first call :—*Held :* there could be no apportionment, but the whole of the sum so paid belonged to the mtgees. of the first call.—*Re* HUMBER IRONWORKS CO., *Ex p.* WARRANT FINANCE CO. (1868), 16 W. R. 667, L. JJ.

C. Benefit of Fire Insurance.

Fire insurance generally.]—*See* INSURANCE, Vol. XXIX., pp. 305 *et seq.*

See, now, Law of Property Act, 1925 (c. 20), s. 108 (3) (4).

1355. Covenant by mortgagor to expend insurance moneys on reinstatement.]—A lessee in possession is not entitled as against his mtgee. to a lien on the policy moneys for repairs done by him after a fire.

A lessee who had covenanted to insure against fire in the joint names of himself & his lessor, with a proviso that the policy moneys should be expended in reinstating the premises, assigned them by way of mtge., with a power of sale under which the mtgee. sold. The mtge. deed did not notice the policy. The premises were subsequently damaged by fire & were reinstated by the mtgee. On a claim filed by the mtgee. & his vendee, the mtgor. was decreed to deliver up the policy & join with the lessor in signing the receipt to the insurance office to enable the mtgee. to receive the money payable under the policy.—GARDEN *v.* INGRAM (1852), 23 L. J. Ch. 478; 20 L. T. O. S. 17, L. C.

Annotations :—**Distd.** Lees *v.* Whiteley (1866), L. R. 2 Eq. 143. **Consd.** Rayner *v.* Preston (1881), 18 Ch. D. 1.

1356. ——.]—(1) A. was the first mtgee. of Blackacre, & C. was the first mtgee. of Whitacre & the second mtgee. of Blackacre. A. & C. demised both properties together, reserving the whole rent to A. The parties did not seem to have observed the distinction between their rights in respect of the two properties. The ct. relieved C. from the mistake, by ordering A. to pay him an apportionment of the whole rent in respect of Whitacre.

(2) In 1841 A. mortgaged a wharf to B., & covenanted to lay out the insurance money in rebuilding the premises. A fire occurred in 1844, & A., having in 1845 purchased an adjoining slip of land, laid out the money in building, partly on both parcels. In 1846 A. mortgaged the slip to C. who had notice of the first mtge. The claim of B. to have the benefit of the expenditure of the insurance moneys on the slip was rejected by the ct.—HARRYMAN *v.* COLLINS (1854), 18 Beav. 11; 23 L. T. O. S. 17; 18 Jur. 501; 2 W. R. 189; 52 E. R. 5, L. JJ.

1357. Covenant by mortgagor to insure—No covenant as to application of insurance money.]—Defts. assigned certain machinery by bill of sale

PART IX. SECT. 1, SUB-SECT. 1.—B.

e. Mortgage of land & mill—Removal of mill.]—A mtge. having been created on land on which was a steam saw-mill, the mtgor. was restrained from removing the machinery, although it was alleged that the property would still remain a sufficient security, for such removal would have changed the character of the premises.—GORDON *v.* JOHNSTON (1868), 14 Gr. 402.—**CAN.**

f. Covenant against cutting timber—Right of mortgagee to bring trover.]—MANN *v.* ENGLISH (1876), 38 U. C. R. 240.—**CAN.**

g. Removal of house from mortgaged premises—Injunction to compel return.]—J. I. CASE THRESHING MACHINE CO. *v.* BERARD (Man.) (1911), 17 W. L. R. 91.—**CAN.**

h. Right to retain expenses out of proceeds of sale.]—Land Transfer Act, 1885, does not preclude a mtgee. from retaining out of the proceeds of a sale of the mtged. property expenses incurred for the preservation of the property.—NATIONAL BANK OF NEW ZEALAND *v.* BARCLAY (1899), 17 N. Z. L. R. 819.—**N.Z.**

PART IX. SECT. 1, SUB-SECT. 1.—C.

1357 *i. Covenant by mortgagor to insure—No covenant as to application of insur-*

to secure a sum of money advanced by pltf. The deed contained a covenant to insure but no provision for the application of the policy moneys in case of fire in liquidation of the mtge. debt. The machinery was burnt & defts. became bkpts.: —*Held:* pltf. had no claim to the benefit of the policy as against defts.—LEES *v.* WHITELEY (1866), L. R. 2 Eq. 143; 35 L. J. Ch. 412; 14 L. T. 472; 14 W. R. 534.

Annotations:—**Refd.** Rayner *v.* Preston (1881), 18 Ch. D. 1; Sinnott *v.* Bowden, [1912] 2 Ch. 414.

SUB-SECT. 2.—AGAINST THIRD PARTIES.

A. When Title of Mortgagor Impeached.

1358. General rule—Right of mortgagee to defend title at expense of mortgagor.]—A mtgee. in possession is not obliged to lay out money any further than to keep the estate in necessary repair. He may add to the principal of his debt a sum expended in support of the mtgor.'s title where it is impeached, & it shall carry interest.—GODFREY *v.* WATSON (1747), 2 Atk. 517; 26 E. R. 1098.

Annotations:—**Refd.** Leith *v.* Irvine (1833), 1 My. & K. 277. **Mentd.** Booth *v.* Leycester, Palmer *v.* Leycester (1836), Donnelly, 65; Barrett *v.* Hartley (1866), 14 W. R. 684.

1359. —— ——.]—A mtgee. is entitled to claim the amount of any costs incurred by him in protecting the title of the mtgor., & in the preservation of the property, but he has no right by his expenditure so to increase the value of the mtged. estate, as to place it out of the power of the mtgor. to redeem.—SANDON *v.* HOOPER (1843), 6 Beav. 246; 12 L. J. Ch. 309; 49 E. R. 820; *on appeal* (1844), 14 L. J. Ch. 120, L. C.

Annotations:—**Refd.** Eyre *v.* Hughes (1876), 2 Ch. D. 148; Tipton Green Colliery Co. *v.* Tipton Moat Colliery Co. (1877), 7 Ch. D. 192; Shepard *v.* Jones (1882), 21 Ch. D. 469; Bright *v.* Campbell (1885), 54 L. J. Ch. 1077. **Mentd.** Pelly *v.* Wathen (1849), 7 Hare, 351.

1360. —— ——.]—PARKER *v.* WATKINS, No. 1361, *post.*

Costs, charges & expenses.]—*See* Part XVIII., *post.*

B. When Title of Mortgagee Impeached.

1361. General rule—Mortgagee must defend at own expense.]—Where a mtgee. has been put to expenses in defending the title to the estate, the defence being for the benefit of all parties interested, he is entitled to charge such expenses against the estate; but if his title to the mtge. only is disputed, the costs of his defence should not be borne by the estate as against parties interested in the equity of redemption, unless they can be shown to have concurred in or assisted the litigation.—PARKER *v.* WATKINS (1859), John. 133; 33 L. T. O. S. 270; 70 E. R. 369.

Annotations:—**Refd.** Walters *v.* Woodbridge (1878), 7 Ch. D. 504. **Mentd.** *Re* Keane, Lumley *v.* Desborough (1871), L. R. 12 Eq. 115.

Costs, charges & expenses.]—*See* Part XVIII., *post.*

C. Right to Protect Lease from Forfeiture.

See, now, Law of Property Act, 1925 (c. 20), s. 146.

For non-payment of rent.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 482, No. 6310.

—— **Mortgagee from sub-lessee.**]—*See* LANDLORD & TENANT, Vol. XXXI., p. 493, Nos. 6403, 6404, 6407.

Breach of covenants other than for payment of rent.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 488, No. 6358.

D. Right to Maintain Trespass.

1362. Right to maintain action before entry—Mortgage by demise.]—A tenant for years of a house demised it, by indenture of mtge., dated Mar. 24, to the mtgee., to hold henceforth for the residue of the term, less one day, subject to the proviso thereinafter mentioned; & he also sold & transferred the fixtures & chattels therein to the mtgee., to hold for his own use & benefit, but subject to the proviso thereinafter contained. The deed contained a proviso for reconveyance, on payment of the mtge. money, on June 24, then next, & also a proviso that, on non-payment on that day, it should be lawful for the mtgee. to enter upon, & receive & take the rents & profits of the said leasehold & other premises, &, if he should think proper, of his sole authority, to sell or underlet the premises, & to sell the fixtures & chattels:—*Held:* the mtgee.'s right to take possession did not attach until June 24, & he could not maintain trespass for an entry, or for an *asportavit* of the fixtures & chattels before that day by a stranger.—WHEELER *v.* MONTEFIORE (1841), 2 Q. B. 133; 1 Gal. & Dav. 493; 11 L. J. Q. B. 34; 6 Jur. 299; 114 E. R. 53.

Annotations:—**Distd.** Doe d. Parsley *v.* Day (1842), 2 Q. B. 147; Rogers *v.* Grazebrook (1846), 8 Q. B. 895. **Mentd.** White *v.* Morris (1852), 11 C. B. 1015; Evans *v.* Wright (1857), 27 L. J. Ex. 50; Barker *v.* Furlong, [1891] 2 Ch. 172.

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ance money.]—CARR *v.* FIRE ASSURANCE ASSOCN. (1887), 14 O. R. 487.—**CAN.**

k. *Insurance money coming to mortgagee — Duty to rebuild.*] — Where a mtge. deed contains no provision as to the application or appropriation of insurance money coming to the mtgee. before the time appointed for payment of the mtge. money the mtgor. is entitled to have the money expended in rebuilding & replacing all parties, as near as may be as they stood before the fire.—AUSTIN *v.* STORY (1863), 10 Gr. 306.—**CAN.**

l. *Application of insurance moneys in reduction of principal.*]—EDMONDS *v.* HAMILTON PROVIDENT & LOAN SOCIETY (1890), 19 O. R. 677; 18 A. R. 347.—**CAN.**

m. *Right of mortgagee to sue on policy.*]—*Semble:* a mtgee. of property may sue on a contract of insurance of the property.—TRITES-WOOD CO., LTD. *v.* WESTERN ASSURANCE CO. (1910), 15 B. C. R. 405.—**CAN.**

n. ——.] — A mtgee. to whom under the terms of a fire insurance policy the loss thereunder is made payable is entitled to sue upon the policy.—*Re* LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD. & CANADIAN FIRE INSURANCE CO. & KADLAC, [1918] 2 W. W. R. 727; 13 Alta. L. R. 498.—**CAN.**

PART IX. SECT. 1, SUB-SECT. 2.—C.

o. *For non-payment of rent.*] — A mtgee. of mining leasehold, in possession is bound to pay rent to preserve property being entitled to charge mtgor. therefor.—UNITED HAND-IN-HAND & BAND OF HOPE CO., REED. *v.* NATIONAL BANK OF AUSTRALASIA (1880), 6 V. L. R. (Eq.) 60, 198.—**AUS.**

p. ——.]—If a mtgor. of leasehold premises allow an arrear of rent to fall due, & an ejectment to be brought by the landlord, the mtgee. may pay the arrear & costs, & apply for a receiver. —KELLY *v.* STAUNTON (1826), 1 Hog. 393.—**IR.**

q. ——.]—Where a tenant, having mortgaged his lease, has neglected to pay rent, & costs, or file his bill, according to Tenantry Acts, within six months from the time of execution executed on an ejectment brought by the landlord, the mtgee. has a further period of three months within which he may, by payment of rent & costs, or filing his bill & lodging the money in ct., save the lease from forfeiture.—O'REILLY *v.* FEATHERSTON (1830), 2 Dow, & Cl. 39; 6 E. R. 644.—**IR.**

PART IX. SECT. 1, SUB-SECT. 2.—D.

r. *Necessity for possession.*] — A mtgee. in fee of land, who is not in possession, cannot maintain trespass *de bonis asportatis* against the sheriff for seizing, under an execution against the mtgor., logs cut by him with the mtgee.'s permission, no delivery of the logs having been made to the mtgee. —DESBRISAY *v.* MCPHELIM (1862), 5 All. 327.—**CAN.**

t. ——.] — Mtgees. out of possession, after their interest in the land has ceased to exist, cannot maintain an action for trespass to the land committed while they held the title, or recover the value of property severed during the same period.—BROWN *v.* BROOKFIELD (1892), 24 N. S. R. 476; 22 S. C. R. 398.—**CAN.**

s. ——.] — The question whether there has been sufficient "possession" by a mtgee. to support an action of trespass must be considered in every case with reference to its peculiar

Sect. 1.—Right to protect security: Sub-sect. 2, D., E., F., G. & H. Sect. 2: Sub-sect. 1.]

1363. Trespass committed before entry—Relation back of mortgagee's title on entry.]—After entry by a mtgee. of land his right of possession relates back to the time at which his legal right to enter accrued, so as to enable him to support an action against a wrongdoer for a trespass committed at a time antecedent to the entry.—OCEAN ACCIDENT & GUARANTEE CORPN. *v.* ILFORD GAS CO., [1905] 2 K. B. 493; 74 L. J. K. B. 799; 93 L. T. 381; 21 T. L. R. 610, C. A.

Annotation:—**Consd.** Elliott *v.* Boynton, [1924] 1 Ch. 236.

E. Right to Maintain Trover, Detinue and Conversion.

1364. Seizure of goods for tolls.]—A. was mtgee. of B. of certain leasehold coal mines & barges, etc. B. afterwards demised the mines, & assigned the barges to C. A. may bring trover against D., who tortiously seized & sold [for unpaid tolls] the barges & part of the produce of the mines.—FRASER *v.* SWANSEA CANAL CO. (1834), 1 Ad. & El. 354; 3 Nev. & M. K. B. 391; 3 L. J. K. B. 153; 110 E. R. 1241.

Annotation:—**Mentd.** Edmands *v.* Best (1862), 7 L. T. 279.

1365. Removal of fixtures.]—The tenant of leasehold premises, assigned them by way of mtge., & afterwards became bkpt. The lease contained a covenant to yield up all fixtures to the messuage belonging or to belong:—*Held:* the fixtures did not pass to the assignees as goods & chattels in the possession, order, & disposition of the bkpt.; & the mtgee. might maintain an action in case as reversioner, against the assignees for removing them.—HITCHMAN *v.* WALTON (1838), 4 M. & W. 409; 1 Horn & H. 374; 8 L. J. Ex. 31; 150 E. R. 1489.

Annotations:—**Refd.** Doe d. Higginbotham *v.* Barton (1840), 11 Ad. & El. 307; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115. **Mentd.** Weeton *v.* Woodcock (1839), 5 M. & W. 143.

1366. Auctioneers—Sale by order of mortgagor.]—A mtgee. of goods can only recover against an auctioneer who has sold them by the direction of the mtgor., the actual damage he has sustained by the injury to his security.—MYERS *v.* MARSH (1883), 1 Cab. & El. 116.

See, also, BILLS OF SALE, Vol. VII., pp. 135 *et seq.*

F. Restraint of Execution against Mortgaged Property.

See COMPANIES, Vol. X., p. 1187, Nos. 8414–8420; CROWN PRACTICE, Vol. XVI., pp. 225, 227, Nos. 161, 181; EXECUTION, Vol. XXI., pp. 502, 563, Nos. 1389–1397.

G. Restraint of Waste.

1367. Removal of fixtures.]—A. & B., carrying on the business of cotton spinners in co-partnership, erect various articles of machinery & other trade fixtures on the premises where the business is carried on, which are the exclusive freehold property of A. The fixtures are paid for out of the funds of the partnership & they are so attached to the building that they cannot be removed without damage to the walls & floors. A. executes a mtge. of the premises & all the fixtures attached or belonging to the premises or partaking of realty; & A. & B. afterwards become bkpt.:—*Held:* these fixtures were not in the order & disposition of A. & B. & the mtgee. was entitled to them.—*Re* ASHTON, *Ex p.* SCARTH (1840), 1 Mont. D. & De G. 240; 9 L. J. Bcy. 35; 4 Jur. 826.

H. Other Cases.

1368. Restrictive covenants—Right of mortgagee to enforce.]—The purchaser of a plot of land, part of an estate laid out for building, covenanted with the vendors, who were the mtgees. in fee in possession of the estate, their heirs & assigns, not to erect any "building" on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road, which houses were about forty feet apart, & about eighty feet from the road. He then erected two houses on his plot, each of which had a bay window projecting three feet beyond the line of the existing houses, & carried from the foundation up to the roof. Upon bill for injunction filed by the transferee from the mtgees. & by a subsequent purchaser from them of a contiguous plot, who had entered into similar covenants:—*Held:* both pltfs. had material interests sufficient to support the suit.—MANNERS (LORD) *v.* JOHNSON (1875), 1 Ch. D. 673; 45 L. J. Ch. 404; 40 J. P. 345; 24 W. R. 481.

Annotations:—**Mentd.** Long Eaton Recreation Grounds Co. *v.* Mid. Ry. (1901), 71 L. J. K. B. 74; Sharp *v.* Harrison, [1922] 1 Ch. 502.

1369. Mortgage including right to use name—No intention by mortgagee to use—Use by assignee of mortgagor.]—The mtgee. of stock-in-trade & goodwill, & of the right to use a name, never having used the name & not intending to use the name, cannot obtain an injunction to restrain persons claiming under the mtgor. from using the name.—BEAZLEY *v.* SOARES (1882), 22 Ch. D. 660; 52 L. J. Ch. 201; 31 W. R. 887.

Mortgage of premises & goodwill—Bankruptcy of mortgagor.]—*See* BANKRUPTCY, Vol. IV., p. 484, Nos. 4352, 4353.

SECT. 2.—RIGHT TO POSSESSION OF MORTGAGED PROPERTY.

SUB-SECT. 1.—WHAT AMOUNTS TO POSSESSION.

See, now, Law of Property Act, 1925 (c. 20), s. 95 (3), (4).

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circumstances.—REID *v.* GALBRAITH (B. C.), [1926] 4 D. L. R. 814; [1926] 3 W. W. R. 500.—**CAN.**

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Sect. 1.—Right to protect security: Sub-sect. 2, D., E., F., G. & H. Sect. 2: Sub-sect. 1.]

1363. Trespass committed before entry—Relation back of mortgagee's title on entry.]—After entry by a mtgee. of land his right of possession relates back to the time at which his legal right to enter accrued, so as to enable him to support an action against a wrongdoer for a trespass committed at a time antecedent to the entry.—OCEAN ACCIDENT & GUARANTEE CORPN. *v.* ILFORD GAS CO., [1905] 2 K. B. 493; 74 L. J. K. B. 799; 93 L. T. 381; 21 T. L. R. 610, C. A.

Annotation:—**Consd.** Elliott *v.* Boynton, [1924] 1 Ch. 236.

E. Right to Maintain Trover, Detinue and Conversion.

1364. Seizure of goods for tolls.]—A. was mtgee. of B. of certain leasehold coal mines & barges, etc. B. afterwards demised the mines, & assigned the barges to C. A. may bring trover against D., who tortiously seized & sold [for unpaid tolls] the barges & part of the produce of the mines.—FRASER *v.* SWANSEA CANAL CO. (1834), 1 Ad. & El. 354; 3 Nev. & M. K. B. 391; 3 L. J. K. B. 153; 110 E. R. 1241.

Annotation:—**Mentd.** Edmands *v.* Best (1862), 7 L. T. 279.

1365. Removal of fixtures.]—The tenant of leasehold premises, assigned them by way of mtge., & afterwards became bkpt. The lease contained a covenant to yield up all fixtures to the messuage belonging or to belong:—*Held:* the fixtures did not pass to the assignees as goods & chattels in the possession, order, & disposition of the bkpt.; & the mtgee. might maintain an action in case as reversioner, against the assignees for removing them.—HITCHMAN *v.* WALTON (1838), 4 M. & W. 409; 1 Horn & H. 374; 8 L. J. Ex. 31; 150 E. R. 1489.

Annotations:—**Refd.** Doe d. Higginbotham *v.* Barton (1840), 11 Ad. & El. 307; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115. **Mentd.** Weeton *v.* Woodcock (1839), 5 M. & W. 143.

1366. Auctioneers—Sale by order of mortgagor.]—A mtgee. of goods can only recover against an auctioneer who has sold them by the direction of the mtgor., the actual damage he has sustained by the injury to his security.—MYERS *v.* MARSH (1883), 1 Cab. & El. 116.

See, also, BILLS OF SALE, Vol. VII., pp. 135 *et seq.*

F. Restraint of Execution against Mortgaged Property.

See COMPANIES, Vol. X., p. 1187, Nos. 8414–8420; CROWN PRACTICE, Vol. XVI., pp. 225, 227, Nos. 161, 181; EXECUTION, Vol. XXI., pp. 562, 563, Nos. 1389–1397.

G. Restraint of Waste.

1367. Removal of fixtures.]—A. & B., carrying on the business of cotton spinners in co-partnership, erect various articles of machinery & other trade fixtures on the premises where the business is carried on, which are the exclusive freehold property of A. The fixtures are paid for out of the funds of the partnership & they are so attached to the building that they cannot be removed without damage to the walls & floors. A. executes a mtge. of the premises & all the fixtures attached or belonging to the premises or partaking of realty; & A. & B. afterwards become bkpt.:—*Held:* these fixtures were not in the order & disposition of A. & B. & the mtgee. was entitled to them.—*Re* ASHTON, *Ex p.* SCARTH (1840), 1 Mont. D. & De G. 240; 9 L. J. Bcy. 35; 4 Jur. 826.

H. Other Cases.

1368. Restrictive covenants—Right of mortgagee to enforce.]—The purchaser of a plot of land, part of an estate laid out for building, covenanted with the vendors, who were the mtgees. in fee in possession of the estate, their heirs & assigns, not to erect any "building" on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road, which houses were about forty feet apart, & about eighty feet from the road. He then erected two houses on his plot, each of which had a bay window projecting three feet beyond the line of the existing houses, & carried from the foundation up to the roof. Upon bill for injunction filed by the transferee from the mtgees. & by a subsequent purchaser from them of a contiguous plot, who had entered into similar covenants:—*Held:* both pltfs. had material interests sufficient to support the suit.—MANNERS (LORD) *v.* JOHNSON (1875), 1 Ch. D. 673; 45 L. J. Ch. 404; 40 J. P. 345; 24 W. R. 481.

Annotations:—**Mentd.** Long Eaton Recreation Grounds Co. *v.* Mid. Ry. (1901), 71 L. J. K. B. 74; Sharp *v.* Harrison, [1922] 1 Ch. 502.

1369. Mortgage including right to use name—No intention by mortgagee to use—Use by assignee of mortgagor.]—The mtgee. of stock-in-trade & goodwill, & of the right to use a name, never having used the name & not intending to use the name, cannot obtain an injunction to restrain persons claiming under the mtgor. from using the name.—BEAZLEY *v.* SOARES (1882), 22 Ch. D. 660; 52 L. J. Ch. 201; 31 W. R. 887.

Mortgage of premises & goodwill—Bankruptcy of mortgagor.]—*See* BANKRUPTCY, Vol. IV., p. 484, Nos. 4352, 4353.

SECT. 2.—RIGHT TO POSSESSION OF MORTGAGED PROPERTY.

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Sect. 2.—Right to possession of mortgaged property: Sub-sects. 1 & 2, A.]

1381. —— In capacity as mortgagee.]—Mtgee. who takes possession of the mtgd. estate is on bill for redemption, bound to render an account of rents & profits received & is also liable for all which he might have received but for his wilful default; but where persons, who though in fact mtgees. enter into possession of the rents & profits in another character, they cannot be subjected to that special liability. Their receipt of the rents & profits in the particular character of mtgees. in possession must be distinctly established.

A person, who, under a mtge., becomes possessed of a property supposing himself to be its purchaser, if it afterwards appears that he is not validly clothed with that character, but only holds a lien on the property in virtue of the money advanced by him on the supposed purchase, cannot, therefore, be so treated as to make him liable to render accounts as an ordinary mtgee. in possession. It is essential to the creation of such a liability that he should have known he was in possession as mtgee.—PARKINSON *v.* HANBURY (1867), L. R. 2 H. L. 1; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642, H. L.

Annotations:—**Consd.** *Re* Colnbrook Chemical & Explosives Co., A.-G. *v.* The Co., [1923] 2 Ch. 289. **Refd.** Kirkwood *v.* Thompson (1865), 2 Hem. & M. 392; Shaw *v.* Bunny (1865), 2 De G. J. & Sm. 468; Selwyn *v.* Garfit (1888), 38 Ch. D. 273; Bailey *v.* Barnes, [1894] 1 Ch. 25; Gaskell *v.* Gosling, [1896] 1 Q. B. 669. **Mentd.** Whyte *v.* Ahrens (1884), 26 Ch. D. 717; Leitch *v.* Abbott (1886), 31 Ch. D. 374; Sachs *v.* Spellman (1887), 37 Ch. D. 295; Hatten *v.* Russell (1888), 38 Ch. D. 334.

1382. —— Through agent.]—The power of sale in a mtge. deed provided that the mtgee. should not exercise it without giving notice to the mtgor., "his exors., administrators, or assigns." The mtgor. subsequently mortgaged the same property, subject to the first mtge., to a second mtgee.:—*Held:* (1) the second mtgee. was entitled to notice from the first mtgee. of his intention to exercise his power of sale, & in default of such notice was entitled to damages from him.

H. mortgaged certain property to S. & the mtge. deed provided that it should be lawful for S., or his "agent or receiver for the time being," immediately after the execution of the deed to receive the rents of the mtged. property as long as any money remained due on the security, & thereout to make certain payments for the preservation of the property. The rents were afterwards collected by T., who had collected the rents of other property of H. & he paid S. his interest thereout. S. alleged that an arrangement was made at the time of the mtge. that T. should be employed by H. to collect the rents & that T. paid him his interest as agent of H.:—*Held:* (2) S. was mtgee. in possession.

The real truth of the case is, that immediately after the execution of the mtge., deft. did enter by his agent (FRY, J.).—HOOLE *v.* SMITH (1881), 17 Ch. D. 434; 50 L. J. Ch. 576; 45 L. T. 38; 29 W. R. 601.

1383. —— By authority of mortgagor.]—Deft. took from the mtgor. an authority to receive the rents of the property accruing due at the date of the mtge., & in fact received the rents from that date. He sold some of the properties included in the mtge., under his power of sale, & contracted for the sale of another at a price which appeared on the evidence to be below its value; the last-mentioned sale was not completed, owing to the pendency of the action:—*Held:* the mtgor. was entitled to an account in the usual form as against a mtgee. who has entered into possession before there was any interest in arrear, & that the sale not yet completed must be set aside.—JONES *v.* LINTON (1881), 44 L. T. 601.

1384. Demand for rent—Acquiescence in refusal by tenant — No evidence of tenant accepting mortgagee as landlord.] — WARD *v.* CARTTAR, No. 1380, *ante*.

1385. Possession taken as purchaser.]—PARKINSON *v.* HANBURY, No. 1381, *ante*.

1386. Forcible entry—Though in breach of statute.]—Where a person having the legal title to land is in actual possession of it, the attempt to eject him by force brings the person who makes it within the provisions of the statute against forcible entry. It will do so though the possession of the person having such legal title has only just commenced, though he may himself have obtained it by forcing open a lock, though his ejection has not been made by a "multitude" of men, nor attended with any great use of violence, & though the person who attempts to eject him may even set up a claim to the possession of the land.

L. became the mtgee. in fee of certain premises of which it appeared that he did not at once take actual possession. The mtgor., whose possession had not been interfered with, made an agreement with T. & W. to allow them, at a rent, the use of these premises, & for some little time T. & W. did have the use of them & deposited goods there. On one morning at an early hour L., without notice to any one went accompanied by a carpenter & another man, & by taking off the lock of the outer door, entered into actual possession. T. & W., hearing of this went to eject him, & not being able to get in at the door obtained an entrance through a side window, then came down & did eject L. On this L., indicted them for a forcible entry; they were acquitted, jointly paid their attorney's bill, & then brought a joint action against L. for malicious prosecution without reasonable & probable cause:—*Held:* they could not sustain the action, & L. was entitled to have the verdict entered in his favour.—LOWS *v.* TELFORD (1876), 1 App. Cas. 414; 45 L. J. Q. B. 613; 35 L. T. 69; 40 J. P. 741; 13 Cox, C. C. 226, H. L.; *revsg.* S. C. *sub nom.* TELFORD *v.* LOWS (1874), 31 L. T. 90, Exch.

Annotations:—**Mentd.** Beddall *v.* Maitland (1881), 17 Ch. D. 174; Jones *v.* Foley (1891), 60 L. J. Q. B. 464; Hemmings *v.* Stoke Poges Golf Club, [1920] 1 K. B. 720.

1387. Restraint of mortgagor from cutting timber—Whether amounting to possession of timber.]—SIMMINS *v.* SHIRLEY, No. 1376, *ante*.

1388. Mortgagee as landlord under attornment clause—Whether mortgagee liable to account.]—*Semble:* where a mtge. contains an attornment clause the mtgee. is liable to wilful default in respect of the rent as being in possession.

An actual lease being created with a reservation of rent, the bankers were as much mtgees. in possession, for all purposes of taking the account of what was due on the mtge., as if they had granted the lease to some new lessee & had given notice to that lessee to pay the rent to them. They were mtgees. in possession liable to account in respect of this £5,000 a year as against any second mtgee. or incumbrancer for what they had received or, but for their wilful default, might have received (JAMES, L.J.).—*Re* STOCKTON IRON FURNACE CO. (1879), 10 Ch. D. 335; 48 L. J. Ch. 417; 40 L. T. 19; 27 W. R. 433, C. A.

Annotations:—**Consd.** *Re* Bowes, *Ex p.* Jackson (1880), 14 Ch. D. 725; *Re* Kitchin, *Ex p.* Punnett (1880), 16 Ch. D. 226; *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 127; *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384; Green *v.* Marsh, [1892] 2 Q. B. 330. **Refd.** *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442. **Mentd.** *Re* Bridgewater Engineering Co. (1879), 12 Ch. D. 181; *Re* Crumlin

Viaduct Works Co. (1879), 48 L. J. Ch. 537; Shubrook *v.* Tufnell (1882), 30 W. R. 740; *Re* Lewis, Lewis *v.* Williams (1886), 31 Ch. D. 623; *Re* Gardner, Long *v.* Gardner (1894), 71 L. T. 412; *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co. (1896), 75 L. T. 508.

1389. —— ——.]—The very words [of the attornment clause] are "for better securing the punctual payment of interest" not to destroy the position of mtgee., &, as was pointed out in *Re Stockton Iron Furnace Co.*, No. 1388, *ante*, the mtgee. becomes mtgee. in possession & liable to account as such (JESSEL, M.R.).—*Re* KITCHIN, *Ex p.* PUNNETT (1880), 16 Ch. D. 226; 50 L. J. Ch. 212; 44 L. T. 226; 29 W. R. 129, C. A.

Annotations:—**Consd.** *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384. **Refd.** *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442. **Mentd.** West London Syndicate *v.* I. R. Comrs., [1898] 2 Q. B. 507.

1390. —— ——.]—In taking the account in a foreclosure action between first mtgee. & second mtgee. & mtgor., an attornment clause in his mtge. deed will not render the first mtgee. liable to account on the footing of mtgee. in possession in respect of the rent reserved by the attornment clause.—STANLEY *v.* GRUNDY (1883), 22 Ch. D. 478; 52 L. J. Ch. 248; 48 L. T. 106; 31 W. R. 315.

Annotation:—**Refd.** *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384.

1391. —— ——.]—The attornment clause was not such a taking possession by the mtgee. as was contemplated by the proviso, though no doubt it would render him liable to account at the suit of a subsequent mtgee. for all the rent agreed to be paid by the mtgor. which might be unreceived owing to the mtgee.'s wilful default. But this attornment clause, not being registered, was void (KAY, L.J.).—GREEN *v.* MARSH, [1892] 2 Q. B. 330; 61 L. J. Q. B. 442; 66 L. T. 480; 56 J. P. 839; 40 W. R. 449; 8 T. L. R. 498; 36 Sol. Jo. 412, C. A.

Annotation:—**Mentd.** *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co. (1896), 75 L. T. 508.

1392. Control & management of estate taken from mortgagor.]—NOYES *v.* POLLOCK, No. 1379, *ante*.

1393. Notice of mortgage to trustees of settled personalty.]—P., who was entitled to a life interest in the income of certain stocks & other personal estate vested in the trustees of a settlement, assigned all his interest under the settlement to pltf. by way of mtge. to secure a principal sum & interest. Shortly afterwards pltf. gave to the trustees the ordinary notice of the mtge., but did not require them to pay the income to himself, & they paid it to P. for about a year & a half, when pltf. brought an action against P. & the trustees claiming foreclosure of the mtge. & personal payment by the trustees of the income as from the date of the notice:—*Held*: the giving of the notice was not equivalent to taking possession of the mtged. property, but had no further effect in depriving the mtgor. of the receipt of income than notice of a similar mtge. of real estate, & the claim against the trustees failed.—*Re* PAWSON'S SETTLEMENT, HIGGINS *v.* PAWSON, [1917] 1 Ch. 541; 86 L. J. Ch. 380; 116 L. T. 559; 33 T. L. R. 233.

SUB-SECT. 2.—WHEN RIGHT ARISES.

A. Legal Mortgagees.

1394. Right to immediate possession.] — The mtgee. has a right to his actual possession whenever he pleases; he may bring his ejectment at any moment that he will. . . . He is also entitled to all the rents which have become due since his mtge. & which are unpaid (BULLER, J.).—BIRCH *v.* WRIGHT (1786), 1 Term Rep. 378; 99 E. R. 1148.

Annotations:—**Apld.** *Re* Brindley, *Ex p.* Hankey (1829), Mont. & M. 247. **Consd.** Doe d. Fisher *v.* Giles (1829), 5 Bing. 421. **Refd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Blundell *v.* Drummond (1848), 14 Jur. 573, n. **Mentd.** Pulteney *v.* Warren (1801), 6 Ves. 73; Denn d. Jacklin *v.* Cartright (1803), 4 East, 29; R. *v.* Horstmonceaux (1827), 7 B. & C. 551; Buckworth *v.* Simpson (1835), 5 Tyr. 344; Doe d. Chadborn *v.* Green (1839), 9 Ad. & El. 658; Brydges *v.* Lewis (1842), 3 Q. B. 603; Doe d. Clarke *v.* Smaridge (1845), 7 Q. B. 957; Standen *v.* Christmas (1847), 9 L. T. O. S. 169; Cattley *v.* Arnold, Banks *v.* Arnold (1859), 1 John. & H. 651; R. *v.* St. Giles without Cripplegate (1863), 4 B. & S. 509; Willesden Overseers *v.* Paddington Overseers (1863), 3 B. & S. 593; De Nicols *v.* Saunders (1870), 22 L. T. 661; Phillips *v.* Homfray (1883), 24 Ch. D. 439; Horn *v.* Beard, [1912] 3 K. B. 181; A.-G. *v.* De Keyser's Royal Hotel, [1920] A. C. 508; Wheeler *v.* Keeble (1914), Ltd., [1920] 1 Ch. 57; R. *v.* Paulson, [1921] 1 A. C. 271.

1395. ——.] — A mtgee. may assume the possession whenever he pleases . . . a ct. of equity never interferes to prevent the mtgee. from assuming possession (GRANT, M.R.). — CHOLMONDELEY (MARQUIS) *v.* CLINTON (LORD) (1817), 2 Mer. 171; 35 E. R. 905.

Annotations:—**Refd.** Sturgis *v.* Champneys (1839), 5 My. & Cr. 97. **Mentd.** Gray *v.* Legard (1831), 9 L. J. O. S. Ch. 80; Hood *v.* Plimm (1831), 4 Sim. 101; Doe d. Pilkington *v.* Spratt (1833), 5 B. & Ad. 731; Boldell *v.* Golightly (1842), 12 L. J. Ch. 187; Bryant *v.* Easterson (1859), 7 W. R. 298; Marshall *v.* Smith (1865), 5 Giff. 37.

1396. ——.]—The mtgee. has the possessory right, & resumes that right by actual entry. He has the right to take possession; since he has taken

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PART IX. SECT. 2, SUB-SECT. 2.—A.

1394 i. *Right to immediate possession.*]—COMMERCIAL BANK *v.* BREEN (1889), 15 V. L. R. 572.—**AUS.**

1394 ii. ——.]—DOE d. EELS *v.* GARNETT (1847), 5 N. B. R. (3 Kerr), 535.—**CAN.**

1394 iii. ——.]—A mtgee. is entitled to take possession at any time, even before default, unless the right to possession till default be reserved.—DOE d. MOWAT *v.* SMITH (1850), 8 U. C. R. 139.—**CAN.**

1394 iv. ——.]—A deed poll to secure a sum of money, in which the words were "mtge. all that certain parcel of land, etc., to have & to hold the aforesaid land unto the said R., his heirs, exors., administrators, & assigns":—*Held*: sufficient to pass the right of possession to the grantee.—VANDELINDER *v.* VANDELINDER (1864), 14 C. P. 129.—**CAN.**

1394 v. ——.]—MCMAHON *v.* MCFAUL (1864), 14 C. P. 433.—**CAN.**

1394 vi. ——.]—PHILLIPS *v.* PRESTON (1867), 14 Gr. 67.—**CAN.**

1394 vii. ——.]—A mtgee., in the absence of any express covenant or stipulation to the contrary, is entitled to enter upon & take possession of the lands & *premises* conveyed in the mtge. at any time, although as an almost invariable rule in this country, the mtgor. remains in possession until default in fulfilment of the conditions of the mtge.—DUNN *v.* MILLER (1874), 9 N. S. R. (3 G. & O.) 347.—**CAN.**

1394 viii. ——.]—In an action upon a mtge. a mtgee. out of possession is not entitled between the time of the order *nisi* & the application for the final order to apply for possession.—COLONIAL INVESTMENT & LOAN CO. *v.* RICHARDSON (Sask.), [1918] 2 W. W. R. 389.—**CAN.**

1394 ix. ——.]—FREDERICTON CORPN. *v.* SIMMONS (N. B.), [1926] 2 D. L. R. 422.—**CAN.**

1394 x. ——.]—RAJA OODIT PURKASH SINGH *v.* MARTINDELL (1849), 4 Moo. Ind. App. 444.—**IND.**

1394 xi. ——.]—Till the mtge. has been redeemed, the mtgee. is entitled to retain possession.—SHEOUMBUR RAI *v.* SHEOBHUNG RAI (1869), 1 N. W. 45.—**IND.**

1394 xii. ——.]—A mtgee. is not bound to take possession immediately default is made.—DEANS *v.* RICHARDSON (1871), 3 N. W. 54.—**IND.**

1394 xiii. ——.]—A mtge. of land held under a freehold lease was made subject to redemption upon payment of principal & interest. The deed did not expressly provide that the mtgor. should remain in possession till default; nor was there, in the opinion of the ct., upon the construction of the entire deed, any implied covenant to that effect:—*Held*: the mtgee. was entitled to maintain an action for the recovery of the possession of the mtged. premises, though the time of redemption had not arrived, & the mtgor. was not in default.—GREEN *v.* BURNS (1879), 6 L. R. Ir. 173.—**IR.**

h. —— *Necessity for notice.*]—Under Land Titles Act, 1920, s. 108, a mtgee.'s entry into possession may be made immediately after service of the notice of his intention to enter.

Sect. 2.—Right to possession of mortgaged property: Sub-sect. 2, A., B., C. & D. Sect. 3: Sub-sect. 1, A.]

possession, can he be a trespasser? (LORD TENTERDEN, C.J.).—JOHNSON *v.* HOWSON (1828), 2 Man. & Ry. K. B. 226; 6 L. J. O. S. K. B. 236.

1397. ——.]—A mtgee. having given notice to the tenants holding the mtged. premises under leases granted by the mtgor. after the mtge., is entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards.

When a mtge. is executed, the mtgee. becomes the legal owner of the land, & is entitled to immediate possession, or to the rents & profits (LITTLEDALE, J.).—POPE *v.* BIGGS (1829), 9 B. & C. 245; 4 Man. & Ry. K. B. 193; 7 L. J. O. S. K. B. 246; 109 E. R. 91.

Annotations:—**Consd.** Evans *v.* Elliot (1838), 9 Ad. & El. 342; Wilton *v.* Dunn (1851), 17 Q. B. 294. **Refd.** Braithwaite *v.* Watts (1832), 2 Tyr. 293; Partington *v.* Woodcock (1835), 6 Ad. & El. 690; Waddilove *v.* Barnett (1836), 2 Bing. N. C. 538; Burrows *v.* Grayden (1843), 7 Jur. 942; Boodle *v.* Cambell (1844), 7 Man. & G. 386; Turner *v.* Cameron's Coalbrook Steam Coal Co. (1850), 5 Exch. 932; Rusden *v.* Pope (1868), L. R. 3 Exch. 269.

1398. ——.]—By deeds of lease & release dated Sept. 7 & 8, 1819, lands were mortgaged in fee, subject to a proviso, that if the mtgor. should well & truly pay the principal money & interest on Mar. 25, then next, the mtgee., his heirs & assigns, should & would reconvey & reassure the mtged. premises to the mtgor., his heirs & assigns. There was also a covenant that it should be lawful for the mtgee., his heirs & assigns, from time to time & at all time after default should be made in the payment of the principal money & interest, contrary to the proviso aforesaid, peaceably & quietly to enter into, have, hold, occupy, possess, & enjoy the said premises: & also a covenant by the mtgor. for further assurance in case of such default:—*Held:* the mtgee. had the right of possession, under this deed, from the time of its execution, & not merely from Mar. 25, 1820.—DOE d. ROYLANCE *v.* LIGHTFOOT (1841), 8 M. & W. 553; 11 L. J. Ex. 151; 5 Jur. 966; 151 E. R. 1158.

Annotations:—**Apld.** Rogers *v.* Grazebrook (1846), 8 Q. B. 895. **Refd.** Doe d. Parsley *v.* Day (1842), 2 Q. B. 147; Hemming *v.* Blanton (1873), 42 L. J. C. P. 158. **Mentd.** Gale *v.* Burnell (1845), 7 Q. B. 850; Knight *v.* Robinson (1856), 2 K. & J. 503; R. *v.* Champneys (1871), L. R. 6 C. P. 384; *Re* Bellis's Trusts (1877), 5 Ch. D. 504.

1399. —— **Without default by mortgagor.**]—A mtge. of the residue of a term less one day, from a day named, gives a right of entry from that day, although there are provisos & covenants for the mtgor.'s quiet occupation until default.—ROGERS *v.* GRAZEBROOK (1846), 8 Q. B. 895; 7 L. T. O. S. 109; 115 E. R. 1111.

Annotation:—**Mentd.** Manders *v.* Williams (1849), 4 Exch. 339.

1400. ——.]—DAWSON *v.* JOHNSON (1859), 34 L. T. O. S. 68.

1401. ——.]—LOWS *v.* TELFORD, No. 1386, *ante*.

1402. Power of sale on default—No right of entry implied.]—A power given to a trustee, in a mtge. deed, to sell, if the mtgee. requests it, does not necessarily imply a right to enter upon the premises.—WATSON *v.* WALTHAM (1835), 2 Ad. & El. 485; 1 Har. & W. 24; 4 Nev. & M. K. B. 537; 4 L. J. K. B. 98; 111 E. R. 188.

1403. Relation back of right.]—A mtgee. out of possession, who gives notice of the mtge. to the tenant who has occupied since the mtge., cannot maintain trespass for mesne profits against the tenant for the rents accrued due since the date of the mtge., by mere entry upon the land after the notice. The doctrine of relation applies only as between disseisor & disseisee, in which case the re-entry has relation back to prior occupation by the owner, & remits him to his original rights.

Where the mtgee. gave notice of the mtge. to the tenant in possession, who had become tenant since the mtge., & made an entry, & subsequently served a notice of ejectment upon the tenant, who gave a judge's order, by which it was agreed that the action should be stayed upon the tenant's undertaking to give up possession of the premises on a day named therein; &, in default thereof, the mtgee. was to be at liberty to sign final judgment, & to issue execution against the tenant for the of the action:—*Held:* the mtgee. was not in a condition to maintain an action of trespass to recover the mesne profits from the date of the mtge., inasmuch as he never had such a possession as is necessary to support the action; & the judge's order could not be considered as equivalent to a judgment by default in ejectment, or as any evidence of the mtgee.'s prior occupation of the premises.—LITCHFIELD *v.* READY (1850), 5 Exch. 939; 20 L. J. Ex. 51; 155 E. R. 409.

Annotations:—**Consd.** Ocean Accident & Guarantee Corpn. *v.* Ilford Gas. Co., [1905] 2 K. B. 493. **Refd.** Barnett *v.* Guildford (1855), 11 Exch. 19. **Mentd.** Humphrey *v.* Nowland (1862), 15 Moo. P. C. C. 343; Harrison *v.* Blackburn (1864), 10 Jur. N. S. 1131.

1404. ——.]—OCEAN ACCIDENT & GUARANTEE CORPN. *v.* ILFORD GAS CO., No. 1363, *ante*.

B. Subsequent Mortgagees.

See, now, Law of Property Act, 1925 (c. 20), Sched. I., Part VII.

1405. General rule.]—In the absence of express contract between the mtgor. & second mtgee. of lands entitling the latter to take possession with the consequential right to take the rents, the rights of the second mtgee. are as follows. He can, subject to the rights of the first mtgee., take possession & enter into receipt—of the rents in either one of two ways: (*a*) in an action to enforce his security he can obtain an order appointing a receiver; or (*b*) under Conveyancing & Law of Property Act, 1881 (c. 41), he can himself appoint a receiver. In the one case he obtains judicially & in the other contractually & by virtue of the statute a right to take the rents by the hand of a receiver. But his only remedy is the appointment of a receiver: he has no legal right to take possession or to demand payment to himself of the rents (BUCKLEY, L.J.).—VACUUM OIL CO., LTD. *v.* ELLIS, [1914] 1 K. B. 693; 83 L. J. K. B. 479; 110 L. T. 181, C. A.

No particular form of notice is required; the notice is sufficient if it states the mtgee.'s intention to enter into pos-

n.—GREAT WEST PERMANENT LOAN CO. *v.* REMPEL (Sask.), [1926] 4 D. L. R. 235; [1926] 2 W. W. R. 663.—**CAN.**

k. —— ——.]—It is only when the requirements of Land Titles Act, s. 108 (1), have been met that a mtgee. may enter into possession of the mtged. land & collect the rent thereon.—STEWART *v.* IMPERIAL LIFE ASSURANCE CO. OF CANADA, [1926] 3 D. L. R. 271; [1926] 2 W. W. R. 355; 20 Sask. L. R. 568.—**CAN.**

l. *Effect of proviso for possession by mortgagor until default.*]—DUNDAS *v.* ARTHUR (1857), 14 U. C. R. 521.—**CAN.**

m. ——.]—D. mortgaged to the T. co., & afterwards to A., who assigned to pltf. D. then conveyed to deft. who took possession, & was recognised by the T. co. as holding under them. Pltf. brought ejectment, there having been no default under the mtge. to the T. co., which contained a proviso for possession by D. until default:—*Held:* pltf. was entitled to recover, for D. could not in the face of his mtge. deny A.'s right of possession or that of pltf. as his assignee.—REID *v.* MCBEAN (1859), 8 C. P. 246.—**CAN.**

n. ——.]—GOODERE *v.* WALLACE (1864), 24 U. C. R. 31.—**CAN.**

o. *No right to possession—Against bonâ fide purchaser of land—Purchase-money paid into court.*]—MANITOBA MORTGAGE & INVESTMENT CO. *v.* CANADIAN PACIFIC RY. CO. (1884), 1 Man. L. R. 285.—**CAN.**

1406. Right to possession against mortgagor.]—On Aug. 18, 1887, B., the bkpt., mortgaged his estate to A., & on Aug. 22, executed a second mtge. in favour of resps., his bankers. Subsequently resps. obtained judgment against B., & put the sheriff in possession. On May 2, a receiving order was made against B., & the sheriff on May 4, withdrew from possession. On June 25, resps. took possession under their mtge., & on same day an arrangement was come to between them & the official receiver by which certain crops on the land were cut & sold without prejudice to the legal position of the parties:—*Held:* as the second mtgees., resps., had taken lawful possession of the land, they were entitled as against the official receiver to the proceeds of the sale of the crops.—*Re* GORDON, *Ex p.* OFFICIAL RECEIVER (1889), 61 L. T. 299; 6 Morr. 150.

C. Registered Proprietor of Charge.

See Land Registration Act, 1925 (c. 21), s. 27 (1); Law of Property Act, 1925 (c. 20), s. 87 (1).

D. Equitable Incumbrancers.

1407. General rule—Not entitled to possession.]—The persons entitled to the annuity or legacies are in the position simply of persons having a charge on real estate; they have no legal estate. They are in the position of equitable mtgees.; they could not have taken possession of the land (NORTH, J.).—GARFITT *v.* ALLEN, ALLEN *v.* LONGSTAFFE (1887), 37 Ch. D. 48; 57 L. J. Ch. 420; 57 L. T. 848: 36 W. R. 413.

1408. Express right to possession if mortgagor should become bankrupt—No right to possession till adjudication.]—A building agreement provided that all the loose materials & plant brought upon the land should "be deemed to be annexed to the freehold." The builder by deed assigned "all his interest under the building agreement" to H. to secure advances. This deed provided that, if the builder should "become bkpt." H. might take possession of the land comprised in the building agreement & complete any unfinished houses. A receiving order was afterwards made against the builder, & adjudication followed. H. took possession under the mtge. when the receiving order was made, on the ground that the builder had "become bkpt.," & completed some unfinished houses, using the loose plant & materials then on the premises:—*Held:* "become bkpt." meant "be adjudicated a bkpt.," & therefore, the builder not being in default under the mtge. when the receiving order was made H. was not then entitled to take possession.—*Re* WEIBKING, *Ex p.* WARD, [1902] 1 K. B. 713; 71 L. J. K. B. 389; 50 W. R. 460; 9 Mans. 131; *sub nom. Re* WEIBKING, *Ex p.* TRUSTEE *v.* HARTLEY, 86 L. T. 24.

See, further, BANKRUPTCY, Vol. IV., p. 366, Nos. 3390–3398.

SECT. 3.—RIGHTS WHILE IN POSSESSION.

SUB-SECT. 1.—RENTS AND PROFITS.

A. In General.

Receipt of rents & profits—Whether amounting to possession.]—*See* Nos. 1377–1383, *ante*.

1409. General rule.]—A solr. advanced money to his client on a second mtge. in which was inserted a power of sale exercisable at any time without the usual proviso requiring that notice should be given, or some interest should be three months in arrear; & it was not shown that he explained to the client that the power was not in the usual form. The solr. afterwards took possession, & for several years received the rents, which, together with some payments made by the mtgor., exceeded the interest on both mtges. He then sold the property without notice. In an action by the mtgor. against the solr.:—*Held:* (1) the omission from the power of sale of the usual qualifying clause was a breach of duty, & the mtgee. was liable in damages as for an improper sale, unless it could be shown that some interest was three months in arrear; (2) the fact that the mtgee. had received rents to an amount more than sufficient to pay interest would not by itself prove that there was no interest in arrear if no appropriation was shown to have been made; (3) as in an account sent by the mtgee. to the mtgor. the interest was treated as satisfied up to a certain day out of the rents, there was evidence of an arrangement that the rents should be applied in discharge of interest, & that, as the final account showed that if the rents were thus appropriated there would be no interest in arrear at the time of sale, the sale was improper.

(4) *Qu.:* whether a mtgee. in possession having a balance of rents in hand more than sufficient for payment of the interest & all expenses he has incurred can be heard to say that interest is in arrear so as to justify a sale because no account has been rendered & no appropriation made.—*v.* EDWARDS (1881), 18 Ch. D. 449; 51 L. J. Ch. 46; 45 L. T. 500; 30 W. R. 446, C. A.

Annotations:—As to (1) **Apld.** Craddock *v.* Rogers (1884), 53 L. J. Ch. 968. **Distd.** Pooley's Trustee *v.* Whetham (1886), 33 Ch. D. 111. **Consd.** Stokes *v.* Prance, [1898] 1 Ch. 212. *As to* (2) **Apld.** Bright *v.* Campbell (1889), 41 Ch. D. 388; Wrigley *v.* Gill, [1906] 1 Ch. 165. *As to* (3) **Distd.** Pooley's Trustee *v.* Whetham (1886), 33 Ch. D. 111. *As to* (4) **Consd.** Wrigley *v.* Gill, [1906] 1 Ch. 165. *Generally*, **Reld.** Nocton *v.* Ashburton, [1914] A. C. 932. **Mentd.** Andrews *v.* Barnes (1888), 39 Ch. D. 133; Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank, [1891] 1 Ch. 270; The Swiftsure (1900), 16 T. L. R. 275.

1410. Nature of rents recoverable—Mortgage of wharves & warehouses—Warehousing charges reserved as rents.]—(1) Under a mtge. of wharves & warehouses occupied by the mtgors. for their business of wharfingers & warehousemen:—*Held:* the mtgees. going into possession were not entitled to receive debts due to the mtgors. for warehousing goods, though the charges out of which the debts arose were termed rents, & were by Act of Parliament recoverable, amongst other charges, by distraint & sale of the goods in respect of which they were incurred. *Semble:* a mtgee. going into possession is entitled to receive all unpaid rents properly so called.

(2) Apportionment Act, 1870 (c. 35), does not disentitle a mtgee. entering into possession to back rents unrecovered.—ANDERSON *v.* BUTLER'S WHARF CO., LTD. (1879), 48 L. J. Ch. 824.

Annotation:—As to (1) **Reld.** Shillito *v.* Biggart, [1903] 1 K. B. 683.

PART IX. SECT. 2, SUB-SECT. 2.—B.

1406 i. *Right to possession against mortgagor.*]—ANTRIM COUNTY LAND BUILDING & INVESTMENT CO. *v.* STEWART, [1904] 2 I. R. 357.—**IR.**

p. *Right of second mortgagee to rents—As against judgment creditor of mortgagor.*]—CAMPION *v.* PALMER, [1896] 2 I. R. 445.—**IR.**

PART IX. SECT. 2, SUB-SECT. 2.—C.

q. *Whether right to possession.*]—*Semble:* that a mtge. under Land Transfer Act, 1885, does not of itself confer on the mtgee. a right to possession of the land mortgaged.—KING *v.* STUART (1887), 5 N. Z. L. R. 304 (S. C.).—**N.Z.**

PART IX. SECT. 3, SUB-SECT. 1.—A.

1409 . *General rule.*]—*Semble:* a first mtgee. has not, as such, a right to the rents & profits.—BANK OF BRITISH NORTH AMERICA *v.* HEATON (1862), 1 Ch. Ch. 175.—**CAN.**

1409 ii. ——.]—WILLIAMS *v.* BOX (1913), 24 W. L. R. 93; 4 W. W. R. 244; 12 D. L. R. 90.—**CAN.**

1409 iii. ——.]—PRABHAKAR CHINTAMAN DIKSHIT *v.* PANDURANG VINAYAK DIKSHIT (1875), 12 Bom. 88.—**IND.**

Sect. 3.—Rights while in possession: Sub-sect. 1, A., B., C., D. & E.; sub-sects. 2, 3 & 4. Sect. 4: Sub-sect. 1.]

1411. —— Rents properly so called.]—ANDERSON *v.* BUTLER'S WHARF CO., LTD., No. 1410, *ante.*

1412. Right to back rents unrecovered—Apportionment.]—ANDERSON *v.* BUTLER'S WHARF CO., LTD., No. 1410, *ante.*

1413. Licence to dig earth & make bricks—Payments in nature of rent—Notice to licensee.]—Payments agreed to be made by an occupier of the soil under a parol licence to dig earth & make bricks are in the nature of rent, & as such a mtgee. of the premises is entitled, after notice in the usual manner, to all sums in arrear from such occupier at the time of the notice, or which may afterwards become due.—*Re* BRINDLEY, *Ex p.* HANKEY (1829), Mont. & M. 247.

1414. Application of rents—Discharge of interest—Balance in reduction of capital.]—In an ordinary case, there being no rent reserved, the tenant at will did not pay any rent, & was not liable to pay any, but you might superadd to that legal relationship an express agreement for a tenancy, as was done in the present case, in which a monthly tenancy was created at a monthly rent. That, no doubt, altered the legal relation between the parties, but it did not alter the equitable relation. The rent, if paid, was in equity paid on account of principal & interest; if it exceeded the interest it would go in reduction of the principal (JESSEL, M.R.).—*Re* KNIGHT, *Ex p.* ISHERWOOD (1882), 22 Ch. D. 384; 52 L. J. Ch. 370; 48 L. T. 398; 31 W. R. 442, C. A.

Annotations:—**Mentd.** *Re* Bushell, *Ex p.* Izard (1883), 23 Ch. D. 115; *Re* Witton, *Ex p.* Arnal (1883), 24 Ch. D. 26; *Re* Salkeld, *Ex p.* Good (1884), 13 Q. B. D. 731.

1415. —— —— ——.]—Testator gave his residuary real & personal estate to trustees upon trust to sell, with power to postpone, & to divide into shares, each share being settled. Testator's assets included several mtge. debts the interest on which was in arrear at his death. Testator had entered into & remained in receipt of the rents of the mtged. properties up to his death, & the trustees had continued in such receipt. The securities being deficient, the question arose between the tenants for life & the remaindermen as to the application of these rents:—*Held:* the trustees must first apply each instalment of rent received since testator's death from each mtged. property in satisfaction of the arrears of interest which at testator's death were due in respect of the mtge., & then distribute the balance as income up to but not exceeding the interest accrued since testator's death on the mtge., & apply any excess as capital.—*Re* COAKS, COAKS *v.* BAYLEY, [1911] 1 Ch. 171; 80 L. J. Ch. 136; 103 L. T. 799.

Annotation:—**Distd.** *Re* Horn's Estate, Public Trustee *v.* Garnett, [1924] 2 Ch. 222.

1416. Right to rent pending sale—Rents amounting to less than interest due.]—Where trustees, under a power in a will, have invested trust funds on the security of mtges. on leasehold properties, & have, on the bkpcy. of the mtgor., foreclosed, the effect of Conveyancing Act, 1911 (c. 37), s. 9, is to place the property which has been foreclosed so far as practicable in the same position as if it had originally formed part of the estate of testator.

Trustees, acting under a power in a will, invested trust money on the security of nine mtges. on nine leasehold properties. The mtgor. having become bkpt., the trustees foreclosed. Four of the properties were sold, leaving five unsold. In the case of two, the net rent exceeded the amount of the interest on the mtge. In the case of two others the net rent was about equal to the former interest, & in the case of the remaining property, the net rent was less than the former interest:—*Held:* the tenant for life was entitled to the whole of the net rents, pending the sale of the properties; but, if during that period the net rents amounted to less than the amounts he would have received by way of interest on the mtges., he would not be entitled to claim any part of the proceeds of sale.—*Re* HORN'S ESTATE, PUBLIC TRUSTEE *v.* GARNETT, [1924] 2 Ch. 222; 93 L. J. Ch. 490; 131 L. T. 286; 68 Sol. Jo. 577.

Rights of mortgagor to rents while in possession.]—*See* Part VI., Sect. 3, sub-sect. 5, *ante.*

B. On Bankruptcy of Mortgagor.

See BANKRUPTCY, Vol. IV., p. 366, Nos. 3390–3395.

C. In respect of Leases and Tenancies.

See Sect. 7, sub-sect. 1, B., *post.*

D. Rights as against Receiver.

1417. Receiver appointed in proceedings not relating to mortgagee's title—Whether mortgagee entitled.]—A mtgee. of a term created for raising portions, & expired, is not entitled to an account of rents & profits in the hands of a receiver accrued before the expiration of the term.—GRESLEY *v.* ADDERLEY, GRESLEY *v.* HEATHCOAT (1818), 1 Swan. 573; 36 E. R. 510, L. C.

Annotations:—**Apld.** Clarendon *v.* Barham (1842), 1 Y. & C. Ch. Cas. 688. **Consd.** *Re* Hoare, Hoare *v.* Owen, [1892] 3 Ch. 94. **Refd.** Hele *v.* Bexley, Whitfield *v.* Bowyer, Whitfield *v.* Knight (1855), 20 Beav. 127.

1418. —— ——.]—A mtgee. has no title to the rents of the mtged. premises, which have been paid into ct. by a receiver appointed in a suit for establishing the will of the mtgor.; notwithstanding that, after the appointment of a receiver, he gave notice to the tenants to pay the rents to him. He ought to have followed up that notice by moving to discharge the receiver.

From the time of the discharge of the receiver, or perhaps from the time when his application was first made for that discharge, he may be considered in possession; but he can have no intermediate rents, when he was out of possession (LEACH, M.R.).—THOMAS *v.* BRIGSTOCKE (1827), 4 Russ. 64; 38 E. R. 729; *affd.*, 4 Russ. 66, L. C.

Annotations:—**Apld.** Clarendon *v.* Barham (1842), 1 Y. & C. Ch. Cas. 688; *Re* Franks (1851), 16 L. T. O. S. 529. **Consd.** Hele *v.* Bexley, Whitfield *v.* Bowyer, Whitfield *v.* Knight (1855), 20 Beav. 127; *Re* Hoare, Hoare *v.* Owen, [1892] 3 Ch. 94. **Distd.** Preston *v.* Tunbridge Wells Opera House, [1903] 2 Ch. 323. **Apld.** *Re* Metropolitan Amalgamated Estates, Fairweather *v.* The Co., [1912] 2 Ch. 497. **Refd.** Paynter *v.* Carew (1854), 23 L. J. Ch. 596.

1414i. *Application of rents—Discharge of interest—Balance in reduction of capital.*]—A creditor in possession under a first heritable bond is entitled, after applying the rents to payment of the interest thereon, to pay the surplus to the proprietor & not bound to apply that surplus to extinction of the principal sum.—BROWN *v.* RAE (1835), 13 Sh. (Ct. of Sess.) 256.—**SCOT.**

r. *Whether entitled to commission for collecting rents.*]—FREEHOLD LOAN CO. *v.* MCLEAN (1893), 9 Man. L. R. 15.—**CAN.**

t. ——.]—A mtgee. in possession is not, as a rule, entitled to commission for collecting rents.—EARLE *v.* HARRISON (1909), 4 N. B. Eq. Rep. 196.—**CAN.**

a. *Proviso that mortgagee may collect rents—Rights against tenants.*]—Where a mtge. contains a proviso that the mtgee., whether in or out of possession, may collect & receive the rents of the mtged. property, he may enforce his rights to collect the rents by notices to the tenants of the mtged. land.—NORTH AMERICAN LIFE ASSURANCE CO. *v.* MORRIS, [1917] 1 W. W. R. 614; 11 Alta. L. R. 35.—**CAN.**

b. *Rents paid before mortgagee takes possession—Whether entitled to refund.*]—A mtgee. is not entitled as against the mtgor. to a refund of rents paid, before the mtgee. takes possession, by a tenant of a purchaser under an agreement for sale.—SELLICK *v.* HAYWARD, [1917] 2 W. W. R. 803; 24 B. C. R. 125.—**CAN.**

1419. —— ——.]—Money in the hands of a receiver is not *in custodia legis* in the same way as if it were in the hands of a sequestrator.

In June, 1886, H. borrowed from R. the sum of £7,000 on the security of a transfer of shares in a co. R. took no steps to have himself registered as owner of the shares until 1892. H. died in 1889, having paid interest on the mtge. debt down to Apr. 1888. In June, 1889, in a creditor's action to administer H.'s estate, a receiver was appointed. In July, 1889, the co. issued to the receiver debentures representing arrears of dividends upon the shares accrued prior to H.'s death. In 1892 R. valued his security at £1,000, & proved for the balance of his debt. He was afterwards registered by the co. as transferee of the shares, & then claimed to have the debentures handed over to him by the receiver:—*Held:* he was not so entitled, the debentures not being *in custodia legis* for his benefit, but being assets in the hands of the receiver, who for this purpose was in the same position as an EXOR.—*Re* HOARE, HOARE *v.* OWEN, [1892] 3 Ch. 94; 61 L. J. Ch. 541; 67 L. T. 45; 41 W. R. 105; 36 Sol. Jo. 523.

Annotations:—**Apld.** Preston *v.* Tunbridge Wells Opera House, [1903] 2 Ch. 323; *Re* Metropolitan Amalgamated Estates, Fairweather *v.* The Co., [1912] 2 Ch. 497.

1420. —— —— **Receiver in debenture-holders' action.**]—A mtgee. who has allowed the mtgor. to remain in possession cannot claim back rents in the hands of a receiver in a debenture-holders' action to which the mtgee. is a stranger, if such rents turn out, as between the parties to the action, to have been received for the mtgor.—*Re* LANDS SECURITIES CO., *Ex p.* NORWICH LIFE INSURANCE SOCIETY (1894), 1 Mans. 526; 13 R. 48.

1421. Receiver's right to deduct remuneration & expenses.]—Where a receiver has been appointed, gone into possession & received rents with the knowledge of a mtgee., such mtgee. upon taking possession is only entitled to the rents in the receiver's hands after deduction of the receiver's remuneration & expenses.—DAVY *v.* PRICE, [1883] W. N. 226; Bitt. Rep. in Ch. 182.

1422. Action by second mortgagee for receiver—First mortgagee not party—Motion to discharge receiver—Right to rent received from date of motion.]—In an action by second mtgees. against the mtgor., to which the first mtgee. was not a party, a receiver was appointed of the rent of mtged. premises subject to the rights of the first mtgee. On motion in the action by the first mtgee. to discharge the receiver & to be let into possession:—*Held:* the first mtgee. was entitled to back rents paid to the receiver after the date of the service of his notice of motion.—PRESTON *v.* TUNBRIDGE WELLS OPERA HOUSE, LTD., [1903] 2 Ch. 323; 72 L. J. Ch. 774; 88 L. T. 53.

Annotation:—**Apld.** *Re* Metropolitan Amalgamated Estates, Fairweather *v.* The Co., [1912] 2 Ch. 497.

1423. —— —— —— ——.]—A co. having mortgaged leasehold flats to first mtgor. subsequently issued a mtge. debenture to a debenture-holder. On Feb. 1, 1912, the first mtgees. appointed A. as receiver under their statutory power, but did not give immediate notice to the tenants. On Feb. 2 the debenture-holder, the second mtgee., obtained the appointment of B. as a receiver in a debenture-holder's action to which the first mtgees. were not parties, & immediate notice was given to the tenants. On Feb. 8 the first mtgees. gave B. & the tenants notice of A.'s prior appointment & claimed the rents. On Feb. 27 the first mtgees. applied to the ct. for liberty to take possession notwithstanding B.'s appointment, & on March 1 B. was ordered to give up possession:—*Held:* notwithstanding the appointment of A. on Feb. 1 & the notice of Feb. 8, the first mtgees. were not entitled to any rents collected by B. prior to their application of Feb. 27.—*Re* METROPOLITAN AMALGAMATED ESTATES, LTD., FAIRWEATHER *v.* THE CO., [1912] 2 Ch. 497; 107 L. T. 545; *sub nom.* YORKSHIRE INSURANCE CO. *v.* METROPOLITAN AMALGAMATED ESTATES, LTD., 81 L. J. Ch. 745.

Appointment after notice by mortgagees to tenant—Demanding payment of rent.]—*See* No. 824, *ante.*

E. Rights as against Sequestrator.

See EXECUTION, Vol. XXI., p. 603, Nos. 1901–1904.

SUB-SECT. 2.—CROPS AND TIMBER.

Growing crops.]—*See* BANKRUPTCY, Vol. IV., p. 366, Nos. 3396–3398; BILLS OF SALE, Vol. VII., pp. 36, 37, Nos. 192–197.

Timber.]—*See* AGRICULTURE, Vol. II., p. 73, Nos. 510–512.

SUB-SECT. 3.—FIXTURES.

See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 181 *et seq.*

1424. Agreement between lessor & lessee—For removal of fixtures by tenant—Agreement not binding on prior mortgagee of lessor.]—As between landlord & tenant an agreement by the landlord that the tenant shall be at liberty to leave the tenant's fixtures on the premises after the expiration of the tenancy & to sever & remove them after they have thus become part of the freehold, may, in the event of the landlord's subsequent refusal to permit severance & removal, give the tenant a right of action for the value of the fixtures. But such an agreement gives the tenant no such right of action against the landlord's mtgees. who have in the meantime entered into possession under a prior mtge.—THOMAS *v.* JENNINGS (1896), 66 L. J. Q. B. 5; 75 L. T. 274; 45 W. R. 93; 12 T. L. R. 637; 40 Sol. Jo. 731.

Whether fixtures pass with mortgage.]—*See* Part IV., Sect. 5, sub-sect. 3, *ante.*

SUB-SECT. 4.—IN RESPECT OF LEASES AND TENANCIES.

See Sect. 7, sub-sect. 1, *post.*

SECT. 4.—LIABILITIES.

SUB-SECT. 1.—IN GENERAL.

1425. Mortgagee a trustee for mortgagor—Until foreclosure.]—Mtgee. till a foreclosure, is but in nature of a trustee for the mtgor.—AMHURST *v.* DAWLING (1700), 2 Vern. 401; 23 E. R. 859.

1425a. ——.]—DOBSON *v.* LAND (1850), 8 Hare, 216; 19 L. J. Ch. 484; 16 L. T. O. S. 41; 14 Jur. 288; 68 E. R. 337; *subsequent proceedings* (1851), 4 De G. & Sm. 575.

Annotations:—**Consd.** Kirkwood *v.* Thompson (1865), 2 Hem. & M. 392; White *v.* City of London Brewery Co. (1888), 39 Ch. D. 559. **Refd.** Bellamy *v.* Brickenden (1861), 2 John. & H. 137; Banner *v.* Berridge (1881), 18 Ch. D. 254; Charles *v.* Jones (1887), 56 L. J. Ch. 745. **Mentd.** Shaw *v.* Bunny (1865), 5 New. Rep. 260.

c. *Right to growing crops.*]—Upon default made in payment of a mtge. the mtgee. has the unquestionable right to take possession of the property in the state in which it then is as to crops, & to hold the whole as his security.—MCDOWALL *v.* PHIPPEN (1882), 1 O. R. 143.—**CAN.**

Sect. 4.—*Liabilities: Sub-sects.* 1, 2, 3, 4 & 5. *Sects.* 5, 6 & 7: *Sub-sect.* 1, *A.*]

Liability to account.]—*See* Part XVI., Sect. 2, *post.*

SUB-SECT. 2.—IN RESPECT OF HIGHWAYS.

See HIGHWAYS, Vol. XXVI., pp. 496, 551, Nos. 2045, 2469, 2470.

SUB-SECT. 3.—IN RESPECT OF LEASES AND TENANCIES.

See Sect. 7, sub-sect. 2, *post.*

SUB-SECT. 4.—REPAIRS.

1426. General rule.]—A mtgee. in possession is bound to repair the mtged. premises; but if when he takes possession the premises are in such a ruinous state that a prudent owner would not repair or attempt to repair them, it is not the duty of the mtgee. to do so. It is not his duty to repair when it can only be done by pulling down & rebuilding the premises.—MOORE *v.* PAINTER (1842), 6 Jur. 903.

1427. Payment from rents after own interest deducted.]—RICHARDS *v.* MORGAN (1753), 4 Y. & C. Ex. 570; 160 E. R. 1136, L. C.

1428. Expenditure beyond rents received.]—RICHARDS *v.* MORGAN (1753), 4 Y. & C. Ex. 570; 160 E. R. 1136, L. C.

1429. Maintenance of state at time of mortgage—Deterioration due to lapse of time.]—A mtgee. is not bound to keep up buildings in as good repair as he found them, if the length of time will account for their being worse.—RUSSEL *v.* SMITHIES (1794), 1 Anst. 96; 145 E. R. 811.

Annotation:—**Refd.** Wragg *v.* Denham (1836), 2 Y. & C. Ex. 117.

1430. Gross neglect by mortgagee.]—On a bill for redemption, the mtgee. will be made to account for all loss & damage, occasioned by his gross negligence in respect of bad cultivation, & non-repair of the mtged. premises.—WRAGG *v.* DENHAM (1836), 2 Y. & C. Ex. 117; 6 L. J. Ex. Eq. 38; 160 E. R. 335.

1431. Buildings in ruinous condition—Liability to demolish & rebuild.]—MOORE *v.* PAINTER, No. 1426, *ante.*

SUB-SECT. 5.—WASTE.

See, now, Law of Property Act, 1925 (c. 20), ss. 85, 87, 101.

1432. Destruction of part of premises—Mortgagee ordered out of possession.]—HANSON *v.* DERBY (1700), 2 Vern. 392; 23 E. R. 852.

1433. Waste by person not authorised by mortgagee.]—An injunction against committing waste will not be granted against a mtgee., even though he makes no affidavit denying the waste, if it appear by the affidavit of the actual occupier of the land, that the alleged waste is not committed by the mtgee., or by his authority.—ANON. (1823), 1 L. J. O. S. Ch. 119.

1434. Bad cultivation—Gross neglect.]—WRAGG *v.* DENHAM, No. 1430, *ante.*

1435. Demolishing buildings—Liability of equitable to legal mortgagees.]—Parties claiming to be equitable mtgees. in possession of certain freehold houses commenced pulling down the wall of one of them. The party claiming to have the legal estate thereupon filed his bill against the equitable mtgees., & obtained, *ex p.*, an injunction to restrain them from pulling down, destroying, or damaging the houses or buildings, & from removing or carrying away the bricks or materials thereof, & from doing or committing any waste, injury or spoil to, in, or upon the premises, or any part thereof. Pltf. afterwards put workmen into the houses, who excluded defts. by shutting the doors & windows. Defts. thereupon obtained an entry by breaking a window in one of the houses, broke the lock of one of the doors, & ejected pltf.'s workmen:—*Held:* under the circumstances, no breach of the injunction had been committed.—LODER *v.* ARNOLD (1850), 15 Jur. 117.

1436. Mortgage of burial ground—Destruction of tombstones.]—In 1831 a chapel & a burial ground adjoining were mtged. The mtgors. remained in possession, & afterwards, in 1833, graves were sold in perpetuity to different persons, without the concurrence of the mtgees. The burial ground was closed by an order of the Queen in Council, & the mtgees. thereupon began to level the ground & deface & destroy the tombstones, etc. The ct. held the mtgees. were bound by the rights granted, & restrained them from doing any act which would prevent the future interment in the family graves, with the permission of the Secretary of State, & from removing or injuring the graves or the tombstones, & ordered the mtgees. to replace those which had been removed.—MORELAND *v.* RICHARDSON (1857), 24 Beav. 33; 26 L. J. Ch. 690; 21 J. P. 741; 3 Jur. N. S. 1189; 5 W. R. 672; 53 E. R. 269.

Annotations:—**Refd.** Thomas *v.* Jennings (1896), 66 L. J. Q. B. 5. **Mentd.** Foster *v.* Dodd (1866), L. R. 1 Q. B. 475.

1437. Opening & working mines—Sufficiency of security.]—Where a mtged. estate is of an insufficient value to pay the mtge., a mtgee., on entering into possession, may open mines & cut timber, & he will be charged only with the net profits. But where the estate is sufficient, a mtgee. in possession has no such right, & if he opens & works mines, he will be charged with the gross receipts, & will be disallowed the expenses of working.—MILLETT *v.* DAVEY (1862), 31 Beav. 470; 32 L. J. Ch. 122; 7 L. T. 551; 9 Jur. N. S. 92; 11 W. R. 176; 54 E. R. 1221.

Cutting timber.]—*See* AGRICULTURE, Vol. II., p. 73, Nos. 510–512.

SECT. 5.—COMPULSORY PURCHASE OF LAND.

See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 243, 274, 275, Nos. 1385, 2017–2027.

SECT. 6.—CONDUCT OF BUSINESS.

1438. Limit of expenditure—That of prudent owner—Mines.]—Motion for the appointment of a receiver upon a mtgee. of mines, who had become a partner by purchasing shares in them, upon the ground of mismanagement, & excluding the mtgor. from interference, refused; the parties having regulated their rights by subsequent agreement, & the mtgee. not admitting that his mtge. was satisfied. The rights & duties of a person in that situation not to be governed solely by principles applicable to one who stands simply in the character of a mtgee. or partner. Mtgee. in possession of mines not bound to expend more than a prudent owner. If he can be deprived of the possession on the ground of mismanagement, it must be of a clear & specified nature.

I do not know of any instance where a mtgee. in possession has said by answer that any thing was

due to him, that the ct. has tried upon affidavits against the answer, whether that was true or not (ELDON, L.C.).—ROWE *v.* WOOD (1822), 2 Jac. & W. 553 ; 37 E. R. 740.

1439. Liability for wilful default.]—A mtgee. in possession of a business is accountable not only for what he has received, but what he might or ought to have received.—CHAPLIN *v.* YOUNG (No. 1) (1864), 33 Beav. 330 ; 3 New Rep. 449 ; 11 L. T. 10 ; 55 E. R. 395.

1440. Right to use mortgagor's name.]—A mtgee. in possession of business premises is entitled to carry on the business for a reasonable time so as to enable him to sell as a going concern, & for that purpose to use the name of the mtgor.'s firm.—COOK *v.* THOMAS (1876), 24 W. R. 427.

1441. Allowances for losses.]—A mtge. of a large block of buildings, let out as residential apartments, contained an assignment of "the rents & profits" & a power to the mtgees. to enter on the premises in default of payment & "manage" & receive the rents & profits thereof. The deed contained no assignment of chattels nor any reference to existing arrangements with tenants, but the mtgor. covenanted to pay moneys expended by the mtgees. for any of the purposes thereby authorised. The block of buildings contained a common kitchen & salle à manger for the use of the inmates, & at the date of the mtge. the apartments were let to tenants under various agreements, made by a former mtgee. who had been paid off, by some of which the tenants stipulated for attendance & a supply of cooked food according to a tariff fixed by the manager. The interest being in arrear the mtgees. took possession of the building & continued to supply the tenants, whether they had special agreements or not, with attendance & cooked food, & managed the building at a loss. An action having been brought by the second mtgee. for an account :—*Held :* the first mtgees. were entitled in taking the accounts to be allowed the losses sustained by them in the management, not only out of the rents of the property, but out of the surplus proceeds of the sale of the property.—BOMPAS *v.* KING (1886), 33 Ch. D. 279 ; 56 L. J. Ch. 202 ; 55 L. T. 190 ; 2 T. L. R. 661, C. A.

SECT. 7.—IN RESPECT OF LEASES AND TENANCIES.

SUB-SECT. 1.—RIGHTS.

A. In General.

See, now, Law of Property Act, 1925 (c. 20), ss. 99, 100.

1442. Power to demise.]—A mtgee. cannot make a lease of a house in mtge. before foreclosure, nor present on an avoidance.—HUNGERFORD *v.* CLAY (1722), 9 Mod. Rep. 1 ; 2 Eq. Cas. Abr. 610 ; 88 E. R. 275, L. C.

1443. —— Demise by mortgagee "as agent"—Demise under seal—Effect of description "as agent."]—R., being the mtgee. of a farm belonging to B. & the collector of the rents thereof for B., but not in possession of the land, entered into an agreement under seal, expressed to be made between R. "as agent, hereinafter called 'the landlord,'" & S., "hereinafter called 'the tenant,'" whereby R. let the farm to S. from year to year. The agreement provided that the tenant should consume on the premises all hay & fodder, spread upon the land all manure & compost produced on the farm, not sell off any hay or fodder, & at the end of the tenancy leave all manure & compost. R. subsequently sold & conveyed the farm to C., who brought an action to restrain S. from acting in contravention of the above-mentioned provision :—*Held :* (1) in a demise under seal by a mtgee., the description of the person letting "as agent" was not sufficient to prevent the demise operating on the legal estate vested in him ; (2) C. as assignee of the reversion, could enforce any covenant in the lease which ran with the reversion, & the covenant as to hay & manure did so run.—CHAPMAN *v.* SMITH, [1907] 2 Ch. 97 ; 76 L. J. Ch. 394 ; 96 L. T. 662 ; 51 Sol. Jo. 428.

Annotation :—Generally, **Mentd.** Ariadne S.S. Co. *v.* McKelvie, [1922] 1 K. B. 518.

1444. Application for relief from forfeiture.]—The mtgee. of a tenant who has incurred a forfeiture cannot be heard on an application for relief under C. L. P. Act, 1860 (c. 126), s. 2, & cannot be made a party to the action of ejectment under R. S. C., Ord. 16, r. 13.—MILLS *v.* GRIFFITHS (1876), 45 L. J. Q. B. 771.

1445. Setting aside judgment by default—Obtained by lessor—No sufficient opportunity to defend—Equitable mortgagee.]—Where the owner of ground rents reserved under a lease brought an action against the lessee, who, to his knowledge had no interest in the property, for recovery of the lands for forfeiture by breach of covenant, & signed judgment by default, & the issue of the writ was not known to the equitable mtgee. of the lease until three days before judgment was signed, during two of which he was necessarily absent on business, & there existed in fact a defence to the action :—*Held :* the judgment could be set aside under R. S. C., Ord. 27, r. 15, on the application of the equitable mtgee., who should be at liberty to defend the action in deft.'s name, but deft. ought to have been made a party to the application, & therefore notice must be served on deft., & he must have liberty to apply to vary or discharge the order.—JACQUES *v.* HARRISON (1884), 12 Q. B. D. 165 ; 53 L. J. Q. B. 137 ; 50 L. T. 246 ; 32 W. R. 470, C. A.

Annotations :—**Apld.** Employers' Liability Assce. Corpn. *v.* Sedgwick, Collins, [1927] A. C. 95. **Mentd.** Lock *v.* Pearce, [1892] 2 Ch. 328.

1446. Enforcement of covenant by mortgagee or assignee—After notice to tenant—Lease by mortgagor while in possession.]—Where a lease is made by a mtgor. in possession under the powers given by Conveyancing & Law of Property Act, 1881 (c. 41), the mtgee., on giving notice to the tenant & going into possession, is entitled by virtue of the Act to enforce the covenants & conditions in the lease in the same manner as if he had been a party to it, & such right cannot be affected by any

PART IX. SECT. 7, SUB-SECT. 1.—A.

1442 i. *Power to demise.*]—A mtgee. in possession under a mtge. under Real Property Act has power to lease the land until redemption.—FINN *v.* LONDON BANK OF AUSTRALIA (1898), 19 N. S. W. L. R. (L.) 364 ; 15 N. S. W. W. N. 155.—**AUS.**

1442 ii. ——.]—DOE d. MALLOCK *v.* ROE (1837), 1 Ont. Dig. 2177.—**CAN.**

1442 iii. ——.]—A person who goes into the possession of land by a verbal permission of the mtgee. cannot be put out of possession by the mtgor., or any one claiming under him.—DOE d. HARDING *v.* HANSON (1866), 6 All. 340.—**CAN.**

1442 iv. ——.]—There is nothing in the covenant (No. 7) in the Act respecting Short Forms of Mortgages, R. S. O., 1887 (c. 107), that on default the mtgee. shall have quiet possession of the lands, repugnant to the proviso in the same Act (No. 14), that the mtgee. on default of payment, may, on giving notice, enter on & lease or sell the lands ; & a mtgee., when his mtge. is in default, may, under the covenant, without giving notice, make any lease which will not interfere with the mtgor.'s right to redeem.—BRETHOUR *v.* BROOKE (1893), 23 O. R. 658 ; *affd.* (1894), 21 A. R. 144.—**CAN.**

1442 v. ——.]—WARREN *v.* JOHNS, W. W. R. 568.—**CAN.**

Sect. 7.—In respect of leases and tenancies: Sub-sect. 1, A. & B.; sub-sect. 2.]

collateral agreement between the lessor & the lessee. — MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY *v.* SMITH (1888), 22 Q. B. D. 70; 58 L. J. Q. B. 61; 37 W. R. 42; 5 T. L. R. 17, C. A.

Annotations:—**Expld.** Matthews *v.* Usher (1899), 68 L. J. Q. B. 988. **Consd.** Robbins *v.* Whyte, [1906] 1 K. B. 125.

1447. —— Covenant running with reversion—Selling or removing hay or manure.]—CHAPMAN *v.* SMITH, No. 1443, *ante*.

1448. Mortgagee as reversioner—Expectant on leases of mortgaged property—Enforcement of remedies as such.]—A mtgee., after default in payment by the mtgor., has, if he think proper to exercise them, the same rights against a tenant by lease granted before the mtge., as the mtgor. had, & may take his remedy on such lease, as assignee of the reversion. If the lease was made by the mtgor. subsequently to the mtge., the mtgee. may treat the tenant as a trespasser, but cannot distrain, or sue for rent, unless he has accepted rent from the tenant, or has given him notice to pay rent, & the tenant has acquiesced.

A deed to lead the uses of a recovery, after reciting that the premises were to be conveyed for the purpose, among others, of securing payment of £800 advanced by J. to M. tenant in tail in remainder, declared the uses as follows: To H. & L., their exors., etc., for one thousand years, to commence from the day before the date, etc., in trust, subject to the powers, etc., after mentioned, upon non-payment of the £800 & interest, to sell or mtgage., & pay that sum to J.: &, from & after the determination of that term, & subject meantime thereto, & to the trusts thereof, to E., mother of M., for life: remainder to T., his exors., etc., for two thousand years, to commence from the day of the decease of E. in trust to levy & repay such sums as E. should during her life pay to J. for interest on the £800, & to suffer the person next in remainder or reversion expectant on the first term to receive the residue of rents not applied in executing the trusts of the latter term: remainder, & in the meantime subject thereto, to such uses as M. should appoint, &, in default of appointment, to him for life: remainders to his sons & to his daughters in tail: remainders over. A power was then reserved to E. to demise the premises for ten years from the date of the deed, or seven years from the day of her decease, reserving the best rent, etc., E. demised the premises to a tenant for seven years from the day of her decease, reserving rent "to M., or the person for the time being entitled to the freehold or inheritance of the premises immediately expectant" on the decease of E. She died & the lessee entered. M. died shortly afterwards, & left a daughter. Afterwards, the trustees of the terms of one thousand & two thousand years assigned them to J., default having been made in the payment of his £800:—*Held:* the seven years lease granted by E., being made under a power created by the deed of uses, must be deemed contemporaneous with the term of one thousand years created by the same deed, & binding on the trustees of that term, who were parties to the deed, so that they could not disturb the possession; the trustees of that term, though not "entitled to the freehold or inheritance," were the reversioners entitled to the rent reserved by the lease, & consequently their assignee might distrain for it.—ROGERS *v.* HUMPHREYS (1835), 4 Ad. & El. 299; 1 Har. & W. 625; 5 Nev. & M. K. B. 511; 5 L. J. K. B. 65; 111 E. R. 799.

Annotations:—**Apld.** *Re* Ind, Coope & Co., Fisher *v.* The Co., Knox *v.* The Co., Arnold *v.* The Co., [1911] 2 Ch. 223. **Mentd.** Yellowly *v.* Gower (1855), 24 L. J. Ex. 289.

1449. —— ——.]—The principle that the mtgor. is in possession & receives the rents of the mtged. property only by leave of the mtgee., & the mtgee. is the reversioner expectant on leases of the mtged. property, & is entitled on taking possession of it to all arrears of rent in respect of leases made before date of the mtge. or subsequently thereto by authority of the mtgee., is not affected by Jud. Act, 1873 (c. 66), s. 25 (5), or Conveyancing & Law of Property Act, 1881 (c. 41), s. 10, which deal with procedure only.—*Re* IND, COOPE & CO., LTD., FISHER *v.* THE CO., KNOX *v.* THE CO., ARNOLD *v.* THE CO., [1911] 2 Ch. 223; 80 L. J. Ch. 661; 105 L. T. 356; 55 Sol. Jo. 600.

Receipt of rents.]—*See* Sub-sect. 1, B., *post*.

Leases jointly with mortgagor.]—*See* Part VI., Sect. 4, sub-sect. 2, *ante*.

B. Rents and Profits.

1450. Lease prior to mortgage—After notice to tenant—Right to arrears.]—A mtgee., after giving notice of the mtge. to the tenant in possession under a lease prior to the mtge., is intitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, & he may distrain for it after such notice.—MOSS *v.* GALLIMORE (1779), 1 Doug. K. B. 279; 99 E. R. 182.

Annotations:—**Apld.** Birch *v.* Wright (1756), 1 Term Rep. 378. **Distd.** Pope *v.* Biggs (1829), 9 B. & C. 245; Partington *v.* Woodcock (1835), 5 Nev. & M. K. B. 672. **Folld.** Burrowes *v.* Gradin (1843), 1 Dow. & L. 213. **Apld.** *Re* Ind, Coope & Co., Fisher *v.* The Co., Knox *v.* The Co., Arnold *v.* The Co., [1911] 2 Ch. 223. **Refd.** *Ex p.* Wilson (1813), 2 Ves. & B. 252; Aichorne *v.* Gomme (1824), 2 Bing. 54; Johnson *v.* Howson (1828), 6 L. J. O. S. K. B. 236; Doe d. Fisher *v.* Giles (1829), 5 Bing. 421; Galliers *v.* Moss (1829), 4 Man. & Ry. K. B. 268; Salmon *v.* Dean (1851), 15 Jur. 641; Trent *v.* Hunt (1853), 9 Exch. 14; Underhay *v.* Read (1887), 58 L. T. 457. **Mentd.** Christophers *v.* Sparke (1820), 2 Jac. & W. 223; Delaney *v.* Fox (1857), 2 C. B. N. S. 768; Heath *v.* Pugh (1881), 6 Q. B. D. 345.

1451. —— —— ——.]—BIRCH *v.* WRIGHT, No. 1394, *ante*.

1452. —— —— ——.]—The mtgee. of an estate may recover in an action for use & occupation, brought against a tenant from year to year, whose tenancy may have commenced anterior to the mtge., the amount of all rent accruing after the mtge., etc., remaining unpaid after notice of the mtge., as well as all rent subsequently accruing; & where an improvement has been effected in the premises by the mtgor. after the execution of the mtge., & the tenant has agreed to pay an increased rent in respect of such improvement, the mtgee. may adopt the act of the mtgor., as that of his agent; & may recover from the tenant in respect of such improved rent.—BURROWES *v.* GRADIN (1843), 1 Dow. & L. 213; 12 L. J. Q. B. 333; 1 L. T. O. S. 318; 8 J. P. 583; 7 Jur. 942.

PART IX. SECT. 7, SUB-SECT. 1.—B.

d. *Lease prior to mortgage.*]—A garnishing creditor of the mtgor. is entitled as against the mtgee. to rent due in respect of a lease of the mtged. premises made after the mtge. by the mtgor.—GREEN *v.* CAUCHON (1885), 3 Man. L. R. 248.—**CAN.**

e. ——.]—A mtgee. is not bound to proceed under C. S. N. B., c. 83, s. 15, but may exercise his rights at common law for the recovery of rent payable under a lease of the mtged. premises made subsequent to the mtge.—BROCK *v.* FORSTER (1897), 34 N. B. R. 262.—**CAN.**

f. *Lease subsequent to mortgage.*]—MORRISON *v.* JACKSON, 21 C. L. T. 85.—**CAN.**

g. ——.]—CLAZY *v.* THORNBURN (Y. T.) (1905), 2 W. L. R. 534.—**CAN.**

h. ——.]—A mtgee. who has never been in possession nor received

1453. —— —— ——.]—*Re* IND, COOPE & Co., LTD., FISHER *v.* THE CO., KNOX *v.* THE CO., ARNOLD *v.* THE CO., No. 1449, *ante*.

1454. —— —— **Increased rent.**]—BURROWES *v.* GRADIN, No. 1452, *ante*.

1455. —— —— **Equitable mortgagee by deposit.**]—An equitable mtgee. by deposit served notice upon the tenant of the mtgor., who was in default under the mtge., intimating the fact of the mtge. & requiring the tenant to pay him, the equitable mtgee., the rent due in respect of the premises. In pursuance of such notice, the tenant paid his rent to the equitable mtgee. Subsequently the tenant sought to recover it back on the ground that it had been paid without consideration:—*Held:* the action failed, inasmuch as the rent had been paid with full knowledge of the fact that it was claimed by deft. as equitable mtgee.—FINCK *v.* TRANTER, [1905] 1 K. B. 427; 74 L. J. K. B. 345; 92 L. T. 297.

Annotation:—**Refd.** Vacuum Oil Co. *v.* Ellis, [1914] 1 K. B. 693.

1456. Lease subsequent to mortgage—After notice affirming tenancy.]—POPE *v.* BIGGS, No. 1397 *ante*.

1457. —— —— **& acquiescence of tenant.**]—ROGERS *v.* HUMPHREYS, No. 1448, *ante*.

1458. —— —— **Subsequent appointment of receiver—Preserving rights of prior incumbrancers.**]—UNDERHAY *v.* READ, No. 824, *ante*.

1459. —— **With consent of mortgagee.**]—*Re* IND, COOPE & Co., LTD., FISHER *v.* THE CO., KNOX *v.* THE CO., ARNOLD *v.* THE CO., No. 1449, *ante*.

—— **Validity against mortgagee.**]—*See* Part VI., Sect. 5, sub-sect. 6, B., *ante*.

1460. Apportionment of rent—Mortgage of separate parts of premises.]—HARRYMAN *v.* COLLINS, No. 1356, *ante*.

1461. Where rent prepaid—Tenant without notice of mortgage.]—A lessee for a term sub-let a house for a period less than his term to pltf., at a rent reserved & made payable by equal quarterly payments on the four usual quarter days. He afterwards mortgaged the premises to defts. as security for money advanced by them for a term less than his own, but greater than pltf.'s. Without knowledge of this mtge., but after it was entered into, pltf. paid his lessor a sum of money for rent before it was due. Between the payment & the rent day defts. gave pltf. notice of their mtge., & required him to pay the rent due upon his lease. Afterwards they distrained for this rent:—*Held:* this payment was no discharge of pltf.'s liability to pay rent when it became due, & therefore defts. were justified in distraining.—DE NICHOLLS *v.* SAUNDERS (1870), L. R. 5 C. P. 589; 39 L. J. C. P. 297; 22 L. T. 661; 18 W. R. 1106.

Annotations:—**Consd.** Ashburton *v.* Nocton, [1915] 1 Ch. 274. **Refd.** Cook *v.* Guerra (1872), L. R. 7 C. P. 132; Green *v.* Rheinberg (1911), 104 L. T. 149. **Mentd.** Glyn Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591.

1462. —— **Constructive notice of mortgage.**]—A. having granted a lease for five years to deft. from Midsummer 1864, persuaded deft. to pay his rent to him for more than four years in advance. In 1865 A. mortgaged the reversion of the premises to pltf. Pltf., in Nov. 1866, requested deft. to pay rent to him in future, but omitted to state that he was mtgee. of the reversion, & deft. took no notice of the notice to pay rent. In an action to recover the rent due for two & a half years from Midsummer 1866 to Christmas 1868:—*Held:* the notice, together with the collateral circumstances, were sufficient to put deft. in possession of the fact that pltf. was the mtgee.; & although all prepayments prior to the giving of such notice were payments of rent as against pltf.'s claim, yet pltf. was entitled to recover rent from the date of the notice.—COOK *v.* GUERRA (1872), L. R. 7 C. P. 132; 41 L. J. C. P. 89; 26 L. T. 97; 20 W. R. 367.

Annotation:—**Refd.** Ashburton *v.* Nocton, [1915] 1 Ch. 274.

1463. —— **Rent for whole time paid in lump sum—Prepayment prior to mortgage—No inquiry by mortgagee.**]—By a lease in writing a house was demised to deft. for a term of four years at a yearly rent payable quarterly; & deft. entered under the lease. Soon after the commencement of the term the lessor agreed to accept, & deft. paid, a lump sum in satisfaction of all rent reserved by the lease during the term. The lessor then mortgaged the premises to pltf. Pltf. knew nothing of the payment of rent in advance by deft., & had only seen the counterpart lease; but she had made no inquiry of deft. before the mtge. was completed:—*Held:* pltf. was bound by the arrangement made between deft. & the lessor, & could not recover from deft. any part of the rent reserved by the lease.—GREEN *v.* RHEINBERG (1911), 104 L. T. 149, C. A.

Annotation:—**Refd.** Ashburton *v.* Nocton, [1915] 1 Ch. 274.

1464. Right of equitable mortgagee.]—FINCK *v.* TRANTER, No. 1455, *ante*.

1465. Set-off by tenant of damages claimed against lessor.]—A building co. entered into an agreement with deft. to erect & complete an hotel so as to be ready for occupation by a certain date, & deft. agreed to take a lease of the hotel for twenty eight years at a specified rent, as soon as it was ready for use. The building co. made default in completing the hotel, but on its subsequent completion deft., accepted a lease for the stipulated term without prejudice to any claim for damages for breach of the agreement. The co., who had obtained a head lease of ninety nine years from the freeholder, mortgaged same to pltfs. In an action by them, as mtgees. in possession, against deft., for arrears of rent accrued since the date of the mtge., deft., sought to set off a claim for damages in respect of the co.'s default in not completing the hotel by the specified time, & alleged that the mtge. was taken by pltfs., with full notice & knowledge of that claim:—*Held:* inasmuch as the right attempted to be set off was not an interest in land, but merely a claim for damages for breach of a personal covenant, the claim to set off could not be allowed.—REEVES *v.* POPE, [1914] 2 K. B. 284; 83 L. J. K. B. 771; 110 L. T. 503; 58 Sol. Jo. 248, C. A.

Right of distress.]—*See* DISTRESS, Vol. XVIII., pp. 283, 284, 345, Nos. 181–189, 806.

Limitation of action.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 390, 395, Nos. 715, 756.

SUB-SECT. 2.—LIABILITIES.

1466. Mortgage by assignment—General rule—Subject to all obligations.]—An assignee by way of mtge. of a leasehold estate is subject to all the

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rent, cannot maintain an action of use & occupation against the lessee of a mtgor., holding by lease subsequent to the mtge.—WYSE *v.* MYERS (1854), 4 I. C. L. R. 101.—**IR.**

k. *Right to rents—When receiver appointed in administration suit.*]—WALLACE *v.* WALLACE (1886), 11 O. R. 574.—**CAN.**

l. *After foreclosure.*]—A mtgee. who has foreclosed his mtge. is not entitled to rent from a tenant of the property from the date of the foreclosure, but from the date on which he has perfected his title & the tenant has notice of his having done so.—RAISUDDIN CHOWDHRY *v.* KHODU NEWAZ CHOWDHRY, 12 C. L. R. 479.—**IND.**

PART IX. SECT. 7, SUB-SECT. 2.

1466 l. *Mortgage by assignment—General rule—Subject to all obligations.*]—A mtgee. of a lease is liable to all the

Sect. 7.—In respect of leases and tenancies: Sub-sect. 2. Sect. 8: Sub-sect. 1.]

same liabilities as between himself & the landlord or lessor as an absolute assignee (LORD CRANWORTH).—GALBRAITH *v.* COOPER (1860), 8 H. L. Cas. 315; 11 E. R. 450, H. L.

1467. —— Liability in covenant.]—It cannot be doubted at this day that where there is an assignment of the whole term to a mtgee., the mtgee. becomes by virtue of the assignment the owner of the lease burdened with the covenants (CAVE, J.). —*Re* GEE, *Ex p.* OFFICIAL RECEIVER (1889), 24 Q. B. D. 65; 59 L. J. Q. B. 16; *sub nom. Re* GEE, *Ex p.* BOARD OF TRADE, 61 L. T. 645; 38 W. R. 143; 6 Morr. 267.

1468. —— —— Ejectment.]—Pltf. being the mtgee. of the lessee of a house under a building lease, took possession of the property upon the original lessee neglecting to fulfil the covenants. Pltf. was afterwards ejected in pursuance of a judgment in an action at law for breach of covenants, & filed a bill to be reinstated in the property, on the ground that there had been no breach of the covenants under the lease. The particular covenants as to which relief was prayed were to make & provide a roadway in front of the house & to construct good & sufficient drains & sewers to carry off the foul water. Pltf. excused himself from performing the first covenant on the ground that the owners of the adjoining houses refused to complete their portion of the road; & as to the second covenant, pltf. had caused drains to be made by competent workmen, but they were found to be insufficient for the purpose:—*Held:* there had been a breach of both covenants.—NOKES *v.* GIBBON (1857), 3 Drew. 681; 26 L. J. Ch. 433; 29 L. T. O. S. 139; 21 J. P. 659; 3 Jur. N. S. 726; 5 W. R. 400; 61 E. R. 1063; *subsequent proceedings*, 3 Drew. 735.

Annotation:—**Mentd.** Hughes *v.* Met. Ry. (1876), 1 C. P. D. 120.

1469. —— Tenancy from year to year by estoppel —Between mortgagee & lessor—Liability for rent for such tenancy.]—A tenancy from year to year is created by estoppel between the mtgee. of an assignee of a lease, disclaimed by the assignee's trustee in bkpcy., & the original lessor, where, in the absence of a vesting order under Bkpcy. Act, 1883 (c. 54), s. 55, in favour of either party, the mtgee. has entered into possession & occupation of the premises, & has for some years continued to pay quarterly the original rent reserved by the lease to the lessor. That the mtgee. had done this merely to preserve his security is no defence to an action for rent due under a tenancy from year to year, nor is it a defence that the lessor had a remedy by distress.—JUMP *v.* PAYNE (1899), 68 L. J. Q. B. 607.

——.]—*See, further*, LANDLORD & TENANT, Vol. XXXI., pp. 405, 407, 408, Nos. 5512–5516, 5529–5543.

1470. Mortgage by sub-demise — Liability to original lessee—Breach of covenant causing forfeiture.]—A lease was made to A. of property described as all that piece of land, etc., with the messuages & buildings thereon erected. The lease contained a covenant by A. to keep the messuages, etc. in repair, & a clause of forfeiture on breach of the covenant. A. mortgaged this property, by way of underlease, together with other property, to B. The mtge. deed contained a power of sale & powers for B. to expend all moneys to be received by him under the deed in repairs, & a covenant by A. to indemnify B. against the covenants in the lease until possession taken by him. At the time of the mtge. the buildings on the demised land consisted of carcases of houses only. B. entered into possession of the property comprised in the lease, but neither sold it nor completed the houses, which were taken by the landlord under the clause of forfeiture:—*Held:* B. was liable to A. in respect of the forfeiture of the lease.—PERRY *v.* WALKER (1855), 3 Eq. Rep. 721; 24 L. J. Ch. 319; 26 L. T. O. S. 36; 1 Jur. N. S. 746; 3 W. R. 314.

1471. —— —— Covenant for payment.]—The lessees of premises having assigned the term, the assignee mtged. the premises by way of sub-demise. The mtge. provided that, upon default by the mtgor., the mtgees. might enter into possession, or receipt of the rents & profits of the premises, & demise or sell same, & out of moneys so received by them, whether as rents & profits or purchase-money, should in the first place pay the rent reserved by the original lease. The mtgees., having entered into possession, did not pay rent which accrued due under the lease while they were in possession. The lessees, having been compelled to pay it, sued the mtgees. to recover the amount so paid by them:—*Held:* the action was not maintainable.—BONNER *v.* TOTTENHAM & EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY, [1899] 1 Q. B. 161; 68 L. J. Q. B. 114; 79 L. T. 611; 47 W. R. 161; 15 T. L. R. 76; 43 Sol. Jo. 95, C. A.

Annotation:—**Mentd.** Moxham *v.* Grant, [1900] 1 Q. B. 88.

1472. Agreement to grant lease with concurrence of mortgagor—Refusal of mortgagor to concur—Specific performance not decreed against mortgagee.]—Deft., a mtgee., agreed to grant a lease to pltf., but upon the mutual understanding that the mtgor. was to concur. The mtgor. having refused his concurrence:—*Held:* pltf. was not entitled to insist on having a lease from the mtgee. alone.—FRANKLINSKI *v.* BALL (1864), 33 Beav. 560; 4 New Rep. 128; 34 L. J. Ch. 153; 10 L. T. 447; 10 Jur. N. S. 606; 12 W. R. 845; 55 E. R. 486.

1473. Action of ejectment—Liability to be made party to.]—MILLS *v.* GRIFFITHS, No. 1444, *ante*.

Mortgage of leaseholds generally.]—*See* Part V., Sect. 3, *ante*.

Distress by landlord on bankruptcy of tenant.]—*See* BANKRUPTCY, Vol. V., p. 956, Nos. 7839, 7840.

SECT. 8.—ACTION FOR POSSESSION.

SUB-SECT. 1.—AGAINST MORTGAGOR.

1474. No necessity for prior demand for possession.]—In ejectment by mtgee. against mtgor., it is not necessary to demand possession before action brought.—DOE d. ROBY *v.* MAISEY (1828), 8 B. & C. 767; 3 Man. & Ry. K. B. 107; 7 L. J. O. S. K. B. 85; 108 E. R. 1228.

Annotations:—**Mentd.** Doe d. Price *v.* Price (1832), 9 Bing. 356; Doe d. Jones *v.* Williams (1836), 5 Ad. & El. 291; Melling *v.* Leak (1855), 16 C. B. 652; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115.

covenants which run with the land, & as a general rule will, under the provisions of 19 & 20 Geo. 3, c. 30, be bound by the acts of the mtgor., whom he has suffered to remain in possession.—GALBRAITH *v.* COOPER (1860), 8 H. L. Cas. 315; 11 E. R. 450. —IR.

PART IX. SECT. 8, SUB-SECT. 1.

m. *Right to possession on default—Necessity for notice.*]—Where a mtge. provided that no means should be taken by the mtgee. to obtain possession of the land until he should have given to the mtgor. one calendar month's notice in writing after default made, demanding payment:—*Held:* in ejectment by the mtgee., a notice signed by pltf.'s attorney was sufficient.—KEYWORTH *v.* THOMPSON (1855), 16 U. C. R. 178.—CAN.

n. —— ——.]—A mtge. contained

1475. —— Or notice to quit.] — Where the mtgor. remains in possession, & the money is not repaid on the day stipulated, the mtgee., who has a power of entry & sale on non-payment, may eject the mtgor. without notice to quit, or demand of possession.—DOE d. FISHER *v.* GILES (1829), 5 Bing. 421; 2 Moo. & P. 749; 7 L. J. O. S. C. P. 134; 130 E. R. 1123.

1476. —— ——.]—Mtge. in fee of freehold, & for years of leasehold premises, with covenant by mtgor., that if payment were not made by a given day, it should be lawful for the mtgee., on giving one month's notice, as thereinafter mentioned, to enter, & whether in or out of possession to sell or let; & by mtgee., that no sale or lease should be made until he should have given the mtgor. a month's notice:—*Held:* the mtgee. was entitled to bring ejectment against the mtgor. without giving any notice, the covenants in the mtge. deed not amounting to a redemise to the mtgor. —DOE d. PARSLEY *v.* DAY (1842), 2 Q. B. 147; 2 Gal. & Dav. 757; 12 L. J. Q. B. 86; 6 Jur. 913; 114 E. R. 58.

Annotations:—**Apld.** Rogers *v.* Grazebrook (1846), 8 Q. B. 895. **Refd.** Chapman *v.* Beecham (1842), 3 Gal. & Dav. . . , Gale *v.* Burnell (1845), 7 Q. B. 850. **Mentd.** Manders *v.* Williams (1849), 4 Exch. 339.

1477. —— —— Mortgagor attorned tenant to mortgagee.]—A mtge. deed, reciting a loan of £850 at 5 per cent. interest, contained an agreement that the mtgor., during his occupation of the mtged. premises, should yield & pay for the same to the mtgee. the yearly rent or sum of £50, payable half-yearly, & that it should be lawful for the mtgee. to use such remedies by distress & sale for the recovery of the said rent as landlords have on common demises; provided that the reservation of such rent should not prejudice the mtgee's right to enter & evict the mtgor. at any time after default made in payment of the moneys secured, or any part thereof:—*Held:* after default made in payment of the principal & of one half year's rent, the mtgee. might eject the mtgor. without any notice to quit, though he had treated the mtgor. as tenant by distraining on him for a previous year's rent.—DOE d. GARROD *v.* OLLEY (1840), 12 Ad. & El. 481; 4 Per. & Dav. 275; 9 L. J. Q. B. 379; 4 Jur. 1081; 113 E. R. 894.

Annotations:—**Apld.** Doe d. Snell *v.* Tom (1843), 4 Q. B. 615; Metropolitan Counties Assce. *v.* Brown (1859), 4 H. & N. 428. **Consd.** Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224.

1478. —— —— —— —.]—T. mortgaged land to B., &, by the mtge. deed, attorned to B. as tenant, at a quarterly rent, which was stated to be done for the purpose of securing the principal & interest, & in contemplation & part discharge thereof. The mtge. deed also gave B. a power of entry in default of payment:—*Held:* B., or his assignee, might bring ejectment against T. without giving him notice to quit.—DOE d. SNELL *v.* TOM (1843), 4 Q. B. 615; 3 Gal. & Dav. 637; 12 L. J. Q. B. 264; 114 E. R. 1030; *sub nom.* DOE d. SMALE *v.* THOM, 1 L. T. O. S. 169; 7 Jur. 847.

Annotations:—**Distd.** Brown *v.* Metropolitan Counties, etc. Soc. (1859), 1 E. & E. 832. **Consd.** Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224. **Apld.** Metropolitan Counties Assce. *v.* Brown (1859), 4 H. & N. 428. **Mentd.** Phillips *v.* Ball (1859), 7 W. R. 580.

1479. —— —— ——.] — By indenture of Sept. 23, 1856, B. mortgaged to V. certain premises as a security for a loan of £2,500. The deed contained a power of sale in default of payment of the principal & interest on a certain day; also a power for the mtgees. "at any time or times after such default" to enter upon the premises. The deed also contained the following provision: "Lastly, to the intent that the said V. may have for the recovery of the interest accruing on the principal money hereby secured the same powers of entry & distress as are by law given to landlords for the recovery of rent in arrear, the said B. doth hereby attorn & become tenant from year to year to the said V. of the said premises hereby assigned, at & under the yearly rent of £125 to be paid by half-yearly payments on Mar. 23, & Sept. 25. Nevertheless it is hereby agreed that in the event of any sale under the powers hereinbefore contained, the attornment & tenancy hereby created shall, as regards such portion of the premises as shall be sold, be at an end; & that without any previous notice to put an end to the same." By indenture of Feb. 18, 1857, B. assigned by way of mtge. all his interest in the mtged. premises to pltfs., as a security for a loan of £1,500. By indenture of Oct. 27, 1858, V. assigned his mtge. to pltfs. On Nov. 12, 1858, pltfs. gave B. notice that they had entered on the premises under the provisions contained in the mtge. deed of Sept. 23, 1856. B. refused to give up possession, & on Nov. 25, pltfs. distrained B.'s goods for rent alleged to be due up to Sept. 25:—*Held:* the clause of attornment in the indenture of Sept. 23, 1856, did not create a tenancy from year to year with all its incidents; & pltfs. might maintain ejectment against B. without giving him six months' notice to quit.—METROPOLITAN COUNTIES ASSURANCE CO. *v.* BROWN (1859), 4 H. & N. 428; 28 L. J. Ex. 340; 33 L. T. O. S. 165; 157 E. R. 906.

1480. —— —— Mortgagor attorned tenant to receiver.]—By a receivership deed executed contemporaneously with a mtge. in fee, which is recited, the mtgor. & mtgee. appointed a receiver, & constituted him their agent & attorney to receive the rents of the mtged. property, & to use such remedies by way of entry & distress as should be requisite for that purpose. By same deed the mtgor. attorned as tenant from year to year to the receiver, & there was a proviso, that if default should be made in payment of the mtge. money, or interest, at the times appointed, the mtgee. might enter & avoid the tenancy created by the attornment. There was also a proviso, that nothing therein contained should lessen the rights, powers or remedies of the mtgee. under the mtge. On the mtgor. being found bkpt.:—*Held:* the relation of the landlord & tenant had been created between the receiver & mtgor. by the receivership deed, & the receiver was entitled to distrain & take the goods which had belonged to the mtgor. on the mtged. premises.

He may at any time be treated as a trespasser by the mtgee. who may maintain ejectment against him without any previous notice or demand of possession (LORD CHELMSFORD, C.).—JOLLY *v.* ARBUTHNOT (1859), 4 De G. & J. 224; 28 L. J. Ch. 547; 33 L. T. O. S. 263; 23 J. P. 677; 5 Jur. N. S. 689; 7 W. R. 532; 45 E. R. 87, L. C.

Annotations:—**Distd.** Hampson *v.* Fellows (1868), 37 L. J. Ch. 694. **Folld.** Morton *v.* Woods (1869), L. R. 4 Q. B. 293. **Consd.** *Re* Threlfall, *Ex p.* Queen's Benefit Bldg. Soc. (1880), 16 Ch. D. 274; Kearsley *v.* Philips (1883),

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a declaration that if the mtgor. should make default, & the mtgee. should, after the time for payment, have given a month's notice demanding payment, the mtgee. might take possession, etc. The mtgor. also covenanted that no means should be taken for recovering possession until after such notice:—*Held:* ejectment would not lie until such month's notice had been given after default made.—COPP *v.* HOLMES (1856), 6 C. P. 373.—**CAN.**

o. *After foreclosure proceedings — Mortgagor in possession under contract to purchase.*]—Pltf. held a mtge. on deft.'s property, & the property was sold under foreclosure proceedings, & bought in by pltf., who received a deed

Sect. 8.—Action for possession: Sub-sects. 1 & 2, A. & B.; sub-sects. 3 & 4.]

11 Q. B. D. 621. **Refd.** *Re* Kitchin, *Ex p.* Punnett (1880), 16 Ch. D. 226. **Mentd.** *Re* Roberts, *Ex p.* Hill (1877), 6 Ch. D. 63.

1481. Several mortgagees ranking pari passu—Action by one.]—The trustees under a turnpike Act, having demised to one of several mtgees. such proportion of the tolls arising from the road & of the toll houses & toll gates for collecting same as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mtgee. brought ejectment for the toll houses & toll gates, in order to repay himself the interest due to him: —*Held:* he might well maintain his action, notwithstanding a clause in the Act that all the mtgees. should be creditors upon the tolls in equal degree.—DOE d. BANKS *v.* BOOTH (1800), 2 Bos. & P. 219; 126 E. R. 1245.

Annotations:—**Apld.** Doe d. Thompson *v.* Lediard (1832), 4 B. & Ad. 137. **Distd.** Doe d. Myatt *v.* St. Helen's Ry. (1841), 2 Q. B. 364. **Folld.** Doe d. Watton *v.* Penfold (1842), 3 Q. B. 757. **Refd.** Pardoe *v.* Price (1844), 13 M. & W. 267; Pardoe *v.* Price (1847), 16 M. & W. 451.

1482. —— ——.]—By a local turnpike Act certain tolls were made subject to the payment of moneys borrowed & to be borrowed thereupon. The trustees granted mtges. of such tolls, in the form given by Turnpike Roads Act, 1822 (c. 126), s. 81, conveying to each creditor such proportion of the tolls & the toll-gates & toll-houses, as the money advanced by him bore, or should bear to the whole sum due or to become due on that security. By a subsequent Act for making a new branch road, the former Act was continued, & certain tolls were granted in respect of the new branch, to be applied like the former, & to be subject to the debts incurred on the credit of the former tolls; & it was enacted, that all moneys due on such credit should be entitled to "a preference & priority of charge & payment" before any moneys advanced under this Act, for making the new branch. On ejectment for the tolls & toll-houses by the holder of a mtge., framed like the former ones, for moneys lent to complete the branch road:—*Held:* the words "priority of charge," did not prevent this mtgee. from acquiring a legal estate in the subjects mtged., & he might recover the toll-houses & gates in ejectment, pursuant to Turnpike Roads Act, 1822 (c. 126), s. 49, only remaining accountable to the other mtgees. for such portions of the tolls as they were entitled to in respect of their advances. —DOE d. THOMPSON *v.* LEDIARD (1832), 4 B. & Ad. 137; 1 Nev. & M. K. B. 683; 2 L. J. K. B. 12; 110 E. R. 407.

Annotations:—**Distd.** Doe d. Myatt *v.* St. Helen's Ry. (1841), 2 Q. B. 364. **Folld.** Doe d. Watton *v.* Penfold (1842), 3 Q. B. 757. **Refd.** Doe d. Levy *v.* Horne (1842), 3 Q. B. 760.

1483. —— ——.]—Trustees of a turnpike road, under the authority of a local Act & of Turnpike Roads Act, 1822 (c. 126), borrowed money on mtges. of the tolls & toll houses to several parties, each mtge. respectively purporting to convey such proportion of the tolls & houses as the sum secured bore or should bear to the whole sum charged or to be charged on the credit of the tolls:—*Held:* under Turnpike Roads Act, 1822 (c. 126), s. 49, the interest vested in a first mtgee. by such conveyance did not prevent a second mtgee. from bringing ejectment for the tolls & toll houses, on his own single demise; but he might recover in such action, holding all that he recovered, after satisfaction of his own claim, in trust for the other mtgees.—DOE d. WATTON *v.* PENFOLD (1842), 3 Q. B. 757; 3 Gal. & Dav. 235; 12 L. J. Q. B. 70; 6 J. P. 730; 6 Jur. 948; 114 E. R. 698.

Annotation:—**Mentd.** Guest *v.* Poole & Bournemouth Ry. (1870), L. R. 5 C. P. 553.

1484. Mortgagee acquiring no title in land—Mortgage under private Act.]—A railway Act, empowered the co. to purchase land for the purposes of the Act, to levy tolls for carriage on the railway, & to regulate such carriage. No other person was empowered to take tolls. The Act likewise authorised them to borrow money, & to assign & charge "the property of the said undertaking, & the rates, tolls, & other sums arising or to arise by virtue of this Act," as security; & it gave a form of mtge., by which the co. were to assign "the said undertaking, & all & singular the rates, tolls, & other sums arising" etc. Mtgees. were to be entitled, one with the other, to their proportions of the said rates, tolls, & sums & premises, according to the sums advanced, without preference by reason of priority in date of mtge. etc. Parties holding mtges. were not on that account to be deemed shareholders:—*Held:* by such mtge. the mtgees. did not acquire title to the land, & they could not bring ejectment as on a demise of "the said undertaking, & all & singular the rates, rolls," etc., arising by virtue of the Act.—DOE d. MYATT *v.* ST. HELEN'S RY. CO. (1841), 2 Q. B. 364; 2 Ry. & Can. Cas. 756; 1 Gal. & Dav. 663; 11 L. J. Q. B. 6; 6 Jur. 640; 114 E. R. 144.

Annotations:—**Consd.** Wickham *v.* New Brunswick & Canada Ry. (1865), L. R. 1 P. C. 64. **Refd.** Walker *v.* Milne (1849), 18 L. J. Ch. 288; Ashton *v.* Langdale (1851), 4 De G. & Sm. 402; Hart *v.* Eastern Union Ry. (1852), 7 Exch. 246; *Re* Mitchell's Estate, Mitchell *v.* Moberly (1877), 6 Ch. D. 655; *Re* Parker, Wignall *v.* Park, [1891] 1 Ch. 682; *Re* Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300. **Mentd.** Fripp *v.* Chard Ry., Fripp *v.* Bridgwater & Taunton Canal, etc. Co. (1853), 11 Hare, 241; *Re* Panama New Zealand & Australian Royal Mail Co. (1869), 39 L. J. Ch. 162; Attree *v.* Hawe (1878), 9 Ch. D. 337.

SUB-SECT. 2.—AGAINST TENANTS.

A. Tenancy Binding on Mortgagee.

1485. General rule.]—ROGERS *v.* HUMPHREYS, No. 1448, *ante*.

1486. Notice to quit by mortgagee—Given before mortgage debt due.]—Notice to a tenant to quit was signed by the mtgees. after mtge. of the reversion. A clause in the mtge. deed provided that if the interest were duly paid by the mtgor. the principal money was not to be called in by the mtgees. until a period after the date of the notice. There was also the usual covenant for quiet enjoyment:—*Held:* notwithstanding this clause the signature of the mtgee. to the notice was sufficient.—BURTON *v.* DICKENSON (1867), 17 L. T. 264.

1487. Action for possession against lessee—On breach of covenant—Pending administration action.] —An exor. mtged. certain of his testator's hereditaments to C. to pay off incumbrances. C. leased these hereditaments, with the consent of the equitable tenant for life to R. Default having been made in the interest due on the mtge. debt, C. directed R., pursuant to a proviso contained in the lease, to pay the rent to him. This not having been done, C. brought an action against

from the sheriff, but deft. continued in possession subsequently under an alleged contract to purchase:—*Held:* a writ of possession was properly refused.—KAULBACH *v.* SPIDLE (1888), 20 N. S. R. (8 R. & G.), 334; 9 C. L. T. 56.—CAN.

—*Necessity for concurrence of sub-mortgagee.*]—FEEHAN *v.* MANDEVILLE (1891), 28 L. R. Ir. 90.—IR.

R. on the covenant to pay rent, & to enforce a reserved right of re-entry, & the exor. was admitted to defend this action. Shortly before this the exor. had instituted an action to administer his testator's estate, & inquiries had been directed in the Ch. Div. as to the incumbrances on the estate. An order having been made at chambers & affirmed by a Div. Ct., that the action for rent & re-entry should be stayed until the administration action was concluded, C. appealed:—*Held:* the order could not be sustained; although the exor. was pltf. in the administration action, & deft. in the action by C., still that C. not being a party to the administration action, ought not to be restrained from pursuing all the remedies reserved to him under the mtge., & he was entitled to proceed with his action.—CROWLE *v.* RUSSELL (1878), 4 C. P. D. 186; 48 L. J. Q. B. 76; 39 L. T. 320; 27 W. R. 84, C. A.

B. Tenancy Not Binding on Mortgagee.

1488. Maintainable without notice to quit.]—A mtgee. may recover in ejectment, without giving notice to quit, against a tenant who claims under a lease from the mtgor. granted after the mtge., without the privity of the mtgee.—KEECH *v.* HALL (1778), 1 Doug. K. B. 21; 99 E. R. 17.

Annotations:—**Folld.** Thunder *v.* Belcher (1803), 3 East, 449. **Expld.** Tarn *v.* Turner (1888), 39 Ch. D. 456. **Refd.** Moss *v.* Gallimore (1779), 1 Doug. K. B. 279; Alchorne *v.* Gomme (1824), 2 Bing. 54; Doe d. Fisher *v.* Giles (1829), 5 Bing. 421; Pope *v.* Biggs (1829), 9 B. & C. 245; Evans *v.* Elliot (1838), 9 Ad. & El. 342; Brown *v.* Storey (1840), 1 Man. & G. 117; Stranks *v.* St. John (1867), L. R. 2 C. P. 376; Gibbs *v.* Cruikshank (1873), L. R. 8 C. P. 454; Lows *v.* Telford (1876), 1 App. Cas. 414; Heath *v.* Pugh (1881), 6 Q. B. D. 345; Corbett *v.* Plowden (1884), 25 Ch. D. 678; Underhay *v.* Read (1887), 20 Q. B. D. 209. **Mentd.** Birch *v.* Wright (1786), 1 Term Rep. 378; Temple *v.* Brown (1815), 6 Taunt. 60; Baynes *v.* Lloyd, [1895] 1 Q. B. 820.

1489. ——.]—Ejectment may be brought by a mtgee. without giving notice to quit, against one who was let into possession as tenant from year to year by the mtgor., after the mtge. made to the original mtgee., but before the assignment of it to the lessor.—THUNDER d. WEAVER *v.* BELCHER (1803), 3 East, 449; 102 E. R. 669.

Annotations:—**Consd.** Jones *v.* Mills (1861), 10 C. B. N. S. 788. **Refd.** Walmsley *v.* Milne (1859), 7 C. B. N. S. 115; Thorp *v.* Facey (1866), 12 Jur. N. S. 741; Gibbs *v.* Cruikshank (1873), L. R. 8 C. P. 454. **Mentd.** Simmons *v.* Crossley, [1922] 2 K. B. 95.

SUB-SECT. 3.—AGAINST OTHER PERSONS.

1490. Former owner remaining in possession—No evidence of tenancy at will—Demand for possession unnecessary.]—In 1836 deft. conveyed premises in fee to G. In 1844 G. mortgaged to the lessor of pltf. Deft. was in actual possession at the time of the sale in 1836, & so continued down to the commencement of the action:—*Held:* there was no evidence of the relation of tenancy at will between G. & deft., at the time of the commencement of the action, or between the lessor of pltf. & deft., so as to render a demand of possession necessary.—DOE d. HAMMOND *v.* BALLARD (1847), 9 L. T. O. S. 203.

1491. Occupier with title by adverse possession against mortgagor—Real Property Limitation Act, 1837 (c. 28).]—Above Act applies, not only as against the mtgor. & persons claiming under him, but also as against a person who has acquired a good title by virtue of Stat. Limitations as against the mtgor. & those claiming under him.—LUDBROOK *v.* LUDBROOK, [1901] 2 K. B. 96; 70 L. J. K. B. 552; 84 L. T. 485; 49 W. R. 465; 17 T. L. R. 397; 45 Sol. Jo. 393, C. A.

See, generally, LIMITATION OF ACTIONS.

SUB-SECT. 4.—DEFENCE OF JUS TERTII.

See, generally, ESTOPPEL, Vol. XXI., pp. 132 *et seq.*

1492. Cannot be set up.]—I found this point settled before I came into this ct., that the Court never suffers a mtgor. to set up the title of a third person against his mtgee. (LORD MANSFIELD, C.J.).—DOE d. BRISTOW *v.* PEGGE (1785), 1 Term Rep. 758, n.; 4 Doug. K. B. 309; 99 E. R. 1362.

Annotation:—**Mentd.** Doe *v.* Staple (1788), 2 Term Rep. 684.

1493. ——.]—In ejectment on the several demises of a mtgor. & mtgee. deft. offered to prove that, seven or eight years back, & after the execution of the mtge. he brought ejectment against the mtgor., at the time in possession; that the cause was referred to arbn.; & that the award was in favour of the now deft., who thereupon entered under a writ of possession, & had occupied the premises ever since:—*Held:* (1) these proceedings were not admissible evidence for deft. against the mtgee. although he was present at one meeting before the arbitrator, it not appearing that he took any part in the proceedings.

The mtge. was executed in 1815. From that time, till deft. obtained possession as above stated the mtgor. had occupied the premises:—*Held:* (2) this though a possession of less than twenty years entitled the mtgee. to recover against deft., the latter having adduced no admissible evidence in support of his own claim.—DOE d. SMITH & PAYNE *v.* WEBBER (1831), 1 Ad. & El. 119; 3 Nev. & M. K. B. 746; 3 L. J. K. B. 148; 110 E. R. 1152.

Annotation:—*Generally,* **Refd.** Whale *v.* Hitchcock (1876), 34 L. T. 136.

1494. ——.]—V. mortgaged land in fee to O.; afterwards, & while V. remained in possession, S., claiming by a title anterior to the mtge., brought ejectment against V., & a verdict was taken against him by consent, subject to arbn. as to what lease S. should grant to V. S. granted a lease to V., in pursuance of the award made:—*Held:* V. could not set up such lease as an answer to an ejectment brought by O.—DOE d. OGLE *v.* VICKERS (1836), 4 Ad. & El. 782; 6 Nev. & M. K. B. 437; 6 L. J. K. B. 266; 111 E. R. 977.

Annotation:—**Refd.** Doe d. Levi *v.* Horne (1843), 7 J. P. 178.

1495. —— **Mortgagor acting in public capacity.**]—This was ejectment brought by pltf. against deft. as clerk of the comrs. of Staines bridge, to recover possession under a mtge. granted in the usual form. Deft. set up a prior mtge., & insisted that the legal estate was in such prior mtgee., & that he, deft., was not estopped from defeating the deed of pltf. although virtually his own deed, because he, deft., was acting in a public capacity for the benefit of others:—*Held:* his public capacity was no answer to the objection that the mtgor. cannot defeat a second mtge. by setting up a prior mtge.—DOE d. LEVY *v.* HORNE (1842), 3 Q. B. 757; 3 Gal. & Dav. 239; 12 L. J. Q. B. 72; 7 J. P. 178; 7 Jur. 38; 114 E. R. 698.

Annotation:—**Refd.** R. *v.* Derbyshire JJ., *Re* White (1843), 7 J. P. 190.

PART IX. SECT. 8, SUB-SECT. 2.—B.

1488 i. *Maintainable without notice to quit.*]—In ejectment by a mtgee. the tenant claimed possession under a lease from the mtgor., & refused to attorn to the mtgee. who demanded possession, & showed no lease, nor any certain holding:—*Held:* he was not entitled to notice to quit.—DOE d. SAMSON *v.* PARER (1835), 4 O. S. 36.—CAN.

Sect. 8.—Action for possession: Sub-sects. 4 & 5. Sect. 9: Sub-sects. 1 & 2, A.]

1496. ——.]—Pltf. in ejectment claiming under a mtgee. gave in evidence the mtge. deed executed by the mtgor. & mtgee., which recited that the mtgor. was seised in fee. Deft. was no party to this deed, but had subsequently indorsed upon it this memorandum. "The within premises were charged by me, W. (deft.), the purchaser of the equity of redemption thereof, with the payment of the further sum of £325" :—*Held:* the memorandum was evidence for the jury that deft. came in under the mtgor., &, if so, he was estopped from setting up an adverse title prior to the date of the mtge. deed.—DOE d. GAISFORD *v.* STONE (1846), 3 C. B. 176; 15 L. J. C. P. 234; 7 L. T. O. S. 207; 10 Jur. 480; 136 E. R. 71.

1497. Right of tenant to set up payment of rent to prior mortgagee.]—A tenant, let into possession by mtgor. before mtge., subsequently paid his rent to the mtgee. In ejectment by mtgee. against the tenant:—*Held:* the latter might defend himself by showing that there had been a prior mtge., & that he had received notice from the prior mtgee. to pay rent to him, & had paid it accordingly, as the tenant did not thereby deny that the mtgor., who gave him possession, had title, but simply that the lessor of pltf. had a good derivative title. So also a tenant who has been let into possession by the second mtgee. himself, may show such prior mtge. & notice; for the tenant thereby admits that his lessor, with respect to the first mtgee., was, in substance, mtgor. in possession not then treated as a trespasser, & so had title to demise, & the tenant is at liberty to go on to show that his lessor has subsequently been treated as a trespasser by the first mtgee., whereby his, the lessor's, title & the tenant's rightful possession under him have been determined.

With respect to the title of a person to whom the tenant has paid rent, but by whom he was not let into possession, he is not concluded by such payment of rent, if he can show that it was paid under a mistake (LORD DENMAN, C.J.).—DOE d. HIGGINBOTHAM *v.* BARTON (1840), 11 Ad. & El. 307; 3 Per. & Dav. 194; 9 L. J. Q. B. 57; 4 Jur. 432; 113 E. R. 432.

Annotations:—**Consd.** Claridge *v.* Mackenzie (1842), 4 Man. & G. 143. **Refd.** Hickman *v.* Machin (1859), 4 H. & N. 716; Underhay *v.* Read (1887), 58 L. T. 457; Serjeant *v.* Nash, Field, [1903] 2 K. B. 304. **Mentd.** Goulderworth *v.* Knights (1843), 11 M. & W. 337; Mountney *v.* Collier (1853), 17 J. P. 132; Delaney *v.* Fox (1857), 2 C. B. N. S. 768; Cuthbertson *v.* Irving (1859), 4 H. & N. 742; White *v.* Greenish (1861), 11 C. B. N. S. 209; Nesbitt *v.* Mablethorpe U. C., [1918] 2 K. B. 1.

SUB-SECT. 5.—PRACTICE.

1498. Judgment on admissions in pleading—Admission of mortgagor's title—R. S. C., Ord. 32, r. 6.]—PADGETT *v.* BINNS, [1884] W. N. 10; Bitt. Rep. in Ch. 6.

1499. Application by originating summons—Delivery of possession alone not ordered—R. S. C., Ord. 55, rr. 5A, 5B.]—A legal mtgee. is not entitled, upon an originating summons under R. S. C., Ord. 55, r. 5A, to an order for delivery of possession of the mtged. premises without any claim for sale or foreclosure, & the ct. has no jurisdiction to make such an order.—WALLIS *v.* GRIFFITHS, [1921] 2 Ch. 301; 90 L. J. Ch. 461; 125 L. T. 820; 65 Sol. Jo. 696.

SECT. 9.—TITLE DEEDS.

SUB-SECT. 1.—IN GENERAL.

1500. Mortgage to raise portions under settlement—Consent of mortgagees to retention by tenant for life—Necessity for—Deeds taken abroad.]—A suit was instituted for raising portions out of a settled estate. Pending the suit the tenant for life took a number of the leases to Paris. He afterwards, under an order of the ct., brought the whole of the title deeds & leases into ct., for the purposes of the suit. The purposes of the suit having been satisfied, & the portions raised by mtge., he applied to have the title deeds & leases given up to him, which application was opposed by the mtgees., & was refused:—*Held:* as the tenant for life had, on a former occasion, taken some of the deeds abroad, the delivery of them to him ought not to be ordered without the consent of the mtgees.—JENNER *v.* MORRIS (1866), 1 Ch. App. 603; 14 W. R. 1003, L. JJ.

Annotation:—**Expld.** Leathes *v.* Leathes (1877), 5 Ch. D. 221.

1501. Mortgagee also tenant for life—Retention as mortgagee.]—Mtgee. who obtains possession of deeds as tenant for life is entitled to hold them as mtgee.—*Re* TWEEDIE'S TAXATION (1908), 53 Sol. Jo. 118.

SUB-SECT. 2.—RIGHT TO CUSTODY.

A. Mortgagee of Fee Simple.

See, now, Law of Property Act, 1925 (c. 20), s. 85, sched. I., Part VII.

PART IX. SECT. 8, SUB-SECT. 5.

q. *Stay of proceedings—When ordered.*]—A. gave an absolute conveyance of land to B., to secure a sum of money, lent by him to A., & B. gave a bond for its reconveyance on the payment of the money lent, at a certain day. On ejectment brought by B. after a lapse of eight years, the ct. ordered that proceedings should be stayed on payment of the principal, interest, & costs.—DOE d. SHUTER *v.* MCLEAN (1835), 4 O. S. 1.—**CAN.**

r. *Defence—Usury.*]—MAIR *v.* CULY & YOUNG (1853), 10 U. C. R. 321.—**CAN.**

t. —— *Failure to prove want of registration.*]—In ejectment brought on a mtge., deft. objected to the want of registry, but closed his case without having proved that the title was a registered one when deft. got his deed. The judge would not allow the defence to be reopened; &, as it appeared that deft. was setting up a dishonest defence, the ct. refused to interfere.—BLAKELY *v.* GARRETT (1858), 16 U. C. R. 261.—**CAN.**

a. *Order for possession — Against tenant of mortgagor.*]—Under the orders of June 29, 1861, a mtgee. is not entitled to an order for the delivery of possession as against the tenants of the mtgor., although such tenancy may have begun after the mtge. was made.—BANK OF MONTREAL *v.* KETCHUM (1861), 1 Ch. Ch. 117.—**CAN.**

b. —— *Effect of pending ejectment suit.*]—The fact that an ejectment suit has been brought by the mtgee., & is pending, is no bar to obtaining the usual order for possession, but the order will be granted only on the terms of discontinuing the action at law, & paying the costs of it.—MOFFATT *v.* WHITE (1864), 1 Ch. Ch. 227.—**CAN.**

c. *Judgment for possession — Whether right passes to assignee of mortgage.*]—Where a mtgee. brought ejectment to recover possession of the land mtged., & obtained judgment, &, before the writ of *habere facias* issued, assigned his mtge.:—*Held:* the assignment did not give to the assignee of the mtge. any right in the judgment.—DOE d. FERGUSON *v.* ROE (1879), 19 N. B. R. 337.—**CAN.**

d. *Speedy judgment—When granted.*]—Speedy judgment granted in an action of ejectment by a mtgee. on default in payment of the mtge. immediately after the service of the writ & summons, it being shown that the pltf. had an advantageous offer for purchase, & wished to be in a position to give the purchaser possession.—MCNIDER *v.* ROSS, 10 C. L. T. Occ. N. 17.—**CAN.**

PART IX. SECT. 9, SUB-SECT. 1.

e. *Devolution on death of mortgagee.*]—Pltfs., having obtained letters of administration, brought detinue for an indenture of mtge. in fee, made to the intestate, & after his death in the possession of deft.:—*Held:* the title to the mtge. followed the legal estate, & it therefore belonged to the mtgee.'s heir.—RIORDON *v.* BROWN (1849), 1 C. P. 199.—**CAN.**

1502. General rule.]—Bill by tenant for life in possession for discovery & delivery of the title deeds; plea, a mtge. in fee by a former tenant for life, alleging himself to be seised in fee, without notice, ordered to stand for an answer, with liberty to except. Title deeds are incident to the possession under a freehold title.—STRODE *v.* BLACKBURNE (1796), 3 Ves. 222; 30 E. R. 979, L. C.

Annotation:—**Mentd.** Ogilvie *v.* Jeaffreson (1860), 2 Giff. 353.

1503. ——.]—NEWTON *v.* BECK, No. 1509, *post.*

1504. Deeds received from trustee for mortgagor & mortgagee.]—If deeds are deposited with A. by mtgor. & mtgee., before the condition broken, A. is trustee for the mtgor., afterwards for the mtgee.; & if A. deliver them to the mtgee., equity will not decree them to be delivered to the mtgor. —ANON. (undated), 2 Eq. Cas. Abr. 284; 22 E. R. 239.

1505. Mortgagee with bad title—Retention of mortgage deed only.]—One who lends money on a security, which he is advised by a lawyer to be a good one, yet if it proves otherwise, & he has notice, that another made title to it, he must deliver up all the writings relating to it, but not the mtge. deed, for there may be covenants in that for payment of the money.—OPIE *v.* GODOLPHIN (1720), Prec. Ch. 548; 24 E. R. 247.

1506. —— Mortgagor without title—Right as against true owner.]—An estate was conveyed in 1803 by J. to W., who in 1812 conveyed it to A., & he sold it in 1826 to pltf. The original vendor did not deliver up the title deeds. In 1824 he was sued by the then owner of the estate for the deeds, & a verdict was recovered against him, but the judgment was not docqueted. He absconded, & in 1825 obtained a sum of money, as on a mtge. of the estate, from one of defts., with whom he deposited the deeds. On trover brought in 1829 by a party claiming through the conveyance to W.:—*Held:* the legal owner of the estate might recover the deeds from the mtgee., without tendering the mtge. money.—HARRINGTON *v.* PRICE (1832), 3 B. & Ad. 170; 110 E. R. 63; *sub nom.* HARRINGTON *v.* GLENN, 1 L. J. K. B. 122.

1507. Deeds obtained by indirect means—Deed of settlement.]—Mtgee. gets a settlement into his hands by indirect means, yet shall not be obliged to deliver it up.

A. upon the marriage of his son settled his estate upon his son for life, then on the intended wife for life, remainder to the heirs of the husband on the wife begotten, remainder to the right heirs of the wife. A. died, the son had issue B., & C., by his wife & died; the wife married again, & she & her husband agreed to convey their interest to B., the eldest son, & for that purpose deposited, among other deeds, this settlement in the hands of an attorney to draw an abstract of the title & then to deliver them all into the hands of E. for the use of B., after the conveyance to the son B. B. died without issue, so that the lands came to C., the second son, who demanded this settlement made by the grandfather & preferred a bill against the attorney & against a pretended mtgee., as alleged in the bill, for to have it delivered up to him: & the attorney in his answer admitted that he had the settlement, set it forth *in haec verba* & said he was ready to produce it as the ct. should direct; but before the hearing of the cause he delivered it to the mtgee.; & it was now insisted for pltf., that though a ct. of equity might not oblige a fair purchaser to deliver up a security which corroborated his title, whatever means he procured it by, yet that deft., the attorney, having had this in his hands for a particular purpose, & delivering it up *pendente lite*, was guilty of a breach of trust, & of such a misdemeanour, that a ct. of equity would compel him to procure the deed or commit him until he did. But the ct. thought he was equally a trustee for the mtgee. as for the mtgor. who was only tenant in special tail & no fine levied or recovery suffered, & therefore dismissed the bill.—SIDDON *v.* CHARNELLS (1731), Bunb. 298; 145 E. R. 680.

1508. Right as against subsequent incumbrancer —Acquiring title deeds bonâ fide.]—In June, 1827, H. borrowed of F. £550, &, as security, by deed of appointment mortgaged a freehold estate to him in fee. The title deeds & mtge. deed were placed in the hands of R., the mtgee.'s solr., who, in that character, retained possession of the deeds, & received the interest on the mtge. debt down to 1840. In 1838, Mr. E., Mrs. E., & J. were the acting exors. & extrix. of one C., deceased, & employed R. as solr. to their testator's estate, & allowed him to receive & retain in his hands £500, part of that estate. In July, 1838, Mr. E. died, & in July, 1839, Mrs. E. also died, leaving J. the sole surviving exor. of C. In 1840, J., through the medium of D., another solr., pressed R. for security for the £500 in his hands. R. thereupon represented to H. that the original mtgee. required repayment of his mtge. debt, & having procured H. to execute to J. a deed, which he R. represented to him H. to be a transfer of the original mtge. debt & security, but which, in fact, was a new mtge., delivered same, together with the title deeds, except the original mtge. deed, to J. R. subsequently became insolvent, & absconded. D., the solr. employed by J. to obtain from R. security for the £500, arranged with him that he should prepare the mtge. deed on behalf of J., precisely the same as if he D. were not acting in the matter for that gentleman, but that he D. should have the draft of the mtge. security submitted to him, & should be allowed to inspect the title deeds. On a bill filed by the original mtgee. to foreclose, & to have the title deeds delivered up to him, the ct. made the usual decree for foreclosure, giving J. the first right to redeem, but, being of opinion that a case of constructive notice was not established against J., declined to order him to deliver up the title deeds.—KENDALL *v.* HULLS (1847), 9 L. T. O. S. 410; 11 Jur. 864.

1509. Delivery of forged copy of genuine deed—Right to recover genuine deed.]—L. conveyed to pltf. by way of mtge. certain land & deposited with him an indenture conveying the land from G. to T., & also a document purporting to be an indenture by which the land was conveyed by T. to L. This document was in fact a forgery. L. afterwards deposited with defts., by way of equitable mtge., a document purporting to be the conveyance from G. to T. but which was in fact a forgery, & also the genuine indenture of conveyance from T. to L.:—*Held:* pltf. might maintain detinue against deft. for the recovery of the latter indenture.

The operation of the mtge. was to give pltf. the right to the deeds (MARTIN, B.).—NEWTON *v.* BECK (1858), 3 H. & N. 220; 27 L. J. Ex. 272; 31

PART IX. SECT. 9, SUB-SECT. 2.—A.

1502 i. *General rule.*]—A mtgee. is entitled to the possession of the title deeds of the mtged. estate; & the mtgor. cannot, by depositing the deeds with his solr., with a view of creating a lien, thereby defeat the right of the mtgee.—SMITH *v.* CHICHESTER (1842), 2 Dr. & War. 393; 4 I. Eq. R. 580; 1 Con. & Law. 4 86.—**IR.**

Sect. 9.—Title deeds: Sub-sect. 2, A., B., C., D. & E.; sub-sect. 3, A. & B.]

L. T. O. S. 87; 4 Jur. N. S. 340; 6 W. R. 443; 157 E. R. 452.

Annotation:—**Refd.** Manners *v.* Mew (1885), 29 Ch. D. 725.

1510. Right as against purchaser for value without notice—Fraudulent sale.]—Two trustees, one of whom was a solr., advanced money on mtge. The mtgor., with the concurrence of the solr. trustee, sold part of the mtged. property without disclosing the mtge. Regular conveyances in fee to the purchasers were executed by the mtgor., containing a recital that he was seised or otherwise well & sufficiently entitled in fee simple. The solr. trustee received the purchase-money, & retained it. Eleven years afterwards both trustees executed a reconveyance of the property so sold, the other trustee believing, on the representation of the solr. trustee, that the property was then about to be sold by the mtgor. Soon afterwards the solr. trustee absconded, & the other trustee then filed a bill against the mtgor. & the purchasers, praying for foreclosure against them:—*Held:* the purchasers would not be ordered to deliver up the deeds which were in their possession.—HEATH *v.* CREALOCK (1874), 10 Ch. App. 22; 44 L. J. Ch. 157; 31 L. T. 650; 23 W. R. 95, C. A.

Annotations:—**Folld.** Waldy *v.* Gray (1875), L. R. 20 Eq. 238. **N.F.** *Re* Ingham, Jones *v.* Ingham, [1893] 1 Ch. 352. **Refd.** Ortigosa *v.* Brown (1878), 47 L. J. Ch. 168; Manners *v.* Mew (1885), 29 Ch. D. 725; Onward Bldg. Soc. *v.* Smithson, [1893] 1 Ch. 1; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Mentd.** The Horlock (1877), 2 P. D. 243; General Finance Mortgage & Discount Co. *v.* Liberator Permanent Benefit Bldg. Soc. (1878), 10 Ch. D. 15; *Re* Morgan, Pillgrem *v.* Pillgrem (1881), 44 L. T. 796; Pugh *v.* Heath (1882), 30 W. R. 553; *Re* Horton, Horton *v.* Perks, Horton *v.* Clark (1884), 51 L. T. 420; Low *v.* Bouverie, [1891] 3 Ch. 82; Brigg *v.* Thornton, [1904] 1 Ch. 386; Poulton *v.* Moore (1913), 83 L. J. K. B. 875.

B. Mortgagee for a Term

See, now, Law of Property Act, 1925 (c. 20), s. 86, sched. I., Part VII. (8).

1511. As against subsequent incumbrancer.]—(1) Mtge. by demise for a term of years. The mtgor. does not deliver to the mtgee. the purchase deed, conveying the freehold to the mtgor., but keeps it back, & subsequently deposits it with another person as security for a loan: the conveyance to the mtgor. & the mtge. were executed within a day of each other, & were both registered on the same day; the deposit was not made for a considerable time afterwards; but no notice by the subsequent incumbrancer of the mtge. being proved, & being denied by his answer:—*Held:* he was entitled to the benefit of the deposit, as against the mtgee., & was not bound to deliver up to him the conveyance.

(2) The registry of a deed is not, of itself, notice as against a subsequent purchaser or incumbrancer.

(3) The common decree in foreclosure does not direct the delivery up of the title deeds by the mtgor. to the mtgee. in case of foreclosure; but, merely, that the mtgee. shall be absolutely barred & foreclosed of all right & equity of redemption; & it is only where there is a covenant to deliver them, in case of default in payment of the principal money & interest, that the ct. makes such a decree.—WISEMAN & BENLEY *v.* WESTLAND, FISHER, BENSON, DAVIS & STANBRIDGE (1826), 1 Y. & J. 117; 148 E. R. 610.

Annotations:—*As to* (1) **Distd.** Newton *v.* Beck (1858), 27 L. J. Ex. 272. *As to* (2) **Refd.** Manks *v.* Whiteley, [1912] 1 Ch. 735.

1512. ——.]—JAMES *v.* GILES, [1880] W. N. 170.

1513. ——.]—*Re* INGHAM, JONES *v.* INGHAM, No. 2143, *post.*

1514. As against guardian of infant—Heir of deceased mortgagor.]—On an advance of a loan, the lender took, as a security, a mtge. from the borrower by way of demise for one hundred years of an estate, of which the borrowed was seised in fee simple. The title deeds were not delivered to the lender, nor was there any covenant in the mtge. to deliver them to him. The mtgor. died, leaving an infant heir; & a gentleman, who assumed his guardianship, possessed himself of the title deeds. On a bill against the infant heir to foreclose, & against his guardian to deliver up the title deeds, the ct. would only make the common decree of foreclosure, & would make no order upon the guardian, but, as against him, dismissed the bill with costs.—KNIGHT *v.* KNIGHT (1831), 1 L. J. Ch. 125.

1515. As against purchaser.]—HUNT *v.* ELMES, No. 2109, *post.*

1516. Consent order for execution of mortgage.]—STOKES *v.* STOKES (1886), 3 T. L. R. 92.

C. Mortgagee of Life Interest.

See, now, Settled Land Act, 1925 (c. 18), ss. 111, 117 (1) (xxi.).

1517. Mortgage of equitable life interest—Retention of deeds by trustees—Right of mortgagee to insist upon.]—Testator specifically bequeathed leaseholds to trustees upon trust out of the rents to pay the ground rents & indemnify the trustees in respect of the property, & to divide the surplus income in equal shares between his nieces with a direction to settle the share of each niece in case of her marrying, & with a gift over in case the nieces should all die without children. The will also gave powers of sale & leasing to the trustees, & empowered the exors. or administrators of the last surviving trustee to appoint any other proper person or persons to be a trustee or trustees; & also empowered the trustees to appoint a receiver & manager of the property, at a salary or on commission to receive the rents & defray the outgoings of the property. On the death of the last surviving trustee named in the will, the nieces, as administrators of such trustee, appointed one of themselves & two other persons new trustees of the will. Since the death of testator in 1876 the trustees had been in possession & management of the property. The nieces who were now unmarried ladies of between forty & fifty years of age, & had mortgaged their life estates, now applied, that, upon their undertaking to pay the ground rents, perform the covenants & preserve the title deeds, the possession of the leasehold property & the title deeds might be delivered up to them:—*Held:* on the niece who had been appointed trustee retiring from that office, possession of the property ought to be given to appcts., but the mtgee. could insist on the title deeds being retained by the trustees.—*Re* NEWEN, NEWEN *v.* BARNES, [1894] 2 Ch. 297; 63 L. J. Ch. 763; 70 L. T. 653; 58 J. P. 767; 43 W. R. 58; 8 R. 309.

Annotations:—**Mentd.** *Re* Hunt, Pollard *v.* Geake (1900), 44 Sol. Jo. 314; Montefiore *v.* Guedalla, [1903] 2 Ch. 723; *Re* Sampson, Sampson *v.* Sampson, [1906] 1 Ch. 435; *Re* Stamford & Warrington, Payne *v.* Grey, [1925] 1 Ch. 162.

D. Equitable Mortgagee.

1518. Mortgage by deposit of title deeds—Right against assignees in bankruptcy of mortgagor.]—

1. Mortgage by deposit of deeds.]—CRAWFURD *v.* HODGE (1831), 10 Sh. (Ct. of Sess.) 11.—SCOT.

In Apr. 1826, A., having contracted to purchase an estate from B., & having had the title deeds delivered to him, agreed to deposit the same with C., as a security for the loan of £5,000 & to give him the mtge. as soon as the legal estate was conveyed to him. B. afterwards conveyed the estate to A., but before such conveyance was made, & after the title deeds had been deposited with C., the latter refused to complete the mtge. unless A. would agree to pay usurious interest upon the sum of £5,000. A., having so agreed, delivered to C. the deed of conveyance of the estate from B. to A. A. afterwards became bkpt., & in an action of trover brought to recover the deeds, it was held, that the original possession of the title deeds being perfectly good, gave C. a right to the estate whenever B. should have conveyed that estate to A.; & that he, & not A.'s assignees, had a right, therefore, to the deed of conveyance from B. to A.—WOOD *v.* GRIMWOOD (1830), 10 B. & C. 679; 5 Man. & Ry. K. B. 551; 8 L. J. O. S. K. B. 192; 109 E. R. 602; *subsequent proceedings*, 10 B. & C. 689.

1519. —— ——.]—Proceedings in a foreclosure suit by an equitable mtgee. against a trustee in bkpcy. restrained; but held, that the mtgee. would not be ordered to deliver up his title deeds to enable the trustee to complete a sale until payment into ct. of a sufficient amount to answer his claim.—*Re* WOODS, *Ex p.* DITTON (1876), 1 Ch. D. 557; 45 L. J. Bcy. 87; 34 L. T. 109; 24 W. R. 289; 2 Char. Pr. Cas. 66, C. A.

Annotations:—**Mentd.** *Re* England, *Ex p.* Pannell (1877), 6 Ch. D. 335; *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169.

1520. —— **Payment into court to cover amount due.**]—A client deposited with his solr. the title deeds of an estate, to secure a sum of money then due, & certain costs then incurred; the ct., on the petition of the client, ordered the deeds to be delivered up to the client, on his paying into ct. a sum sufficient to cover the solr.'s claim, & directed the usual taxation.—MILLS *v.* FINLAY (1839), 1 Beav. 560; 48 E. R. 1058.

Annotations:—**Apld.** *Re* South Essex Equitable Investment & Advance Co. (1882), 46 L. T. 280. **Refd.** Richards *v.* Platel (1841), Cr. & Ph. 79.

1521. —— **Right against prior equitable interest.**]—Where the ct. establishes a prior equitable title to an estate as against a person who took an equitable mtge. by deposit of the title deeds from the legal owner without notice:—*Semble*: it will go on to order him to deliver up the deeds, though he acquired them for value & without notice from the person who at law was the absolute owner of them.—NEWTON *v.* NEWTON (1868), 4 Ch. App. 143; 38 L. J. Ch. 145; 19 L. T. 588; 17 W. R. 238, L. C. & L. J.

Annotations:—**Consd.** Taylor *v.* Russell, [1891] 1 Ch. 8. **Refd.** Perrin *v.* Burbey, [1869] W. N. 160; Heath *v.* Crealock (1874), 31 L. T. 650.

1522. —— **Right against subsequent legal mortgagee.**]—A., being indebted to B., delivered to him, by way of further security, a parcel purporting to contain the title deeds to certain lands, & also executed a legal mtge. to him of the same lands. It being afterwards discovered that the deeds relating to part of the mtged. lands were in the possession of C., with whom they had been deposited by way of equitable mtge. previous to the mtge. to A.:—*Held*: A. had no equity as against C. to have the deeds delivered up to him.—BARNARD *v.* BYWATER (1868), 17 W. R. 71.

Annotation:—**Refd.** Ratcliffe *v.* Barnard (1871), 40 L. J. Ch. 147.

1523. —— **After proper tender of payment—Improperly refused.**]—Resp. deposited his title deeds with applts. by way of equitable mtge. He afterwards tendered the amount alleged by him to be due on the security, but applts. refused to accept it, alleging that a larger sum was due, which was in fact not the case. Resp. then brought an action of detinue to recover his deeds, alleging special damage:—*Held*: the action would not lie.—BANK OF NEW SOUTH WALES *v.* O'CONNOR (1889), 14 App. Cas. 273; 58 L. J. P. C. 82; 60 L. T. 467; 38 W. R. 465; 5 T. L. R. 342, P. C.

Annotations:—**Refd.** Edmondson *v.* Copland (1911), 105 L. T. 8; Graham *v.* Seal (1918), 88 L. J. Ch. 31.

E. Mortgagee of Interest of Co-Owner.

1524. Right as against other co-owners.]—Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title deeds whenever it shall be necessary, & the deeds afterwards come into the vendee's possession on his taking a mtge. of the other part of the estate, & he then assigns the mtge. to a third person not mentioning the deeds, such third person cannot maintain trover against him for the deeds.—YEA *v.* FIELD (1788), 2 Term Rep. 708; 100 E. R. 381.

Annotations:—**Consd.** Foster *v.* Crabb (1852), 12 C. B. 136. **Refd.** Davies *v.* Vernon (1844), 6 Q. B. 443. **Mentd.** Fraser *v.* Pippard, Fraser *v.* Rudd (1839), 3 Jur. 815.

SUB-SECT. 3.—PRODUCTION.

A. Under Statute.

Mortgages after 1881.]—*See, now*, Law of Property Act, 1925 (c. 20), ss. 96, 205.

Bankruptcy proceedings of mortgagor.]—*See* BANKRUPTCY, Vol. V., p. 622, Nos. 5603, 5605.

B. Apart from Statute.

1525. Whether mortgagee liable.]—Though a mtgee. is not bound to discover his title deeds, where he denies notice; he must not only deny notice in general, but all special facts & circumstances charged, relating to it.—SENHOUSE *v.* EARL (1752), 2 Ves. Sen. 450; 28 E. R. 287, L. C.

1526. ——.]—The rule that a purchaser for valuable consideration, without notice, cannot be compelled to discover his title deeds, does not extend to the mtge. or purchase deed itself.—*Re* WHITE, *Ex p.* CALDECOTT (1830), Mont. 55, L. C.

Annotations:—**Refd.** *Re* Martindale, *Ex p.* Trueman (1832), 1 Deac. & Ch. 464; *Re* Marks' Trust Deed (1866), 1 Ch. App. 429.

1527. ——.]—L. claimed to be lawful owner of divers goods & chattels in the visible user & enjoyment of M. at his family mansion. N., a judgment creditor of M., filed a bill against him & L., charging that bills of sale & assignments of the said goods & chattels were executed by M. to L., without consideration, & that they were void as against N., & praying a declaration to that

PART IX. SECT. 9, SUB-SECT. 3.—A.

g. Production for registration.]—*Re* TRANSFER OF LAND ACT, 1890, *Re* ARMITAGE, *Ex p.* ANDREWS (1891), 17 V. L. R. 77.—**AUS.**

ARMSTRONG *v.* DIXON, [1911] 1 I. R. 435.—**IR.**

PART IX. SECT. 9, SUB-SECT. 3.—B.

1525 i. *Whether mortgagee liable.*]—A mtge. deed for the inspection of the mtgor., when there is no question of title in dispute, the bill being for redemption, & the right to redeem being admitted by the answer.—BELL *v.* CHAMBERLEN (1871), 3 Ch. Ch. 429.

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effect, & offering to pay what, if anything, should be found due to L. on the security of the said goods. L., by his answer, admitted the bills of sale & assignments to be in his possession, & said they were executed to him for full consideration, & that M. had only the permissive, not the absolute use of the goods; & on a further answer he claimed to have an equitable lien on them for money advanced, & he set forth in a schedule abstracts of the bills of sale, etc.:—*Held:* N. was entitled to inspection of the bills of sale & assignments, on the grounds, that these instruments were only a mtge. security; &, that N. had a right to see if the abstracts corresponded with the originals, in order to ascertain what he would have to pay to L. in redeeming the mtge.—LATIMER *v.* NEATE (1837), 4 Cl. & Fin. 570; 11 Bli. N. S. 112; 7 E. R. 217, H. L.; *affg.* S. C. *sub nom.* NEATE *v.* LATIMER (1836), 2 Y. & C. Ex. 257.

Annotations:—**Distd.** Browne *v.* Lockhart (1840), 10 Sim. 420. **Expld.** Glover *v.* Hall (1848), 2 Ph. 484. **Apld.** Hunt *v.* Elmes (1859), 27 Beav. 62; Owen *v.* Nickson (1861), 3 E. & E. 602. **Mentd.** Taylor *v.* Rundell (1841), Cr. & Ph. 104.

1528. ——.]—A mtgee. is not obliged to produce his deeds, as he cannot be compelled to show his title; & the same rule applies to drafts & copies of deeds.—BYCROFT *v.* SIBEL (1852), 20 L. T. O. S. 197; 1 W. R. 96.

1529. ——.]—Deft. the trustee & exor., was also a mtgee. of part of the estate. Upon a bill for the administration of the estate:—*Held:* deft. was not bound to produce the mtge. & title deeds, but he must produce all accounts in his possession relating to the mtge.—FREEMAN *v.* BUTLER (1863), 33 Beav. 289; 55 E. R. 379; *sub nom.* FREEMAN *v.* BUTLER, *Re* TRIGG'S ESTATE, 9 L. T. 405; 12 W. R. 94.

1530. ——.]—A mtgee. is always bound to produce the mtge. deed for the inspection of the mtgor. *Semble:* where a solicitor employed professionally by mtgor. & mtgee. subsequently takes a transfer of the mtge. & forecloses; in a suit by a mtgor. to open the foreclosure decree, the solr. is bound to produce all documents, etc., prepared by him as such solr.—PATCH *v.* WARD (1865), L. R. 1 Eq. 436; 13 L. T. 496; 12 Jur. N. S. 2; 14 W. R. 166.

Annotation:—**Dbtd.** Carter *v.* Hubback (1876), 24 W. R. 354.

1531. ——.]—CARTER *v.* HUBBACK, No. 1558, *post.*

1532. —— **On proposed sale.**]—On a decree of foreclosure, the ct. will not oblige pltf. to lay the title deeds before counsel, for deft. to get an assignment or sale of the lands, unless pltf. consents to a sale, but only to give a copy of the mtge. deed.—ANON. (1729), Mos. 246; 25 E. R. 376, L. C.

Annotation:—**Dbtd.** Browne *v.* Lockhart (1840), 10 Sim. 420.

1533. —— ——.]—Pltf. & deft., being mtgor. & mtgee., entered into an agreement, being a compromise of a foreclosure suit, by which the mtged. estate was to remain the absolute property of deft., subject only to this condition, that if pltf. paid a certain sum upon a day named, deft. should reconvey the estate, & deliver up the title deeds to pltf. A person was willing to purchase a portion of the estate from pltf. for more than the sum to be paid to deft.; but deft. refused to produce the title deeds to the proposed purchaser. Pltf., believing this difficulty could not be overcome, twelve days before the day named for the repurchase, entered into a fresh agreement with deft., securing to the latter far more favourable terms. The purchaser was, in fact, willing to waive the difficulty about the title deeds, & ready immediately to pay the money to the repurchase to deft., & he informed pltf.'s solr. & deft. of this after the agreement, but before the day named for the repurchase. The agreement was, two months afterwards, embodied in a deed, which was executed by pltf. The purchaser filed a bill against pltf. for specific performance, in which all the facts appeared, & to which pltf. put in an answer stating, without question, her agreement with deft. She also raised a sum of money, which she was enabled to do by the agreement. Upon a bill, seeking to set aside the agreement & deed:—*Held:* deft. was not bound to produce the title deeds for the inspection of the purchaser.—SMITH *v.* PAWSON (1855), 25 L. T. O. S. 40, L. JJ.

1534. —— **In obedience to subpœna duces tecum.**]—On a question of settlement, a mtgee., a rated inhabitant of applt. parish, subpœnaed by resp. parish is not compellable under a *subpœna duces tecum* to produce the title deed of his mtgor.—R. *v.* UPPER BODDINGTON (INHABITANTS) (1826), 8 Dow. & Ry. K. B. 726; 4 Dow. & Ry. M. C. 233; 5 L. J. O. S. M. C. 10.

1535. —— **On payment into court.**]—Estates being conveyed, among other purposes, to secure a debt of comparatively small amount, the ct. will not direct a release upon payment into ct. of the largest sum to which the debt can in probability amount; the incumbrancer being entitled to retain the security till the debt is discharged.—POSTLETHWAITE *v.* BLYTHE (1818), 2 Swan. 256; 36 E. R. 613, L. C.

Annotations:—**Consd.** Bank of New South Wales *v.* O'Connor (1889), 14 App. Cas. 273. **Mentd.** Richards *v.* Platel (1841), Cr. & Ph. 79.

1536. —— **On payment of principal & interest.**]—The mtgor. & his representatives are not entitled, as against the mtgee., to production of inspection of the mtge. deed, until payment of the principal & interest due to him.—BROWNE *v.* LOCKHART (1840), 10 Sim. 420; 9 L. J. Ch. 167; 4 Jur. 167; 59 E. R. 678.

Annotations:—**Refd.** Owen *v.* Nickson (1861), 3 L. T. 737; Fitzgerald's Trustee *v.* Mellersh, [1892] 1 Ch. 385.

1537. —— ——.]—JOHNSTON *v.* TUCKER, No. 1551, *post.*

1538. —— ——.]—A. was a transferee of a mtge. for £4,000, & claimed also under a judgment £880. A bill was filed by a subsequent mtgee. to redeem the mtge. for £4,000, & for payment of pltf.'s incumbrance in a priority over the judgment debt. The bill alleged that A. had in his possession a deed of conveyance of the estate in which was a recital that the judgment debt had been off. A. admitted the possession of the deed, & set out a portion of it by which it was recited that the judgment debt had been paid off; but he said that in fact this was only done for the purpose of clearing the estate, & that he had taken an assignment of the debt:—*Held:* if he had not been a mtgee., he must have produced the deed; & £4,000 having been paid to him, without prejudice to any question in the cause, he could not set off £880 of that as due to the judgment debt, but must be taken to be paid off as mtgee., & therefore liable to produce the deed.

When the mtgor. comes offering to redeem, the mtgee. is not bound to produce his deed till he is paid (KINDERSLEY, V.-C.).—CANNOCK *v.* JAUNCEY (1853), 1 Drew. 497; 61 E. R. 542; *sub nom.* CANNOCK *v.* CHICHESTER, CANNOCK *v.* JAUNCEY, 1 W. R. 378.

1539. —— **Admission of possession in pleadings.**]—Where deft. appears to be a bare trustee for

pltf., & offers no explanation to the contrary, the ct. will compel the production of deeds & documents admitted, by his answer, to be in his possession. The ct. will not, upon motion before the hearing, compel an incumbrancer to produce at the hearing deeds which are admitted by his answer, but which are his title deeds, even though pltf. may have an interest in such deeds; but, under circumstances, the ct. will direct them to be proved before the examiner.—SPARKE *v.* MONTRIOU (1834), 1 Y. & C. Ex. 103; 160 E. R. 43.

1540. —— ——.]—A mtgee., having, in his answer to a bill to redeem, set out his mtge. deed, cannot be compelled to produce documents admitted to be in his possession, relating to his title as a mtgee.—YEOMAN *v.* COODE (1841), 11 L. J. Ch. 59.

a mtgor. against the transferee of the mtge. only, pltf. confessing deft.'s title, but stating that he was unable to discover, & seeking discovery, by what means deft. made it out:—*Held:* deft. was not bound to produce the deed of transfer to him, which his answer admitted to be in his possession, & to be relevant to the matters in question, on the ground that it was privileged as deft.'s title deed.—LEWIS *v.* DAVIES (1853), 17 Jur. 253.

1542. —— —— **Vouchers.**]—A mtgee., against whom a bill was filed by another mtgee. for redemption & foreclosure, admitted the possession of vouchers consisting of bills of exchange & promissory notes:—*Held:* he was bound to produce them.—GIBSON *v.* HEWETT (1846), 9 Beav. 293; 50 E. R. 356.

1543. —— **Mortgagee with limited interest.**]—Where a lease is executed by both the lessor & lessee, & the lessee assigns it by way of mtge., the lessor having no counterpart, is entitled, on an ejectment brought for a forfeiture, to compel the mtgee. to allow an inspection, & give a copy of the lease.—DOE d. MORRIS *v.* ROE (1836), 1 M. & W. 207; 1 Gale, 367; Tyr. & Gr. 545; 5 L. J. Ex. 105; 150 E. R. 408.

1544. —— **Mortgagee himself a mortgagor—Administration suit.**]—Where, in a suit for the administration of testator's estate, a mtgee. was ordered to produce before the master all deeds & writings relating to the estate which were in his custody or power, he does not sufficiently account for the non-production of them by stating, that several years before the decree he had deposited them with a third person as a collateral security for money advanced by him.—ROGERS *v.* ROGERS (1842), 6 Jur. 497.

1545. —— **Inspection of indorsement on mortgage deed.**]—Mtge. deed in the hands of the mtgee. ordered, on the application of the mtgor., to be produced for the purpose of inspecting an indorsement on the instrument.—PHILLIPS *v.* EVANS (1843), 2 Y. & C. Ch. Cas. 647; 63 E. R. 290.

1546. —— **Transfer — Alleged vexatious & fraudulent.**]—After a bill for redemption had been filed, but before the subpœna had been served, the mtgee. transferred his mtge., & his transferee was brought before the ct. by supplemental bill. It was alleged that the transfer had been made for fraudulent & vexatious purposes:—*Held:* pltf. was not entitled to the production of the deed of transfer.—GILL *v.* EYTON (1843), 7 Beav. 155; 49 E. R. 1023.

1547. —— ——.]—P., having conveyed his estates to trustees in trust to raise money for payment of his debts, &, subject thereto, in trust for himself, a suit was instituted, by one of his creditors, against him & his other creditors, to have the trusts of the deed carried into execution. After defts. had answered the bill, & the deeds relating to the estates had been deposited in the master's office, P. died, having devised the estates to his nephew; who, after he had been made deft. to a supplemental bill, entered into a treaty, with an insurance co., for a loan to enable him to pay off the debts due to pltf. & the other parties to the suit; &, after giving them notice of his intention to pay them off, he moved that all further proceedings in the suit might be stayed, & that he & his solrs., & the solrs. & agents of the insurance co., might be at liberty to examine the abstracts of title to the estates, with the deeds in the master's office, & to take copies thereof, for the purpose of verifying the title to the estates & effecting the loan; & that, for the same purpose, pltf. & two of defts. might be ordered to produce, to him, & his solrs., & to the solrs. & agents of the insurance co., all deeds, etc., in their custody relating to the estates. Motion refused.—DAMER *v.* PORTARLINGTON (EARL) (1846), 15 Sim. 380; 1 Coop. *temp.* Cott. 229; 15 L. J. Ch. 405; 60 E. R. 666; *on appeal*, 2 Ph. 30, L. C.

Annotation:—**Mentd.** Paynter *v.* Carew (1854), Kay, App. XXXVI.

1548. —— **Validity of mortgage impeached.**]—In a bill to redeem, pltf. contested the validity of one of several mtges. held by deft.:—*Held:* he was not entitled to a production.—CRISP *v.* PLATEL (1844), 8 Beav. 62; 50 E. R. 24.

1549. —— ——.]—Pltf. impeached a certain deed in deft.'s possession, & stated in his bill that this deed had been left with deft. as a security for a loan of money which had been since repaid. Deft., in his answer, admitted the possession & relevancy of the impeached deed, & stated that it was a *bonâ fide* conveyance to him for valuable consideration, & denied that it had ever been so deposited with him as in the bill mentioned:—*Held:* as deft. denied that he was a mtgee., pltf.'s whole statement that there had been such a mtge., & that it was paid off, must be regarded; & pltf. was entitled to the production of the deed; *secus:* if deft. had claimed the privilege of a mtgee. to refuse production of the deed.—JONES *v.* JONES (1853), Kay, App. VI.; 69 E. R. 314.

1550. —— ——.]—In a suit by a mtgor. to set aside a mtge. deed on the alleged ground of pressure & surprise on the part of the mtgee., which allegations were, however, denied by the answer, the mtgee. being a solr. & the sole adviser of the mtgor. in the transaction, the ct. made an order, upon motion, for the production of the mtge. deed.—DAVIS *v.* PARRY (1857), 27 L. J. Ch. 294; 31 L. T. O. S. 264; 4 Jur. N. S. 431; 6 W. R. 174.

1551. —— **To cestui que trust—Trustee also mortgagee—Of cestui que trust.**]—Although as between a *cestui que trust* & trustee, or a person in the situation of a trustee, the *cestui que trust* is entitled to the production of title deeds & other documents, as of course, yet the moment the trustee acquires the character of a mtgee., the right to production ceases, unless upon the offer to pay off the mtge. debt.—JOHNSTON *v.* TUCKER (1847), 11 Jur. 382.

1552. —— —— —— **Objection to production by mortgagors.**]—The trustees & exors., defts. in an administration suit, admitted by their answer the possession of title deeds of mtge. securities, in which they had properly invested their testator's assets, but alleged that the mtgors. objected to the production of the deeds, & would prefer to pay off their debts, & they objected to the

Sect. 9.—Title deeds: Sub-sect. 3, B.; sub-sect. 4.]

production of the deeds in the suit in the absence of the mtgors.; on a motion for production:—*Held:* the deeds must be produced.—GOUGH *v.* OFFLEY (1852), 5 De G. & Sm. 653; 19 L. T. O. S. 324; 17 Jur. 61; 64 E. R. 1285.

Annotation:—**Consd.** *Re* Cowin, Cowin *v.* Gravett (1886), 33 Ch. D. 179.

1553. —— —— Conveyance of equity of redemption from trustee.]—Mtgee. taking conveyance of equity of redemption from trustee thereof, with notice of the trust, cannot withhold production of such conveyance in a suit by *cestui que trust* for redemption of the mtge. & reconveyance of the property, though one of the trusts was a trust for sale.—SMITH *v.* BARNES (1865), L. R. 1 Eq. 65; 35 L. J. Ch. 109; 13 L. T. 402; 11 Jur. N. S. 924; 14 W. R. 96.

1554. —— ——.]—On a motion for production of documents impeached on account of fraud, it is not sufficient merely to allege the fraud; but to entitle the party to production, he must also allege that, if produced, they would help to substantiate the charge.

Under the circumstances, I cannot order these two mtge. deeds to be produced. You may amend your bill, & may perhaps then obtain production (LORD LANGDALE, M.R.).—DENDY *v.* CROSS (1848), 11 Beav. 91; 11 L. T. O. S. 170; 50 E. R. 751.

Annotation:—**Distd.** Davis *v.* Parry (1857), 6 W. R. 174.

1555. —— Drafts & copies.] — BYCROFT *v.* SIBEL, No. 1528, *ante*.

1556. —— Collateral documents—Memorandum relating to deposit.]—Detinue for title deeds. Plea, on equitable grounds, that the title deeds belonged to P., deceased, under whom pltfs. claimed; & she, being indebted to N., agreed with him that he should hold them as a security by way of equitable mtge., & he so held them, the debt remaining unpaid; & that N. died, & appointed defts. extrixes. In answer to interrogatories, defts. admitted that they had in their possession a memorandum that the deeds should remain in the possession of N. until repayment of the money:—*Held:* pltfs. were entitled to an inspection of the memorandum, under Evidence Act, 1851 (c. 99), s. 6.—OWEN *v.* NICKSON (1861), 3 E. & E. 602; 30 L. J. Q. B. 125; 3 L. T. 757; 7 Jur. N. S. 497; 121 E. R. 568.

1557. —— —— Administration of estate.]—FREEMAN *v.* BUTLER, No. 1529, *ante*.

1558. —— Party demanding production having sufficient interest.]—In a suit by assignees in trust from T. of two policies of assurance, which formed part of a trust estate in T.'s hands as surviving exor. of J., to impeach an alleged prior mtge. of the policies by T. to the co. which issued them, the bill, in effect, alleged, though the answer denied, that the giving of the prior mtge. was a breach of trust on T.'s part of which the co. was aware at the time. The bill also alleged, & the answer admitted, that the co. intended to surrender the policies or sell them by auction. On summons by pltfs. for production of documents:—*Held:* pltfs. had not shown sufficient interest in the mtge. deed to entitle them to its production.

That view [as held in *Patch* v. *Ward*, No. 1530, *ante*, that mtgor. had a right to production of the mtge. deed] has never been acted upon (JAMES, L.J.).—CARTER *v.* HUBBACK (1876), 24 W. R. 354, C. A.

1559. —— Joint possession of mortgagee & another.]—In an action for the seizure of the goods of pltf., which was justified by deft. under an alleged power of distress in a mtge. deed, deft. stated in his affidavit of documents that he & one B., who was not a party to the action, jointly had in their possession or power certain documents specified in a schedule to such affidavit & that they were the muniments of title of himself & the said B., as mtgees., & that he, deft., objected to their production:—*Held:* such affidavit showed sufficient reason for not making an order for inspection of the documents.—KEARSLEY *v.* PHILIPS (1883), 10 Q. B. D. 465; 52 L. J. Q. B. 269; 48 L. T. 468; 31 W. R. 467, C. A.

Annotations:—**Apld.** Coomes *v.* Hayward, [1913] 1 K. B. 150. **Refd.** London & Yorkshire Bank *v.* Cooper (1885), 15 Q. B. D. 7; Gowan *v.* Briggs (1895), 39 Sol. Jo. 330; London & Provincial Marine & General Insce. *v.* Chambers (1900), 5 Com. Cas. 241; Rattenberry *v.* Monro (1910), 103 L. T. 560; Forbes *v.* Samuel, [1913] 3 K. B. 706. **Mentd.** Hennessy *v.* Wright (1888), 21 Q. B. D. 509; Carew *v.* Carew (1891), 65 L. T. 167.

——.]—*See, further*, DISCOVERY, Vol. XVIII., pp. 98, 99, Nos. 495–502.

1560. Right to call for production—Mortgagee of remainderman—Against tenant for life.]—Any remainderman whose estate is vested may maintain a bill against the tenant for life, for the sole purpose of production & inspection of the muniments of title. If the tenant for life suggests that the purpose for which production is required is improper, the *onus* is on him to show it. This right, however, only exists when the title of the remainderman is undisputed; for, if there be a reasonable cause for litigating his title, he cannot compel production.

The mtgee. of A., an alleged remainderman, instituted a suit against B., the alleged tenant for life, for the mere production of the title deeds. B. set up a *bonâ fide* objection, that A.'s estate had become forfeited, & also that by the terms of the mtge. deed the estates in question were not comprised therein. The assignees of A., who had become bkpt., though interested in the latter question, were not parties to the suit. The ct. declined adjudicating, incidentally, on pltf.'s right, & dismissed the bill with costs.—DAVIS *v.* DYSART (EARL) (1855), 20 Beav. 405; 3 Eq. Rep. 599; 24 L. J. Ch. 381; 25 L. T. O. S. 91; 1 Jur. N. S. 743; 3 W. R. 393; 52 E. R. 659.

Annotations:—**Refd.** Pennell *v.* Dysart (1859), 27 Beav. 542. **Mentd.** Chichester *v.* Donegal (1869), 4 Ch. App. 416; Pryse *v.* Pryse (1872), L. R. 15 Eq. 86.

Secondary evidence of documents not produced.]—*See* EVIDENCE, Vol. XXII., pp. 218, 219, Nos. 1907–1908, 1916–1917.

SUB-SECT. 4.—LOSS OF DEEDS.

1561. Extent of liability for loss—Indemnity to mortgagor.]—Under a bill of foreclosure by devisee of a mtgee., the mtge. deed being lost, a reconveyance directed with an indemnity & costs against pltf.—STOKOE *v.* ROBSON (1815), 19 Ves. 385; 34 E. R. 560; *previous proceedings* (1814), 3 Ves. & B. 51.

Annotations:—**Folld.** Shelmardine *v.* Harrop (1821), 6 Madd. 39. **Refd.** Cockell *v.* Bridgeman (1841), 4 Beav. 499; Middleton *v.* Eliot (1847), 15 Sim. 531.

1562. —— ——.]—Upon a bill of foreclosure, the mtgee. having been robbed of the title deeds, payment of the mtge. money within a limited time was decreed, & on payment of the same a

k. *Whether mortgagor entitled to compensation.*]—GILLIGAN & NUGENT *v.* NATIONAL BANK, LTD., [1901] 2 I. R. 513. —IR.

reconveyance was directed, with a bond of indemnity.—SHELMARDINE *v.* HARROP (1821), 6 Madd. 39; 56 E. R. 1004.

1563. —— ——.]—A. made a mtge. to B., & delivered to him the title deeds of the estate. Some years afterwards A. gave B. notice of his intention to pay off the mtge. at the end of six months; but did not pay the money until after that time, owing to B. not having offered him any indemnity that was satisfactory to him, in respect of B. having lost some of the deeds. B. then brought an ejectment for the estate; whereupon A. filed a bill to redeem. The ct. decreed a redemption, & ordered that a sum, which A. had paid for interest accrued on the mtge. money after the expiration of the six months, should be repaid to him; that B. should give him an indemnity to be approved of by the master, & also pay the costs of the ejectment & of the suit.—MIDLETON (LORD) *v.* ELIOT (1847), 15 Sim. 531; 11 Jur. 742; 60 E. R. 725.

Annotations:—**Folld.** James *v.* Rumsey (1879), 11 Ch. D. 398. **Refd.** Wodehouse *v.* Farebrother (1855), 1 Jur. N. S. 998.

1564. —— ——.]—A. possessed of leasehold premises for a long term, in Feb. 1872, mortaged them to trustees, & handed to their solr. the indenture of lease & other title deeds. On Sept. 25, 1876, it was arranged between the parties that A. should redeem at once, he paying with the principal moneys three months' interest in lieu of the usual notice. It was afterwards discovered that the trustees had not in their possession the indenture of lease, & therefore A. could not safely redeem. After A. commenced this action he was informed, & the fact was certified by the chief clerk, that the trustees' former solr. had fraudulently deposited the deed to secure moneys lent to him. A. alleged that he had sustained damage in being prevented from redeeming, & claimed an account; a reconveyance of the premises & a delivery of the title deeds; & if the indenture of lease were lost, an indemnity in respect of the loss; an attested copy of the deed, & compensation, & costs:—*Held:* (1) pltf. should have liberty to bring an action to recover the deed; if he could not recover it he would be entitled to an indemnity; (2) he was right in coming to the ct. to have the matter inquired into & his title made clear; & he was entitled to all his costs of the action, but (3) he was not entitled to any compensation for the loss of the deed; & (4) in accordance with the arrangement made in Sept. 1876, only three months' interest ought to be paid.—JAMES *v.* RUMSEY (1879), 11 Ch. D. 398; 48 L. J. Ch. 345; 27 W. R. 617.

Annotation:—**Folld.** Caldwell *v.* Matthews (1890), 62 L. T. 799.

1565. ——.]—In 1867 M. mortgaged his life interest in certain funds subject to the trusts of his marriage settlement & three policies of insurance on his own life. In 1876 he executed a second mtge. of his life interest to pltfs. This mtge. did not include the policies of insurance. In 1886 an action was brought by pltf.'s against the mtgor. & H., the legal personal representative of the first mtgee., to redeem the first mtge. & foreclose the mtgor. Pending the progress of the action it was discovered that the mtge. of 1867 & the policies were not in the possession of H., & an inquiry was directed as to the loss of the documents, & whether any & what indemnity should be given in respect of the loss in case it should be found that any of them had been lost. In the meanwhile pltfs. had paid into ct. the amount which had been certified to be due to deft. H. under the mtge. of 1867, & for her taxed costs of the action. The chief clerk in answer to the inquiry, found that the mtge. of 1867 & the policies had been lost, & he also found that pltfs. were entitled to "such an indemnity as will equal that which the insurance co. may require." Pltfs. took out a summons to vary this certificate, by which they asked that the whole of the fund in ct. might be retained until further order by way of indemnity to them. The insurance co. declined to make any arrangement with regard to an indemnity until claims should be made on the policies:—*Held:* (1) pltfs. were entitled to a bond of indemnity, to be given by deft. H. as extrix., the bond to be settled in chambers in case the parties differed, & (2) they were also entitled to have retained in ct. the sum of £100 & no more, to meet any possible costs that might be incurred when the policies should become claims.—CALDWELL *v.* MATTHEWS (1890), 62 L. T. 799.

1566. —— **Damages.**]—A mtgee. having inadvertently burnt the mtge. deed, & the documents relating to the title to the mtged. estate, some of which were originals & others attested & office copies, was ordered, in a foreclosure suit, not only to procure fresh attested & office copies, but to make compensation for the damage done to the estate by the destruction of the deeds, the amount to be settled by the master, & deducted from the mtge. debt.—HORNBY *v.* MATCHAM (1848), 16 Sim. 325; 17 L. J. Ch. 471; 12 Jur. 825; 60 E. R. 899.

Annotations:—**Consd.** Brown *v.* Sewell (1853), 11 Hare, 49. **Apld.** Ellis' Trustee *v.* Dixon-Johnson (1924), 131 L. T. 652. **Refd.** Woodman *v.* Higgins (1850), 15 L. T. O. S. 342.

1567. —— **Measure of damages.**]—On a bill by a mtgor., whose estate had been discharged from the mtge., & who had taken a reconveyance, against the mtgee., for the delivery up of the title deeds, or for an indemnity, it was found that the deeds were lost by the mtgee. or his agent. The ct. thereupon refusing to take into consideration the speculative damages which the title or marketable value of the estate might sustain upon any future dealing with it, from the absence of the deeds, yet held that the mtgor. was, upon the authorities, entitled to relief in respect of the additional expense of producing evidence of his title, & directed a reference to ascertain what ought to be allowed to him as a sufficient compensation for the damage done to the estate by the loss of the deeds.—BROWN *v.* SEWELL (1853), 11 Hare, 49; 1 Eq. Rep. 61; 22 L. J. Ch. 1063; 22 L. T. O. S. 32; 17 Jur. 708; 68 E. R. 1182.

1568. ——.]—JAMES *v.* RUMSEY, No. 1564, *ante*.

1569. **Costs—Foreclosure action.**]—STOKOE *v.* ROBSON, No. 1561, *ante*.

1570. **Ejectment—Counterclaim for redemption.**]—MIDLETON (LORD) *v.* ELIOT, No. 1563, *ante*.

1571. **Action to recover deeds.**]—JAMES *v.* RUMSEY, No. 1564, *ante*.

1572. **Retention of sum in court—To meet future costs.**]—CALDWELL *v.* MATTHEWS, No. 1565, *ante*.

1573. **Cessation of interest—After mortgagor ready to redeem.**]—MIDLETON (LORD) *v.* ELIOT, No. 1563, *ante*.

1574. ——.]—JAMES *v.* RUMSEY, No. 1564, *ante*.

1575. Right of mortgagor to bring action—In respect of loss.]—JAMES *v.* RUMSEY, No. 1564, *ante*.

SECT. 10.—**CONSOLIDATION.**
See Part X., *post.*

SECT. 11.—**TACKING.**
See Part XI., *post.*

SECT. 12.—**ACCOUNTS.**
See Part XVI., *post.*

SECT. 13.—**COSTS, CHARGES, AND EXPENSES.**
See Part XVIII., *post.*

SECT. 14.—**OTHER CASES.**

1576. Liability for wrongful acts of mortgagor in possession.]—Where a trespass was committed on pltfs.' mine, & an air course & level roads made through it underground to connect adjoining collieries in mtge. to defts., & large quantities of pltfs.' coal were thereby fraudulently gotten & removed without their knowledge:—*Held:* (1) defts., the mtgees., could not be made accountable for any portion removed by their mtgor. while they allowed him to remain in possession, notwithstanding the proceeds of the coal, so wrongfully removed by him, had found their way week by week, but without notice of the fraud, into defts.' hands, & notwithstanding they continued the use of the air course & roads after taking possession, & retained in their employment as manager of the collieries the person by whose agency the fraud had been perpetrated.

(2) *Qu.:* whether, under such circumstances as the above, the *onus* is not upon persons in the position of the mtgees. to show how much coal had been abstracted by themselves, & how much by others before they took possession.—POWELL *v.* AIKEN (1858), 4 K. & J. 343; 70 E. R. 144.

Annotations:—As to (1) **Apld.** Hilton *v.* Woods (1867), L. R. 4 Eq. 432. **Consd.** Elias v. Griffith (1878), 8 Ch. D. 521. **Reid.** Bowser *v.* Maclean (1860), 2 De G. F. & J. 415; Llynvi Co. *v.* Brogden (1870), L. R. 11 Eq. 188.

1577. Liability to pay rentcharge—Though not in possession.]—A mtgee. in fee of land which is subject to a rentcharge is personally liable to pay the rentcharge although he has never been in possession.—CUNDIFF *v.* FITZSIMMONS, [1911] 1 K. B. 513; 80 L. J. K. B. 422; 103 L. T. 811, D. C.

1578. Rights as against other incumbrancers—Under fictitious deeds.]—In 1873, D., in order to carry out a fraudulent scheme, obtained a transfer to himself of mtges. of freehold property, & after various dealings with it the legal estate was, in Sept. 1875, conveyed by a mtgee. to H. in trust for M., & in Mar. 1876, by H. to M. M. was alleged to have been an accomplice of & trustee for D.. In Aug. 1874, in pursuance of this scheme, T., claiming to be entitled to this property under a fictitious lease for ninety-eight years, purporting to have been granted to him in Mar. 1870, by a merely fictitious freeholder, an agent & accomplice of D., demised the property by way of mtge. to A. In Nov. 1874, M., claiming to be entitled to the same property under a fictitious lease for ninety-nine years, also dated Mar. 1870, & purporting to be granted to him by T., demised the property by way of mtge. to B., the mtge. deed being executed by M. only. In Jan. 1877, M., to whom the legal estate had been conveyed in Mar. 1876, deposited the genuine title deeds of the property with C. upon a memorandum charging his estate & interest in the lands comprised in the deeds & a statutory declaration of title; & further advances were made to M. & D., who came forward & stated that M. was merely a trustee for him of the property. In 1878, D., M., & T. were convicted & sentenced to penal servitude for forgery & fraud in connection with this property, & C., as equitable mtgee., entered into possession. In an action by A. to settle the priorities of himself, B., & C., as incumbrancers on the property:—*Held:* (1) assuming T. to have been the agent of D., so that his representations to A. of having a good title were binding on D., such representations followed by the acquisition of the property beneficially by D. did not bind the estate so as to give A. a prior equitable charge as against subsequent purchasers for value without notice; (2) the like representations of M. to B., followed by the acquisition, first, of the equitable, & afterwards of the legal estate by M., did not put B. in any better position, & the doctrine of estoppel did not apply so as to convert the ficitious title acquired by B. from N. in Nov. 1874, into a valid legal title *ab initio* upon the conveyance of the legal estate to M. in Mar. 1876; (3) as purchaser for value without notice by deposit of the genuine title deeds, C., though subsequent in date, was entitled in priority over A. & B.—KEATE *v.* PHILLIPS (1881), 18 Ch. D. 560; 50 L. J. Ch. 664; 44 L. T. 731; 29 W. R. 710.

1579. Right to compensation—For diminution of value of property—Abandonment of projected railway.]—A railway co. being about to apply for an Act of Parliament for making an extension line assented to F., an owner of land over which the line was intended to pass, commencing the line over his own land. F. accordingly made an embankment over his land & was paid for the work by the co. After a considerable part of the work on F.'s land had been done the co. obtained their Act giving power to construct the railway in the proposed line. The Act contained a proviso that if the new line were not opened for traffic within five years the parliamentary deposit should be applied towards compensating landowners or other persons whose land had been interfered with or rendered less valuable "by the commencement, construction or abandonment of the railway." The extension railway was not completed within five years but no warrant of abandonment was obtained under Railways Abandonment Act. A fresh Act was passed authorising a petition for

PART IX. SECT. 14.

l. *Liability for acts of mortgagor.*]—A mtgee. of land through which a stream flows is not liable for an injury caused by a mill dam erected by the mtgor. in possession, though the money for which the mtge. was given was lent by the mtgee. for the purpose of building the dam.—MCNAUGHTON *v.* FRASER (1855), 8 N. B. R. (3 All.) 247. —**CAN.**

m. *Right to prove against estate of deceased mortgagor.*]—A mtgee., after the death of the mtgor., has a right in an administration suit to prove upon the general estate for his whole claim. —*Re* STEWART, STEWART *v.* STEWART (1863), 10 Gr. 169.—**CAN.**

n. *Mortgagee's interest—Liability to execution.*]—After a mtge. in fee has become forfeited by nonpayment of the mtge. money, the mtgee.'s interest in the mtged. premises cannot be sold under an execution against lands.—PARKE *v.* RILEY (1866), 3 E. & A. 215. —**CAN.**

o. *Rights where lands mortgaged by trustee.*]—Where lands held in trust are mtged. by the trustee, the mtgee. is not entitled to the benefit of any equities & rights arising either under express contract or upon equitable principles, entitling the trustee to indemnity from his *cestui que trust.*—WILLIAMS *v.* BALFOUR (1890), 18 S. C. R. 472.—**CAN.**

p. *Right to execution.*]—The meaning of Land Titles Act, s. 62, as amended in 1916 & 1917, is that where

winding up the co. & the sale of the undertaking by the official liquidator. A petition having been presented by F.'s mtgees. & the trustee in his liquidation for the application of the parliamentary deposit in compensation for the injury done to his estate by the commencement, construction or abandonment of the works :—*Held :* (1) the undertaking was abandoned within the Act; F. having commenced the works on his own land before the co. had obtained their Act on the speculation that they would obtain power to construct the railway petitioners had no claim for compensation for injury to the estate by the commencement or construction of the railway ; but they had a claim for compensation for injury done by the abandonment of the railway ; the measure of injury must be determined by comparing the value of the estate immediately before with its value immediately after the abandonment ; (2) mtgees. of the landowner might be persons entitled to claim compensation under the Act.—*Re* POTTERIES, SHREWSBURY & NORTH WALES RY. CO. (1883), 25 Ch. D. 251 ; 53 L. J. Ch. 556 ; 50 L. T. 104 ; 32 W. R. 300, C. A.

Annotations :—As to (1) **Apld.** *Re* Ruthin & Corrig-y-Druidion Railway Act (1886), 32 Ch. D. 438 ; *Re* Southport & Lytham Tramroad Act, 1900, *Ex p.* Hesketh, [1911] 1 Ch. 120 ; *Re* West Yorkshire Tramways Bill, 1906 (1912), 82 L. J. Ch. 98.

Part X.—Consolidation.

SECT. 1.—IN GENERAL.

See, now, Law of Property Act, 1925 (c. 20), s. 93.

1580. Right of mortgagee to consolidate.]—Mtgee. lends more money to the mtgor. on bond ; his heir shall not redeem without paying off the bond, as well as the mtge., in case the heir is bound. Where a man has two mtges., & one is defective, if the heir will redeem, he shall take both.—SHUTTLEWORTH *v.* LAYCOCK (1684), 1 Vern. 245 ; 23 E. R. 443.

Annotation :—**Refd.** Jones *v.* Smith (1794), 2 Ves. 372.

1581. ——.]—The pltf. decreed to pay off a bond of £50 as well as the mtge. money upon redemption.—HALLILEY *v.* KIRTLAND (1685), 2 Rep. Ch. 360 ; 21 E. R. 687.

1582. ——.]—If A. makes two several mtges., & dies, & one of the mtges. is of an entailed estate, or is deficient in value, the heir of the mtgor. shall not be admitted to redeem one, without redeeming the other.—MARGRAVE *v.* LE HOOKE (1690), 2 Vern. 207 ; 23 E. R. 734.

Annotation :—**Refd.** Jones *v.* Smith (1794), 2 Ves. 372.

1583. ——.]—One makes two mtges. of several estates, for several sums, & one of the mtges. is deficient in value. If the mtgor. brings his bill to redeem one, he must redeem both.

If pltf. will redeem one, he shall redeem both (*per* CUR.).—POPE *v.* ONSLOW (1692), 2 Vern. 286 ; 23 E. R. 784.

Annotations :—**Dbtd.** *Ex p.* King (1750), 1 Atk. 300. **Consd.** Jones *v.* Smith (1794), 2 Ves. 372 ; Jennings *v.* Jordan (1881), 6 App. Cas. 698.

1584. ——.]—ELWYS *v.* THOMPSON (1742), 9 Mod. Rep. 393 ; 88 E. R. 528, L. C.

1585. ——.]—Where there are two or more mtges., the ct. will not compel a redemption of one, without the rest.—ROE d. KAYE *v.* SOLEY (1770), 2 Wm. Bl. 726 ; 96 E. R. 426.

Annotation :—**Expld.** Sharp *v.* Rickards, [1909] 1 Ch. 109.

1586. ——.]—CATOR *v.* CHARLTON (1775), cited in 2 Ves. at p. 377 ; 30 E. R. 681.

Annotations :—**Consd.** Jones *v.* Smith (1794), 2 Ves. 372. **Refd.** Jennings *v.* Jordan (1881), 6 App. Cas. 698.

1587. ——.]—(1) The mtgor. of one property assigned the equity of redemption, & afterwards mortgaged another property to the mtgee. of the first. The assignee of the equity of redemption having brought an action to redeem the first property, the mtgee. claimed to consolidate the mtges. :—*Held :* the right of the purchaser of an equity of redemption cannot be affected by a mtge. created after the purchase, & the assignee was entitled to redeem the first mtge. without redeeming the second.

(2) A mtgee., who holds several distinct mtges. under the same mtgor., redeemable, not by express contract, but only by virtue of the right which is called "equity of redemption," may within certain limits, & against certain persons, entitled to redeem all or some of them, "consolidate" them, that is, treat them as one, & decline to be redeemed as to any, unless he is redeemed as to all. This doctrine of consolidation is well established, & cannot now be altered except by the legislature, whether it originally rested on sound equitable foundation or not. The present question is as to its proper limits. There is no difficulty in its application, when all the mtges., whether originally made to the same mtgee. or having come into a single hand by subsequent assignments, are redeemable at the same time by the same person (LORD SELBORNE, C.).

I have much more difficulty in following, or satisfactorily explaining, the principle of some other authorities such as *Beevor* v. *Luck*, No. 1604, *post*, which have held contrary to the decision in *White* v. *Hillacre*, No. 1590, *post*, that a mtgee.'s right to consolidate, as against the purchaser of the equity of redemption of property mortgaged to him, is capable of being enlarged, after the date of that purchase, by a transfer to the mtgee. of other mtges., which were then in other hands, & with the equity of redemption of which, if there were no consolidation, the purchaser would have nothing to do (LORD SELBORNE, C.).—JENNINGS *v.* JORDAN (1881), 6 App. Cas. 698 ; 51 L. J. Ch. 129 ; 45 L. T. 593 ; 30 W. R. 369, H. L. ; *revsg.* S. C. *sub nom.* MILLS *v.* JENNINGS (1880), 13 Ch. D. 639, C. A.

Annotations :—As to (1) **Consd.** Hughes *v.* Britannia Permanent Benefit Bldg. Soc., [1906] 2 Ch. 607. *As to* (2) **Consd.** Bird *v.* Wenn (1886), 33 Ch. D. 215 ; Griffith *v.* Pound (1890), 45 Ch. D 553 ; Riley *v.* Hall (1898), 79

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there has been an abortive sale in an action on a mtge., pltf. cannot issue execution before obtaining order for foreclosure.—OLLON *v.* MONTGOMERY (Alta.), [1917] 3 W. W. R. 757.—**CAN.**

q. ——.]—ROYAL LOAN & SAVINGS CO. *v.* BEND (Sask.), [1919] 1 W. W. R. 414.—**CAN.**

r. *Whether liable to pay taxes.*]—A first mtgee. in possession who is not receiving sufficient revenue from the property in any one year to meet the annual interest on his mtge. is not obliged to pay the taxes on the property, even to keep it from being sold for non-payment of taxes.—CARTER *v.* MCMILLAN (Alta.), [1922] 2 W. W. R. 187 ; 68 D. L. R. 653.—**CAN.**

PART X. SECT. 1.

t. *Nature of right—Right to one redemption of several mortgages.*]—The rule of equity which allows the holder of several mtges. created by the same

Sect. 1.—*In general.* *Sect.* 2: *Sub-sects.* 1 & 2.]

L. T. 244. **Refd.** Harter *v.* Colman (1882). 19 Ch. D. 630; Harris *v.* Tubb (1889), 60 L. T. 699. *Generally*, **Refd.** Andrews *v.* City Permanent Benefit Bldg. Soc. (1881), 44 L. T. 641; Atherley *v.* Barnett (1885), 52 L. T. 736; Mutual Life Assce. Soc. *v.* Langley (1886), 32 Ch. D. 460; Minter *v.* Carr, [1894] 3 Ch. 498; Pedge *v.* White, [1896] A. C. 187. **Mentd.** Doble *v.* Manley (1885), 54 L. J. Ch. 636; Francis *v.* Harrison (1889), 43 Ch. D. 183; Wavell *v.* Mitchell (1891), 64 L. T. 560; Biddulph *v.* Billiter-street Offices Co. (1895), 72 L. T. 834.

1588. ——.]—Mtge. for £2,000 before which time the mtgor. borrowed of him that was afterwards the mtgee. £300 which was agreed to be secured by the mtge., both sums must be paid upon redemption.—WINDHAM *v.* JENNINGS (1683), 2 Rep. Ch. 247; 21 E. R. 669.

1589. —— **Founded on equitable principle—He who seeks equity must do equity.**]—The principle that where two distinct estates are mortgaged for two distinct debts, a separate redemption cannot be decreed, operates as long as the equities of redemption remain united in the same person.

If a person makes two different mtges. of two different estates, the equity reserved is distinct on each, & the contracts are separate; yet if the mtgor. would redeem one, he cannot; because if you come for equity you must do equity; & the general estate being liable to both mtges. this ct. will not be an instrument to take illegally from a mtgee. that by which he will be defrauded of a part of his debt (LORD NORTHINGTON, C.).—WILLIE *v.* LUGG (1761), 2 Eden, 78; 28 E. R. 825, L. C.

Annotation:—**Consd.** Jennings *v.* Jordan (1881), 6 App. Cas. 698.

1590. —— —— ——.]—The principle upon which a ct. of equity allows the tacking of mtges., does not apply to a case where the equity of redemption belongs to different persons at the time when the mtgee.'s title to both estates accrues. Therefore, where A., being seised of Blackacre, mortgaged it to M. & then devised it to B. in fee & died; & B., being seised of Whiteacre, mortgaged it to N., & then devised the two estates to distinct classes of devisees & died; & then N. obtained an assignment of M.'s mtge.:—*Held*: N. could not, by tacking the two mtges. together, obtain payment out of Blackacre of the balance due in respect of his own mtge. after sale of Whiteacre.

The right seems to have been established upon this principle, that, where a mtgee. is in possession of the legal estate in two properties, as a security for money lent on them, a ct. of equity will not allow the person entitled to the equity of redemption to redeem either of them, unless he redeems both; & allows the mtgee. a lien on the whole for his whole debt (ALDERSON, B.).—WHITE *v.* HILLACRE (1839), 3 Y. & C. Ex. 597; 4 Jur. 102; 160 E. R. 839.

Annotations:—**Consd.** Beevor *v.* Luck, Beevor *v.* Lawson (1867), L. R. 4 Eq. 537; Jennings *v.* Jordan (1881), 6 App. Cas. 698. **Apld.** Harter *v.* Coleman (1882), 19 Ch. D. 630. **Refd.** Marcon *v.* Bloxam (1856), 11 Exch. 586; Pledge *v.* White (1896), 65 L. J. Ch. 449.

1591. —— —— ——.]—The doctrine of consolidation of mtges. does not enable the grantee by a registered bill of sale of goods seized under a *fi. fa.* to tack a prior mtge. of other property of the grantor, & claim that the surplus proceeds of the goods, after discharging the sum secured by the bill of sale, shall be applied in satisfaction of the prior mtge. so as to defeat the right of the execution creditor to such surplus.

The principle of the doctrine [of consolidation of mtges.] is that a person who comes into equity must do equity. If the mtgor. comes within the time limited by the deed for payment, the equitable doctrine has no application, but if he has allowed that time to pass, & has no legal rights, then the equitable doctrine applies (LINDLEY, J.).—CHESWORTH *v.* HUNT (1880), 5 C. P. D. 266; 49 L. J. Q. B. 507; 42 L. T. 774; 44 J. P. 605; 28 W. R. 815, D. C.

1592. —— —— ——.]—In 1871, V., being the owner of shares in a building society & entitled to an advance in respect thereof, conveyed property to the trustees to secure the sum advanced, with provisoes for redemption, & that if he paid them the sum named monthly for twelve years, & all sums which might become due on the shares, the security should determine & the trustees should indorse a receipt on the deed. In 1874, V. & N., co-partners, being the owners of shares in the society, & entitled to an advance in respect thereof, conveyed partnership property to the trustees to secure the sum advanced, with provisoes for redemption, & that if they or either of them paid the sum, named, monthly for fourteen years, & all sums which might become due on the shares, the security should determine, & the trustees should indorse a receipt on the deed. In 1875, V. & N. as debtors, and V. as surety, conveyed to their bankers part of the property comprised in the deed of 1871, to secure all moneys due from the firm. V. & N. went into liquidation, & trustees were appointed thereunder. Default was made in payment of the monthly instalments, secured by the deed of 1874, & arrears became due to the society. The bankers entered into possession & receipt of the rents of the property mortgaged to them. They paid to the society the monthly instalments secured by the deed of 1871, & in 1878 gave notice to the trustees of the society that they, in accordance with the rules of the society, desired to redeem the property comprised in the deed of 1871, but the trustees refused to allow them to do so unless they also redeemed the mtge. of 1874, & brought an action for a declaration that they were entitled to consolidate their securities:—*Held*: consolidation only applies where default has been made on all the securities in respect of which it is claimed; & therefore as there had been no default on the 1871 mtge. pltfs. were not entitled to the consolidation they claimed.

The whole doctrine of consolidation arises from the power of the Ct. of Equity to put its own price upon its own interference on a matter of equitable consideration in favour of any suitor. With regard to *Beevor* v. *Luck*, No. 1604, *post*, where it was decided that you could consolidate a security given by two or more partners for a partnership debt, I am bound to say I am unable to see myself upon what principle that could be done (JAMES, L.J.).—CUMMINS *v.* FLETCHER (1880), 14 Ch. D. 699; 49 L. J. Ch. 563; 42 L. T. 859; 28 W. R. 772, C. A.

Annotations:—**Consd.** Harris *v.* Tubb (1889), 60 L. T. 699. **Refd.** Harter *v.* Colman (1882), 19 Ch. D. 630.

See, generally, EQUITY, Vol. XX., pp. 243–248, Nos. 94–127.

1593. Effect of intermediate incumbrancer's right

mtgor. on separate properties to consolidate the debts, & insist on being redeemed in respect of all before releasing any one of his securities, is not "tacking."—DOMINION SAVINGS & INVESTMENT SOCIETY *v.* KITTRIDGE (1876), 23 Gr. 631.—**CAN.**

a. —— ——.]—The rule that a mtgee. shall not be redeemed in respect of one mtge., without being redeemed also as to another mtge. created by the same mtgor., applies as well in a suit to foreclose as to redeem.—JOHNSTON *v.* REID (1881), 29 Gr. 293.—**CAN.**

—— ——.]—SMITH *v.* SMITH (1889), 18 O. R. 205.—**CAN.**

to marshall.]—A tenant for life mortgaged his real estate & certain policies of insurance to a mtgee. By the same deed it was declared that the mtgee. should hold the policies & all moneys received in respect thereof, upon trust, in the first place, to secure to him payment of the principal & interest owing upon the mtge., & all sums expended by him in keeping on foot the said policies, & then upon trust for the mtgor., his exors., administrators, & assigns. The deed contained no power of sale. The mtgee. subsequently obtained judgments against the mtgor., but between these charges & the prior mtge., there were several intermediate incumbrancers of the real estate, but they had no charge upon the policies. Upon a petition, praying that upon payment to the mtgee. of what was owing to him on the security of his mtge. deed, he might be ordered to release the hereditaments & assign the policies to the party having the conduct of the cause :—*Held :* (1) notwithstanding the trusts of the deed, the mtgee. might sell the policies & apply the proceeds towards payment of his mtge. debt ; but that if he was paid his mtge. debt out of the rents of the real estate, the subsequent incumbrancers were entitled to the benefit of the policies.

(2) The mtgee. could not consolidate his charges so as to oust the intermediate incumbrancers.—FORD *v.* TYNTE (1872), 41 L. J. Ch. 758 ; 27 L. T. 304.

SECT. 2.—WHEN RIGHT EXISTS.

SUB-SECT. 1.—DEFAULT BY MORTGAGOR.

1594. Necessity for default—As to each of the mortgages.]—Personal securities pledged for a specific debt ; after a mtge. to creditor, the same securities with others were pledged to him for the balance for an account ; the transactions being distinct, redemption of the personal securities was decreed without discharging what was due on the mtge.

Now, at least by the modern cases, it is laid down that the mtgee. cannot tack a bond against the mtgor., nor against creditors ; but may against the heir, merely to prevent circuity of action. If there are two legal mtges., which at law are become absolute, for that must be the principle, the mtgee. shall insist on being redeemed as to both or neither. Why a bond is not upon the same footing, I do not know. Those cases amount to this ; that if a man makes a mtge., & afterwards makes another mtge. for another sum, & then assigns the equity of redemption of one, both must be redeemed ; & the case of the assignee is not better than that of the original mtgor. How far does that differ from the case of a personal pledge ? In the case of an estate mortgaged, the party has no remedy whatsoever.

Here is a mtge., in which C. is one of three mtgors., & deft. one of three mtgees. ; afterwards the former & his partner pledge with deft. bills & notes for payment of an account current between them, of which account the money due upon the mtge. makes no part. If they were deposited expressly for one purpose, is there any pretence to say, the money was advanced upon security of the mtge. ; & that he would not have advanced any more money but on security of the mtge. ? I could not permit him to say that. What confusion would arise, if upon a bill of redemption by the mtgors., they were not to redeem without paying what was due upon the distinct transaction with C. & D. ? They are transactions totally distinct (ALVANLEY, M.R.).—JONES *v.* SMITH (1794), 2 Ves. 372 ; 30 E. R. 679 ; *revsd.* (1798), 2 Ves. 380, n., H. L.

Annotations :—**Consd.** *Re* Loosemore, *Ex p.* Berridge (1843), 3 Mont. D. & De G. 464. **Reld.** *Re* Newton, *Ex p.* Bignold (1836), 3 Mont. & A. 9 ; Cummins *v.* Fletcher (1879), 28 W. R. 272 ; Jennings *v.* Jordan (1881), 6 App. Cas. 698 ; Harter *v.* Colman (1882), 19 Ch. D. 630. **Mentd.** *Re* Morritt, *Ex p.* Official Receiver (1886), 56 L. T. 42.

1595. —— ——.]—CUMMINS *v.* FLETCHER, No. 1592, *ante*.

1596. —— **Mortgagor relying on legal right to redeem.**]—A mtge. was made of estate A. for £300, in which sureties joined to secure the debt. Another mtge. of estate B. was made by the same mtgor. to the same mtgee. to secure £1,500, & the title deeds of other property belonging to the mtgor.'s wife were deposited as collateral security for £300, part of the £1,500. The first £300 was paid off partly by the sureties. Afterwards, the other principal security was realised, & the £1,500, paid off. The mtgee. resisted the delivery of the deposited deeds on the ground that the sureties might have an equity against them, & the sureties were made parties to a suit for delivery of the deeds. The sureties did not assert any claim in the suit :—*Held :* the mtgor. was entitled to a decree for delivery of the deeds, & to the costs of the suit against the mtgee., & the principle of consolidating securities did not apply to a mere bailment of deeds to secure one of the debts.

Qu. : whether the principle of consolidating securities applies to a case in which the mtgor. is not relying upon his right to redeem but on a right at law.—CRICKMORE *v.* FREESTON (1870), 40 L. J. Ch. 137, L. JJ.

SUB-SECT. 2.—MORTGAGES MADE BY SAME MORTGAGOR.

See, now, Law of Property Act, 1925 (c. 20), s. 93.

1597. General rule.]—G. bequeathed (*inter alia*) all his furniture, plate, pictures & books, subject to his debts, to his wife, S. for life, remainder to his son, H., & appointed them his extrix. & exor., With the sanction of the Ct. of Ch., which had made a decree for sale, & directed the purchase-money to be paid into ct., H. agreed to purchase & became the purchaser of the books, & paintings at a valuation of £2,050 15*s.* & for the purpose of paying the amount & to supply the other wants of H., he & his mother, S., by deed, assigned (*inter alia*) to M., by way of mtge., the furniture, plate, pictures & books for £2,800 & both jointly covenanted for payment. H. afterwards became the purchaser of the plate & furniture, with the sanction of the Ct. of Ch., at a valuation of £706 8*s.* ; & to enable him to make the purchase M. advanced him £600 secured by deed of H., executed after

PART X. SECT. 2, SUB-SECT. 1.

1594 i. *Necessity for default—As to each of the mortgagees.*]—Plffs., who were the mtgees. under three mtges. from the same mtgors., on different lands, were held entitled only to consolidate in respect of the mtges. in default when action was brought to enforce them, & as the amount due on one of the mtges. had been then paid, & there was then no default as to it, consolidation was refused.—SCOTTISH AMERICAN INVESTMENT CO. *v.* TENNANT (1890), 19 O. R. 263.—**CAN.**

1594 ii. —— ——.]—*Re* UNION ASSURANCE CO. (1893), 23 O. R. 627.—**CAN.**

PART X. SECT. 2, SUB-SECT. 2.

1597 i. *General rule.*]—If two or more distinct mortgages be made of different estates between the same parties, or if a sum of money be advanced on one estate, & other estates be afterwards made a security for the sum already advanced, & also for further advances,

Sect. 2.—When right exists: Sub-sects. 2 & 3.]

the death of his mother, S. whereby he covenanted that the furniture, plate, pictures & books assigned by the first deed should stand charged with & be a security to M. for payment of the £600, & should not be redeemable until payment of that sum, as well as of the £2,800. The £600 was paid into the hands of H.'s. solr., but the purchase-money for the plate & furniture was never paid into the Ct. of Ch. M. having sold the furniture, plate, pictures & books under a power of sale contained in the first deed :—*Held :* in an action by him against the exor. of S. A. on her covenant for payment, although M. as against S.'s representatives, could not, by force of the second deed, in equity, deduct the £600 out of the moneys so raised, yet he was entitled to deduct the unpaid purchase-money of £706 8*s.* as he could not sell the whole of the mtged. property without satisfying the lien of the Ct. of Ch. to that extent.

This is in truth an attempt to tack the mtge. of £600 to the mtge. for £22,800, but that cannot be done for the mtges. are made by different persons (*per* CUR.).—MARCON *v.* BLOXAM (1856), 11 Exch. 586 ; 25 L. J. Ex. 193 ; 26 L. T. O. S. 245 ; 156 E. R. 964.

Annotation :—**Refd.** Dixon *v.* Steel, [1901] 2 Ch. 602.

1598. ——.]—S. executed to R. separate mtges. of four leasehold houses & assigned the equities of redemption to pltf. One house was sold & the mtge. upon it paid off. The pltf. then acquired the freehold of another house, No. 7, & granted a long lease of it to C., who executed a mtge. of the leasehold to R. In this transaction C. was a mere trustee for pltf. Subsequently pltf. got rid of the freehold reversion in No. 7 & took an assignment from C. of the equity of redemption in the leasehold interest. R. died, & this summons was taken out by pltf. against his exors. for redemption of No. 7. Defts. claimed to consolidate the mtge. on No. 7 with those on the other three houses. All the mtges. contained clauses excluding Conveyancing & Law of Property Act, 1881 (c. 41), s. 17 :—*Held :* (1) the fact that C. was a trustee for pltf. gave defts. no right to consolidate with the mtge. of No. 7 made by C. the other three mtges., for a mtgee. has no right for the purpose of consolidation to go behind the mtgor. & inquire into equitable interests.

(2) The assignment of C.'s interest to pltf. gave no right of consolidation, for the right to consolidate can only arise when all the mtges. were originally made by the same mtgor. It is not enough that the different equities of redemption have got into the same hands by assignment.—SHARP *v.* RICKARDS, [1909] 1 Ch. 109 ; 78 L. J. Ch. 29 ; 99 L. T. 916.

1599. Union of equities of redemption not sufficient.]—SHARP *v.* RICKARDS, No. 1598, *ante.*

1600. One mortgage by heir.]—BROMLEY *v.* HAMOND (1679), 2 Cas. in Ch. 23 ; 22 E. R. 828.

1601. One mortgage by trustee for first mortgagor.]—Two persons partners in a mercantile firm, who held a leasehold house, made an equitable mtge. of it to W. Afterwards the firm took in another partner who acquired a share in the equity of redemption. The firm then mortgaged their interest in another house, which they held as joint tenants, to W. for a further debt. The firm having become bkpt., the lease on the first-mentioned house was determined by bkpcy. & the lessor re-entered. W. claimed to consolidate both debts, so that the second-mentioned house should not be redeemed without paying both debts :—*Held :* one mtged. property having ceased to exist, there could be no consolidation of the two debts. *Qu. :* whether a mtge. by three persons can be consolidated with a mtge. by two in trust for the three.

I know no authority a principle upon which a mtgee. can consolidate a mtge. by three persons with one by two in trust for the three ; there being no reference to the first transaction in the second, & no privity between the mtgor. & the *cestuis que trust.* Counsel suggested that the *cestuis que trust* in the mtge. of property held upon trust could have called on the trustees to have conveyed the estate to them ; but it appears to me that a mtgee., has no right to look into any transactions between the mtgor. & third parties (JAMES, L.J.).—*Re* RAGGETT, *Ex p.* WILLIAMS (1880), 16 Ch. D. 117 ; 50 L. J. Ch. 187 ; 44 L. T. 4 ; 29 W. R. 314, C. A.

Annotations :—**Refd.** Banner *v.* Berridge (1881), 18 Ch. D. 254 ; *Re* Gregson, Christison *v.* Bolam (1887), 36 Ch. D. 223 ; Sharp *v.* Rickards, [1909] 1 Ch. 109.

1602. ——.]—SHARP *v.* RICKARDS, No. 1598, *ante.*

1603. One mortgage by sole mortgagor—Other jointly with partner.]—JONES *v.* SMITH, No. 1594, *ante.*

1604. —— ——.]—A person holding two mtges., created by the same mtgor., on two separate estates, by distinct deeds, may charge each estate with the aggregate of the two debts, even as against a person who purchased the equity of redemption in the estate first mortgaged before the second mtge. was got in.

Where several persons take interests in an equity of redemption by one & the same instrument, only one common right of redemption is given to them all by the decree ; but if they take under different instruments, they are entitled to have the mtged. property offered to them successively, according to the dates of the instruments under which they take. The latter rule applies where a purchaser or mtgee. of an equity of redemption of one estate is compelled to redeem another also by virtue of the doctrine of consolidation.

The ct. said the question of notice has nothing to do with it ; he has a right to tack the two together, & having that right, the person who is unfortunately affected by it must be taken to have known that there was the possibility of the union taking place (PAGE WOOD, V.-C.).—BEEVOR *v.* LUCK, BEEVOR *v.* LAWSON (1867), L. R. 4 Eq. 537 ; 36 L. J. Ch. 865 ; 15 W. R. 1221.

Annotations :—**Dbtd.** Cummins *v.* Fletcher (1880), 14 Ch. D. 699. **Overd.** Jennings *v.* Jordan (1881), 6 App. Cas. 698. **Dbtd.** Harter *v.* Colman (1882), 19 Ch. D. 630. **Consd.** Lewis *v.* Aberdare & Plymouth Co. (1884), 53 L. J. Ch. 741 ; Pledge *v.* White (1896), 65 L. J. Ch. 449 ; Riley *v.* Hall (1898), 79 L. T. 244. **Refd.** Wellesley *v.* Mornington (1869), 17 W. R. 355 ; Baker *v.* Gray (1875), 1 Ch. D. 491 ; Bradley *v.* Riches (No. 2) (1878), 39 L. T. 78 ; Mills *v.* Jennings (1880), 13 Ch. D. 639 ; Minter *v.* Carr (1894), 7 R. 558.

1605. —— ——.]—CUMMINS *v.* FLETCHER, No. 1592, *ante.*

1606. —— **Other jointly with surety.**]—Form of decree in a foreclosure suit, where A., whose estate was already mortgaged to the pltf., joined B., as his surety, in a mtge. to the pltf. of both their estates for a further sum.—ALDWORTH *v.* ROBINSON (1840), 2 Beav. 287 ; 48 E. R. 1191.

—— ——.]—*See,* GUARANTEE, Vol. XXVI., pp. 117–119, Nos. 831–845.

although without any agreement that the first estate shall be charged with the further advances, nevertheless, neither the mtgor. nor any one claiming under him the equity of redemption of one of the estates, although without notice of the other mtge. or charge, shall be permitted to redeem one mortgage without redeeming both.—SASKATCHEWAN GENERAL TRUSTS *v.* THOMPSON (1916), 34 W. L. R. 705 ; 10 W. W. R. 661.—CAN.

1607. One mortgage of entirety—Other by co-owner.]—H. mortgaged the entirety of freehold, & part of copyhold, hereditaments to secure payment of £6,500. M., who was the owner of two-thirds of the freeholds, received two-thirds of the £6,500, & he & his wife joined in collateral securities for payment of the whole sum. H. afterwards paid £500 of the mtge. debt, &, subject thereto, conveyed his one-third of the freeholds to secure payment of £1,200. M. subsequently mortgaged his two-thirds of the freehold hereditaments to secure payment of £2,106. The first & last mtges. were assigned to T., who filed his bill for redemption or foreclosure:—*Held:* T. was not entitled to tack the last mtge. to the first.—THORNEYCROFT *v.* CROCKETT (1848), 2 H. L. Cas. 239; 9 E. R. 1082, H. L.

Annotations:—**Refd.** Millett *v.* Davey (1862), 31 Beav. 470; Jennings *v.* Jordan (1881), 6 App. Cas. 698.

SUB-SECT. 3.—UNION OF MORTGAGES IN ONE MORTGAGEE.

1608. General rule.]—The doctrine of consolidation of mtges. laid down in *Vint* v. *Padget*, No. 1613, *post*, & other cases to the same effect has been too long established to be now overthrown. Therefore where the owner of different properties mortgages them to different persons & the mtgees. afterwards become united in title, the holder of the mtges. has a right to consolidate them, & to refuse to be redeemed as to one without payment of what is due to him on all, not only as against the mtgor., but also as against a person to whom the mtgor. has by one deed assigned the equity of redemption of all the properties, although the assignment is made before the mtgees. become united in title.—PLEDGE *v.* WHITE, [1896] A. C. 187; 65 L. J. Ch. 449; 74 L. T. 323; 44 W. R. 589, H. L.; *affg.* S. C. *sub nom.* PLEDGE *v.* CARR, [1895] 1 Ch. 51, C. A.

Annotations:—**Refd.** Riley *v.* Hall (1898), 79 L. T. 244; Sharp *v.* Rickards, [1909] 1 Ch. 109.

1609. ——.]—The right to consolidate two mtges. arises when the title of the mtgees. in respect to each mtge. can be shown to be vested in one & the same hand, & this fact must be established in order to bring into operation the doctrine of consolidation; consequently, in the case of a mtge. of freehold hereditaments in which A. & another were mtgees. advancing money on a joint account, & a second mtge. of the same hereditaments & certain leasehold premises in which A. was sole mtgee., although there is a possibility of the mtges. becoming vested in one & the same hand, namely, in A. upon his surviving his co-mtgee., & notwithstanding the fact that A. could give a good receipt for the moneys secured on both mtges., the doctrine of consolidation does not apply.—RILEY *v.* HALL (1898), 79 L. T. 244; 42 Sol. Jo. 702.

1610. Mortgages originally to different mortgagees—Subsequent union in one mortgagee.]—Where two distinct estates are mortgaged to different persons, these mtges. may be redeemed separately, though both mtges. have come into the hands of one person.—FOSBROOKE *v.* WALKER (1832), 2 L. J. Ch. 161.

1611. —— ——.]—After a first mtge. has been paid off, the second mtgee. may file a bill to have the legal estate conveyed to him without praying to foreclose the mtge.; & it seems he may do this, at the peril of costs, until the day of payment under a decree for redemption obtained against him by the mtgor. Until the mtgee. is actually paid off by his own consent or by decree of the ct., he retains the character of mtgee., with all the rights incident to it, & may therefore file a bill for foreclosure, notwithstanding a notice by the mtgor. to pay off the mtge., & even notwithstanding a decree of redemption. *Qu.:* whether a second mtgee., who upon payment of the first mtge. gets in the legal estate, can tack this mtge. to another mtge., previously executed to him by the same mtgor., of a different property.—GRUGEON *v.* GERRARD (1840), 4 Y. & C. Ex. 119; 160 E. R. 945.

1612. —— ——.]—A mtge. was given for a judgment debt. There was a prior equitable charge, of which the mtgee. had no direct notice, but no investigation of title or production of deeds was had, besides which, by arrangement, the mtgor.'s solr. prepared the deed for the mtgee.'s solr. The ct. concluded that the arrangement was to give a mtge. subject to existing charges, &, also, that the mtgee. was affected by the notice possessed by the mtgor.'s solr. of the prior equitable title.

A. made two equitable mtges. of two several estates, the one to A. & the other to B. He then executed a legal mtge. of both to C., who had constructive notice of the prior equitable mtges. B. obtained a transfer of A.'s mtge.:—*Held:* C. could only redeem B., on payment of both debts.

C., in point of fact, as I hold, took merely an equitable interest with knowledge of what had taken place as to the prior charge. With notice he can only stand in the position of B., & be entitled to his rights only; & if B. could not have redeemed one property without the other, then, I am of the opinion, that C. stands in no better or more favourable situation, & that he is not entitled to redeem one without redeeming the other (ROMILLY, M.R.).—TWEEDALE *v.* TWEEDALE (1857), 23 Beav. 341; 53 E. R. 134.

Annotation:—**Refd.** Pledge *v.* White, [1896] A. C. 187.

1613. —— ——.]—C. mortgaged an estate of which he was seised to A. & afterwards mortgaged another estate to B. He subsequently made a second mtge., by one conveyance, of his equity of redemption in both estates to the deft., & notice of this second mtge. was given to both A. & B. Ultimately the first two mtges. became vested in pltf., who filed their bill for an account, for payment, or in default for foreclosure of both. The deft. contended that he had a right under these circumstances to redeem one estate without redeeming the other; but it was:—*Held:* he had no right to redeem one of the estates only, & the fact of the first mtgee. having had notice of the second mtge., made no difference.—VINT *v.* PADGET (1858), 2 De G. & J. 611; 32 L. T. O. S. 66; 4 Jur. N. S. 1122; 6 W. R. 641; 44 E. R. 1126, L. JJ.

Annotations:—**Folld.** Beevor *v.* Luck, Beevor *v.* Lawson (1867), L. R. 4 Eq. 537. **Consd.** Wellesley *v.* Mornington (1869), 17 W. R. 355. **Distd.** Harter *v.* Colman (1882), 19 Ch. D. 630. **Consd.** Minter *v.* Carr, [1894] 3 Ch. 498. **Apprvd.** Pledge *v.* White, [1896] A. C. 187. **Refd.** Tennant *v.* Trenchard (1869), 4 Ch. App. 537, n.; Baker *v.* Gray (1875), 1 Ch. D. 491; Sharp *v.* Rickards, [1909] 1 Ch. 109.

1614. —— ——.]—JENNINGS *v.* JORDAN, No. 1587, *ante*.

1615. —— ——.]—A. mortgaged certain leaseholds & the mtge. was subsequently transferred to C. Afterwards A. in conjunction with his partner B. mortgaged other leaseholds to C.:—*Held:* C. was entitled to consolidate the mtges. as against the legal personal representative of A.—HARRIS *v.* TUBB (1889), 42 Ch. D. 79; 58 L. J. Ch. 434; 60 L. T. 699; 38 W. R. 75.

1616. First mortgage to mortgagee alone—Second to mortgagee & another—On joint account.]—RILEY *v.* HALL, No. 1609, *ante*.

See, also, Sect. 3, sub-sect. 3, B., *post*.

Sect. 2.—*When right exists: Sub-sects.* 4, 5, 6 & 7. *Sect.* 3: *Sub-sects.* 1, 2 & 3, *A.* (*a*).]

SUB-SECT. 4.—NATURE OF PROPERTY MORTGAGED.

1617. Mortgages of personalty.]—A. having a reversionary interest in personalty, which he had mortgaged first to B. & then to C., agreed to sell it to D., & D. having at A.'s request paid off B. out of the purchase-money, A. agreed that, until the sale should be completed, D. should stand in the place of B., & have the benefit of B.'s security. In the memorandum in which the agreement was expressed, there was a recital that the payment had been made to B. out of the purchase-money & in discharge of her debt:—*Held:* B.'s debt was not extinguished, but D. was entitled to the benefit of B.'s security.

The rules as to tacking one mtge. to another apply to foreclosure as well as redemption suits, & to mtges. of equitable personalty, by way of trusts for sale, as well as to ordinary mtges. of real estate.—WATTS *v.* SYMES (1851), 1 De G. M. & G. 240; 21 L. J. Ch. 713; 18 L. T. O. S. 216; 16 Jur. 114; 42 E. R. 544, L. JJ.

Annotations:—**Apld.** Selby *v.* Pomfret (1861), 3 De G. F. & J. 595; Neve *v.* Pennell, Hunt *v.* Neve (1863), 2 Hem. & M. 170. **Consd.** Adams *v.* Angell (1877), 5 Ch. D. 634. **Refd.** *Re* Tasker, Hoare *v.* Tasker, [1905] 2 Ch. 587. **Mentd.** *Re* Phillips, *Ex p.* Kiveton Coal Co. (1872), 7 Ch. App. 730.

1618. One mortgage of realty—Other of personalty.]—R. mortgaged an estate in 1832 to four persons who were known by R., to lend the money as trustees for the K. co. In 1841 R. mortgaged the same property to S. & co., who had notice of the K. co. mtge., but did not give the co. notice of their security. In 1856 R. joined as surety for N. in a security to other persons, who, as trustees for the K. co., advanced money to N. This security comprised real estate of N. & a policy of assurance belonging to R., who knew that the security was taken on behalf of the co.:—*Held:* S. & co. could not redeem the property comprised in the first mtge. without also redeeming that comprised in the mtge. of 1856.

It makes no difference whether the securities are held by the same person or in trust for the same person (TURNER, L.J.).—TASSELL *v.* SMITH (1858), 2 De G. & J. 713; 27 L. J. Ch. 694; 32 L. T. O. S. 4; 4 Jur. N. S. 1090; 6 W. R. 803; 44 E. R. 1166, L. JJ.

Annotations:—**Distd.** Baker *v.* Gray (1875), 1 Ch. D. 491. **Overd.** Jennings *v.* Jordan (1881), 6 App. Cas. 698. **Refd.** Beevor *v.* Luck, Beevor *v.* Lawson (1867), L. R. 4 Eq. 537; Minter *v.* Carr (1894), 7 R. 558; Pledge *v.* White (1896), 65 L. J. Ch. 449.

1619. ——— ———.]—In 1872 T. mortgaged certain property to pltfs., which they now wished to foreclose. At that time they had notice only of a prior mtge. to the R. society. In 1874 T. filed a petition for liquidation of his affairs by arrangement, & his step-daughter P. then produced for the first time, & mtge. of the same property, dated Aug. 15, 1871, to secure a sum of money lent by her to T. in 1864. She proved her debt in the liquidation, & handed her security to the trustee, who now claimed to have it paid off. The deed contained a recital that T. had agreed to give her a mtge. as a security for the money:—*Held:* on the evidence the deed had not been communicated to P.; it was void under 27 Eliz. c. 4; &, though the recital would have worked an estoppel against the mtgor. & persons simply claiming under him, it had no such effect against pltfs., who obtained their title under the statute.

Pltfs. sold the property contained in their mtge., & paid the R. society not only what was due to them as prior mtgees., but also a sum due to them on an equitable mtge. of other property. They now claimed to consolidate their mtge. with the equitable mtge., & to hold the deeds of the latter until the whole amount due to them was paid:—*Held:* as the equitable mtge. was paid with money which, had the first mtgee. not claimed a right to consolidate, would have belonged to the second mtgees., it was in fact paid by the second mtgees., who by the fact of such payment became equitable transferees, & were entitled to consolidate the mtges.

They were equitable mtgees. of the property comprised in the security mtge., & they were legal mtgees. of the station land for the balance due to them on their own mtge. They were consequently in the position of having two independent mtges. on two independent properties mortgaged by the same mtgor. That being so, the rule of consolidation would apply (JESSEL, M.R.).—CRACKNALL *v.* JANSON (1879), 11 Ch. D. 1; 40 L. T. 640; 27 W. R. 851, C. A.

Annotation:—**Mentd.** Wigan *v.* English & Scottish Law Life Assce. Assocn., [1909] 1 Ch. 291.

1620. ——— ——— **Bill of sale.**]—CHESWORTH *v.* HUNT, No. 1591, *ante*.

1621. Mortgage of mixed realty & personalty—No consolidation with vendor's lien.]—P. was adjudicated bkpt. in August, 1899. B. K. & co., who had various debts & various securities, sent in their proof as secured creditors, lumping together their debts & securities & claiming to prove for the balance. The securities consisted of (*a*) a vendor's lien on ship shares, & (*b*) a mtge. of policies, a debt, & freeholds. The trustee asked for details of value, & (*a*) was assessed at £1,325, & the property in (*b*) at £2,481, making in the aggregate £3,806. The trustee, however, did not object to the proof being made for a lump sum, nor did he require the separate value of the securities to be assessed in the proof, but he admitted the proof to rank for the amount claimed less £3,806, the aggregate assessed values of the securities. Subsequently a scheme for a composition was approved, & on payment of the composition bkpcy. was annulled & the outstanding estate of P. was ordered to revest in him. A subsequent incumbrancer on the freeholds included in mtge. (*b*) having claimed to redeem, B. K. & co. contended that redemption could now only be obtained on payment of the full sum of £3,806:—*Held:* the trustee in bkpcy. could not, by accepting the securities as worth the aggregate sum assessed, confer upon the secured creditor any part of bkpt.'s property to which the secured creditor was not entitled, or compel a mtgee. to put a separate value on two different properties included in the same security, & that mtge. (*b*) could be redeemed for £2,481 after allowing for what had already been received by the mtgees. on this security.—*Re* PEARCE, [1909] 2 Ch. 492; 78 L. J. Ch. 628; 100 L. T. 792; 16 Mans. 191. C. A.

SUB-SECT. 5.—POSSESSION OF LEGAL ESTATE.

1622. Whether possession of legal estate essential.]—JONES *v.* SMITH, No. 1594, *ante*.

PART X. SECT. 2, SUB-SECT. 4.

c. *Common law mortgage—& mortgage under Real Property Act.*]—In the case of mtges. to which Conveyancing Act, 1919, s. 97 (2), does not apply, although a mtgee. is not entitled to consolidate a common law mtge. under the old system of title with a mtge. under the provisions of Real Property Act, 1900, he is entitled to consolidate a mtge. under Real Property Act with a common law mtge.—BROWNE *v.* CRANFIELD (1925), 25 S. R. N. S. W. 443; 42 N. S. W. W. N. 125.—**AUS.**

1623. ——.]—WHITE *v.* HILLACRE, No. 1590, *ante.*

1624. ——.]—(1) A mtgee. holding several securities from the same mtgor. has a right to consolidate as against a subsequent incumbrancer, although such mtgee. may not have the legal estate, & although such subsequent incumbrancer may originally have held the first change, but have lost his priority by neglecting to register his security.

(2) Where two deeds are both registered in the Middlesex Registry on the same day & at the same hour, that which is denoted by the earlier number must be, in the absence of direct evidence to the contrary, presumed to have been first registered. Such priority of registration is in the absence of notice sufficient under the Act to give priority of charge to a mtge. posterior in date to that created by the deed so subsequently registered.—NEVE *v.* PENNELL, HUNT *v.* NEVE (1863), 2 Hem. & M. 170; 2 New Rep. 508; 33 L. J. Ch. 19; 9 L. T. 285; 11 W. R. 986; 71 E. R. 427.

Annotations:—As to (1) **Reld.** Cummins *v.* Fletcher (1879), 28 W. R. 272; Pledge *v.* White (1896), 65 L. J. Ch. 449. *As to* (2) **Reld.** *Re* Wight's Mortgage Trust (1873), L. R. 16 Eq. 41.

1625. Consolidation of two equitable mortgages.]—TWEEDALE *v.* TWEEDALE, No. 1612, *ante.*

SUB-SECT. 6.—AFTER SALE OR NOTICE TO PAY OFF.

1626. Sale of one property.]—WHITE *v.* HILLACRE, No. 1590, *ante.*

1627. ——.]—P. mortgaged to defts. leasehold premises in Mark Lane. He subsequently mortgaged other premises at Herne Hill to S. & N. & then became bkpt. Defts., shortly after the bkpcy., took a transfer of the mtge. securities of S. & N., & sold the property under a power of sale. The Mark Lane premises were insufficient to satisfy the charges upon it, but there was a surplus in respect of the Herne Hill property:—*Held:* upon bill filed by the assignees under the bkpcy. of P. defts. were entitled to apply such surplus in part discharge of the amount due to them under their first mtge. As regards a mtgee.'s right to tack, there is no difference between a suit to foreclose & one to redeem.—SELBY *v.* POMFRET (1861), 3 De G. F. & J. 595; 1 John. & H. 336; 30 L. J. Ch. 770; 4 L. T. 314; 7 Jur. N. S. 835; 9 W. R. 583; 45 E. R. 1009, L. C.

Annotations:—**Apld.** Neve *v.* Pennell, Hunt *v.* Neve (1863), 9 L. T. 285. **Expld.** Cummins *v.* Fletcher (1880), 14 Ch. D. 699. **Consd.** Pledge *v.* White, [1896] A. C. 187. **Reld.** *Re* Raggett, *Ex p.* Williams (1880), 16 Ch. D. 117; Minter *v.* Carr, [1894] 2 Ch. 321.

1628. ——.]—CRACKNALL *v.* JANSON, No. 1619, *ante.*

1629. Notice to pay off—With view to exercise power of sale.]—Mtgees. holding several mtges. executed by the same mtgor., who have excluded Conveyancing & Law of Property Act, 1881 (c. 41), s. 17, are entitled to consolidate, although they have given notice under Conveyancing & Law of Property Act, 1881 (c. 41), s. 17, to the mtgor. to pay off one of the mtges. in order to acquire a power of sale, & the mtgor. has prepared for the payment & tendered the money, the doctrine of election having no application. Where the equity of redemption in one of the mtges. has been purchased by a limited co., & the co. has issued debentures to a large amount which were a charge on the mtged. property:—*Held:* all the debenture holders having an interest in the equity of redemption must be made parties to a foreclosure action, & not merely some as representatives of the whole, under R. S. C., Ord. 16, r. 9.—GRIFFITH *v.* POUND (1890), 45 Ch. D. 553; 59 L. J. Ch. 522.

Annotation:—**Mentd.** Wavell *v.* Mitchell (1891), 64 L. T. 560.

SUB-SECT. 7.—STATUTORY EXCLUSION.

See Sect. 6, *post.*

SECT. 3.—AGAINST WHOM MORTGAGEE MAY CONSOLIDATE.

SUB-SECT. 1.—IN GENERAL.

1630. Person holding all equities of redemption.]—WILLIE *v.* LUGG, No. 1589, *ante.*

1631. The mortgagor.]—JONES *v.* SMITH, No. 1594, *ante.*

1632. ——.]—PLEDGE *v.* WHITE, No. 1608, *ante.*

SUB-SECT. 2.—HEIR-AT-LAW OF MORTGAGOR.

1633. One mortgaged estate deficient.]—SHUTTLEWORTH *v.* LAYCOCK, No. 1580, *ante.*

1634. ——.]—MARGRAVE *v.* LE HOOKE, No. 1582, *ante.*

SUB-SECT. 3.—ASSIGNEES OF MORTGAGOR.

A. Where Equities of Redemption not Severed.

(a) In General.

1635. General rule—Mortgagee entitled to consolidate.]—WILLIE *v.* LUGG, No. 1589, *ante.*

1636. ——.]—JONES *v.* SMITH, No. 1594, *ante.*

1637. ——.]—Pltf. was the second mtgee. of the A. estate of which deft. was the first mtgee. Deft. was also a mtgee. of the B. estate, which belonged to the same mtgor. Before action brought pltf. made a definite offer to deft. to redeem his mtge. on A., but this deft. refused, claiming to be entitled to consolidate his mtge. on B. with his mtge. on A., & requiring pltf. to redeem both. Pltf. then brought an action for the redemption of deft.'s mtge. on A., & a declaration that deft. was not entitled to consolidate:—*Held:* deft. was not entitled to consolidate.—SQUIRE *v.* PARDOE (1891), 66 L. T. 243; 40 W. R. 100; 36 Sol. Jo. 77, C. A.

1638. —— **Assignment before union of mortgagees' title.**]—PLEDGE *v.* WHITE, No. 1608, *ante.*

1639. Assignment by subsequent mortgage.]—BOVEY *v.* SKIPWICH (1671), 1 Cas. in Ch. 201; 3 Rep. Ch. 67; 22 E. R. 762.

Annotations:—**Consd.** Titley *v.* Davies (1743), 2 Y. & C. Ch. Cas. 399, n. **Apld.** Vint *v.* Padget (1858), 2 De G. & J. 611. **Consd.** Pledge *v.* White, [1896] A. C. 187. **Reld.** Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377; Minter *v.* Carr (1894), 7 R. 558.

1640. ——.]—TWEEDALE *v.* TWEEDALE, No. 1612, *ante.*

1641. ——.]—VINT *v.* PADGET, No. 1613, *ante.*

PART X. SECT. 3, SUB-SECT. 1.

1631 i. *The mortgagor.*]—COLONIAL INVESTMENT & LOAN CO. *v.* KING (1902), 23 C. L. T. 126; 5 Terr. L. R. 371.—**CAN.**

PART X. SECT. 3, SUB-SECT. 3.—A. (a).

1635 i. *General rule—Mortgagee entitled to consolidate.*]—THOMPSON *v.* WARWICK (1894), 21 A. R. 637.—**CAN.**

Sect. 3.—Against whom mortgagee may consolidate: Sub-sect. 3, A. (b), & B. (a), (b), (c) & (d); sub-sects. 4 & 5.]

(b) Trustee in Bankruptcy of Mortgagor.

1642. General rule.]—POPE *v.* ONSLOW, No. 1583, *ante.*

1643. ——.]—Where bkpt. executed several distinct mtges. of different estates, his assignees cannot apply to redeem one mtge., without also redeeming the others.—*Re* BREEDS, *Ex p.* ALSAGER (1841), 2 Mont. D. & De G. 328, Ct. of R.

Annotation :—**Refd.** *Re* Loosemore, *Ex p.* Berridge (1843), 3 Mont. D. & De G. 464.

1644. ——.]—A., mtgee. in fee, assigns the mtge. debt & the securities to B., & gives him a bond for the sum due. A. subsequently mortgages other property to B. & then becomes bkpt. :—*Held :* B. was entitled to have both the estates as a security for the whole debt due to him.—*Re* LOOSEMORE, *Ex p.* BERRIDGE (1843), 3 Mont. D. & De G. 464 ; 2 L. T. O. S. 212 ; 7 Jur. 1141, Ct. of R.

Annotation :—**Refd.** Selby *v.* Pomfret (1861), 1 John. & H. 336.

1645. ——.]—CRACKNALL *v.* JANSON, No. 1619, *ante.*

1646. Assignment of mortgage taken after notice of adjudication.]—SELBY *v.* POMFRET, No. 1627, *ante.*

1647. —— **Reservation of right of consolidation in first mortgage.**]—Three mtges. of the same property were granted by the same mtgor. to three different parties, the third mtge. also including other property. Only the first mtge. contained a clause reserving a right of consolidation. On the bkpcy. of the mtgor., the second mtgee. took transfers of the first & third mtges. :—*Held :* the trustee in bkpcy. could not redeem the third mtge. without also redeeming the first & second mtges.—*Re* SALMON, *Ex p.* TRUSTEE, [1903] 1 K. B. 147 ; 72 L. J. K. B. 125 ; 87 L. T. 654 ; 51 W. R. 288 ; 10 Mans. 22.

B. Where Equities of Redemption Severed.

(a) Both Mortgages Prior to Severance.

1648. Mortgagee entitled to consolidate.]—TITLEY *v.* DAVIES (1743), 2 Y. & C. Ch. Cas. 399, n. ; 63 E. R. 177, L. C.

Annotations :—**Consd.** Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377 ; Vint *v.* Padget (1858), 2 De G. & J. 611. **Expld.** Beevor *v.* Luck, Beevor *v.* Lawson (1867), L. R. 4 Eq. 537. **Consd.** Wellesley *v.* Mornington (1869), 17 W. R. 355. **Apld.** Bradley *v.* Riches (1878), 47 L. J. Ch. 811. **Expld.** Jennings *v.* Jordan (1881), 6 App. Cas. 698 ; Pledge *v.* White, [1896] A. C. 187. **Refd.** Minter *v.* Carr (1894), 7 R. 558.

1649. ——.]—Two separate mtges. of different estates to the same person ; purchaser of the equity of redemption of one of them cannot redeem that mtge. only, but must redeem both.—*Re* ——, *Ex p.* CARTER (1773), Amb. 733 ; 27 E. R. 474.

1650. ——.]—TRIBOURG *v.* POMFRET (LORD) & WILKINS (1773), cited Amb. at p. 733 ; 27 E. R. 474.

Annotations :—**Refd.** *Re* Loosemore, *Ex p.* Berridge (1843), 3 Mont. D. & De G. 464 ; Selby *v.* Pomfret (1861), 1 John. & H. 336.

1651. ——.]—CATOR *v.* CHARLTON (1775), cited in 2 Ves. at p. 377 ; 30 E. R. 681.

Annotations :—**Consd.** Jones *v.* Smith (1794), 2 Ves. 372 ; Jennings *v.* Jordan (1881), 6 App. Cas. 698.

1652. ——.]—COLLET *v.* MUNDEN (1786), cited 2 Ves. at p. 377 ; 30 E. R. 681.

Annotations :—**Consd.** Jones *v.* Smith (1794), 2 Ves. 372. **Refd.** Jennings *v.* Jordan (1881), 6 App. Cas. 698.

1653. ——.]—JONES *v.* SMITH, No. 1594, *ante.*

1654. ——.]—A purchaser of an equity of redemption filed his bill against the mtgee. to redeem. The original mtgor. having made a mtge. of other premises to the same mtgee. for a distinct debt, the purchaser cannot redeem the first, without redeeming the second mtge. The parties interested in the equity of redemption of the second mtge. are necessary parties to the suit.—IRESON *v.* DENN (1796), 2 Cox, Eq. Cas. 425 ; 30 E. R. 197.

Annotations :—**Consd.** Vint *v.* Padgett (1858), 1 Giff. 446 ; Jennings *v.* Jordan (1881), 6 App. Cas. 698.

1655. ——.]—A mtge. to defts. of leasehold property, M., contained a provision that the mtgor. should not be entitled to redeem without first paying all moneys that might be secured to the mtgees. by any other mtge. executed by the mtgor. The mtgor. then mortgaged another leasehold, R., to defts., & the day after gave a second mtge. of it to pltfs. Of this mtge. defts. had notice. He subsequently gave two further mtges. of different properties to defts. In an action by pltfs., as second mtgees., to redeem R. :—*Held :* defts., as first mtgees. of R., were entitled to consolidate their prior mtge. on M. with their mtge. on R., but not the two mtges. subsequent in date to pltfs.' mtge.

Treating s. 17 of the Conveyancing Act, 1881 (c. 41), as, for the moment, out of the way, the law is settled that a mtgee. of property A. is entitled, as against a puisne mtgee. of that property, to consolidate with his mtge. of A. a mtge. of B., prior in date to that of the puisne mtge. created by the same mtgor. He has that equity against the mtgor, & the puisne mtgee. cannot stand in a better position . . . all the mtges. are subsequent to the Conveyancing Act, 1881, & by s. 17 of that Act the right of consolidation is taken away, but only where a contrary intention is not expressed in the mtge. deeds, or one of them (KEKEWICH, J.). —HUGHES *v.* BRITANNIA PERMANENT BENEFIT BUILDING SOCIETY, [1906] 2 Ch. 607 ; 75 L. J. Ch. 739 ; 95 L. T. 327 ; 22 T. L. R. 806.

(b) Second Mortgage Subsequent to Severance.

1656. No right of consolidation.]—TASSELL *v.* SMITH, No. 1618, *ante.*

1657. ——.]—First mtge. of Blackacre to A., followed by subsequent mtges. to other persons of which A. had notice. After this, first mtge. by the same mtgor. of Whiteacre to B. After this, transfer of A.'s mtge. to B., the mtgor. joining in the transfer ; this transfer being made in pursuance of an agreement under which B. had paid off A. before the date of B.'s mtge. At the date of this agreement B. had notice of the puisne mtges. of Blackacre :—*Held :* B. could not consolidate the mtges. of Blackacre & Whiteacre as against the puisne mtgees.—BAKER *v.* GRAY (1875), 1 Ch. D. 491 ; 45 L. J. Ch. 165 ; 33 L. T. 721 ; 24 W. R. 171.

Annotations :—**Distd.** Jennings *v.* Jordan (1881), 6 App. Cas. 698. **Refd.** Mills *v.* Jennings (1880), 13 Ch. D. 639 ; Harris *v.* Tubb (1889), 60 L. T. 699 ; Minter *v.* Carr (1894), 7 R. 558.

1658. ——.]—JENNINGS *v.* JORDAN, No. 1587. *ante.*

1659. —— **New mortgage substituted for first mortgage—After creation of second mortgage.**]—A brewery co. were first mtgees. for £1,000, & pltf. was third mtgee. of a public-house, A. The co. afterwards took a mtge. of a public-house, B., A., & B. both belonging to the same mtgor. The lease of A. was nearly out, & by arrangement

1656 i. *No right of consolidation.*]—FRASER *v.* NAGLE (1888), 16 O. R. 241.—CAN.

between all parties the co. advanced £1,000 for a new lease which was granted to the mtgor., & was then mortgaged by him, first to the brewery co. to secure £2,000 & advances, & subject thereto to pltf. By a memorandum given at the same time pltf. declared that the co. was to have priority for their £2,000, & advances, not to exceed in the whole £2,300. The brewery co. afterwards transferred both mtges. to deft. Pltf. claimed to redeem A., to which deft. objected unless pltf. also redeemed B. :—*Held :* though the new mtge. of A. to pltf. was in date subsequent to the mtge. of B. the intention of the parties was merely to give priority to the co. for their £2,300 & not to give the co. a right to consolidate the mtge. on A. & the mtge. on B. ; & as the whole was equitable the co. could not be held to have obtained any such right ; nor could their assignee be in any better position.—BIRD *v.* WENN (1886), 33 Ch. D. 215 ; 55 L. J. Ch. 722 ; 54 L. T. 933 ; 34 W. R. 652.

1660. —— Although right to consolidate reserved in first mortgage—Mortgagee with notice of severance.]—HUGHES *v.* BRITANNIA PERMANENT BENEFIT BUILDING SOCIETY, No. 1655, *ante.*

(c) Union of Mortgages before Severance.

1661. Mortgagee's right to consolidate—Against purchaser of equity of redemption.]—BEEVOR *v.* LUCK, BEEVOR *v.* LAWSON, No. 1604, *ante.*

(d) Union of Mortgages after Severance.

1662. Whether mortgagee entitled to consolidate —Severance by devise.]—WHITE *v.* HILLACRE, No. 1590, *ante.*

1663. —— Notice to assignee immaterial.]—BEEVOR *v.* LUCK, BEEVOR *v.* LAWSON, No. 1604, *ante.*

1664. ——.]—JENNINGS *v.* JORDAN, No. 1587, *ante.*

1665. —— Both mortgages created before severance—Severance by sale or mortgage.]—When two mtges., made by the same mtgor. to different mtgees. on different estates, become united for the first time in one person after the mtgor. has assigned by way either of sale or mtge., the equity of redemption of one of them, the owner of the two mtges. cannot consolidate them as against the assignee of the equity of redemption, even though both the mtges. were created before the assignment. The assignee of an equity of redemption takes it subject to all equities which affect the assignor in respect of it at the date of the assignment, but the possibility that the mtge. may, by virtue of its subsequent union in the same person with a mtge. of another estate made, previously to the assignment, by the same mtgor. to a different mtgee., become liable to consolidation, is not such an equity.—HARTER *v.* COLMAN (1882), 19 Ch. D. 630 ; 51 L. J. Ch. 481 ; 46 L. T. 154 ; 30 W. R. 484.

Annotations :—**Apld.** Minter *v.* Carr, [1894] 2 Ch. 321. **Distd.** Pledge *v.* Carr, [1894] 2 Ch. 328. **Consd.** Hughes *v.* Britannia Permanent Benefit Bldg. Soc., [1906] 2 Ch. 607. **Reld.** Bird *v.* Wenn (1886), 33 Ch. D. 215 ; Mutual Life Assce. Soc. *v.* Langley (1886), 32 Ch. D. 460 ; Minter *v.* Carr, [1894] 3 Ch. 498 ; Pledge *v.* White (1896), 65 L. J. Ch. 449.

1666. ——.]—J. was the owner of two properties, A. & B. In Feb. 1864, he mortgaged A. to S. ; & in July, 1864, he gave a second mtge. on it to W.

In 1863, 1865, & 1866, he mortgaged B. to other mtgees., & in 1871 & 1873 the first mtges. on both properties were transferred to R.

In 1884, J. mortgaged both properties to pltf., & in 1885 he mortgaged both properties to P., subject to the prior incumbrances.

In July, 1890, W.'s second mtge. of A. was transferred to P., who, in Oct. 1890, sold it under his power of sale, to pltf., subject only to the mtge. to S. :—*Held :* as the union of the first mtges. on the two properties in R. had not taken place until after the equity of redemption in A. had been assigned to W. the exors. of R. could not consolidate the first mtges. so as to prevent the pltf. from redeeming A. alone.—MINTER *v.* CARR, [1894] 3 Ch. 498 ; 63 L. J. Ch. 705 ; 71 L. T. 526 ; 7 R. 558, C. A.

Annotation :—**Reld.** Pledge *v.* White (1896), 74 L. T. 323.

SUB-SECT. 4.—SUBSEQUENT INCUMBRANCER.

1667. Right available—Loss of priority by incumbrancer.]—NEVE *v.* PENNELL, HUNT *v.* NEVE, No. 1624, *ante.*

1668. ——.]—BEEVOR *v.* LUCK, BEEVOR *v* LAWSON, No. 1604, *ante.*

1669. ——.]—HARTER *v.* COLMAN, No. 1665, *ante.*

1670. ——.]—MINTER *v.* CARR, No. 1666, *ante.*

1671. ——.]—HUGHES *v.* BRITANNIA PERMANENT BENEFIT BUILDING SOCIETY, No. 1655, *ante.*

SUB-SECT. 5.—OTHER PERSONS.

1672. Parties claiming under voluntary settlement—No consolidation.]—(1) A mtgee. of an estate which has already formed the subject of a voluntary settlement by the mtgor. is not entitled, as against the persons claiming under the settlement, to consolidate subsequent mtges. from the same mtgor.

(2) A voluntary settlor of an estate which is already subject to a mtge., & which is subsequently sold by the mtgee. under his power of sale, is not entitled, as against the persons claiming under the settlement, to the surplus proceeds of sale, inasmuch as the sale not being by the settlor, nor under any power reserved to him under the settlement, 27 Eliz. c. 4, does not apply.—*Re* WALHAMPTON ESTATE (1884), 26 Ch. D. 391 ; 53 L. J. Ch. 1000 ; 51 L. T. 280 ; 32 W. R. 874.

Annotation :—Generally, **Mentd.** *Re* Holland, Gregg *v.* Holland (1901), 49 W. R. 476.

PART X. SECT. 3, SUB-SECT. 3.—B. (c).

d. *Mortgagee's right to consolidate —Effect of registration of conveyance.*]—Where two mtges. on different properties by the same mtgor. came into C.'s hand before Registry Act, 1865, & the mtgor., after the passing of that Act, assigned the equity of redemption to M. by a registered instrument. On M.'s suing for redemption :—*Held :* the registered conveyance to M. prevailed, under sect. 66 of the Act, over C.'s equitable right to consolidate the two mtges.—MILLER *v.* BROWN (1882), 3 O. R. 210.—**CAN.**

PART X. SECT. 3, SUB-SECT. 4.

e. *Whether allowed—Against puisne incumbrancer—Of one mortgaged property.*]—Where the owner of property mortgaged it to W., & then assigned an undivided half to J., subject to the mtge., & afterwards mortgaged the remaining half to B., who afterwards obtained an assignment of the first mtge. :—*Held :* the representatives of J. were not bound to redeem both mtges., but only the mtge. to W.—BUCKLER *v.* BOWMAN (1866), 12 Gr. 457. —**CAN.**

f. —— —— ——.]—The right of consolidating separate mtge. debts on separate properties, is an equitable one, & under 31 Vict. c. 20, s. 68, will not be allowed in favour of the holder of the mtges. against a puisne incumbrancer of one of the mtged. properties without notice, although such right would be enforced as against the mtgor. himself.—BROWER *v.* CANADIAN PERMANENT BUILDING ASSOCN. (1877), 24 Gr. 509.—**CAN.**

g. —— —— ——.]—MUTTLEBURY *v.* TAYLOR (1892), 22 O. R. 312.—**CAN.**

PART X. SECT. 3, SUB-SECT. 5.

h. *Whether purchaser for value without notice.*]—BIRKBECK LOAN CO. *v.* JOHNSTON (1903), 6 O. L. R. 258 ; 2 O. W. R. 556.—**CAN.**

Sect. 3.—Against whom mortgagee may consolidate: Sub-sect. 5. Sects. 4, 5, 6 & 7. Part XI. Sect. 1.]

1673. Surety—Suretyship not disclosed by mortgage deed.]—By a deed dated the 11th Mar. 1875, G. mortgaged to I. certain real estate for securing £1,050, & by a deed dated Dec. 10, 1875, G. mortgaged to I. certain Hudson Bay shares, & by the same deed A. & wife mortgaged to I. certain railway shares. A. & wife were, in fact, sureties for G., but that fact was not disclosed on the deed. G. subsequently executed other mtges. of the Hudson Bay shares to other persons, including M. The proceeds of the Hudson Bay shares had been paid into ct. under the Trustee Relief Act. M. presented a petition for payment out of ct. of that fund, & in Aug. 1887, the petition was referred to chambers to ascertain the priorities of the various mtgees. on the fund The chief clerk found that the first mtgee. was I., & that he was entitled to consolidate his mtge. of Mar. 11, 1875, that the second mtgees. were A. & wife to the extent of the value realised from the railway shares which had gone in part payment of I.'s security of Dec. 10, 1875, & that the other mtgees. were entitled subject to those priorities. The petition then came on upon further consideration, together with a summons by A. & wife, to vary the certificate by declaring that I. was not entitled to consolidation as against them:—*Held:* I. was entitled to consolidate, on the ground that the suretyship not being disclosed by the deed of Dec. 10, 1875, the only right of A. & wife against the trust fund was through G., & was therefore subject to I.'s rights against G.—*Re* TOOGOOD'S LEGACY TRUSTS (1889), 61 L. T. 19.

——.]—*See, also*, GUARANTEE, Vol. XXVI., p. 119, Nos. 839, 840.

1674. Personal representative of deceased mortgagor—Joint mortgagor with another.]—HARRIS *v.* TUBB, No. 1615, *ante*.

SECT. 4.—**WHO MAY CONSOLIDATE.**

Mortgagee in whom mortgages united.]—*See* Sect. 2, sub-sect. 3, *ante*.

—— **Union after bankruptcy of mortgagor.**]—*See* Nos. 1627, 1647, *ante*.

1675. Mortgagee of equity of redemption of one estate—After paying off mortgage on other estate.]—TITLEY *v.* DAVIES (1743), 2 Y. & C. Ch. Cas. 399, n.; 63 E. R. 177.

Annotations:—**Consd.** Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377; Beevor *v.* Luck, Beevor *v.* Lawson (1867), L. R. 4 Eq. 537. **Folld.** Bradley *v.* Riches (1878), 47 L. J. Ch. 811. **Consd.** Jennings *v.* Jordan (1881), 6 App. Cas. 698. **Distd.** Pledge *v.* White, [1896] A. C. 187. **Refd.** Vint *v.* Padget (1858), 2 De G. & J. 611; Wellesley *v.* Mornington (1869), 17 W. R. 355; Minter *v.* Carr (1894), 7 R. 558.

1676. —— ——.]—CRACKNALL *v.* JANSON, No. 1619, *ante*.

1677. Holder of securities on other account or as trustee.]—TASSELL *v.* SMITH, No. 1618, *ante*.

1678. Assignee of mortgagee—Only if mortgagee has right.]—BIRD *v.* WENN, No. 1659, *ante*.

SECT. 5.—**IN WHAT PROCEEDINGS ENFORCEABLE.**

Right purely an equitable one.]—*See* Sect. 1, *ante*.

1679. Whether in foreclosure as well as in redemption proceedings.]—(1) Mtgee. having separate mtges. created by the same mtgor. on two different estates, has not a right to foreclose both estates on non-payment of the aggregate amount of the mtged. debts; but can only foreclose each estate separately, on non-payment of what is secured upon it.

(2) Form of decree for foreclosure where the mtgee. has a legal mtge. for the whole of his debt on one of the mtgor.'s estates, & an equitable mtge. for part of his debt on another of the mtgor.'s estates.—HOLMES *v.* TURNER (1843), 7 Hare, 367, n.; 68 E. R. 151.

Annotations:—*As to* (1) **Folld.** Smeathman *v.* Bray (1851), 15 Jur. 1051. **N.F.** Selby *v.* Pomfret (1861), 1 John. & H. 336. *As to* (2) **Folld.** Austin *v.* Chase (1850), 16 L. T. O. S. 279.

1680. ——.]—(1) Mtgee., having separate mtges. created by the same mtgor. on two different estates, has not a right to foreclose both estates on non-payment of the aggregate amount of debts, but can only foreclose each separately on non-payment of what is secured upon it.

(2) Where foreclosure is sought by claim, an option is given to pltf., at the hearing, to take either the common order for foreclosure, or an inquiry as to the existence of other incumbrances, suspending the order for foreclosure till after the report.—SMEATHMAN *v.* GRAY (1851), 17 L. T. O. S. 241; 15 Jur. 1051.

Annotation:—*As to* (1) **N.F.** Selby *v.* Pomfret (1861), 1 John. & H. 336.

1681. ——.]—WATTS *v.* SYMES, No. 1617, *ante*.

1682. ——.]—VINT *v.* PADGET, No. 1613, *ante*.

1683. ——.]—SELBY *v.* POMFRET, No. 1627, *ante*.

SECT. 6.—**STATUTORY RESTRICTION ON CONSOLIDATION.**

See, now, Law of Property Act, 1925 (c. 20), s. 93.

1684. Covenant by mortgagor to observe rules of mortgagee society—Rules providing for consolidation.]—A. mortgaged two leasehold plots of land, & the houses in course of erection thereon, to a building society to secure £500. On the same day he executed a second mtge. of the same property to B. Subsequently A. mortgaged three other plots of land & houses to the society to secure £600. B. had a charge on this property. The first mtge. contained a covenant by A. to observe all the rules of the society. One of such rules provided that if the society held more than one mtge. from any member such member should not have power to redeem one property alone without the consent of the board. B. acted as A.'s solr. in the matter of the first mtge., & was the witness to his execution thereof.

A. having become bkpt., & the society having taken possession of all the houses, B. brought a redemption action. The society claimed to consolidate their mtges. as against him:—*Held:* the covenant to observe the rules amounted to an express covenant that the society should have power to consolidate, & B. having notice of that covenant had expressly taken his mtge. subject to the risk of consolidation, & the society had a right to consolidate.—ANDREWS *v.* CITY PERMANENT BENEFIT BUILDING SOCIETY (1881), 44 L. T. 641.

PART X. SECT. 6.

k. *Clause reserving right to consolidate—Construction of.*]—*Re* THOMSON'S ESTATE, [1912] 1 I. R. 194, 460.—IR.

l. *Under Land Transfer Acts, 1870 & 1885.*]—There is no right of consolidation of mtges. under Land Transfer Acts of 1870 & 1885.—WILKIN *v.* DEANS (1888), 6 N. Z. L. R. 425.—N.Z.

1685. Clause reserving right to consolidate—In one of three mortgages only.]—*Re* SALMON, *Ex p.* TRUSTEE, No. 1647, *ante.*

1686. —— Expression of "contrary intention."]—HUGHES *v.* BRITANNIA PERMANENT BENEFIT BUILDING SOCIETY, No. 1655, *ante.*

SECT. 7.—**LOSS OF RIGHT.**

1687. Security ceasing to exist—Whether right lost.]—B. effected a policy for securing a judgment debt due from him to C. C. afterwards obtained a second judgment against B. for a second debt. B. then conveyed real estate to trustees for sale, & to pay B.'s two judgments. After this, C. obtained a third judgment against B. C. subsequently recovered the amount of the policy, & concealing that fact, he received the whole amount of the first two judgments from the trustees:—*Held:* he was entitled to retain all the moneys so received in payment of the three judgment debts, & could not be compelled, at the suit of B. or his representatives, to apply the policy money in satisfaction of the first judgment, & refund the difference between the sum paid by the trustees & the policy money.—SPALDING *v.* THOMPSON (1858), 26 Beav. 637; 53 E. R. 1044.

Annotations:—**Consd.** *Re* Haselfoot's Estate, Chauntler's Claim (1872), L. R. 13 Eq. 327. **Distd.** Pile *v.* Pile (1875), 23 W. R. 440. **Apld.** Jeyes *v.* Jeyes (1876), 45 L. J. Ch. 245. **Distd.** *Re* Gregson, Christison *v.* Bolam (1887), 36 Ch. D. 223. **Refd.** *Re* General Provident Assce., *Ex p.* National Bank (1872), L. R. 14 Eq. 507.

1688. —— ——.]—G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his own life. He had also mortgaged a policy on his own life to the same mtgees. After the death of G. the mtgees. received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy:—*Held:* they had no right to set off the balance against the exor. in respect of arrears of the annuity.—*Re* GREGSON, CHRISTISON *v.* BOLAM (1887), 36 Ch. D. 223; 57 L. J. Ch. 221; 57 L. T. 250; 35 W. R. 803.

Annotations:—**Dbtd.** *Re* Gedney, Smith *v.* Grummitt, [1908] 1 Ch. 804. **Distd.** *Re* Thorne, [1914] 2 Ch. 438. **Refd.** Watkins *v.* Lindsay (1898), 67 L. J. Q. B. 362.

1689. —— ——.]—BARROW *v.* MANNING, [1880] W. N. 108.

Annotation:—**Dbtd.** *Re* Raggett, *Ex p.* Williams (1880), 16 Ch. D. 117.

1690. —— ——.]—*Re* RAGGETT, *Ex p.* WILLIAMS, No. 1601, *ante.*

1691. —— ——.]—SQUIRE *v.* PARDOE, No. 1637, *ante.*

Part XI.—Tacking.

SECT. 1.—**IN GENERAL.**

See, now, Law of Property Act, 1924 (c. 20), s. 94.

1692. Statement of right.]—It is an established rule in equity, that a third mtgee. having lent his money, without knowing there was a second mtge. upon the same estate, may, by paying off the first incumbrancer, & taking an assignment of his interest to himself, hold the estate against the second mtgee., till he shall be paid what is due to him upon both mtges. The principle upon which this doctrine was first established, & has ever since prevailed, is, that the third mtgee. having innocently lent his money, without knowing that the second had any claim upon the estate, has in conscience as good a right to be paid the whole money he has lent, as the second mtgee. has to the payment of what he advanced; & having by the assignment of the first mtge. got a right to hold the estate absolutely at law, & having possession of the title deeds, without which the estate cannot be sold, a ct. of conscience ought not to take from him his legal protection of an honest debt.—BELCHIER *v.* RENFORTH (1764), 5 Bro. Parl. Cas. 292; 2 E. R. 686, H. L.; *affg.* S. C. *sub nom.* BELCHIER *v.* BUTLER, RENFORTH *v.* IRONSIDE (1760), 1 Eden, 523.

Annotations:—**Folld.** Peacock *v.* Burt (1834), 4 L. J. Ch. 33 **Apld.** *Re* Russell Road Purchase-Moneys (1871), L. R 12 Eq. 78.

1693. Reason for rule—Equal equity fortified by legal estate.]—BELCHIER *v.* RENFORTH, No. 1692, *ante.*

1694. —— Avoiding circuity of action.]—Petitioner being an equitable mtgee. of lands of bkpt., H., for the sum of £1,200, advanced to him the further sum of £1,350, & took a warrant of attorney to secure the last mentioned sum. Afterwards bkpt. executed to the petitioner a conveyance of the lands, in trust to sell, & after payment of the £1,200 & interest, to pay the surplus to bkpt., & on the day on which the conveyance was executed, judgment was entered up & execution levied under the warrant of attorney for the £1,350, & part of that sum was satisfied by the levy:—*Held:* the petitioner was not entitled to tack the residue of the judgment debt to the mtge.

Claimant in this case, having an equitable mtge., by deposit of title deeds, converted herself, not into a legal mtgee. but into another character, that of a trustee for sale, with a direction to pay the surplus to debtor, & a separate instrument is executed to secure the other debt, on which judgment is entered & execution actually levied. The right of tacking depends on the principle of avoiding circuity of action; but in the circumstances of this case, no circuity of action would have reached the surplus, & the principle is inapplicable (LEACH, V.-C.).—*Re* HOUGHTON, *Ex p.* PETTIT (1825), 2 Gl. & J. 47.

Annotation:—**Refd.** *Re* Allen, *Ex p.* Barnett (1844), 3 L. T. O. S. 61.

1695. —— ——.]—*See, generally,* EQUITY, Vol. XX., pp. 296 *et seq.*

PART X. SECT. 7.

m. *Whether right waived.*]—A subsequent mtgee., who also held a mtge. on other property of the mtgor., proved his claim on the property in question, & after the solr. of the mtgor. had taken a mtge. on it for costs incurred, & the report had been made, applied to consolidate his mtges.:—*Held:* the mtgee. had not waived the right to consolidate, & that the solr.'s claim must be postponed.—ROSS *v.* STEVENSON (1877), 7 P. R. 126.—**CAN.**

PART XI. SECT. 1.

n. *Statutory restrictions—Registry Act.*]—MCDONALD *v.* MCDONALD (1867), 14 Gr. 133.—**CAN.**

o. —— ——.]—A mtgee. is prevented by the operation of 6 Ann. c. 2, from tacking, so as to gain a priority against mesne registered incumbrances.—LATOUCHE *v.* DUNSANY (LORD) (1803), 1 Sch. & Lef. 137.—**IR.**

p. —— ——.]—The doctrine of tacking securities applies here as in the cts. of England, except where, in this country, it has been excluded by

Sect. 1.—*In general.* *Sect.* 2: *Sub-secls.* 1, 2, 3 & 4, *A.*]

1695. Application of rule—First mortgagee tacking a third mortgage.]—MARCH *v.* LEE (1670), 3 Rep. Ch. 62; 1 Cas. in Ch. 162; 21 E. R. 729: *sub nom.* MARSH *v.* LEE, 2 Vent. 337; *sub nom.* ANON., Hard. 173, n.

Annotations:—**Folld.** Edmunds *v.* Povey (1683), 1 Vern. 187. **Distd.** Brace *v.* Marlborough (1728), Mos. 50; Wortley *v.* Birkhead (1754), 2 Ves. Sen. 571. **Folld.** Peacock *v.* Burt (1834), 4 L. J. Ch. 33. **Consd.** Jennings *v.* Jordan (1881), 6 App. Cas. 698. **Refd.** Titley *v.* Davies (1743), 2 Y. & C. Ch. Cas. 399, n.; Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377; Hopkinson *v.* Rolt (1861), 9 H. L. Cas. 514; Atherley *v.* Harnett (1885), 52 L. T. 736.

1696. ——— ———.]—A. voluntarily gave to his sisters, in 1848, a mtge. for a term of two hundred years, to secure an antecedent debt. The sisters allowed him to retain the title deeds, that he might give security on the estate for another debt for which he was then being sued by L. Shortly afterwards, A. agreed in writing, to give L. a mtge. on the estate for the debt, & the deeds, in pursuance of this agreement, were deposited with G., P., & B., the London agents of A.'s solr., & who shortly afterwards became his solrs., to be held by them for the purpose of giving effect to the security. A., in 1851, made a mtge. in fee to C., who had no notice of the prior incumbrances, & G. P. & B. handed over to C. the title deeds. In 1855, the sisters made a sub-mtge. of the term by assignment:—*Held:* the mtge. of 1848 was void under 27 Eliz. c. 4, as against C., who therefore took the legal fee discharged of the term; C., having no notice, was not affected by the fraud committed by G., P. & B. in parting with the title deeds: & having the title deeds, & having acquired the legal estate for value without notice, he was entitled to priority over the sisters & their assignee, & over the equitable security of L.

A legal mtgee. acquiring a subsequent equitable interest is, as I apprehend, entitled to tack the subsequent interest which he so acquires to the legal mtge., so as to exclude an intervening equitable charge, unless he has notice of that charge (TURNER, L.J.).—LLOYD *v.* ATTWOOD, ATTWOOD *v.* LLOYD (1859), 3 De G. & J. 614; 29 L. J. Ch. 97; 33 L. T. O. S. 209; 5 Jur. N. S. 1322; 44 E. R. 1405, L. JJ.

Annotations:—**Refd.** *Re* Beetham, *Ex p.* Broderick (1886), 18 Q. B. D. 380. **Mentd.** Freeman *v.* Pope (1870), 5 Ch. App. 538; *Re* Johnson, Golden *v.* Gillam (1881), 20 Ch. D. 389.

1697. —— **Puisne mortgagee getting in legal estate.**]—COCKES *v.* SHERMAN (1676), Freem. Ch. 13; 22 E. R. 1026, L. C.

SECT. 2.—WHEN RIGHT EXISTS.

SUB-SECT. 1.—IN GENERAL.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1698. Equities must be equal except as to time.]—A. having mortgaged an estate to B. & C. in succession, agreed to sell it to D. free from incumbrances: part of the purchase-money was to be paid down, & the rest on the completion of the purchase. During the investigation of the title, A. induced D., who was ignorant of the mtges., to make further payments on account of the purchase-money, & having also raised a further sum from E. on the security of his contract, without giving him notice of C.'s mtge., became insolvent & absconded. D. thereupon, with notice of all that had happened, paid off C.'s mtge. out of the balance of the purchase-money remaining due, & E., to secure himself, took an assignment of B.'s mtge. But the balance of purchase-money not being sufficient to pay both E.'s charge & what E. had paid to B.:—*Held:* E. was not entitled to tack his security to B.'s mtge.: because his security was not a security on the estate, but only on the purchase-money; & because, although E. at the time he advanced his money had no notice of any particular incumbrance on the estate except B.'s, he knew that he was dealing for a supposed balance out of which D., having contracted for the estate free from incumbrances, would be entitled to pay off any incumbrances to which the estate might be found to be subject, & therefore the equities of D. & E. were not equal.

A party claiming to tack must, as against the party against whom the tack is to operate, have advanced his money upon the credit of the land. He must, except as to time, have an equal equity; &, which follows from the last, he must have advanced his money without notice of the other's claim (LORD COTTENHAM, C.).—LACEY *v.* INGLE (1847), 2 Ph. 413; 41 E. R. 1002, L. C.

SUB-SECT. 2.—ADVANCE MADE ON SECURITY OF THE LAND.

1699. General rule.]—LACEY *v.* INGLE, No. 1698, *ante.*

1700. Whether lien on land sufficient—Judgment debt.]—Whether a judgment creditor may as well secure himself by buying in a prior incumbrance, as a third mtgee. may by taking an assignment of the first mtge.—WRIGHT *v.* PILLING (1718), Prec. Ch. 494; Gilb. Ch. 150; 24 E. R. 221.

1701. —— ——.]—(1) Third mtgee. buys in the first, though pending a bill brought by the second mtgee. to redeem the first, yet the third mtgee. shall tack the first mtge. to his third mtge.

(2) If a creditor by judgment, statute, or recognisance buys in the first mtge., he shall not tack it to his judgment, etc., because he did not lent his money on the credit of the land, has no present right therein, nor can be called a purchaser.

(3) If a puisne mtgee. buys in a judgment or statute, being the first incumbrance, he shall hold till by law he can be evicted.

(4) The first mtgee. lends a further sum to the mtgor. upon a statute of judgment, he shall retain against mesne mtgees. till the statute or judgment is paid.

(5) If a puisne mtgee. buys in a prior judgment extended on an elegit at an under value he shall hold the extent till evicted at law.

(6) But in all these cases there must not be notice of the mesne incumbrance when the money is lent.

(7) If a puisne incumbrancer buys in a prior mtge., & the legal title be in a trustee or in any third-person, then the buying in such first mtge. will not avail, but in all such cases where the legal estate is standing out the incumbrances must be paid according to their priority.—BRACE *v.*

the operation of the Registry Act.—TENISON *v.* SWEENY (1844), 1 Jo. & Lat. 710; 7 I. Eq. R. 511.—**IR.**

q. *Whether applicable to India.*]—The English law of tacking is not recognised in the cts. of this country.—UDAYA CHANDRA RANA *v.* BHAJAHARI JANA (1869), 2 B. L. R. App. 45.—**IND.**

r. ——.]—The English principle of tacking does not apply to mortgages of land in the *mofussil.*—GAUR NARAYAN MAZUMDAR *v.* BRAJA NATH KUNDU CHOWDHRY (1870), 5 B. L. R. 463; 14 W. R. 491.—**IND.**

MARLBOROUGH (DUCHESS) (1728), 2 P. Wms. 491; Mos. 50; 24 E. R. 829.

Annotations:—As to (1) **Folld.** Peacock *v.* Burt (1834), 4 L. J. Ch. 33. **Distd.** Simmons *v.* Pettit (1844), 8 Jur. 209. **Consd.** Beavan *v.* Oxford (1856), 6 De G. M. & G. 507; Jennings *v.* Jordon (1881), 6 App. Cas. 698. **Apld.** Bailey *v.* Barnes, [1894] 1 Ch. 25. **Refd.** Atherley *v.* Barnett (1885), 52 L. T. 736. *As to* (2) **Distd.** *Ex p.* Knott (1806), 11 Ves. 609. **Apld.** Lacey *v.* Ingle (1847), 2 Ph. 413. **Consd.** Beavan *v.* Oxford (1856), 6 De G. M. & G. 507. *As to* (4) **Consd.** Titley *v.* Davies (1743), 2 Y. & C. Ch. Cas. 399. **Apld.** Wyllie *v.* Pollen (1863), 3 De G. J. & Sm. 596. *As to* (6) **Apld.** Lacey *v.* Ingle (1847), 2 Ph. 413. **Refd.** Wyllie *v.* Pollen (1863), 3 De G. J. & Sm. 596. *As to* (7) **Distd.** Willoughby *v.* Willoughby (1756), 1 Term Rep. 763. *Generally,* **Refd.** Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377. **Mentd.** Pomfret *v.* Windsor (1752), 2 Ves. Sen. 472; White *v.* Peterborough (Bp.) (1821), Jac. 402; Langton *v.* Horton (1842), 1 Hare, 549; Tipping *v.* Power (1842), 1 Hare, 405; Whitworth *v.* Gaugain (1846), 1 Ph. 728; Armstrong *v.* Storer, Bazalgette *v.* Storer (1851), 14 Beav. 535; Macrae *v.* Ellerton (1858), 27 L. J. Ch. 777; Prosser *v.* Rice (1859), 28 Beav. 68; Phillips *v.* Phillips (1861), 4 De G. F. & J. 208; Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139.

1702. —— ——.]—(1) The claim to tack by a third mtgee., having taken in the first mtge. of the inheritance, but subject to a term outstanding, given up as against a mesne incumbrancer: as against the assignees under the bkpcy. of the mtgor.

(2) A subsequent incumbrancer without notice protected by getting possession of the deed, creating an outstanding term.

(3) Mtgee. may tack a subsequent judgment, but a mere judgment creditor cannot tack; not contracting for an interest in the land though he has a lien.

(4) The question of priority between incumbrancers, if the legal estate has not been got in, depends upon the better right to call for it; & the prior incumbrancer, if he has that right, is in equity in the same state as if he had an assignment.

(5) Tacking allowed up to a decree to settle the priorities; not afterwards.—*Ex p.* KNOTT (1806), 11 Ves. 609; 32 E. R. 1225, L. C.

Annotations:—As to (1) **Refd.** Frere *v.* Moore (1820), 8 Price, 475. *As to* (2) **Distd.** Carter *v.* Carter (1857), 3 K. & J. 617. **Refd.** Joyce *v.* Rawlins, Pilcher *v.* Rawlins (1870), 40 L. J. Ch. 105; Pilcher *v.* Rawlins (1872), 7 Ch. App. 259. *As to* (3) **Refd.** Lacey *v.* Ingle (1847), 2 Ph. 413; Beavan *v.* Oxford (1856), 6 De G. M. & G. 507. *As to* (5) **Apld.** *Ex p.* Herbert (1806), 13 Ves. 183. *Generally,* **Refd.** Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377; Bates *v.* Johnson (1859), John. 304; Lloyd *v.* Attwood (1859), 3 De G. & J. 614. **Mentd.** Scott *v.* Scott (1854), 23 L. T. O. S. 27.

1703. Legal mortgage of two estates—Equitable mortgage of one only.]—Two properties, X. & Y., were mortgaged to A. in fee. Y., was then mortgaged, by deposit of title deeds, to B., who had no notice of A.'s mtge. X. was subsequently mortgaged, by deposit of title deeds, to C., who had no notice of the mtges. to A. & B. Afterwards C., having obtained notice of B.'s equitable mtge., paid off A., & took a transfer from him of his legal mtge. of X. & Y.:—*Held:* C. was entitled to tack his equitable mtge. of X. to A.'s legal mtge. of X. & Y., so as to charge X. & Y. with payment of the amount due to him on the security of his equitable mtge. of X., in priority to the payment of the amount due to B. on his equitable mtge. of Y.—ATHERLEY *v.* BARNETT (1885), 52 L. T. 736; 33 W. R. 779.

*Annotation:—***Refd.** Manners *v.* Mew (1885), 54 L. J. Ch. 909.

Debts other than mortgage debts.]—*See* Sect. 5, *post.*

Effect of death of mortgagor.]—*See* Sect. 7, *post.*

SUB-SECT. 3.—LEGAL AND EQUITABLE MORTGAGE HELD IN SAME RIGHT.

1704. First mortgage held in own right—Third mortgage held as trustee.] — (1) None but a *bonâ fide* purchaser of a puisne incumbrance, without notice of intermediate ones, can tack it to a prior. A prior mtgee., who has an assignment of a third mtge. as a trustee only, cannot tack the two mtges. together, to the prejudice of intervening incumbrancers.

(2) A mtge. may be tacked to a judgment.—MORRET *v.* PASKE (1740), 2 Atk. 52; 26 E. R. 429.

1705. —— **Third mortgage held as executor.**]—(1) The right of the first mtgee., with the legal estate, to tack as against mesne mtgees., does not cover a mtge. of the equity of redemption, coming to him as exor.

(2) To postpone the first mtgee. on the ground of leaving the title deeds in the possession of the mtgor., the case must amount to fraud.—BARNETT *v.* WESTON (1806), 12 Ves. 130; 33 E. R. 50.

Annotations:—As to (1) **Refd.** Garnham *v.* Skipper (1885), 53 L. T. 940. *As to* (2) **Apld.** Colyer *v.* Finch (1856), 5 H. L. Cas. 905. **Distd.** Garnham *v.* Skipper (1885), 53 L. T. 940. **Refd.** Hewitt *v.* Loosemore (1851), 9 Hare, 449; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482; Manners *v.* Mew (1885), 29 Ch. D. 725; Walker *v.* Linom, [1907] 2 Ch. 104. *Generally,* **Mentd.** Frere *v.* Moore (1820), 8 Price, 475.

SUB-SECT. 4.—LEGAL ESTATE GOT IN.

A. In General.

See, generally, Part XII., Sect. 1, sub-sect. 2, *post.*

1706. Necessity for.]—CLARKE *v.* ABBOT (1741), Barn. Ch. 457; 2 Eq. Cas. Abr. 606; 27 E. R. 718.

1707. Got in from trustee of mortgagor.]—The trustee of a mtgor. is not entitled to avail himself of the legal estate for the purpose of altering the priorities of the mtgees.

The owner of a farm mortgaged it in succession to three persons, the third mtgee. having no notice of the second mtge. By a deed made between the mtgor. & P., in order, as was recited, to stop a forced sale by the mtgees., the equity of redemption was conveyed to P. upon trust for sale, with power to postpone the sale & raise money, by mtge. or otherwise, to pay off the mtges., & the proceeds were to be held by P. upon trust to pay his costs & expenses, & after payment of the same & the mtges., to pay the residue to the mtgor. P., having notice of the second mtge., paid off the first & third out of his own moneys, & took a transfer of the benefit of them, & he subsequently got in the legal estate. Upon an action by the second mtgee. for redemption:—*Held:* P. acted as trustee for the mtgor. & he was not entitled to tack to the prejudice of the second mtgee., but he was entitled to add his costs to his security.—LEDBROOK *v.* PASSMAN (1888), 57 L. J. Ch. 855; 59 L. T. 306.

1708. Covenant by trustee to stand possessed.]—M. & his wife mortgaged to F. by indenture, wherein B. M.'s trustee of the mtged. premises, who had the legal estate covenanted to stand possessed, subject to a prior mtge., for securing to G. £2,900 & subject thereto, in trust for such persons as M. & his wife should appoint. M. & wife afterwards appointed, that B. should stand possessed, subject to the said first mtge. & subject to the sum of pounds, due to the representatives of F., in trust for securing to H., £1,200. Afterwards M. & wife appointed that B., should stand possessed, etc., subject to the first mtge. in trust for securing to T. the representative of F., the sum of £2,714, due on the mtge. to F. for £2,900, & £2,162 due to T. before the mtge. made

Sect. 2.—When right exists: Sub-sect. 4, A. & B.; sub-sect. 5, A. & B.; sub-sect. 6.]

to H. which latter sum was composed of sums owing to him as exor. of F. & of another person, on notes & bonds & of sums due to himself on bonds, & the balance of an account, all of which were recited in the deed:—*Held:* (1) as the mtgees. had all equal equities, & neither had got in the legal estate, the incumbrances were available according to the priority of their several dates only, & they were entitled to no other preference *inter se;* (2) T. could not tack the two securities, so as to exclude the mesne mtge.; (3) the covenant to stand possessed was not equivalent to an assignment, or tantamount to getting in the legal estate, which, however, either of the mtgees., in this case, might have done, & thereby have obtained a priority.—FRERE *v.* MOORE (1820), 8 Price, 475; 146 E. R. 1267.

1709. Sub-mortgage from legal mortgagee.]—GRAHAM *v.* HORN, [1866] W. N. 166.

Acquisition of satisfied term.]—*See* Sub-sect. 6, *post.*

B. Pendente lite.

1710. Secures priority.]—After a bill brought by a second mtgee. against the first & third mtgees. to discover incumbrances, the last mtgee. may get in the first incumbrance, & protect himself against the second.—HAWKINS *v.* TAYLOR (1687), 2 Vern. 29; 23 E. R. 628.

Annotation:—**Reld.** Brace *v.* Marlborough (1728), Mos. 50.

1711. ——.]—A subsequent incumbrancer, though *pendente lite*, may buy in a prior mtge., which though satisfied, shall not be taken from him until all the money due to him on the subsequent incumbrance be paid him.—TURNER *v.* RICHMOND (1688), 2 Vern. 81; 23 E. R. 663.

Annotation:—**Reld.** Metcalfe *v.* Pulvertoft (1813), 2 Ves. & B. 200.

1712. ——.]—Puisne incumbrancer may *pendente lite* take in the first & gain a preference to a second by tacking the first to the third: but not if done after a decree & direction to settle the priorities; for that would open a door to collusion between creditors.

That a third incumbrancer having taken his security or mtge. without notice of the second incumbrance, & then being puisne taking in the first incumbrance, shall squeeze out & have satisfaction before the second, that equity is certainly established in general (LORD HARDWICKE, C.).—WORTLEY *v.* BIRKHEAD (1754), 2 Ves. Sen. 571; 3 Atk. 809; 28 E. R. 364.

Annotations:—**Reld.** Willoughby *v.* Willoughby (1756), 2 Ves. Sen. 684; Jennings *v.* Jordan (1881), 6 App. Cas. 698; Taylor *v.* Russell (1892), 61 L. J. Ch. 657.

1713. ——.] — BRACE *v.* MARLBOROUGH (DUCHESS), No. 1701, *ante.*

1714. ——.]—Third mtgee. buying in the first mtge. *pendente lite* shall exclude the second.—ROBINSON *v.* DAVISON (1779), 1 Bro. C. C. 63; 28 E. R. 986.

Annotations:—**Reld.** *Re* Russell Road Purchase-Moneys (1871), L. R. 12 Eq. 78; Bailey *v.* Barnes, [1894] 1 Ch. 25.

1715. ——.]—*Ex p.* KNOTT, No. 1702, *ante.*

1716. ——.]—BATES *v.* JOHNSON, No. 1885, *post.*

1717. Latest time for getting in—Decree settling priorities.]—WORTLEY *v.* BIRKHEAD, No. 1712, *ante.*

1718. —— ——.]—*Ex p.* KNOTT, No. 1702, *ante.*

SUB-SECT. 5.—NOTICE OF PRIOR INCUMBRANCE.

A. At Time When Money Lent.

See, now, Law of Property Act, 1925 (c. 20), s. 94 (2).

1719. Absence of notice essential.] — ANON. (1676), Freem. Ch. 6; 22 E. R. 1020.

1720. ——.]—ANON. (1680), 2 Cas. in Ch. 35; 22 E. R. 834.

1721. ——.] — BRACE *v.* MARLBOROUGH (DUCHESS), No. 1701, *ante.*

1722. ——.] — BROTHERS *v.* BENCE (1730), Fitz-G. 118; 94 E. R. 680.

1723. ——.]—MORRET *v.* PASKE, No. 1704, *ante.*

1724. ——.]—A settled rule, that prior mtgee. may tack a judgment to his mtge., though subsequent in time to a second mtgee., provided he has no notice of the second.—SHEPHERD *v.* TITLEY (1742), 2 Atk. 348; 26 E. R. 612.

1725. ——.]—WORTLEY *v.* BIRKHEAD, No. 1712, *ante.*

1726. ——.]—A second mtgee. cannot, by giving notice to the first, prevent a third mtgee. from obtaining a priority over his security, if the latter advance his money without notice of the second mtge., & afterwards obtain the legal estate by buying up the first mtge. The third mtgee., being a purchaser for valuable consideration, is not bound by the notice to the first mtgee.—PEACOCK *v.* BURT (1834), 4 L. J. Ch. 33.

Annotations:—**Folld.** Bates *v.* Johnson (1859), John. 304. **Expld.** West London Commercial Bank *v* Reliance Permanent Bldg. Soc. (1885), 29 Ch. D. 954. **Reld.** Jones *v.* Jones (1837), 8 Sim. 633; Taylor *v.* Russell, [1891] 1 Ch. 8.

1727. ——.]—By a mtge. deed in 1843, deft. & his wife & two daughters joined in mortgaging to pltf. certain property, partly belonging to deft. & partly to his wife & daughters, to secure £5,600 with a proviso that deft. & his property should be primarily liable for the amount, part of his property being subject to a mtge. for £400, which was assigned in 1844 to pltf. In 1849 deft. created a further charge upon his own portion of the property to pltf. for £700:—*Held:* the latter charge for £700, must be postponed to such rights as the daughters of deft. had under the deed of 1843, in which they were sureties for their father; & the daughters as such sureties had a right on payment to pltf. of £6,000 & interest to call for a transfer of all the securities comprised in the mtge. of 1843.

[Pltf.] when he took his future charge in 1849 had full notice [of the rights of the daughters] & therefore he could only take subject to such rights as the daughters had acquired (ROLFE, V.-C.).—BOWKER *v.* BULL (1850), 1 Sim. N. S. 29; 20 L. J. Ch. 47; 16 L. T. O. S. 503; 15 Jur. 4; 61 E. R. 11.

Annotations:—**Consd.** Farebrother *v.* Wodehouse (1856) 23 Beav. 18; Drew *v.* Lockett (1863), 32 Beav. 499 **Apld.** Dawson *v.* Bank of Whitehaven (1877), 4 Ch. D. 639.

1728. ——.]—Although a cause is heard on motion for decree the defence of purchase for value without notice must still be set up by the answer. Where, therefore, defts. merely stated by their answer that pltf. was a volunteer whose charge was invalid as against a subsequent purchaser for value:—*Held:* defts. could not in evidence raise the question of absence of notice of pltf.'s charge.

There is no such general rule as that a ct. of equity will never assist a pltf. against a deft. who

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PART XI. SECT. 2, SUB-SECT. 5.—A.

1. *Whether absence of notice essential.*] — Where there were three mtges. on the same property, & the third was taken without notice of the second, & was afterwards transferred to another person, who thereupon obtained a conveyance to himself of the first mtge.:—*Held:* he could not tack his third mtge. to the first.—MCMURRAY *v.* BURNHAM (1851), 2 Gr. 289.—**CAN.**

.]—STARK *v.* REID (1895), 26 O. R. 257.—**CAN.**

is a purchaser without notice; & an incumbrancer for value of an equitable interest may successfully file a bill against a subsequent incumbrancer for vaue to have the priority declared & enforced.

Every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, & no more. If, therefore, a person seised of an equitable estate, the legal estate being outstanding, makes an assurance by way of mtge. or grants an annuity, & afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz. the estate subject to the mtge. or annuity & no more the subsequent grantee takes only that which is left in the grantor. Hence grantees & incumbrancers claiming in equity take & are ranked according to the dates of the securities & the maxim applies, *Qui prior est tempore potior est jure.*

. . . It is well known that if there are three incumbrancers, & the third incumbrancer, at the time of his incumbrance & payment of his money, had no notice of the second incumbrance, then, if the first mtgee. or incumbrancer has the legal estate, & the third pays him off, & takes an assignment of his securities & a conveyance of legal estate, he is entitled to tack his third mtge. to the first mtge. which he has acquired, & to exclude the intermediate incumbrancer (LORD WESTBURY, C.). —PHILLIPS *v.* PHILLIPS (1862), 4 De G. F. & J. 208; 31 L. J. Ch. 321; 5 L. T. 655; 8 Jur. N. S. 145; 10 W. R. 236, C. A.

Annotations:—**Consd.** Cave *v.* Cave (1880), 15 Ch. D. 639. **Refd.** Harpham *v.* Shacklock (1881), 45 L. T. 569; Manners *v.* Mew (1885), 29 Ch. D. 725. **Mentd.** *Re* Imperial Rubber Co., Bush's Case (1874), 22 W. R. 685; Kettlewell *v.* Watson (1882), 21 Ch. D. 685; Emmerson *v.* Ind, Coope (1886), 33 Ch. D. 323; Ind *v.* Emmerson (1887), 36 W. R. 243; Ind, Coope *v.* Emmerson (1887), 12 App. Cas. 300; Cloutte *v.* Storey, [1911] 1 Ch. 18.

1729. ——.]—LACEY *v.* INGLE, No. 1698, *ante.*

1730. ——.]—Certain freehold property was twice mortgaged. The first mtge. was, after several transfers, finally transferred to D., who at the same time made a further advance on the same security. D. had no actual knowledge of the second mtge., but the gentleman who acted as his solr. on the occasion of the transfer had become aware of the existence of the second mtge. when acting as solr. for one of the previous transferees of the first mtge.:—*Held:* as the solr. did not acquire his knowledge while acting as D.'s solr., D. could not be held to have notice of the second mtge., & he was, therefore, entitled to tack his further charge to his first mtge.—BULPETT *v.* STURGES (1870), 22 L. T. 739; 18 W. R. 796.

B. At Time of Acquiring Legal Estate.

1731. Does not bar right to tack.]—MARCH *v.* LEE (1670), 3 Rep. Ch. 62; 1 Cas. in Ch. 162; 21 E. R. 729; *sub nom.* MARSH *v.* LEE, 2 Vent. 337; *sub nom.* ANON., Hard. 173, n.

Annotations:—**Folld.** Edmunds *v.* Povey (1683), 1 Vern. 187. **Distd.** Brace *v.* Marlborough (1728), Mos. 50; Wortley *v.* Birkhead (1754), 2 Ves. Sen. 571. **Folld.** Peacock *v.* Burt (1834), 4 L. J. Ch. 33. **Consd.** Jennings *v.* Jordan (1881), 6 App. Cas. 698. **Refd.** Titley *v.* Davies (1743), 2 Y. & C. Ch. Cas. 399, n.; Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377; Hopkinson *v.* Rolt (1861), 9 H. L. Cas. 514; Atherley *v.* Barnett (1885), 52 L. T. 736.

1732. ——.] — COCKES *v.* SHERMAN (1676), Freem. Ch. 13; 22 E. R. 1026, L. C.

1733. ——.]—Thomas Matthews gave pltf. at different times three notes, one for £450, another for £250, & the last for £150, & expressed in each to be secured by mtge. on my Stoke-hall estate: the drawer of the notes had before mortgaged the same estate to deft.; pltf. takes in a prior mtge. to protect the sums lent upon the notes:—*Held:* there was nothing to differ this case from the common one & deft. shall be paid the money lent upon the notes in the first place, as well as the money due on the assignment of the prior mtge.—MATTHEWS *v.* CARTWRIGHT (1742), 2 Atk. 347; 26 E. R. 611.

SUB-SECT. 6.—SATISFACTION OF MORTGAGE BEFORE EXERCISE OF RIGHT.

1734. Acquisition of satisfied term ineffectual.]—BATES *v.* JOHNSON, No. 1885, *post.*

1735. ——.]—(1) Some property was mortgaged to a building society, & afterwards to A. The mtgor. borrowed money from B. to pay off the building society, which was done on Sept. 4, & a receipt was indorsed on the mtge. Fourteen days afterwards, the mtgor. executed a new mtge. to B.:—*Held:* the legal estate vested, under 6 & 7 Will. 4, c. 32, in A. & not in B.

(2) If the legal estate is in the hands of a person who has no pecuniary interest, & who is therefore a bare trustee with duties to perform, the getting in of the legal estate does not alter the situation of the parties, & the fact of obtaining the legal estate under such circumstances does not give the person obtaining it the advantage of being able to tack his security to the legal estate. If it were otherwise, a trustee who had his legal estate might put it up for sale & sell it to the person who would give the largest sum for it (ROMILLY, M.R.). —PROSSER *v.* RICE (1859), 28 Beav. 68; 54 E. R. 291.

Annotations:—*As to* (1) **Folld.** Pease *v.* Jackson (1868), 3 Ch. App. 578, n. (*See* 3 Ch. App. 581.) **Refd.** Sangster *v.* Cochrane (1884), 28 Ch. D. 298.

1736. ——.]—Land was devised to the S. trustees in strict settlement, the trustees, who were devisees to uses, having powers of sale & mtge. & as incidental thereto power to revoke the uses declared by the will. The trustees made a legal mtge. of the land with other property & afterwards sold the land to T. without notice of the mtge., which appeared to have been forgotten, & handed the title deeds to him. T. showing a forged title mortgaged the land to pltfs., who believed they thereby acquired a good legal mtge., & handed the forged title deeds to them. T. then made another mtge. showing the true title to the deft., who also though he had a legal mtge. & handed the genuine title deeds to him. Neither pltfs. nor deft. had at the date of their respective mtges. any notice of the prior legal mtge., & deft. had no notice of pltfs.' mtge. Afterwards deft. discovered the existence of pltfs.' mtge. & of the prior legal mtge., & thereupon induced the legal mtgees. to release the land from their mtge., the remaining property being sufficient for their security, & to reconvey the legal estate by a voluntary deed to the S. trustees on the express condition that the latter should immediately thereafter convey the legal estate to deft. This the S. trustees accordingly did, having at the time notice of pltf.'s mtge. Pltfs. having brought an action as first equitable mtgees. to establish their priority over the second equitable mtgee.:—*Held:* there was nothing to show that the second equitable mtgee. had acted inequitably in getting in the legal estate; there was no equity which prevented him from availing himself of its protection; & he was entitled to priority over the first equitable mtgee.

An equitable mtgee. who has advanced money without notice of a prior equitable mtge. may gain

Sect. 2.—When right exists: Sub-sect. 6. Sects. 3, 4 & 5: Sub-sects. 1, 2 & 3, A. & B.; sub-sect. 4.]

priority by getting in the legal estate unless the circumstances are such as to make it inequitable for him to do so, as would be the case, for example, if the legal estate were held upon express trust or, according to recent authorities, if it were vested in a satisfied mtgee. (LORD MACNAGHTEN).—TAYLOR *v.* RUSSELL, [1892] A. C. 244; 61 L. J. Ch. 657; 66 L. T. 565; 41 W. R. 43; 8 T. L. R. 463; 36 Sol. Jo. 379, H. L.

Annotations:—**Refd.** London & County Banking Co. *v.* Goddard, [1897] 1 Ch. 642; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Mentd.** Powell *v.* London & Provincial Bank, [1893] 1 Ch. 610.

SECT. 3.—WHO MAY TACK.

See, now, Law of Property Act, 1925 (c. 20), s. 94 (3).

1737. Mortgagee by way of trust for sale & payment of debt.]—The owner mortgaged first to A., secondly to B., & he then conveyed to C. in trust to sell & pay A. & a debt due to D., & another due to C., & the residue to the owner. C., who had no notice of B.'s mtge., afterwards got a transfer of A.'s mtge., & with it the legal estate:—*Held:* C. was entitled to tack the third charge to the first mtge., & exclude B.—SPENCER *v.* PEARSON, PEARSON *v.* SPENCER (1857), 24 Beav. 266; 53 E. R. 360.

Annotation:—**Consd.** Ledbrook *v.* Passman (1888), 57 L. J. Ch. 855.

Transferee of building society mortgage.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 481, 482, Nos. 163-166.

SECT. 4.—AGAINST WHOM RIGHT AVAILABLE.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1738. Tenant in elegit.]—A mtgee., although without notice of any writ of *elegit* having been issued, is not entitled to tack a subsequent charge to his first mtge. on redemption by the tenant by elegit.—CHAMPNEYS *v.* BURLAND (1870), 23 L. T. 584; 19 W. R. 148; *on appeal* (1871), 19 W. R. 913, L. JJ.

1739. Assignee in bankruptcy.]—SHARPNELL *v.* BLAKE (1737), 2 Eq. Cas. Abr. 603; 22 E. R. 506; *sub nom.* SHRAPNELL *v.* BLAKE, West *temp.* Hard. 166, L. C.

1740. —— Mortgage subsequent to act of bankruptcy.]—Mtgee. not permitted to tack as against assignees in bkpcy. a mtge. subsequent to an act of bkpcy., though without notice, & previous to the commission; & though he had the legal estate.—*Ex p.* HERBERT (1806), 13 Ves. 183; 33 E. R. 263, L. C.

1741. —— No execution issued on judgment at time of bankruptcy.]—First & second mtgees.; the mtgor. a bkpt. The first mtgee. entitled to tack a subsequent judgment, docketed, though no execution had issued, at the time of the bkpcy.—BAKER *v.* HARRIS (1810), 16 Ves. 397; 33 E. R. 1035.

Persons entitled after death of mortgagor.]—*See* Sect. 7, *post.*

Tacking debts not secured on land against mortgagor.]—*See* Sect. 5, *post.*

SECT. 5.—DEBTS OTHER THAN MORTGAGE DEBTS.

SUB-SECT. 1.—SIMPLE CONTRACT DEBTS.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1742. Whether right to tack available.]—Bill to foreclose if principal & interest, & a debt upon simple contract be not paid on such a day: decreed accordingly; but not the debt on simple contract.—NEWBY *v.* COOPER (1678), Cas. *temp.* Finch, 379; 23 E. R. 208.

1743. ——.]—One pawns jewels to A. & after borrows £50 more of A. on a promissory note. He shall not redeem the jewels without paying also the money on the note.—DEMAINBRAY *v.* METCALFE (1715), 2 Vern. 691; 1 Eq. Cas. Abr. 324; Gilb. Ch. 104; Prec. Ch. 419; 23 E. R. 1048, L. C.; *subsequent proceedings,* 2 Vern. 698, L. C.

Annotations:—**Consd.** *Ex p.* Deeze (1748), 1 Atk. 228; Jones *v.* Smith (1794), 2 Ves. 372. **Distd.** Adams *v.* Claxton (1801), 6 Ves. 226. **Refd.** Meliorucchi & Royal Exchange Assce. (1728), 1 Eq. Cas. Abr. 8; Archer d. Hankey *v.* Snapp (1738), Andr. 341; *Re* Matthews, *Ex p.* Ockenden (1754), 1 Atk. 235. **Mentd.** Olive *v.* Smith (1813), 5 Taunt. 56; Young *v.* Bank of Bengal (1836), 1 Deac. 622; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585.

1744. ——.]—THOMAS *v.* PARKER (1843), 7 Jur. 844.

As against heir.]—*See* Sect. 7, sub-sect. 1, *post.*

As against devisee.]—*See* Sect. 7, sub-sect 2, *post.*

As against creditors.]—*See* Sect. 1, sub-sect. 3, *post.*

SUB-SECT. 2.—BOND DEBTS.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1745. No right to tack against mortgagor.]—Mtgee. lends more money to the mtgor. on bond. Mtgor. shall not redeem without paying the bond debt, as well as the mtge.—BAXTER *v.* MANNING (1684), 1 Vern. 244; 23 E. R. 441.

Annotation:—**Refd.** Jones *v.* Smith (1794), 2 Ves. 372.

1746. ——.]—Mtgor. who borrows more money from the mtgee. on his bond, shall redeem without paying the bond debt; but his heir cannot, neither can the devisee of the equity of redemption, since the statute against fraudulent devises.—CHALLIS *v.* CASBORN (1715), Prec. Ch. 407; 1 Eq. Cas. Abr. 325; Gilb. Ch. 96; 24 E. R. 183, L. C.

Annotations:—**Refd.** Jones *v.* Smith (1794), 2 Ves. 372. **Mentd.** Kidney *v.* Coussmaker (1806), 12 Ves. 136.

1747. ——.]—(1) Under Real Property Limitation Act, 1833 (c. 27), s. 42, & Civil Procedure Act, 1833 (c. 42), s. 3, a mtgee. of land, whose mtge. debt & interest are secured also by a bond or covenant, is entitled in a foreclosure suit to charge the mtged. estate with the full arrears of interest accruing on the mtge. debt, within twenty years before the institution of the suit.

(2) The price of redeeming the mtged. premises is the same in a suit by the mtgor. to redeem as it would be in the like circumstances in a suit by the mtgee. to foreclosure.

PART XI. SECT. 3.

b. *Representatives of deceased mortgagee.*]—HYMAN *v.* ROOTS (1863), 10 Gr. 340.—**CAN.**

PART XI. SECT. 5, SUB-SECT. 1.

1742 i. *Whether right to tack available.*]—A municipal treasurer gave to the municipality a mtge. to secure the moneys coming to his hands. On taking an account in a suit to redeem:—*Held:* the municipality could not tack a simple contract debt due to them by pltf. before the execution of the mtge.—FERGUSON *v.* FRONTENAC (1874), 21 Gr. 188.—**CAN.**

(3) If the debt & interest are secured only by the mtge., the mtgee. is entitled to no more than six years' arrear of interest.

(4) A mtgee. cannot in general tack a bond debt in his mtge. in a suit against the mtgor. himself (WIGRAM, V.-C.).—DU VIGIER *v.* LEE (1843), 2 Hare, 326; 12 L. J. Ch. 345; 7 Jur. 299; 67 E. R. 134.

Annotations:—As to (1) **Apld.** Elvy *v.* Norwood (1852), 5 De G. & Sm. 240. **Consd.** Round *v.* Bell (1861), 30 Beav. 121; Shaw *v.* Johnson (1861), 1 Drew. & Sm. 412; Bolding *v.* Lane (1862), 3 Giff. 561; Dingle *v.* Coppen, Coppen *v.* Dingle, [1899] 1 Ch. 726; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385. **Refd.** Hunter *v.* Nockolds (1850), 1 Mac. & G. 640; Sinclair *v.* Jackson (1853), 17 Beav. 405. *As to* (4) **Refd.** Pile *v.* Pile (1875), 23 W. R. 440. *Generally,* **Refd.** Blower *v.* Blower (1858), 32 L. T. O. S. 193.

1748. As against creditor.]—Bond not to be tacked to a mtge. against creditors.—HAMERTON *v.* ROGERS (1792), 1 Ves. 513; 30 E. R. 464.

—— **After death of mortgagor.**]—*See* Sect. 7, sub-sect. 3, *post.*

As against heir.]—*See* Sect. 7, sub-sect. 1, *post.*

As against devisee.]—*See* Sect. 7, sub-sect. 2, *post.*

As against assignee of redemption.] — *See* Sect. 7, sub-sect. 4, *post.*

Recovery of interest beyond penalty of bond.]—*See* BONDS, Vol. VII., p. 217, Nos. 592–594.

SUB-SECT. 3.—JUDGMENT DEBTS.

A. Mortgagee Tacking Subsequent Judgment Debt.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1749. Whether right available.]—Third mtgee. without notice at the time of his mtge. buys in the first incumbrance, being a satisfied judgment. He shall have the benefit of it.—EDMUNDS *v.* POVEY (1683), 1 Vern. 187; 23 E. R. 404.

Annotation:—**Consd.** Brace *v.* Marlborough (1728), 2 P. Wms. 491.

1750. ——.]—A man possessed of a term for years, mortgages it, & then becomes indebted, first by statute, & afterwards by judgment, & dies. The judgment shall be first satisfied out of the equity of redemption of the term.—MORGAN *v.* SHERRARD (1684), 1 Vern. 293; 23 E. R. 477; *sub nom.* ANON., Freem. Ch. 90.

1751. ——.]—A. mortgaged to B. in trust for C., & then confessed judgment to D., & afterwards mortgaged again to C.: the judgment creditor D. was allowed to redeem on payment of the first mtge. only.—ANON. (1690), Freem. K. B. 331; Freem. Ch. 331; 89 E. R. 246.

1752. ——.] — BRACE *v.* MARLBOROUGH (DUCHESS), No. 1701, *ante.*

1753. ——.]—SHEPHERD *v.* TITLEY, No. 1724, *ante.*

1754. ——.]—Prior mtgee. may tack a subsequent judgment; but a prior judgment creditor obtaining a subsequent mtge. cannot. A prior mtgee., however, cannot tack a bond debt against the mtgor., his assignee of the equity of redemption, or creditors; though he may, as against his mtgor.'s heir, to prevent a circuity.—JACKSON *v.* LANGFORD (1755), 2 Ves. Sen. 662; 28 E. R. 422, L. C.

Annotation:—**Refd.** Adams *v.* Claxton (1801), 6 Ves. 226.

1755. ——.]—*Ex p.* KNOTT, No. 1702, *ante.*

1756. ——.]—BAKER *v.* HARRIS, No. 1741, *ante.*

1757. —— **Right of executors of first mortgagee.**]—Mtgee., by demise, enters up judgment against the mtgor. on another debt, & dies. His exors. take, from the mtgor., a memorandum, empowering them to hold the title deeds of the mtged. property as a security for a part of the judgment debt in addition to the original mtge. debt:—*Held:* on the mtgor. becoming bkpt., the exors. might, as against a second mtgee., tack the whole of the judgment debt to the mtge.—*Re* SQUIBB, *Ex p.* COX (1842), 2 Mont. D. & De G. 486, Ct. of R.

1758. —— **Against assignee of equity of redemption.**]—A. mortgaged leasehold property to B. in 1839. In 1841 A. assigned his equity of redemption to C., which assignment was registered on Sept. 23, but no actual notice of that assignment was given to B. until Dec. 11, 1841; at which time B. had obtained a judgment against A., in Michaelmas Term, 1841, which judgment was signed but not registered Dec. 10:—*Held:* B. was not entitled to tack his judgment as against C.—SIMMONS *v.* PETTIT (1844), 2 L. T. O. S. 438; 8 Jur. 209.

B. Judgment Creditor Tacking Subsequent Mortgage.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1759. Whether right available.]—WRIGHT *v.* PILLING, No. 1700, *ante.*

1760. ——.] — BRACE *v.* MARLBOROUGH (DUCHESS), No. 1701, *ante.*

1761. ——.]—ALLEN *v.* PAPWORTH (1731), 1 Ves. Sen. 163; 27 E. R. 958, L. C.

Annotations:—**Mentd.** Hulme *v.* Tenant (1778), 1 Bro. C. C. 16; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494; Shattock *v.* Shattock (1866), 14 L. T. 452; *Re* Armstrong, *Ex p.* Gilchrist (1886), 17 Q. B. D. 521.

1762. ——.]—Where a first incumbrancer by judgment, has likewise a mtge., though there is another judgment prior to the mtge., yet if the mtgee. had no notice of it, the ct. will not direct a sale of the estate in favour of creditor upon the second judgment, unless he will pay off principal & interest both of the first judgment & mtge.—SMITHSON *v.* THOMPSON (1739), 1 Atk. 520; 26 E. R. 329, L. C.

1763. ——.] —MORRET *v.* PASKE, No. 1704, *ante.*

1764. ——.]—JACKSON *v.* LANGFORD, No. 1754, *ante.*

1765. ——.]—*Ex p.* KNOTT, No. 1702, *ante.*

1766. ——.]—A bill was filed by a judgment creditor, which, as such, could not be sustained, but pending the suit he got in a mtge. & claimed the benefit of it by amendment:—*Held:* pltf. could not support his suit by this supplemental title.—GODFREY *v.* TUCKER (1863), 33 Beav. 280; 3 New Rep. 20; 33 L. J. Ch. 559; 9 Jur. N. S. 1188; 12 W. R. 33; 55 E. R. 375; *sub nom.* GODFREY *v.* SACREE, GODFREY *v.* TUCKER, 9 L. T. 359.

SUB-SECT. 4.—OTHER DEBTS.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1767. Interest due on mortgage—Only recoverable under covenant by reason of Statute of Limitations.]—Mtgee., notwithstanding the interest mtged. is reversionary, can only recover six years'

PART XI. SECT. 5, SUB-SECT. 3.—A.

1749 1. *Whether right available.*]—A mtgor.'s devisee held not entitled to redeem the mtge. without also paying a judgment held by the owner of the mtge. against the mtgor. This is not such tacking as the Registry Act forbids.—MCLAREN *v.* FRASER (1870), 17 Gr. 533.—**CAN.**

PART XI. SECT. 5, SUB-SECT. 4.

c. *Part of consideration for release.*]—A mtgor. conveyed his equity of redemption to a third party, &

Sect. 5.—Debts other than mortgage debts: Sub-sect. 4. Sect. 6: Sub-sects. 1 & 2.]

arrears of interest as against the land mtged., although he may recover twenty years' arrears on the covenant to pay.

The interest on money secured by mtge. of land & by covenant being sixteen years in arrear, the mtgee. filed his bill of foreclosure against the heir of the mtgor., raising no question of liability on the covenant or of any right of tacking. A decree was made to take an account of what was due on the mtge. Under the statutes limitation twenty years' arrears could be recovered on the covenant, but six only as against the land. The master refused to allow pltf. to tack his two claims: —*Held:* he was right.

Qu.: whether the right to tack in such a case would be different in a suit for foreclosure, from what it is in a suit for redemption.

The point now sought to be made out is, that the original mtgor. being liable, on covenant, to pay the mtge. debt & interest, unrestricted to six years' interest, the mtgee. is entitled to tack what could be recovered on the covenant to what is due on the mtge. securities, as restricted by Statute of Limitations (ROMILLY, M.R.). — SINCLAIR *v.* JACKSON (1853), 17 Beav. 405; 1 W. R. 400; 51 E. R. 1090.

Annotations:—**Consd.** Dingle *v.* Coppen, Coppen *v.* Dingle, [1899] 1 Ch. 726. **Refd.** Smith *v.* Hill (1878), 9 Ch. D. 143; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385.

1768. Purchase-money paid in ignorance of mortgage.]—P., the lessee of certain premises, mortgaged them to H. for the whole term wanting one day. He remained in possession, & some time after the mtge. agreed to sell the whole term to B., & delivered copies of his title deeds, promising to furnish the originals as soon as one should be re-executed. B. allowed a considerable time to elapse, & paid great part of the purchase-money without requiring the original deeds; but subsequently, before completion, he learnt that P. had deposited them with H., & had also before the agreement for sale, deposited with A. two worthless deeds, purporting to be the original deeds, by way of securing a running account. After the notice of the agreement, A. took an assignment of P.'s property, including the leasehold. B. bought in H.'s mtge.:—*Held:* (1) B. was entitled to tack the sums he had paid for purchase-money to the mtge. debt, & also to hold the property as security for sums laid out by him on improvements; (2) B. was not guilty of such gross negligence as to fix him with notice of all he might have learnt by inquiry; (3) on A.'s receiving notice that P. had parted with his right to redeem, he was no longer bound to appropriate payments by P. to the extinction of the debt secured by the deposit of deeds.—HIPKINS *v.* AMERY (1860), 2 Giff. 292; 3 L. T. 53; 6 Jur. N. S. 1047; 8 W. R. 360; 66 E. R. 122.

1769. Costs of defence of action on covenant—Executor of surety to mortgage.]—Exor. of a person, who had joined as surety in a mtge., unsuccessfully defended an action on the covenant in the mtge., & was compelled to pay the debt:—*Held:* as against a second mtgee., he could not tack the costs of such defence to the first mtge.—SOUTH *v.* BLOXAM (1865), 2 Hem. & M. 457; 5 New Rep. 506; 34 L. J. Ch. 369; 12 L. T. 204; 11 Jur. N. S. 319; 71 E. R. 541.

Annotations:—**Refd.** Dixon *v.* Steel, [1901] 2 Ch. 602. **Mentd.** *Re* Toogood's Legacy Trusts (1889), 61 L. T. 19.

SECT. 6.—FURTHER ADVANCES.

SUB-SECT. 1.—WHAT CONSTITUTES A FURTHER ADVANCE.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1770. Subsequent advance on promissory note.]—DEMAINBRAY *v.* METCALFE, No. 1743, *ante*.

1771. ——.]—Equitable mtgee. by deposit of title deeds will not be allowed to tack to the sum secured a further advance of money to a party who became entitled to the estate, unless it satisfactorily appear that it was intended such further advance should form part of the mtge. security. Where the affidavit in support of the claim showed that such further advance was secured by a promissory note alone, the only declaration of the ct. was, that the amount of the equitable mtge. was limited to the sum first advanced.—NEWBURGH (EARL) *v.* MORTON (1850), 16 L. T. O. S. 482; 15 Jur. 166.

Annotation:— **Mentd.** Mellor *v.* Porter (1883), 25 Ch. D. 158.

1772. Purchase-money secured upon premises—Further advance for building purposes.]—Testator devised certain building land to trustees for sale, & declared that they might make such agreements with the purchasers thereof, as to the forbearance of payment of the purchase-money, & to advance such sums for the purpose of assisting the purchasers, in building or otherwise, in the manner he had been accustomed to do. Testator was in the habit of allowing the purchase-money to remain secured upon the land; & also subsequent advances, made by him to assist the purchasers in building; & had dealt with bkpts. upon this system. After testator's death, bkpts. purchased a piece of land from the trustees, leaving the purchase-money secured upon the premises; subsequently, the trustees advanced £600 to them for building, but took no security for it:—*Held:* upon the bkpcy. of the purchasers, the trustees were equitable mtgees., as well for the advances as for the purchase-money.—*Re* BAKER & HARLEY, *Ex p.* LINDEN (1841), 1 Mont. D. & De G. 428; 10 L. J. Bcy. 22; 5 Jur. 57.

1773. Agreement to make sum a further advance—Not acted on.]—The facts are few & simple. B. mortgaged an estate, of which he was owner, to the sisters of F., for £500. This was the money of pltf.; nothing but the legal interest was in his sisters as trustees. F. afterwards, having a further demand on B. for £130, applied for payment, stating that he was sadly in want of money, & that he must apply to M., or get it from his sisters, who must add it to their mtge. That was

afterwards contracted to release to the mtgee., & the latter, having no notice of the prior conveyance, paid the mtgor. some part of the consideration that he had contracted to give for the release: —*Held:* he was entitled to tack what he had so paid to his mtge. debt.—GORDON *v.* LOTHIAN (1851), 2 Gr. 293. —**CAN.**

d. Assessment payable by mortgagor.]—Where a mtgee. in possession pays the assessment on the mtged. land which was payable by the mtgor., he has a right to tack on the amount so paid to his mtge. debt.—KAMAYA NAIK *v.* DEVAPA RUDRA NAIK (1896), I. L. R. 22 Bom. 440.—**IND.**

PART XI. SECT. 6, SUB-SECT. 1.

e. Within Transfer of Property Act.]—Where a mtge. was to secure further advances, any advance when made after another mtge. was granted becomes a subsequent advance within Transfer of Property Act, s. 80.—IMPERIAL BANK OF INDIA *v.* U. RAI GYAW THU & CO., LTD. (1923), I. L. R. 1 Ran. 637.—**IND.**

f. Goods.]—A co. gave a mtge. to secure an amount advanced to it by several persons jointly, & further advances. Afterwards one of the mtgees. delivered certain goods to the co. upon the other mtgees. & the co. (by resolution) agreeing that the delivery of the goods should be treated

acceded to. B. agreed to the proposal to attach the debt to the sisters' mtge. But nothing was done upon that; there was no application to the sisters to advance the money. At the expiration of a month, a writ was issued for this money. I do not understand on what principle it is attempted to tack this debt to the mtge. If pltf. had said his object was security, it is possible, nay probable, that B. would have agreed it; but that will not justify me in converting one proposal into another. I think it was of the very essence of the contract that the money should have been advanced by the sisters. How can it be said that this is not of the essence of the contract, when it is the very consideration? It was a proposal, a proposition, & nothing was done upon it. There is no reason why the second sum should be tacked (LORD LYNDHURST, C.).—FRAMPTON *v.* CANNAN, FRAMPTON *v.* WHITMORE (1843), 2 L. T. O. S. 165, L. C.

1774. Mortgage to secure present "& future advances"—Mortgagor becoming indebted to mortgagee for costs.]—Mortgage by N. to R., a solr., to secure present & future advances, with subsequent registered judgment in favour of S., without notice of the mtge. N. became indebted to R. for costs:—*Held:* those costs were not *bonâ fide* advances, & upon S. redeeming R., the latter was not entitled to have those costs included in the account.—SHAW *v.* NEALE (1858), 6 H. L. Cas. 581; 27 L. J. Ch. 444; 31 L. T. O. S. 190; 4 Jur. N. S. 695; 6 W. R. 635; 10 E. R. 1422, H. L.; *revsg.* (1855), 20 Beav. 157.

Annotations:—**Refd.** Beavan *v.* Oxford (1855), 6 De G. M. & G. 492; Hopkinson *v.* Rolt (1861), 9 H. L. Cas. 514; Menzies *v.* Lightfoot (1871), L. R. 11 Eq. 459. **Mentd.** Turner *v.* Letts (1855), 20 Beav. 185; North *v.* Stewart (1890), 15 App. Cas. 452; Briscoe *v.* Briscoe, [1892] 3 Ch. 543; *Re* Knight, Knight *v.* Gardner, [1892] 2 Ch. 368; Meguerditchian *v.* Lightbound, [1917] 2 K. B. 298.

SUB-SECT. 2.—RIGHT TO TACK.

See, now, Law of Property Act, 1925 (c. 20), s. 94; Land Registration Act, 1925 (c. 21), s. 30.

1775. Whether further advances may be tacked—Made after notice of subsequent incumbrance—Second mortgagee also having notice of first mortgage.]—GORDON *v.* GRAHAM (1716), 2 Eq. Cas. Abr. 598; 7 Vin. Abr. 52, pl. 3; cited in 9 H. L. Cas. at p. 521; 22 E. R. 502, L. C.

Annotations:—**Consd.** Shaw *v.* Neale (1858), 6 H. L. Cas. 581. **Expld.** Hopkinson *v.* Rolt (1861), 9 H. L. Cas. 514. **Consd.** Menzies *v.* Lightfoot (1871), L. R. 11 Eq. 459. **Refd.** London & County Banking Co. *v.* Ratcliffe (1881), 6 App. Cas. 722; Bradford Banking Co. *v.* Briggs (1885), 29 Ch. D. 149; West *v.* Williams, [1898] 1 Ch. 488.

1776. —— —— ——.]—Where a mtge. is executed to secure present & future advances to a specified amount made & to be made by A., & afterwards B., with notice, advances money, & then A., with notice of B.'s mtge., advances further sums within the amount specified in his first mtge., A. is not entitled to priority over B. in respect of such further advances made with notice of B.'s mtge.—HOPKINSON *v.* ROLT (1861), 9 H. L. Cas. 514; 34 L. J. Ch. 468; 5 L. T. 90; 7 Jur. N. S. 1209; 9 W. R. 900; 11 E. R. 829, H. L.; *affg.* S. C. *sub nom.* ROLT *v.* HOPKINSON (1858), 3 De G. & J. 177, L. C.

Annotations:—**Apld.** Daun *v.* City of London Brewery Co. (1869), L. R. 8 Eq. 155; Menzies *v.* Lightfoot (1871), L. R. 11 Eq. 459; London & County Banking Co. *v.* Ratcliffe (1881), 6 App. Cas. 722. **Consd.** Bradford Banking Co. *v.* Briggs (1886), 12 App. Cas. 29. **Apld.** Union Bank of Scotland *v.* National Bank of Scotland (1886), 12 App. Cas. 53; West *v.* Williams, [1899] 1 Ch. 132; Hughes *v.* Britannia Permanent Benefit Bldg. Soc., [1906] 2 Ch. 607. **Consd.** Deeley *v.* Lloyds Bank, [1912] A. C. 756. **Refd.** Hipkins *v.* Amery (1860), 2 Giff. 292; Bolding *v.* Lane (1863), 1 De G. J. & Sm. 122; Burgess *v.* Eve (1872), L. R. 13 Eq. 450; Dawson *v.* Bank of Whitehaven (1877), 4 Ch. D. 639; Miles *v.* New Zealand Alford Estate Co. (1885), 54 L. J. Ch. 1035; Newfoundland Government *v.* Newfoundland Ry. (1888), 13 App. Cas. 199; Parkinson *v.* Wakefield (1889), 5 T. L. R. 562; The Benwell Tower (1895), 72 L. T. 664; *Re* Morris, Mayhew *v.* Halton, [1922] 1 Ch. 126. **Mentd.** Jones *v.* Consolidated Investment & Assce. Co. (1858), 28 L. J. Ch. 66; Anderson *v.* Morice (1876), 1 App. Cas. 713; Rainford *v.* Keith & Blackmore Co., [1905] 1 Ch. 296; Mackereth *v.* Wigan Coal & Iron Co., [1916] 2 Ch. 293.

1777. —— —— —— **Usage in public-house trade.**]—In 1858, a publican deposited the lease of his public-house with defts., a firm of brewers, with a memorandum stating that the deposit was to secure payment of a sum of £200, as well as any other sums in which the depositor might become indebted to the brewers on any account, not exceeding £500. The brewers, in July, 1865, made the publican a further advance of £100. Four days after, the publican signed to pltfs., a firm of distillers, a memorandum, whereby he declared that the documents deposited with the brewers should, subject to the brewers' charge, be a security to the distillers for a sum of £120 then due, & all other sums that might thereafter become due, to the distillers. Notice of this second equitable mtge. was on the same day given by the distillers to the brewers. After the date of this notice the publican became indebted to the brewers in a further sum of money, the price of beer supplied to the publican. The brewers claimed to be entitled, by virtue of a custom in the trade between brewers & publicans, to add this further sum to the amount secured by the deposit of the lease, in priority to the distillers' charge:—*Held:* the alleged custom was bad in law for want of mutuality, & for want of defined limits; &, further, that it was imperfectly supported by the evidence. Consequently, the case of brewers & distillers formed no exception to the rule as to first & second mtgees. laid down in *Hopkinson* v. *Rolt*, No. 1776, *ante*.—DAUN *v.* CITY OF LONDON BREWERY CO. (1869), L. R. 8 Eq. 155; 38 L. J. Ch. 451; 20 L. T. 601; 33 J. P. 547; 17 W. R. 663.

Annotation:—**Consd.** Menzies *v.* Lightfoot (1871), L. R. 11 Eq. 459.

1778. —— —— —— ——.]—The lessee of a public-house in London executed at the public-house, & at the time of entering into possession thereof, a mtge. of his lease in favour of the brewer by whom the house was supplied with beer, to secure a sum already advanced, & future advances not to exceed in the whole a given sum. At the same time & place he charged the lease, subject to the security already given, to the brewer, with the repayment to the distiller who supplied the house with spirits of an advance made by him. The mtge. & charge were both executed in the presence of the solrs. of the brewer & distiller, & the latter there & then gave to the former a formal notice of the charge in favour of his client. Afterwards the publican became indebted to the brewer for the price of beer supplied to the house. The lease having been sold to the brewer under a power of sale in his mtge.:—*Held:* in the absence of any express agreement, the distiller was entitled to be repaid his advancement out of the purchase-money in priority to the debt which had been incurred to the brewer subsequently to the time

as a further advance under the mtge. to the extent of their value. In liquidation proceedings:—*Held:* there had been a valid further advance to the extent of the value of the goods, which was secured by the mtge.—*Re* GOOD HOPE PROPRIETARY, LTD., *Ex p.* HURLEY (LIQUIDATOR) (1905), 24 N. Z. L. R. ~~5.—N.Z.

6.—*Further advances: Sub-sect.* 2. *Sect.* 7: *Sub-sect.* 1.]

when notice was given to him of the distiller's charge; & this priority was not affected by a custom of trade alleged to exist between publicans, brewers, & distillers in London.—MENZIES *v.* LIGHTFOOT (1871), L. R. 11 Eq. 459; 40 L. J. Ch. 561; 24 L. T. 695; 19 W. R. 578.

Annotation:—**Reld.** Union Bank of Scotland *v.* National Bank of Scotland (1886), 12 App. Cas. 60, n.

1779. —— ——.]—SISH *v.* HOPKINS (1730), Amb. 794; 27 E. R. 505, L. C.

1780. —— ——.]—A. mtges. an estate to B., to secure future advances. He then mtges. the same property to C., who gives notice of his security to B. *Qu.:* whether the rights of B. under his mtge. security are affected by the transaction between A. & C.—JOHNSON *v.* BOURNE (1843), 2 Y. & C. Ch. Cas. 268; 7 Jur. 642; 63 E. R. 118.

Annotation:—**Consd.** Hopkinson *v.* Rolt (1861), 9 H. L. Cas. 514.

1781. —— ——.]—SHAW *v.* NEALE, No. 1774, *ante*.

1782. —— ——.]—The owner of land, after depositing the title deeds with a bank as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted with the knowledge of the bank to sell the land to one who had notice of the terms of the deposit. The vendor afterwards paid into his own account at the bank sums which in the whole exceeded the debt due to the bank on his balance at the time of the contract of sale, so that that debt was discharged. The bank, without giving notice to the purchaser, continued the account & made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase-money by instalments to the vendor:—*Held:* on the principle of *Hopkinson* v. *Rolt*, No. 1776, *ante*, the bank had no charge on the land as against the purchaser for the fresh advances.—LONDON & COUNTY BANKING CO. *v.* RATCLIFFE (1881), 6 App. Cas. 722; 51 L. J. Ch. 28; 45 L. T. 322; 30 W. R. 109.

Annotations:—**Reld.** Union Bank of Scotland *v.* National Bank of Scotland (1886), 12 App. Cas. 60, n.; Parkinson *v.* Wakefield (1889), 5 T. L. R. 562; Deeley *v.* Lloyds Bank, [1912] A. C. 756. **Mentd.** Glyn Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591.

1783. —— ——.]—The arts. of assocn. of a co. registered under Cos. Act, 1862 (c. 89), provided that the co. should have "a first & permanent lien & charge, available at law & in equity, upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with a bank as security for the balance due & to become due on his current account, & the bank gave the co. notice of the deposit. The certificates stated that the shares were held subject to the arts. of assocn.:—*Held:* the co. could not in respect of moneys which became due from the shareholder to the co. after notice of the deposit with the bank claim priority over advances by the bank made after such notice, but the principle of *Hopkinson* v. *Rolt*, No. 1776, *ante*, applied.

As soon as he [the mtgee.] is aware that the property on which he is entitled to rely has ceased so far to belong to the debtor he cannot make a new advance in priority to that of which he has notice (LORD BLACKBURN).—BRADFORD BANKING CO., LTD. *v.* BRIGGS & CO., LTD. (1886), 12 App. Cas. 29; 56 L. J. Ch. 364; 56 L. T. 62; 35 W. R. 521; 3 T. L. R. 170, H. L.; *revsg.* (1885), 31 Ch. D. 19, C. A.

Annotations:—**Apld.** Miles *v.* New Zealand Alford Estate Co. (1886), 32 Ch. D. 266. **Consd.** Union Bank of Scotland *v.* National Bank of Scotland (1886), 12 App. Cas. 60, n.; West *v.* Williams, [1899] 1 Ch. 132. **Reld.** Newfoundland Government *v.* Newfoundland Ry. (1888), 13 App. Cas. 199; Deeley *v.* Lloyds Bank, [1912] A. C. 756; Mackereth *v.* Wigan Coal & Iron Co., [1916] 2 Ch. 293; Bank of N. T. Butterfield *v.* Golinsky, [1926] A. C. 733. **Mentd.** Bank of Africa *v.* Salisbury Gold Mining Co., [1892] A. C. 281; Boaler *v.* Brodhurst (1892), 8 T. L. R. 398; Rainford *v.* Keith & Blackman Co., [1905] 2 Ch. 147; Hickman *v.* Kent or Romney Marsh Sheep-Breeder's Assocn., [1915] 1 Ch. 881.

1784. —— ——.]—A disponee who holds property on an *ex facie* absolute title of ownership, but in security only of advances made & to be made to the disponer, is not entitled to hold the property for repayment of advances made after he has received notice that the disponer has, for a valuable consideration, conveyed his reversionary right in the property to another.—UNION BANK OF SCOTLAND *v.* NATIONAL BANK OF SCOTLAND (1886), 12 App. Cas. 53; 56 L. T. 208, H. L.

Annotations:—**Consd.** West *v.* Williams, [1899] 1 Ch. 132; Deeley *v.* Lloyds Bank, [1912] A. C. 756. **Mentd.** Heritable Reversionary Co. *v.* Millar, [1892] A. C. 598; Bank of Scotland *v.* Macleod, [1914] A. C. 311.

1785. —— ——.]—In Oct. 1864, certain property was mortgaged to A., B., & C., who were trustees, as joint tenants to secure £3,000 & interest. In Feb. 1866, the same property was mortgaged to L. to secure £3,500 & interest. In Oct. 1876, a further charge was executed in favour of the first mtgees. to secure £1,500 & interest.

A. died in May, 1883, & B. died in Jan. 1889. B., who was a solr., acted for all parties on the occasions of the creation of all three securities, & had actual notice of the second mtge. & of the further advance when they were created, but he failed to communicate the fact of the second advance to his co-mtgees., & they had no personal knowledge of its existence at the date of the further advance:—*Held:* pltfs., who were the successors in title as trustees of the first mtgees., were not entitled to tack the amount due in respect of the further advance to the amount due on the first mtge. so as to postpone defts. who represented the second mtgee.

In the case of a mtge. of real estate to joint tenants to secure a debt due to them jointly, it cannot be said as against strangers that any one portion of the security or of the debt belongs to any one of the mtgees.: each is entitled to the whole; & if notice of a second incumbrance is given to any one of them that creates an equity against one in respect of the whole sufficient to prevent any tacking.—FREEMAN *v.* LAING, [1899] 2 Ch. 355; 68 L. J. Ch. 586; 81 L. T. 107; 48 W. R. 9; 43 Sol. Jo. 625.

Annotations:—**Reld.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231; *Re* Phillips' Trusts, [1903] 1 Ch. 183.

1786. —— —— **Further advance in pursuance of covenant in first mortgage.**]—The doctrine of *Hopkinson* v. *Rolt*, No. 1776, *ante*, that after notice of a subsequent incumbrance, a first mtgee. cannot, as against that incumbrancer, tack to his debt further advances made by him to the mtgor. applies to further advances made in pursuance of an obligation or covenant on the part of the first mtgee. entered into at the time of the first mtge.

The owner of a life interest in personal estate,

PART XI. SECT. 6, SUB-SECT. 2.

1779 i. *Whether further advances may be tacked—Made after notice of subsequent mortgage.*]—BLACKLEY *v.* KENNY (1889), 16 A. R. 522.—**CAN.**

1779 ii. —— ——.]—ROYAL BANK OF CANADA *v.* DOERING, [1924] 1 D. L. R. 488; [1924] 1 W. W. R. 251; 33 B. C. R. 257.—**CAN.**

1779 iii. —— ——.]—UNION BANK OF SCOTLAND *v.* NATIONAL BANK OF SCOTLAND (1886), 12 App. Cas. 53.—**SCOT.**

who had already mortgaged it, mortgaged it a second time to two persons, his uncles, who had no notice of the first mtge. One of the conditions of the second mtge. was, that the mtgor. should make a settlement of his life interest, so that that interest should be made determinable on alienation by him, with a trust in that event for the application of the income, at the discretion of the trustees, for the maintenance, support or benefit of the settlor, his wife if any & children or remoter issue, & his sisters & their children or remoter issue, & a settlement to that effect was executed contemporaneously with the execution of the second mtge. At the date of the second mtge. the first mtgee. had not given notice of his mtge. to the trustees of the will which created the life interest, & he did not give them notice until nine months afterwards, before which time notice of the second mtge. & of the settlement had been given to them. Notice of the first mtge. was given to the second mtgees. about five weeks after the notice to the trustees:—*Held:* the uncles were entitled, in respect of their original advance & all further advances made by them to the nephew before they received notice of the first mtge., to priority over the first mtgee., but the settlement must be treated as voluntary, & the first mtge. was entitled to priority over it.—WEST *v.* WILLIAMS, [1899] 1 Ch. 132; 68 L. J. Ch. 127; 79 L. T. 575; 47 W. R. 308, C. A.

Annotation:—**Consd.** Deeley *v.* Lloyds Bank, [1912] A. C. 756.

1787. —— Made before notice of subsequent mortgage.]—In 1856 an equitable mtge. was created, & in 1858, it was transferred to pltfs., who made further advances, & obtained a legal mtge. three months afterwards:—*Held:* pltfs. had priority over a charge created by a registered judgment obtained against the mtgor. two days before the transfer, for all their subsequent advances made *bonâ fide* & without notice of the judgment.—COOKE *v.* WILTON (1860), 29 Beav. 100; 30 L. J. Ch. 467; 7 Jur. N. S. 280; 9 W. R. 220; 54 E. R. 564.

Annotation:—**Refd.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231.

1788. ——.]—Testator, in 1832, devised his copyhold estate, which was subject to a mtge., to his wife for life, & then to his children. The will was never proved, & no notice of it was entered on the ct. rolls. The widow emigrated in 1845, leaving her eldest son in possession of the estate as her agent. In 1851 the son, falsely representing himself to be in possession as heir of his father, procured a further advance upon mtge. of the estate, & the original mtge. being transferred to the second mtgee. he claimed a right to tack his further advance. The widow died in 1860:—*Held:* the mtgee., having the legal estate, & having no notice of any adverse title, was entitled to be protected against the rights of the children, & to tack his further advance.—YOUNG *v.* YOUNG (1867), L. R. 3 Eq. 801.

1789. ——.]—WEST *v.* WILLIAMS, No. 1786, *ante*.

—— **Building society mortgage.**]—*See* BUILDING SOCIETIES, Vol. VII., pp. 481, 482, Nos. 163–169.

SECT. 7.—EFFECT OF DEATH OF MORTGAGOR.

SUB-SECT. 1.—RIGHT AGAINST HEIR.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1790. Allowed to avoid circuity of action.]—SHRAPNELL *v.* BLAKE (1737), West *temp.* Hard. 166; 25 E. R. 876; *sub nom.* SHARPNELL *v.* BLAKE, 2 Eq. Cas. Abr. 603, L. C.

1791. ——.]—Mtgee. who lent a further sum upon bond, shall not be allowed to tack it to his mtge. in preference to creditors under a trust created by the will of the mtgor. for payment of debts.

The reason why the heir of the mtgor. shall not redeem the mtge. without paying the bond likewise, is to prevent a circuity, because the moment the estate descended it became assets, & liable to the bond; the same rule will hold as to a devisee of the mtged. premises.—HEAMS *v.* BANCE (1748), 3 Atk. 630; 26 E. R. 1162, L. C.

Annotations:—**Folld.** Price *v.* Fastnedge (1770) Amb. 685; Adams *v.* Claxton (1801), 6 Ves. 226. **Apld.** Pile *v.* Pile (1875), 23 W. R. 440. **Mentd.** Hercy *v.* Dinwoody (1793), 4 Bro. C. C. 257.

1792. ——.]—JACKSON *v.* LANGFORD, No. 1754, *ante*.

1793. ——.]—JONES *v.* SMITH, No. 1594, *ante*.

1794. In what cases—Bond debt.]—ST. JOHN *v.* HOLFORD (1667), 1 Cas. in Ch. 97; 22 E. R. 712.

Annotation:—**Apld.** Demary *v.* Metcalf (1715), Gilb. Ch. 104.

1795. —— ——.]—CHALLIS *v.* CASBORN, No. 1746, *ante*.

1796. ——.]—One seised in fee mortgages to A. & afterwards binds himself & his heirs by bond to A. & dies; if the heir comes to redeem this mtge. he must pay the bond debt as well as the mtge., but if the heir assigns the equity of redemption to J. S. who brings his bill to redeem, he shall pay the mtge. only, & not the bond.—COLEMAN *v.* WINCH (1721), 1 P. Wms. 775; Prec. Ch. 511; 24 E. R. 609, L. C.

Annotations:—**Folld.** Rolfe *v.* Chester (1855), 20 Beav. 610 Thomas *v.* Thomas (1856), 22 Beav. 341.

1797. ——.]—The heir cannot redeem without paying the mtge. money, & the money due by bond too.—MAYEW *v.* COPPING (1729), Mos. 239; 25 E. R. 370, L. C.

1798. ——.]—SHRAPNELL *v.* BLAKE (1737), West *temp.* Hard 166; 25 E. R. 876; *sub nom.* SHARPNELL *v.* BLAKE, 2 Eq. Cas. Abr. 603, L. C.

1799. .]—Mtgee. may tack to his mtge. a bond by mtgor. against his heir-at-law, not against purchaser for valuable consideration.—TROUGHTON *v.* TROUGHTON (1748), 1 Ves. Sen. 86; 3 Atk. 656; 27 E. R. 908, L. C.

Annotations: **Folld.** Adams *v.* Claxton (1801), 6 Ves. 226. **Mentd.** O'Grady *v.* Wilmot, [1916] 2 A. C. 231.

1800. .]—JACKSON *v.* LANGFORD, No. 1754, *ante*.

1801. .]—Mtgee., having also a bond, cannot tack it, against other specialty creditors; though he may against the heir.—LOWTHIAN *v.* HASEL (1790), 3 Bro. C. C. 102; 29 E. R. 407, L. C.

Annotation:—**Refd.** Jones *v.* Smith (1794), 2 Ves. 372.

1802. .]—JONES *v.* SMITH, No. 1594, *ante*.

1803. .]—The difference which arises from the alienation appears strongly in the case of a mtgor. becoming subsequently indebted to the mtgee. on bond, & then dying. The heir cannot himself redeem the mtge. without paying the bond; but the assignee of the equity of redemption from the heir may redeem the mtge. without paying the bond (LANGDALE, M.R.).—RICHARDSON *v.* HORTON (1843), as reported in 7 Beav. at p. 112; 13 L. J. Ch. 186; 49 E. R. 1006.

Annotations:—**Mentd.** Pimm *v.* Insall (1849), 1 H. & Tw. 487; Kinderley *v.* Jervis (1856), 22 Beav. 1; Dilkes *v.* Broadmead (1860), 2 Giff. 113.

Sect. 7.—Effect of death of mortgagor: Sub-sects. 1, 2, 3 & 4. Part XII. Sect. 1: Sub-sect. 1.]

1804. ——— ———.]—Exor. of mtgee. lends a further sum on bond; may tack, as against the heir or devisee of mtgor., but not as against other creditors, if the estate be charged with, or devised for, payment of debts.—PRICE *v.* FASTNEDGE (1770), Amb. 685; 27 E. R. 444.

1805. ——— **Judgment debt.**]—CANNON *v.* PACK (1714), 2 Eq. Cas. Abr. 226; 22 E. R. 192, L. C.

1806. ——— **Simple contract debt—Against customary heir.**]—Since the 3 & 4 Will. 4, c. 104, a mtgee. of copyholds may tack a simple contract debt to his mtge. debt, as against the customary heir or devisee, but not as against specialty, creditors. It seems also that a mtgee. may tack a simple contract debt to his mtge. debt as against the heir, devisee or exor., wherever the equity of redemption is assets in their hands for payment of simple contract debts.—ROLFE *v.* CHESTER (1855), 20 Beav. 610; 25 L. J. Ch. 244, 247; 52 E. R. 739.

Annotations:—**Refd.** Thomas *v.* Thomas (1856), 22 Beav. 341. **Mentd.** Talbot *v.* Frere (1878), 9 Ch. D. 568.

1807. ——— ——— ———.]—Mtgee. may tack simple contract debts to his mtge. as against the heir where the property descended is assets in his hands for payment of simple contract debts, & consequently since 3 & 4 Will. 4, c. 104, a mtgee. of freeholds may tack his simple contract debt as against the heir.—THOMAS *v.* THOMAS (1856), 22 Beav. 341; 25 L. J. Ch. 391; 28 L. T. O. S. 55; 4 W. R. 345; 52 E. R. 1139.

1808. ——— **Arrears of interest.**]—The heir of a mtgor., who has covenanted for himself & his heirs to pay the mtge. debt & interest, cannot redeem without paying arrears of interest to the extent of twenty years, the mtgee. being entitled to tack the arrears of interest to the debt as against the heir.—ELVY *v.* NORWOOD (1852), 5 De G. & Sm. 240; 21 L. J. Ch. 716; 19 L. T. O. S. 198; 16 Jur. 493; 64 E. R. 1099.

Annotations:—**Apld.** Sinclair *v.* Jackson (1853), 17 Beav. 405. **Consd.** *Re* Stead's Mortgaged Estates (1876), 2 Ch. D. 713. **Refd.** Kensington *v.* Bouverie (1854), 24 L. T. O. S. 187; Roddam *v.* Morley (1856), 2 K. & J. 336; Round *v.* Bell (1861), 30 Beav. 121.

SUB-SECT. 2.—RIGHT AGAINST DEVISEE.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1809. Tacking a bond debt.]—CHALLIS *v.* CASBORN, No. 1746, *ante.*

1810. ———.]—HEAMS *v.* BANCE, No. 1791, *ante.*

1811. ——— **By executor of mortgagee.**]—PRICE *v.* FASTNEDGE, No. 1804, *ante.*

1812. Tacking simple contract debt—Customary devisee of copyholds.]—ROLFE *v.* CHESTER, No. 1806, *ante.*

SUB-SECT. 3.—RIGHT AGAINST CREDITORS.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

See Administration of Estates Act, 1833 (c. 104); Administration of Estates Act, 1925 (c. 23), s. 56, sched. II., Part I.

1813. No right to tack—Bond debt.]—HEAMS *v.* BANCE, No. 1791, *ante.*

1814. ———.]—JACKSON *v.* LANGFORD, No. 1754, *ante.*

1815. ——— ———.]—PRICE *v.* FASTNEDGE, No. 1804, *ante.*

1816. ——— ———.]—LOWTHIAN *v.* HASEL, No. 1801, *ante.*

1817. ——— ———.]—JONES *v.* SMITH, No. 1594, *ante.*

1818. ——— ———.]—(1) Mtgor. died, & a bill was filed by the mtgee. for the administration of the estate & payment of the mtge. The mtged. property was sold, & the produce paid into ct. to a general account, & accumulated for a series of years:—*Held:* mtgee. had no right to treat the fund as appropriated to the mtge., & take the accumulations.

(2) Mtgor. died, having made his real estate equitable assets. Defts., who were both mtgees. & bond creditors, were held not entitled to tack.—IRBY *v.* IRBY (1855), 22 Beav. 217; 52 E. R. 1091.

Annotations:—**Distd.** Pile *v.* Pile (1875), 23 W. R. 440. **Mentd.** Talbot *v.* Frere (1878), 9 Ch. D. 568.

1819. ——— **Simple contract debt.**]—ROLFE *v.* CHESTER, No. 1806, *ante.*

1820. ——— ———.]—The owner of freehold property mortgaged it & died insolvent, having devised his real & personal estate to trustees for payment of debts. In a suit for the administration of his estate the mtgee. consented to an order directing the property to be sold & the proceeds to be carried to a separate account, the order being expressly without prejudice to his right to have simple contract debts due to him from the mtgor. satisfied out of the proceeds:—*Held:* he had no right to tack simple contract debts to the prejudice of other creditors, & the proceeds were not to be regarded as sale moneys in his hands so as to give him a right of retainer in respect of such debts; & consequently the balance left after payment of the mtge. debt must be carried to the account of the general estate.—PILE *v.* PILE (1875), 23 W. R. 440.

1821. ———.]—No tacking against creditors or assignees for valuable consideration. Trustee not charged with a loss by the failure of the banker to the agent; in whose hands the money was deposited pending a transaction for the change of a trustee. No lien under the circumstances. Upon further directions a question decided by the master was opened, without any exception: all the circumstances appearing on the report.—ADAMS *v.* CLAXTON (1801), 6 Ves. 226; 31 E. R. 1024.

Annotations:—**Refd.** Pile *v.* Pile (1875), 23 W. R. 440. **Mentd.** Vulliamy *v.* Noble (1817), 3 Mer. 593; Brown *v.* Sansome (1825), M'Cle. & Yo. 426; Raw *v.* Cutten (1832), 9 Bing. 96; Morgan *v.* Evans (1834), 8 Bli. N. S. 777; Cooper *v.* Cooper (1838), 7 L. J. Ch. 253; M'Fadden *v.* Jenkyns (1842), 1 Hare, 458; Ottey *v.* Pensam (1842), 1 Hare, 322.

SUB-SECT. 4.—RIGHT AGAINST ASSIGNEES OF EQUITY OF REDEMPTION.

See, now, Law of Property Act, 1925 (c. 20), s. 94.

1822. No right to tack—Bond debt.]—Mtgor. borrows more money on bond, the vendee of the heir of the mtgor. shall redeem the land without paying the bond debt.—BAYLY *v.* ROBSON (1698), Prec. Ch. 89; 24 E. R. 43, L. C.

1823. ——— ———.]—CHALLIS *v.* CASBORN, No. 1746, *ante.*

1824. ——— ———.]—COLEMAN *v.* WINCH, No. 1796, *ante.*

1825. ——— ———.]—The purchaser of the equity of redemption is intitled to stay proceedings in an ejectment brought by the mtgee., on paying the mtge. debt & without paying a bond debt due by

the mtgor. to the mtgee. before the purchase, & whereof the purchaser had notice.—ARCHER d. HANKEY *v.* SNAPP (1738), Andr. 341 ; 2 Stra. 1107 ; 95 E. R. 426.

1826. —— ——.]—TROUGHTON *v.* TROUGHTON, No. 1799, *ante*.

1827. —— ——.]—JACKSON *v.* LANGFORD, No. 1754, *ante*.

1828. —— ——.]—RICHARDSON *v.* HORTON, No. 1803, *ante*.

1829. ——.]—ADAMS *v.* CLAXTON, No. 1821, *ante*.

Assignee in bankruptcy.]—*See* Nos. 1739–1741, *ante*.

Tacking judgment debt.]—*See* Sect. 5, sub-sect. 3, *ante*.

Part XII.—Priority of Mortgagees.

SECT. 1.—MORTGAGES OF LAND.

SUB-SECT. 1.—IN GENERAL.

See, now, Law of Property Act, 1925 (c. 20), s. 97 ; Land Charges Act, 1925 (c. 22), ss. 10, 13.

1830. Rules of priority—Priority in mortgages of personalty distinguished.]—Although a mtge. debt is a chose in action, yet where the subject of the security is land, the mtgee. is treated as having "an interest in land" & priorities are governed by the rules applicable to interests in land & not by the rules which apply to interests in personalty & leaseholds are real estate for the purposes of the rule.

In 1882 T., a solr., advanced money of his own upon the security of leaseholds mortgaged to him by sub-demise. In 1889, being then one of the two trustees of the B. settlement, he received a sum of money belonging to the settlement & without the knowledge of his co-trustee, fraudulently applied it to his own use. By entries in his books, under the heading of the trust, he purported to appropriate his own mtge. debt to answer the sum of which he had defrauded the trust estate, but he never communicated the purported appropriation either to his co-trustee or to his *cestuis que trust*, all of whom were *sui juris*. In 1896 the appropriation became known to one of the *cestuis que trust*, who was a solr. & acted as such for the others, but although they had all become absolutely entitled in possession to the trust funds they never called upon the trustees to transfer them, & no inquiry was made respecting the mtge. In 1889 T. was also a trustee of the T. settlement. In 1895, T. having then become sole trustee of that settlement, N. was appointed co-trustee, & at N.'s request, on T.'s representation that the trust funds included the above-mentioned mtge. debt, & securities, the representation being supported by his production to N. of the deeds, T. executed a legal transfer into the joint names of himself & N., N. being then totally ignorant of the existence of the B. settlement & of T.'s secret appropriation thereto. The deed of transfer had been prepared by T. as solr. to the T. trust & the mtge. & other title deeds remained in his custody as such solr. In 1897, T., without N.'s knowledge, deposited the deeds with his bankers as security for a debt due from him to them, at the same time executing to them a deed poll by which he charged the debt upon all his estate & interest in the property comprised in the deeds, & undertook to execute on request a legal mtge. ; & he thereby declared that during the continuance of the security he would hold all his interest thereby charged in trust for the bank as mtgees. ; & he appointed three officers of the bank his attorneys for him & on his behalf, & as his act & deed, to execute any such legal mtge. as aforesaid. At that time the bank had no notice of either of the two settlements. In Mar. 1898, T., absconded, & in Apr. 1898, notice was given to the bank of the T. settlement, but they had no notice of the B. settlement. Notwithstanding the notice, the bank purported to execute to themselves by their three officers as T.'s attorneys under the deed poll a legal mtge. of the leaseholds comprised in the deposited deeds. In actions to ascertain the priorities of the B. settlement the T. settlement & the bank to the benefit of the mtge. debt & securities :—*Held :* (1) assuming there was a good appropriation in favour of the B. settlement, N., as trustee of the T. settlement, & having no notice of the appropriation, could not be deprived of the advantage acquired by him as against the B. settlement by the possession of the legal estate in one moiety of the mtge. debt & securities, & of the better right to the legal estate in the other moiety which had become vested in the bank through T.'s mtge. to them operating as a severance of the joint tenancy between himself & N. ; & N. must be treated as an innocent purchaser for value without notice, on the ground that by accepting the transfer of the mtge. debt & securities he gave up his right to sue T. for the debt due to the T. settlement ; N. was protected by Conveyancing Act, 1882 (c. 39), s. 3 (1), & (2), from being affected with constructive notice of the appropriation to the B. settlement because no possible inquiries or inspection by N., or any independent solr. on his behalf, would have brought the appropriation to the B. settlement to his knowledge, & the appropriation did not "come to the knowledge of" T. either as N.'s solr. or "in the same transaction in respect to which the question of notice arose" ; (2) inasmuch as the bank had, at the date of the mtge. to them in Apr. 1898, notice of the T. settlement they could not be allowed to gain priority over that settlement by means of the legal estate they had acquired in an undivided moiety of T.'s mtge. debt & securities, their mtge. not relating back to the date of the deed poll of 1897 ; (3) N. as trustee of the T. settlement, was entitled to the mtge. debt & securities in priority to both the B. settlement & the bank, & the bank was ordered to reconvey to him as such trustee the legal estate vested in them, & to deliver up the deeds accordingly.

(4) *Qu. :* whether, when the estates of a prior & subsequent incumbrancer are both equitable, the rules as to postponement, in *Northern Counties*

PART XII. SECT. 1, SUB-SECT. 1.

g. Rules of priority.]—Where a mtgee., subsequently to the execution of the mtge. deed, takes another mtge. in renewal of the former deed, he has priority over incumbrances subsequent to the first deed.—ALANGARAN CHETTI *v.* LAKSHMANAN CHETTI (1896), I. L. R. 20 Mad. 274.—**IND.**

h. ——.]—Where there are two mtges. on a single property & a person advances money for the payment of

Sect. 1.—Mortgages of land: Sub-sects. 1 & 2, A.]

of England Fire Insurance Co. v. *Whipp*, No. 2088, *post*, are not excluded.

(5) An equitable mtgee. who has made an advance without notice of a prior equitable title, may gain priority by getting in the legal title, unless there are circumstances which make it inequitable for him so to do. One case which falls within this exception is where the mtgee. has notice that the legal title, at the time when it is so got in, is held on an express trust in favour of persons who assert a claim to the property (STIRLING, J.).

(6) I next proceed to consider the order of priority between the purely equitable titles. This is governed by order of time—unless there has been some act or omission on the part of the owner of an equitable title prior in point of time, such as to cause that title to be postponed to a subsequent equitable interest (STIRLING, J.).

(7) Where the relation between the equitable incumbrancer & the person in possession of the title deeds is not merely that of mtgee. & mtgor., but is of a fiduciary nature, as, for example, that of *cestui que trust* & trustee, as client & solr., there is a great body of authority to show that the equitable incumbrancer is not to be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the encumbrancer has no ground to suppose that there has been any want of good faith on the part of the custodian of the deeds (STIRLING, J.).—TAYLOR *v.* LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. *v.* NIXON, [1901] 2 Ch. 231; 70 L. J. Ch. 477; 84 L. T. 397; 49 W. R. 451; 17 T. L. R. 413; 45 Sol. Jo. 394, C. A.

Annotations:—As to (6) **Consd.** Walker *v.* Linom, [1907] 2 Ch. 104. *Generally.* **Reid.** *Re* Pidcock, Penny *v.* Pidcock (1907), 51 Sol. Jo. 514; *Re* Cozens, Green *v.* Brisley, [1913] 2 Ch. 478; Radcliffe *v.* Abbey Road & St. John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557.

1831. What amounts to interest in land—Mortgage debt arising out of leaseholds.]—TAYLOR *v.* LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. *v.* NIXON, No. 1830, *ante*.

1832. Mortgage "subject to prior incumbrances"—Whether prior equitable charge included—Charge unknown to mortgagee—No intention to include.]—GREENWOOD *v.* CHURCHILL, No. 1919, *post*.

1833. Mortgagee with imperfect security—Subsequently perfected—After second mortgage to other party.]—Where a mtgee. holds under an imperfect security, & that security is recited as perfect in a subsequent mtge. to another party, the first mtgee. may notwithstanding maintain his priority, provided he can get his security perfected, although it was done after the second mtge. was duly executed.—SHUTTLEWORTH *v.* BENGOUGH (1846), 8 L. T. O. S. 273.

1834. Inquiry into priorities—Persons entitled to conduct of inquiry.]—The mtgor. & his incumbrancer, who first presented their petition, are entitled to the conduct of the inquiry. The absence of the mtgor. is immaterial, if an incumbrancer joins with him in his petition, even although such incumbrancer should be the solr. of the mtgor., the validity of his incumbrance being, as yet in this case, undisputed by the other incumbrancers can, under an order made on this petition, dispute the validity of the security of the solr. of the mtgor. (ROMILLY, M.R.).—WILSON'S MORTGAGED ESTATES (1866), 14 W. R. 529.

1835. Mortgage to trustees & their solicitors—In equal shares—Guarantee by solicitors of trustees' portion—Whether conferring priority.]—Trustees acting under the advice of their solrs. invested £3,000, part of the trust fund, upon the security of a contributory mtge. for £6,000, the remaining £3,000 being advanced by the solrs. themselves. The legal estate in the mtged. property was not vested in the trustees, the mtge. being taken in the names of one of them & of a stranger to the trust. The mtgees. executed a contemporaneous declaration of trust declaring that their names should stand in the mtge. as to the sum of £3,000, part of the said sum of £6,000, & the interest thereof in trust for the trustees, & as to the further sum of £3,000, "residue of the said sum of £6,000 & the residue of the interest to become due & payable" under the mtge., in trust for the solrs. By another contemporaneous document the solrs. guaranteed to the trustees the sufficiency of the security for the sum of £3,000 & interest, & further guaranteed to the trustees the repayment of the £3,000 & interest. The solrs. assigned their portion of the security to other persons, & were afterwards adjudicated bkpts. The mtged. property having failed to realise the whole of the £6,000:—*Held:* the trustees were not entitled to priority for their £3,000 as against the assignees of the solrs.—STOKES *v.* PRANCE, [1898] 1 Ch. 212; 67 L. J. Ch. 69; 77 L. T. 595; 46 W. R. 183; 42 Sol. Jo. 68.

1836. Priority as against portioners—Portion appointed or payable subsequent to mortgage—Mortgage for purpose of paying off earlier portion.]—Testator who died in 1851 charged three sums of £5,000 for children's portions on his real estate. In 1880, two of the portions had become raisable, &, in an action brought for the purpose of clearing the estate from charges, an order was made in May, 1882, directing that the two portions should be raised by a mtge. of the estate to be settled by the judge to a person who was then willing to lend the money. The mtge. as settled contained recitals of the title to the portions & of the proceedings in the action, & was expressed to be without prejudice to any charge which might be subsisting in the mtged. hereditaments under the will. The money was paid into ct. by the mtgee., & was afterwards distributed among the persons interested in the two portions. The estate being now believed to be insufficient to pay the whole of the said portions, the mtgee. commenced the present action for the realisation of his mtge., & claimed priority over the persons interested in the remaining portion:—*Held:* on the construction of the proceedings in the action, the judgment obtained, & the circumstances under which it was given, no interference with the charge of the remaining portion was contemplated or authorised, & there was nothing in the form of the mtge. settled by the judge which entitled pltf. to more than a charge on the estate for the two sums of £5,000 *pari passu* with the third £5,000 charged thereon in equity by virtue of the will.—NIGHTINGALE *v.* REYNOLDS, [1903] 2 Ch. 236; 72 L. J. Ch. 564; 88 L. T. 654; 52 W. R. 1, C. A.

1837. —— —— Power to appoint prior to mortgage.]—Under a marriage settlement made in 1832 estates stood limited in 1854 to the use of A. for life, remainder to the use of trustees for a long term of years to secure £20,000 as portions for younger children of the marriage, with remainder to B., A.'s eldest son, in tail male, with remainders

the first mtge., the claim of such person to priority over the second mtge. cannot be sustained unless the first mtge. is entirely discharged.—HANUMANTHAIYAN *v.* MEENATCHI NAIDU (1911), I. L. R. 35 Mad. 183.—**IND.**

k. *Inquiry into priorities — By master.*]—FORRESTER *v.* CAMPBELL (1879), 26 Gr. 212.—**CAN.**

over; & the settlement contained a power for A. by deed or will to appoint the further sum of £10,000 as portions for younger children. In 1854 B., with A.'s consent, executed a disentailing assurance by which the estates were assured, subject to the uses & estates created by the settlement anterior to B.'s estate tail & to all powers to such precedent estates annexed, to such uses as A. & B. should by deed jointly appoint. Thereupon A. & B., in exercise of their joint power, created a mtge. over the estates; they also created a further mtge. over the estates partly by the exercise of their joint power & partly by a grant of A.'s life estate. In each case, upon the construction placed by the ct. upon the mtges. the lands were assured by the operative part subject to the power to appoint the further sum of £10,000 as portions. Each mtge. contained a joint & several covenant by the mtgors. for quiet enjoyment, " & that free & clear & freely & clearly acquitted & exonerated or released " or otherwise indemnified of, from & against (*inter alia*) former or other gifts, leases, jointures, portions, & all other incumbrances whatsoever. A. died, having by his will charged the estates with the further sum of £10,000 as portions for younger children. Questions of priority having arisen as between these further portions & the mtges.:—*Held:* the covenant for quiet enjoyment did not enlarge the operation of the security, & did not amount to a release by A. of his power to appoint further portions; & therefore the further portions had priority over the mtges.—NOTTIDGE *v.* DERING, RABAN *v.* DERING, [1910] 1 Ch. 297; 79 L. J. Ch. 439; 102 L. T. 145, C. A.

Annotation:—**Mentd.** *Re* Evered, Molineux *v.* Evered (1910), 102 L. T. 694.

Building societies.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 480–482, Nos. 160, 162–168.

Application of doctrine of notice—Between equitable mortgagees.]—*See* Sub-sect. 3, B., *post.*

SUB-SECT. 2.—EFFECT OF POSSESSION OF LEGAL ESTATE.

A. In General.

See, now, Law of Property Act, 1925 (c. 20), s. 97, Land Charges Act, 1925 (c. 22), ss. 10, 13, & *generally,* EQUITY, Vol. XX., pp. 296 *et seq.*

1838. Legal estate gives priority.]—A subsequent title which is both legal & equitable, destroys a prior title in equity only.—HAGSHAW *v.* YATES (1719), 1 Stra. 240; 93 E. R. 497, L. C.

1839. ——.]—A. entitled for life to rents of houses, & for life or until he assigns them or becomes bkpt., etc., & then his wife entitled to an annuity during A.'s life. A. mortages, representing himself to be entitled to the estate charged with the annuity, in fee. The mtgee. files a bill for foreclosure of the annuity, & the wife claims a provision for herself & children out of it:—*Held:* the assignee of the annuity for valuable consideration was entitled to it without making any such provision for the wife & children of A.—STANTON *v.* HALL (1831), 2 Russ. & M. 175; 9 L. J. O. S. Ch. 111; 39 E. R. 361, L. C.

Annotations:—**Consd.** Tidd *v.* Lister (1854), 3 De G. M. & G. 857. **Reld.** Life Assocn. of Scotland *v.* Siddal (1861), 3 De G. F. & J. 271. **Mentd.** Tyler *v.* Lake (1831), 2 Russ. & M. 183; Massey *v.* Parker (1834), 2 My. & K. 174; Blacklow *v.* Laws (1842), 2 Hare, 40; Greedy *v.* Lavender (1850), 13 Beav. 62; *Re* Tarsey's Trust (1866), L. R. 1 Eq. 561; *Re* Peacock's Trusts (1879), 10 Ch. D. 490.

1840. ——.]—A party lending a large sum over an estate possessed in fee simple stipulated to receive as part security, in addition to a bond & disposition in security in his favour, assignations to certain incumbrances of a prior date. The incumbrances were paid by the trustee & agent of the borrower, but it did not appear with whose money. In a question between a party holding an incumbrance intervening between the assigned incumbrances & the bond & disposition in security:—*Held:* the presumption was, that the prior incumbrancers were paid with the money of the assignee; &, as there was no evidence to the contrary, the assignment conferred a preference over the intermediate incumbrancer.—MACKENZIE *v.* ORR (1839), Macl. & Rob. 117; 9 E. R. 42, H. L.

1841. ——.]—C., an equitable mtgee., (1851) of property, with notice of a prior legal mtge. of it to A. & B., as the exors. of their brother, filed a bill for redemption or foreclosure against A., B., & the mtgor. The bill stated that A., who was also an unsecured creditor of the mtgor., proposed to him to make a transfer of the joint mtge., to secure the last-mentioned debt. The mtgor., without expressly assenting to that offer, wrote to A. telling him he thought of selling some part of the mtge. security; & if he did so, he would give A. another security for his debt; but that he, A., could hold " the legal assignment " as exor. of his brother, until he was paid off or received the substituted security. The joint mtge. was paid off; & A. & B. prepared & executed a reassignment to A. of the mtge. security ready for execution by the mtgor., but did not deliver it to him. The mtgor. subsequently mortgaged the equity of redemption in the property to D., when all the deeds relating to it, including the reassignment executed by A. & B., were deposited with D. The mtgor. then (1858) absconded without having repaid or given A. the substituted security for his unsecured debt, when also A. & B. first expressly heard of the equitable mtge. to C., A. & B. then (1859) conveyed all their interest in the mtged. property to D.:—*Held:* pltf. was entitled to priority, D. having advanced his money without notice of pltfs.' mtge., & having received the title deeds, ought not to be deprived of them, or required to produce them without payment of what was due to him.—FAGG *v.* JAMES (1863), 8 L. T. 5, L. C.

1842. ——.]—In 1813 R. mortgaged an estate for a term of five hundred years to secure a mtge. debt, which was paid off in 1837 by his heir-at-law, but no assignment of the term was then executed by the mtgee. In 1840, R.'s heir-at-law, being then in possession of the estate, demised it for lives to W. & in 1843 mortgaged the same estate to J., when the term was, by his direction, assigned by the original mtgee., who had been paid off in 1837, in trust for the new mtgee., to secure his debt & then to attend; but neither the mtge. deed nor the assignment of the term contained any mention of the lease of 1840 to W.:—*Held:* the term was not a satisfied term within 8 & 9 Vict. c. 112, & so did not enure to the protection of

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PART XII. SECT. 1, SUB-SECT. 2.—A.

1838 i. *Legal estate gives priority.*]—MERCHANTS BANK OF CANADA *v.* MORRISON (1872), 19 Gr. 1.—**CAN.**

1838 ii. ——.]—FRASER *v.* GUNN (1881), 29 Gr. 13.—**CAN.**

1838 iii. ——.]—A. advanced money to B. to pay off a first mtge. to C. A reconveyance was made to B., who executed in favour of A. a charge on the land, & an agreement to execute a valid mtge. Afterwards it was discovered that B. had previously given a second mtge. to D. A. thereupon took a mtge. from B. In a suit to settle priorities:—*Held:* as B. had the legal estate he was entitled to priority.—OLLIVIER *v.* BANK OF AUSTRALASIA (1885), 4 N. Z. L. R. 94 (S. C.).—**N.Z.**

the lessee & might therefore be set up by the heir-at-law of R. in answer to pltf.'s action.—OWEN *v.* OWEN (1864), 3 H. & C. 88; 33 L. J. Ex. 237; 11 L. T. 137; 10 Jur. N. S. 884; 159 E. R. 459.

1843. ——.]—(1) The defence of purchase for value without notice may be sustained, although deft., in order to make out his title to the legal estate, must rely on an instrument which discloses the title of pltf., deft. not having had notice of such instrument at the time of his purchase.

(2) The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mtgor., the mtge. deed noticing the trust. The surviving trustee of the settlement afterwards reconveyed part of the property to the mtgor. on payment of part of the mtge. money, which he appropriated. The mtgor. then conveyed that part of the property to new mtgees., concealing, with the connivance of the trustee, both the prior mtge. & the reconveyance. When the fraud was discovered, the *cestuis que trust*, under the settlement filed a bill against the new mtgees. claiming priority:—*Held:* the ct. would not interfere to take away the legal estate which passed to the new mtgees. under the reconveyance.

(3) The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mtgor., the mtge. deed noticing the trust. The surviving trustee afterwards induced the mtgor. to execute a deed by which the mtged. property purported to be conveyed to the trustee as on a purchase by him, though no money in fact passed. The trustee then, concealing the prior mtge. & showing title under the pretended purchase deed, conveyed the property to a mtgee. without notice:—*Held:* the ct. would not interefere to take away the legal estate from the mortgagee.

(4) When a mtgee. is in possession of the legal estate there is no equity to make him reconvey, & he is entitled to hold it until every part of his incumbrance has been paid (JAMES, L.J.).—PILCHER *v.* RAWLINS (1872), 7 Ch. App. 259; *sub nom.* PILCHER *v.* RAWLINS, JOYCE *v.* RAWLINS, 41 L. J. Ch. 485; 25 L. T. 921; 20 W. R. 281, L. C. & L.JJ.

Annotations:—As to (2) **Refd.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. *As to* (3) **Refd.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. *Generally*, **Refd.** Mumford *v.* Stohwasser (1874), L. R. 18 Eq. 556; Garnham *v.* Skipper (1885), 53 L. T. 940; Bailey *v.* Barnes, [1894] 1 Ch. 25. **Mentd.** Gray *v.* Fowler (1873), L. R. 8 Exch. 249; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489.

1844. —— **If mortgagee without notice of prior incumbrance.**]—A subsequent lease made to one by way of mtge., who had notice of a prior lease for raising children's portions, was set aside.—ALDRIDGE *v.* DUKE (1679), Cas. *temp.* Finch, 439; 23 E. R. 239.

1845. —— ——.]—A. mortgaged copyholds to B. by deposit of copy of his own admission. A. died & his heir mortgaged them to C. by deposit of his own admission. C. afterwards sold & conveyed the estate to D. D. had notice of B.'s security:—*Held:* . . . . conveyance to D. was void as against B.—TYLEE *v.* WEBB (1843), 6 Beav. 552; 1 L. T. O. S. 408; 49 E. R. 939.

Annotation: **Consd.** Hewitt *v.* Loosemore (1851), 9 Hare, 449.

1846. ——.]—LLOYD *v.* ATTWOOD, ATTWOOD *v.* LLOYD, No. 1696, *ante*.

1847. —— —— **Burden of proof of notice.**]—An equitable mtgee. will not be preferred to a subsequent legal mtgee., who has no notice of the equitable mtge.; & the *onus* lies upon the former, claiming a priority, to prove that the latter had such notice.—*Re* HARDY, *Ex p.* HARDY (1832), 2 Deac. & Ch. 393.

1848. —— —— **Second & third mortgagees.**]—BATES *v.* JOHNSON, No. 1885, *post*.

1849. —— ——.]—YOUNG *v.* YOUNG, No. 1788, *ante*.

1850. —— ——.]—TAYLOR *v.* LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. *v.* NIXON, No. 1830, *ante*.

1851. —— ——.]—A purchaser who has, before completion of his purchase, received notice of an outstanding equitable interest must, in order to get a good title from his vendor, take care to see that that interest is got in or destroyed. If he chooses to complete in reliance upon the assurance of the vendor, or of the vendor's solr., that the interest has been got in or destroyed, he does so at his own risk if it turns out that the interest is still outstanding, & the conveyance to him of the legal estate, accompanied by the delivery, unknown to the owner of the equitable interest, of the title deeds, affords him no protection against the prior equitable interest.

Prior to the completion of a purchase of leaseholds the purchaser's solrs. discovered the existence of an equitable mtge. not disclosed by the abstract, & required it to be discharged. On completion of the purchase the vendor's solr., who was also the solr. of the equitable mtgee., produced the memorandum creating the equitable mtge. with what purported to be a receipt, signed by the mtgee., for all moneys due on the security; an assignment of the property by the vendor to the purchaser, passing the legal estate, was then executed, & the equitable mtge., the receipt, & all the other title deeds were handed to the purchaser. The receipt turned out to be a forgery, & on an action being brought by the equitable mtgee. against the purchaser to establish the priority of his charge:—*Held:* as deft. had purchased with notice of an incumbrance which, as a fact, was still subsisting, the legal estate & possession of the title deeds afforded no protection, & pltf.'s equitable mtge. therefore had priority, & was still enforceable against deft.—JARED *v.* CLEMENTS, [1903] 1 Ch. 428; 72 L. J. Ch. 291; 88 L. T. 97; 51 W. R. 401; 19 T. L. R. 219; 47 Sol. Jo. 435, C. A.

*Annotations:—***Refd.** Perham *v.* Kempster, [1907] 1 Ch. 373. **Mentd.** Hooper *v.* Bromet (1903), 89 L. T. 37.

—— —— **What amounts to notice.**]—*See* Sect. 13, sub-sect. 1, *post*.

1852. No new equity acquired—Action by court of equity restrained.]—ROOPER *v.* HARRISON, No. 1931, *post*.

1853. Purported second legal mortgage—Delivery of title deeds to second mortgagee—No evidence as to continuance of first mortgage.]—S., in 1841, executed a legal mtge. of leasehold property to J. to secure £300 & interest. In 1865 he purported to execute another legal mtge. of the same property to R. to secure £121 16*s.* & interest. R. had no notice of the first mtge., & the lease of the property was given up to him:—*Held:* R.'s mtge. was entitled to priority, inasmuch as no explanation was given of the fact of S. being in possession of the lease.—JONES *v.* RHIND, RHIND *v.* JONES (1869), 17 W. R. 1091.

1854. Mortgagee trustees with legal estate—Mortgage of share of cestui que trust—Absence of notice—Priority over prior incumbrance.]—Funds belonging to L. were, on her marriage in 1834,

vested in three trustees, one of whom died in 1840, in trust for her for life for her separate use, without power of anticipation, & after her death for the children of the marriage, & in case there should be none, for such persons, if she should die in her husband's lifetime, as she should appoint. In 1843 the husband & wife executed a deed to secure the payment of moneys due from him, & the wife appointed that in case there should be no child of the marriage, & if she should die in the husband's lifetime, the trustees of the settlement of 1834 should, out of the trust funds, raise sufficient to pay the husband's debt. Notice was given of the deed of 1843 to the two surviving trustees of the settlement. In 1848 the wife & the sole surviving trustee of the settlement, who desired to retire, appointed three new trustees, & assigned to them the trust funds. One of those trustees died, & the two surviving trustees & the survivor of them, at the request of the husband & wife, dealt with some of the trust funds, which ultimately were much diminished. A portion of the funds was invested in the purchase of leasehold premises, which were held upon the trusts of the settlement. The wife died in Mar. 1870, without having had any child. The husband survived. The survivor of the trustees of 1848 in May, 1870, received a notice from R. of a charge on the leaseholds in his favour, dated Oct. 5, 1864; & in Oct. 1870, he received a notice of the deed of 1843:—*Held:* the surviving trustees of 1848 were not liable to make good the funds which had been lost; R. was not entitled to priority over the trustees of the deed of 1843; & the persons claiming under the deed of 1843, were entitled to the funds which remained in part satisfaction of the moneys due to them.

Assignees of an equitable interest should, if they desire to be perfectly secured, obtain a *distringas* on the funds; or have their deed indorsed on the original deed; or obtain a transfer of the funds into ct.

Trustees who have got a legal estate, or an estate of any kind, either money or land, may lend money to the *cestui que trust*, & get a beneficial interest in the trust property if they have no notice that there have been any prior incumbrancers. They have got the legal estate & they have got the legal right; they have therefore got, in respect of the charge created in their favour, before they have got any notice of anything else, a right to retain that which the law has given them (JAMES, L.J.).—PHIPPS *v.* LOVEGROVE, PROSSER *v.* PHIPPS (1873), L. R. 16 Eq. 80; 42 L. J. Ch. 892; 28 L. T. 584; 21 W. R. 590.

Annotations:—**Consd.** Newman *v.* Newman (1885), 28 Ch. D. 674. **Reld.** Low *v.* Bouverie, [1891] 3 Ch. 82.

1855. ——————. A trustee who has the legal estate & takes from his *cestui trust* an assignment of the equitable interest by way of security for money advanced to the *cestui que trust*, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice.—NEWMAN *v.* NEWMAN (1885), 28 Ch. D. 674; 54 L. J. Ch. 598; 52 L. T. 422; 33 W. R. 505; *sub nom.* NEWMAN *v.* NEWMAN, BROWN *v.* NEWMAN, 1 T. L. R. 211.

1856. Assignment of prior equitable mortgage—Assignment subsequent to legal mortgage—Substitution of assignee for equitable mortgagee—Intention of parties.]—W. was owner in fee of certain property, & prior to May 1, 1879, mortgaged it by deposit of title deeds to G. to secure an advance by her. On May 1, 1879, W. gave a legal mtge. of the same property to B., to secure a debt owed by him. B. at the time of the execution of the mtge. did not know of the equitable mtge. to G. In June, 1879, W. applied to deft. to make an advance to pay off the charge held by G. Deft. advanced the money; G. handed the deeds back to W., who handed them to H., who was acting for all parties; & H., in his turn handed them to deft. W., on or about the same date executed a legal mtge. of the same premises to deft. to secure his advance. This deed did not recite the mtge. of May 1, to B., nor was deft. aware of its existence. B. subsequently became insolvent, & his trustee in liquidation, pltf., claimed priority for the mtge. to B. of May 1, over that of June, 1879, to deft. The county ct. judge, before whom the case came on for trial, decided in favour of the priority of B.'s mtge. Defts. appealed:—*Held:* the decision of the county ct. judge should be reversed, & as from the nature of the transaction between the parties it was intended that deft. should stand in the place of the equitable mtgee., he was entitled to priority over the first legal mtgee. to the extent of the amount of the equitable mtge.—MASON *v.* RHODES (1885), 53 L. T. 322, D. C.

1857. Legal estate in trustee of mortgagor—Whether effective to alter priorities.]—LEDBROOK *v.* PASSMAN, No. 1707, *ante*.

1858. Notice of prior incumbrance—Duty to take care that interest got in or destroyed—Reliance on assurance of sender or his agent.]—JARED *v.* CLEMENTS, No. 1851, *ante*.

Failure to gain or loss of priority.]—*See* Sect. 13, *post*.

B. Legal Estate Acquired After Mortgage.

now, Law of Property Act, 1925 (c. 20), s. 97.

1859. General rule—Priority obtained—If advance made without notice.]—CLARKE *v.* JEVON (1684), Freem. Ch. 89; 22 E. R. 1076.

1860. ——————.]—If a subsequent purchaser or mtgee. has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term, prior to both, in order to get a preference. But if he had no notice of such prior purchase or incumbrance, & has the first & best right to call for the legal estate, then if he gets an assignment of it, a ct. of equity will not deprive him of his advantage. If a second mtgee. lend his money upon an estate upon which there is an old outstanding term, & has notice at the same time of a certain incumbrance, prior to his own, the prior incumbrancer has the best right to call for the legal estate, & to satisfy himself of any other incumbrances upon the estate; although such other incumbrances were not known to the second mtgee. at the time he advanced his money.

Wherever the legal estate is standing out, either in a prior incumbrancer, or in such a trustee as against whom the puisne incumbrancer has not the best right to call for the legal estate, the whole title & consideration is in equity, & then the general maxim must take place, *qui prior est tempore potior est jure* (LORD HARDWICKE, C.).—

PART XII. SECT. 1, SUB-SECT. 2.—B.

1. *Acquisition of reversion by assignee.*]—The assignee of a term, who takes the assignment subject to a mtge. & afterwards acquires the reversion, cannot levy out of the mtged. premises, to the prejudice of the mtgees., the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee.—MACKENZIE *v.* BUILDING & LOAN ASSOCN. (1898), 28 S. C. R. 407.—**CAN.**

Sect. 1.—*Mortgages of land: Sub-sect.* 2, *B., C. & D.*]

WILLOUGHBY *v.* WILLOUGHBY (1756), 1 Term Rep. 763; 2 Ves. Sen. 685; Amb. 282; 99 E. R. 1366, L. C.

Annotations:—**Consd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1. **Refd.** Maundrell *v.* Maundrell (1805), 10 Ves. 246; Doe d. Putland *v.* Hilder (1819), 2 B. & Ald. 782; Jones *v.* Jones (1838), 8 Sim. 633; Drew *v.* Lockett (1863), 32 Beav. 499; Sharples *v.* Adams (1863), 32 Beav. 213; Chadwick *v.* Turner (1865), 5 New Rep. 395; Pease *v.* Jackson (1868), 3 Ch. App. 576; Pilcher *v.* Rawlins, Joyce *v.* Rawlins (1870), L. R. 11 Eq. 53. **Mentd.** Mole *v.* Smith (1822), Jac. 490; Carter *v.* Carter (1857), 4 Jur. N. S. 63; Frend *v.* Buckley (1870), L. R. 5 Q. B. 213.

1861. —— —— ——.]—PLUMB *v.* FLUITT, No. 1995, *post.*

1862. —— —— ——.]—*Ex p.* KNOTT, No. 1702, *ante.*

1863. —— —— ——.]—A solr. drew up a memorandum of charge by A. in favour of pltf. Afterwards the solr. took a legal mtge. to himself from A. of the same property. Pltf. brought an action claiming priority:—*Held:* the solr. had notice of the memorandum which therefore had priority over the legal mtge.—HUGGINS *v.* BURCHELL (1888), 60 L. T. 32.

1864. —— —— ——.]—BAILEY *v.* BARNES, No. 2001, *post.*

1865. —— —— —— **Unless inequitable.**]—TAYLOR *v.* RUSSELL, No. 1736, *ante.*

1866. —— —— —— ——.]—TAYLOR *v.* LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. *v.* NIXON, No. 1830, *ante.*

1867. Bankruptcy of mortgagor before acquisition—Legal estate no protection to subsequent mortgage.]—A. makes a mtge., & afterwards a commission of bkpcy. is taken out against him, & comrs. make an assignment of his estate, & then B. lends £2,000 to the bkpt. on a second mtge., having no notice of the bkpcy., & afterwards he gets in the first mtge. This prior mtge. shall not protect the mtge. subsequent to the bkpcy.—HITCHCOCK *v.* SEDGWICK (1690), 2 Vern. 156; 1 Eq. Cas. Abr. 323, pl. 5; 23 E. R. 707, H. L.

Annotations:—**Refd.** Brace *v.* Marlborough (1728), Mos. 50; Collet *v.* De Gols (1734), Cas. *temp.* Talb. 65; Downing *v.* Bagnall (1755), Amb. 818; Langdale *v.* Briggs (1856), 8 De G. M. & G. 391. **Mentd.** Wiseman *v.* Vandeputt (1690), 2 Vern. 203; Sowerby *v.* Brooks (1821), 4 B. & Ald. 523.

1868. Mortgagee without notice at time of advance—Third mortgagee—Effect of notice by second to first mortgagee.]—PEACOCK *v.* BURT, No. 1726, *ante.*

1869. —— **Legal estate procured to mortgagee—Or trustee for him.**]—If the owner of the legal estate in realty creates successive equitable incumbrances upon it, he cannot alter the equities of those incumbrancers by afterwards transferring the legal estate to any one of them. But if the legal estate be outstanding in a third person who has no privity with the several incumbrancers, the incumbrancer who obtains a conveyance of it to himself, or a trustee for him, will secure a priority over the others.

The owner of the legal estate in realty deposited the title deeds of it with pltfs., to secure moneys advanced by them to him. He afterwards admitted that he was originally trustee of the legal estate in the property for A., to whom such legal estate was afterwards conveyed. It appeared from the balance of the evidence in the case that A. must have known of the deposit of the deeds with pltfs.:—*Held:* they were entitled to a decree for the sale of the realty, & payment of what was due to them; with costs of suit, to be paid by A.—SHARPLES *v.* ADAMS (1863), 32 Beav. 213; 1 New Rep. 460; 8 L. T. 138; 11 W. R. 450; 55 E. R. 84.

Annotations:—**Consd.** Maxfield *v.* Burton (1873), L. R. 17 Eq. 15. **Refd.** Drew *v.* Lockett (1863), 32 Beav. 499; R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231.

1870. —— **Effect of notice when getting in legal estate.**]—BATES *v.* JOHNSON, No. 1885, *post.*

1871. —— ——.]—A person who has *bonâ fide* paid money without notice of any other title, may afterwards, even *pendente lite*, get a legal title if he can, & may hold it, though during the interval between the payment & the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself.—BLACKWOOD *v.* LONDON CHARTERED BANK OF AUSTRALIA (1874), L. R. 5 P. C. 92; 43 L. J. P. C. 25; 30 L. T. 45; 22 W. R. 419, P. C.

Annotations:—**Apprvd.** Taylor *v.* Russell, [1892] A. C. 244. **Consd.** London & County Banking Co. *v.* Goddard (1897), 76 L. T. 277.

1872. —— ——.]—TAYLOR *v.* RUSSELL, No. 1736, *ante.*

1873. —— **Acquisition pendente lite.**]—BLACKWOOD *v.* LONDON CHARTERED BANK OF AUSTRALIA, No. 1871, *ante.*

1874. Legal estate in mortgagor—Transfer to one of several equitable mortgagees.]—SHARPLES *v.* ADAMS, No. 1869, *ante.*

1875. —— **Agreement to grant legal mortgage to equitable mortgagee—Grant of legal estate to another—Purchaser for value without notice.**]—MAXFIELD *v.* BURTON, No. 2016, *post.*

1876. —— —— —— **Subsequent mortgagee giving fresh advance.**]—S., who was the equitable owner in possession of freeholds, charged them in favour of K., at the same time giving K. an undertaking to execute a legal mtge. S., having subsequently got in the legal estate, granted a mtge. in fee to G. without notice of K.'s incumbrance:—*Held:* notwithstanding the undertaking to execute a legal mtge. to K., G. was entitled to priority.—GARNHAM *v.* SKIPPER (1885), 55 L. J. Ch. 263; 53 L. T. 940; 34 W. R. 135; 2 T. L. R. 64.

Legal estate vested in satisfied mortgagee.]—*See* Nos. 1900–1902, *post.*

Conveyance in breach of trust.]—*See* Sub-sect. 2, F., *post.*

C. Mortgagee with Better Right to Call for Legal Estate.

1877. Right to priority—As against other equitable incumbrancers.]—A purchaser without notice shall not be hurt in equity, not only where he has got in a prior legal title, but where he has a better right to call for the legal estate, than another who has got an incumbrance prior to his title.—WILKES *v.* BODINGTON (1707), 2 Vern. 599; 23 E. R. 991, L. C.

Annotations:—**Consd.** Willoughby *v.* Willoughby (1756), 1 Term Rep. 763. **Refd.** Fitzgerald *v.* Fauconberge (1731), Fitz-G. 207; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Mentd.** *Re* Slobodinsky, *Ex p.* Moore, [1903] 2 K. B. 517; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6; *Re* Gunsbourg, [1920] 2 K. B. 426.

1877 i. *Right to priority—As against other equitable incumbrancers.*]—LOWNDES *v.* MITTON (1897), 16 N. Z. L. R. 385.—N.Z.

1877 ii. —— ——.]—BISHOP *v.* HUNT (1907), 26 N. Z. L. R. 950.—N.Z.

1878. —— ——.]—(1) Second mtgee. with notice of a former, but without notice of a trust charge antecedent to both, of which first mtgee. had notice, must take subject to that demand.

(2) Where all claim in equity, *qui prior est tempore potior est jure* except where one has better right to call for the legal estate.—POMFRET (EARL) *v.* WINDSOR (LORD) (1752), 2 Ves. Sen. 472 ; 28 E. R. 302, L. C.

Annotations :—As to (1) **Refd.** Chalmer *v.* Bradley (1819), 1 Jac. & W. 51 ; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1 ; Peacock *v.* Burt (1834), 4 L. J. Ch. 33 ; Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377. *Generally*, **Mentd.** Hercy *v.* Dinwoody (1793), 4 Bro. C. C. 257 ; Stackhouse *v.* Barnston (1805), 10 Ves. 453 ; Goodright d. Fowler *v.* Forrester (1807), 8 East, 552 ; Hughes *v.* Thomas (1811), 13 East, 474 ; Lake *v.* Skinner (1819), 1 Jac. & W. 9 ; Brown *v.* Claxton (1829), 3 Sim. 225.

1879. —— ——.]—WILLOUGHBY *v.* WILLOUGHBY, No. 1860, *ante*.

1880. —— ——.]—Rule between incumbrancers, that a subsequent incumbrancer, without notice, getting in a term, may protect himself ; unless there are circumstances giving the prior incumbrancer a better right to call for an assignment.

Subsequent incumbrancer cannot protect himself by a satisfied term against a prior incumbrance, unless in some sense got in : either by an assignment, or making the trustee a party to the instrument or taking possession of the deed, creating the term ; nor, if he has notice, before he pays his money.—MAUNDRELL *v.* MAUNDRELL (1804), 10 Ves. 246 ; 32 E. R. 839, L. C.

*Annotations :—***Consd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1 ; Wilmot *v.* Pike (1845), 5 Hare, 14. **Apld.** Rice *v.* Rice (1854), 2 Drew. 73. **Consd.** Carter *v.* Carter (1857), 3 K. & J. 617. **Refd.** *Ex p.* Knott (1806), 11 Ves. 609 ; Mackreth *v.* Symmons (1808), 15 Ves. 329 ; Doe d. Putland *v.* Hilder (1819), 2 B. & Ald. 782 ; Frere *v.* Moore (1820), 8 Price, 475 ; Peacock *v.* Burt (1834), 4 L. J. Ch. 33 ; R. *v.* Oundle (1834), 1 Ad. & El. 283 ; Bates *v.* Johnson (1859), John. 304 ; Prosser *v.* Rice (1859), 28 Beav. 68 ; Pease *v.* Jackson (1868), 3 Ch. App. 576 ; Pilcher *v.* Rawlins (1872), 7 Ch. App. 259 ; Taylor *v.* Russell, [1891] 1 Ch. 8 ; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Mentd.** Roach *v.* Wadham (1805), 2 Smith, K. B. 376 ; Rawlins *v.* Burgis (1814), 2 Ves. & B. 382 ; Ray *v.* Pung (1821), 5 Madd. 310 ; Tunstall *v.* Trappes (1830), 3 Sim. 286 ; Logan *v.* Bell (1845), 1 C. B. 872 ; Glass *v.* Richardson (1852), 9 Hare, 698 ; Hughes *v.* Wells (1852), 9 Hare, 749 ; Sing *v.* Leslie (1864), 2 Hem. & M. 68 ; Spencer *v.* Clarke (1878), 9 Ch. D. 137.

1881. —— ——.]—*Ex p.* KNOTT, No. 1702, *ante*.

1882. —— ——.]—TAYLOR *v.* LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. *v.* NIXON, No. 1830, *ante*.

1883. —— **Mortgagee paying off prior incumbrance.**]—A member of a building society having made a mtge. to the trustees of the society & a subsequent equitable charge in favour of pltfs., requested defts. to pay off the first mtge. This was done, & the receipt of the trustees was indorsed upon the first mtge. & the title deeds handed over to defts., & the mtgor. at the same time executed a mtge. of the property to defts., who had no notice of pltf.'s charge :—*Held :* defts. had the better equity, & therefore that the rule, "*Qui prior est tempore, potior est jure*" did not apply.—PEASE *v.* JACKSON (1868), 3 Ch. App. 576 ; 37 L. J. Ch. 725 ; 32 J. P. 757 ; 17 W. R. 1, L. C.

Annotations :—As to (1) **Apld.** Fourth City Mutual Benefit Bldg. Soc. *v.* Williams, Marson *v.* Cox (1879), 14 Ch. D. 140. **Distd.** Carlisle Banking Co. *v.* Thompson (1884), 28 Ch. D. 398. **Folld.** Mason *v.* Rhodes (1885), 53 L. T. 322 ; Crosbie-Hill *v.* Sayer, [1908] 1 Ch. 866. *Generally*, **Refd.** Lawrence *v.* Clements (1874), 31 L. T. 670 ; Robinson *v.* Trevor (1883), 12 Q. B. D. 423 ; Sangster *v.* Cochrane (1884), 28 Ch. D. 298 ; Hosking *v.* Smith (1888), 13 App. Cas. 582.

1884. —— ——.]—In 1902 D. mtged. freeholds to a building society. In June, 1905, D.'s bankers, at his request, paid off the mtge. The building society delivered the title deeds other than the mtge. deed to the bank, & D. executed in favour of the bank a memorandum of equitable charge containing an agreement to execute a legal mtge. when called upon. Shortly afterwards the building society handed the mtge. deed to the bank, indorsed with the receipt authorised by Building Societies Act, 1874 (c. 32), s. 40. The receipt was dated the day of payment off, though in fact executed afterwards. In Nov. 1905, by means of forged title deeds, D. obtained an advance from defts.' predecessor in title, & executed what purported to be a legal mtge. of the property to him. In 1906 pltfs. paid off the moneys owing to the bank. D. executed a mtge. of the property to them, & the bank handed them the title deeds, but did not convey the legal estate to them. Pltfs. were in ignorance of the transaction with defts.' predecessor, & he was ignorant of the bank's claim when he advanced his money to D. :—*Held :* the statutory receipt operated to vest the legal estate in the bank, & the bank's mtge. was still alive for the purpose of giving pltfs., as having the best right to call for the legal estate, priority over the incumbrance vested in defts.—CROSBIE-HILL *v.* SAYER, [1908] 1 Ch. 866 ; 77 L. J. Ch. 466 ; 99 L. T. 267 ; 24 T. L. R. 442.

Annotation :— **Refd.** Manks *v.* Whiteley, [1912] 1 Ch. 735.

D. Possession by Transferee of Mortgage.

See, now, Law of Property Act, 1925 (c. 20), s. 97.

1885. General rule.] — Where two or more successive mtgees. advance their money upon security of real property, without notice of a prior trust fraudently concealed by the mtgor. the first mtgee. taking a mtge. of the legal estate, the last mtgee. is at liberty, after notice of the trust, & pending a suit by the *cestuis que trust* for redemption of the first mtge., to pay off all the prior mtges., & upon getting in the legal estate, to hold it until all the moneys advanced by him have been paid in full.

Where there are three successive mtgees., the third taking his security without notice of the second at the time of advancing his money, if the third can obtain, even after bill filed, a conveyance of the legal estate from the first, he can, as it is termed, "squeeze out" the second, although at the time of obtaining such conveyance he had full notice of the existence of the second mtge. The fact of his having such notice at the time of his getting in the legal estate is immaterial, provided he had no such notice at the time when he advanced his money (PAGE WOOD, V.-C.).

The authorities, as it seems to me, have gone to this extent although I am still of opinion that they have never gone before, that any person having an unsatisfied mtge. or charge upon real property, is at liberty, at any time before decree, to convey the legal estate in the property, in respect of his unsatisfied charge, to any subsequent incumbrancer, who may have advanced his money without notice of any intervening or other charge as ncumbrance, & by so doing may give to that other ncumbrancer a right, which this ct. cannot take from him, to insist upon the legal estate, which as the ct. holds, he has thus properly acquired (PAGE WOOD, V.-C.).

In the case of a satisfied mtge., where the mtgee. would hold simply upon trust for the original mtgor. as those claiming under him as in the case of a trustee of a satisfied term. . . . I do not find any authority which decides, that where notice has once been fixed upon the person thus holding as a trustee of a dry legal estate for the benefit of the parties entitled, he is at liberty to convey that estate to a third party, as to give such third

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party a security which could only be acquired through the medium of a breach of trust on his part (PAGE WOOD, V.-C.).—BATES *v.* JOHNSON (1859), John. 304; 28 L. J. Ch. 509; 70 E. R. 439; *sub nom.* BATES *v.* JOHNSON, HOOKE *v.* JOHNSON, 33 L. T. O. S. 233; 5 Jur. N. S. 842; 7 W. R. 512.

Annotations :—**Refd.** West London Commercial Bank *v.* Reliance Permanent Bldg. Soc. (1884), 53 L. J. Ch. 860; Taylor *v.* Russell, [1891] 1 Ch. 8; Bailey *v.* Barnes, [1894] 1 Ch. 25.

1886. Transferee without notice—Transferor with notice.]—MERTINS *v.* JOLLIFFE, No. 2000, *post.*

1887. Transferor without notice—Knowledge of transferee immaterial.]—Assignee of a mtge. from persons not having notice of mtgor.'s being only tenant for life, not bound to discover whether he himself had notice.

Whether he had or had not [notice] was immaterial if those through whom he claimed had not (*per* CUR.).—SWEET *v.* SOUTHCOTE (1786), 2 Bro. C. C. 66; 2 Dick. 671; 29 E. R. 38.

Annotation :—**Consd.** Wilkes *v.* Spooner, [1911] 2 K. B. 473.

1888. Constructive notice—Notice to agent of transferee's solicitor—Further advance on transfer.]—In order to affect a principal with constructive notice of facts within the knowledge of an agent, it is necessary not only that the knowledge should be derived from the same transaction, but it must be knowledge of facts which are material to that transaction & which it was the duty of the agent to communicate. Therefore, the transferee of a mtge. is not affected by the knowledge of the solr., acting for him in the matter of the transfer, of an incumbrance subsequent to the original mtge., so as to prevent him from making further advances, such knowledge not being material to the business of the transfer.—WYLLIE *v.* POLLEN (1863), 3 De G. J. & Sm. 596; 2 New Rep. 500; 32 L. J. Ch. 782; 9 L. T. 71; 11 W. R. 1081; 46 E. R. 767, L. C.

Annotation :—**Mentd.** Blackburn, Low *v.* Vigors (1887), 57 L. J. Q. B. 114.

Compare Sub-sect. 2, E. & Sect. 13, sub-sect. 1, *post.*

Mortgages to building societies.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 481–483, Nos. 160, 162–174; & Law of Property Act, 1925 (c. 20), s. 115 (9).

E. Possession by Purchaser for Value Without Notice.

See EQUITY, Vol. XX., pp. 256–263, 296–305, 416, Nos. 191–251, 509–585, 1487; FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 160, 161, Nos. 95–97, 99.

F. Where Legal Estate Taken from Trustee.

1889. Mortgagee with notice — No priority gained.]—A purchaser or mtgee. shall not protect himself by taking a conveyance from a trustee after notice of the trust, for by taking such conveyance he becomes the trustee himself.—SAUNDERS *v.* DEHEW (1692), 2 Vern. 271; 23 E. R. 775; *sub nom.* SANDERS *v.* DELIGNE, Freem. Ch. 123.

Annotations :—**Apld.** Allen *v.* Knight (1846), 5 Hare, 272. **Consd.** Carter *v.* Carter (1857), 3 K. & J. 617. **Distd.** Bates *v.* Johnson (1859), John. 304. **Foll.** Mumford *v.* Stohwasser (1874), L. R. 18 Eq. 556. **Apld.** Bailey *v.* Barnes, [1894] 1 Ch. 25. **Refd.** Taylor *v.* Russell (1890), 62 L. T. 922; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231.

1890. —— —— ——.]—A., in whom a lease was vested, deposited it with his bankers by way of equitable mtge. The bankers afterwards received notice, as the fact was, that A. was a mere trustee of the leasehold, but they subsequently obtained from him a formal mtge. of the legal estate :—*Held :* the *cestuis que trust* had priority over the bankers. —BAILLIE *v.* M'KEWAN (1865), 35 Beav. 177; 55 E. R.

on :—**Refd.** R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420.

1891. —— ——.]—Where money is lent on an equitable mtge. without notice of a prior equitable agreement, the lender gains no priority over the owner of the prior equitable interest by getting in the legal estate after he has notice that his mtgor. has made himself a trustee for the owner of the prior equity.

Qu.: whether he would be in any better position if he had no notice.

A builder entered into a building agreement under which leases of plots of land were to be granted on completion of houses on them. He built a house on one plot, & verbally agreed on getting his lease to grant an underlease to M., who gave valuable consideration for the underlease, & entered into possession. Subsequently the builder, without the knowledge of M., obtained a lease of the house, & deposited it with deft. to secure an advance made without notice of M.'s title. After this the builder, as agent for pltf., who claimed under M.'s will, let the house to a tenant. Subsequently the builder granted to deft. a legal mtge. to secure the previous advance. The suit was instituted for specific performance of the agreement for an underlease :—*Held :* the tenancy gave deft. constructive notice at the time of taking the legal mtge., the builder was a trustee for M.; & the legal estate was no protection to deft. against the prior equity.—MUMFORD *v.* STOHWASSER (1874), L. R. 18 Eq. 556; 43 L. J. Ch. 694; 30 L. T. 859; 22 W. R. 833.

Annotations :—**Distd.** Bailey *v.* Barnes, [1894] 1 Ch. 25. **Dbtd.** Hunt *v.* Luck, [1902] 1 Ch. 428. **Refd.** Ortigosa *v.* Brown (1877), 47 L. J. Ch. 168; Garnham *v.* Skipper (1885), 55 L. J. Ch. 263; Union Bank of London *v.* Kent (1888), 39 Ch. D. 238; Powell *v.* London & Provincial Bank, [1893] 1 Ch. 610; *Re* Lake, *Ex p.* Cavendish, [1903] 1 K. B. 151.

1892. —— ——.]—The owner of a copyhold, which was subject to a mtge. by conditional surrender for £350, made by a former owner, instructed S., his solr., to procure him, on the security of the property, a loan of £550, out of which the old mtge. was to be paid off. S. in July, 1876, obtained the money from pltf., who was also his client. In July, 1877, S. took a security for £700 on the property in his own name, the mtgee. assigning the old mtge. debt, & the mtgor. covenanting to surrender. The old mtgee. was paid by a cheque drawn by S. on B. & co., his bankers. S.'s account was already overdrawn, but on the same day he applied to them for leave further to overdraw, which was granted on his depositing with them the security for £700, & the cheque when presented was honoured. B. & co. had no notice of pltf.'s claim. Some time after this S. put his account in credit, but it shortly afterwards became again overdrawn. S. handed over some of the other muniments of title to pltf. Pltf. commenced his action to establish his right to rank as incumbrancer for £550 in priority to B. & co. After this, B. & co. procured the old mtgee. to be admitted under the old conditional surrender, & to surrender to them. B. & co. appealed asking for priority over pltf. to the extent of the old mtge. which had been paid off with their money :—*Held :* (1) S., having received money from pltf. for the purpose of being invested on a mtge. of specified

property, & having taken a security on that property in his own name, was a trustee of that security for pltf. to the extent of the money received from him, & this equitable title must prevail against the deposit with B. & co., & the £350 mtge. could not be set up against pltf.; (2) B. & co. did not acquire priority by having got the legal estate, for an equitable incumbrancer cannot, after receiving notice of a prior incumbrance, obtain priority over it by getting in a legal estate from a bare trustee.—HARPHAM *v.* SHACKLOCK (1881), 19 Ch. D. 207; 45 L. T. 569; 30 W. R. 49, C. A.

Annotations:—**Apld.** *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589. **Expld.** Taylor *v.* Russell, [1891] 1 Ch. 8. **Refd.** Garnham *v.* Skipper (1885), 53 L. T. 940; Powell *v.* London & Provincial Bank, [1893] 1 Ch. 610; London & County Banking Co. *v.* Goddard (1897), 76 L. T. 277. **Mentd.** *Re* Cooper, Cooper *v.* Vesey (1882), 20 Ch. D. 611.

1893. —— ——.]—TAYLOR *v.* RUSSELL, No. 1736, *ante*.

1894. —— ——.]—TAYLOR *v.* LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. *v.* NIXON, No. 1830, *ante*.

1895. —— ——.]—Testator, after bequeathing legacies & annuities, devised his real estate to three trustees, of whom K. was one, upon trust out of the rents & profits in aid of his personal estate to pay his debts, funeral & testamentary expenses, & the said legacies & annuities, &, subject thereto, to hold the said premises upon trust as to a certain freehold house for K., his heirs & assigns. Testator then disposed of his residue. He died in Mar. 1872. In Sept. 1872, K. assigned his interest under the will by way of mtge. to pltf., who gave notice to K.'s two co-trustees. In 1879 K., by the death of his co-trustees, became sole trustee of the will. In 1890 he deposited the deeds of the house & the probate of the will with defts., his bankers, & executed to them a memorandum of charge to secure an overdraft, & in 1903 he executed to the bank a conveyance of the hereditaments to which the title deeds related by way of mtge. to secure the existing debt & further advances. Defts. did not know, either in 1890 or 1903, of pltf.'s equitable mtge., but on the occasion of their first advance the bank manager examined the deeds without professional assistance. In 1890 all the debts, legacies, & annuities had been satisfied except a legacy of £100 bequeathed to a tenant for life, who was still living, with remainder to her children. In an action to determine the priorities of the mtgees.: —*Held*: in 1903 the trusts of the will not having been fully executed, K.'s equitable interest had not become merged in his legal estate; the bank, knowing K. to be the surviving trustee of the will, & having notice that what they took from him was part of his trust estate, took it subject to all the subsisting trusts to which it was subject, including the mtge. of 1872, & therefore had not priority over pltf.'s earlier equitable mtge.—PERHAM *v.* KEMPSTER, [1907] 1 Ch. 373; 76 L. J. Ch. 223; 96 L. T. 297.

Annotation:—**Distd.** Pearce *v.* Bulteel, [1916] 2 Ch. 544.

1896. Mortgagee without notice — Whether priority gained—Second mortgagee with notice of prior charge—First mortgagee with notice of trust.]—POMFRET (EARL) *v.* WINDSOR (LORD), No. 1878, *ante*.

1897. —— —— **Instrument creating trusts foundation of mortgagee's legal title.**]—CARTER *v.* CARTER, No. 2113, *post*.

1898. —— ——.]—PILCHER *v.* RAWLINS, No. 1843, *ante*.

1899. Effect of knowledge of party conveying to mortgagee.]—PILCHER *v.* RAWLINS, No. 1843, *ante*.

1900. —— **Conveyance by satisfied mortgagee.**]—CARTER *v.* CARTER, No. 2113, *post*.

1901. —— ——.]—BATES *v.* JOHNSON, No. 1885, *ante*.

1902. —— ——.]—TAYLOR *v.* RUSSELL, No. 1736, *ante*.

SUB-SECT. 3.—EQUITABLE MORTGAGES.

A. In General.

See, now, Law of Property Act, 1925 (c. 20), s. 97; Land Charges Act, 1925 (c. 22), ss. 10, 13, &, *generally*, EQUITY, Vol. XX., pp. 305 *et seq.*

1903. General rule—Qui prior est tempore potior est jure.]—Mtges. are not to be preferred to other real incumbrances, but they shall all take place according to their priority, & as they severally stand in order of time.—SYMMES *v.* SYMONDS (1703), 4 Bro. Parl. Cas. 328; 2 E. R. 222.

1904. —— ——.]—BRACE *v.* MARLBOROUGH (DUCHESS), No. 1701, *ante*.

1905. ——.]—CLARKE *v.* ABBOT (1741), Barn. Ch. 457; 2 Eq. Cas. Abr. 606; 27 E. R. 718, L. C.

1906. .]—WILLOUGHBY *v.* WILLOUGHBY, No. 1860, *ante*.

1907. .]—FRERE *v.* MOORE, No. 1708, *ante*.

1908. .]—PHILLIPS *v.* PHILLIPS, No. 1728, *ante*.

1909. .]—NEWTON *v.* NEWTON, No. 1521, *ante*.

1910. .] Testator, who died in 1866, devised & bequeathed all his real & personal estate upon trust for sale & conversion, & empowered his trustees to carry on his business for such time as they should see fit, & to employ in the business all the capital which might be invested therein at the time of his decease, & the profits thereof, & to increase or abridge the business & his capital therein, & generally to transact all matters & concerns respecting the business, & to do all acts relative thereto, in the same manner as if they were absolutely entitled to the same. The personal estate of testator comprised nearly the whole of the capital of the business. His real estate consisted of the manufactory & buildings upon which the business was carried on, & for which he received a rent. The trustees carried on the business after testator's death in partnership with other persons; but the firm ultimately became bkpt. In 1869 one of the trustees advanced to his co-trustee £2,000 & the title deeds relating to the manufactory & premises were deposited with him for securing the repayment of the advance with interest. The money was applied for the purposes of the business. This transaction had not been disclosed.

In Jan. 1882, an action was commenced for the administration of testator's estate. In pursuance of an order made in that action, the business was sold in 1883. In Sept. 1882, certain of the beneficiaries mortgaged all their respective shares under the will to secure the repayment to a banking co. of £4,600. The banking co. applied by petition for leave to intervene in the action, & obtain payment of their debt. The question raised was, whether the trustees had power to

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make an equitable mtge. of real estate, which did not form part of the assets employed in the business, for the purposes of the business :—*Held :* power to employ other assets in the business was conferred upon the trustees by the authority to increase the capital of the business ; as they could have sold the real estate & used the proceeds in the business, they were not wrong in using the property itself to assist in carrying on the business ; & the mtge. of 1869 had priority over the mtge. of 1882.—*Re* DIMMOCK, DIMMOCK *v.* DIMMOCK (1885), 52 L. T. 494.

1911. —— ——.]—Machinery obtained by a co. under a hire-purchase agreement was fixed to its business premises. Subsequently the co. gave to a bank an equitable mtge. of its premises by deposit of deeds accompanied by written memoranda of charge. The bank had no notice of the hire-purchase agreement. On default in payment by the co. under the hire-purchase agreement the vendor of the machinery gave notice demanding the return of the machinery. A winding-up order was made against the co., & money was still owing to the bank under its memoranda of charge :—*Held :* the bank being an equitable mtgee. took subject to the hire-purchase agreement, the hire-purchase agreement created an equitable interest by which a subsequent purchaser who had not the legal estate was bound, & the interest of the bank under its mtge. was postponed to the interest of the vendors of the machinery under the hire-purchase agreement.—*Re* ALLEN (SAMUEL) & SONS, LTD., [1907] 1 Ch. 575 ; 76 L. J. Ch. 362 ; 96 L. T. 660 ; 14 Mans. 144.

Annotations :—**Apprvd.** *Re* Morrison, Jones & Taylor, Cookes *v.* Morrison, Jones & Taylor, [1914] 1 Ch. 50. **Refd.** Hamer *v.* London City & Midland Bank (1918), 87 L. J. K. B. 973. **Mentd.** Becker *v.* Riebold (1913), 30 T. L. R. 142.

1912. —— ——.]—Testator died in 1895, having by his will given his real estate to his son C., & to L. upon trust to sell & divide the proceeds among his four children, including C., each share being settled on trusts for a child for life, & afterwards for the children of that child. L. having died in Aug. 1904, from then till Jan. 1905, C. was the sole exor. & trustee of the will. In Sept. 1904, C. & another severally owed money to M. on promissory notes for £2,000 C. & M. in fraud of the rights of the beneficiaries under the will, M. having full notice of the breach of trust, arranged that the £2,000 should be further secured on part of the trust estate & to carry out the arrangement. C. on Sept. 29, 1904, executed & delivered to M. what purported to be a conveyance on sale of part of the land held in trust to M. in consideration of £2,000. The deed contained the usual receipt for the purchase-money but no part of the £2,000 was ever paid, it being arranged that the deed was to be held as security for the money due on the notes to the extent to which they should be dishonoured. In Apr. 1905, M. deposited the deed with B. & gave him a memorandum charging the land conveyed with £1,000 lent by B. who had no actual or constructive notice that any breach of trust had been committed or that the £2,000 had not been paid by M. & had not been guilty of any conduct which would have made his equity inferior to that of the beneficiaries :—*Held :* there was no contract of sale, & therefore no vendor's lien but an equity in the beneficiaries to have the property sold & the proceeds divided ; the beneficiaries were not estopped by the receipt from saying that the money had not been paid or that the real transaction was not a sale & purchase ; & the equities of the beneficiaries & B., being equal in every other respect the equity of the beneficiaries must prevail by reason of its priority in point of time.—CAPELL *v.* WINTER, [1907] 2 Ch. 376 ; 76 L. J. Ch. 496 ; 97 L. T. 207 ; 23 T. L. R. 618 ; 51 Sol. Jo. 570.

1913. —— ——.]—By an agreement in writing, dated Nov. 11, 1910, G. M. & co., Ltd., agreed to supply & erect upon the works owned by the firm of M., J. & co., the predecessors of deft. co., a complete installation of a patent automatic sprinkler for the protection of the premises from fire, at the price of £237, payable by annual instalments. In the event of default being made in any annual instalment, or of any breach of the agreement by the purchasers, the whole unpaid balance of principal & interest was immediately to become due. The agreement further provided that the basis of the contract was that the sprinkler installation remained the sole & exclusive property of the contractors until the whole sum of £237 had been paid, & in the event of default the contractors might enter upon the premises & remove the installation. Deft. co., was incorporated in 1911 & took over the assets & liabilities of the firm of M., J. & co., including their interest under the agreement. In Dec. 1911, deft. co., issued a series of first mtge. debentures containing a charge in the usual form on the undertaking, such charge to be a floating security. On Oct. 18, 1912, a receiver & manager was appointed in an action brought by the debenture-holders to enforce their security. On Oct. 21, the last instalment under the agreement fell due & was not paid. The debenture-holders had no notice of the agreement. On an application by G. M. & co., Ltd., for liberty to enter upon deft., co.'s premises & remove therefrom the sprinkler installation :—*Held :* the effect of the hire-purchase agreement was to confer upon applts. an interest in the land to which the sprinkler installation was affixed & to authorise them, in the events which had happened, to enter & remove it ; & the interest of the debenture-holders being also equitable the ordinary principles of priorities applied ; & that interest being subsequent in date was therefore postponed to the interest of applts.—*Re* MORRISON, JONES & TAYLOR, LTD., COOKES *v.* MORRISON, JONES & TAYLOR, LTD., [1914] 1 Ch. 50 ; 83 L. J. Ch. 129 ; 109 L. T. 722 ; 30 T. L. R. 59 ; 58 Sol. Jo. 80, C. A.

Annotation :—**Consd.** Hamer *v.* London City & Midland Bank (1918), 87 L. J. K. B. 973.

1914. —— —— **Unless circumstances cause postponement—Negligence or fraud.**]—BRADLEY *v.* RICHES, No. 2073, *post.*

1915. —— —— —— **Later incumbrancer with better equity.**]—BRADLEY *v.* RICHES, No. 2073, *post.*

1916. —— —— ——.]—TAYLOR *v.* LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. *v.* NIXON, No. 1830, *ante.*

1917. Priority as against purchaser with notice.]—Equitable mtge. by deposit of title deeds preferred to a purchase with notice.—HIERN *v.* MILL (1806), 13 Ves. 114 ; 33 E. R. 237.

Annotations :—**Refd.** Kennedy *v.* Green (1834), 3 My & K. 699 ; Dryden *v.* Frost (1838), 3 My. & Cr. 670 ; Jones *v.* Jones (1838), 8 Sim. 633 ; Jones *v.* Smith (1841), 1 Hare,

deeds—Whether priority given over registered deed.]—An equitable mtgee. by deposit of title-deeds, unaccompanied by any memorandum in writing, takes priority over a purchaser for value claiming under a subsequent registered deed, without notice of such deposit. —*Re* BURKE'S ESTATE, *Ex p.* BURKE (1881), 9 L. R. Ir. 24.—**IR.**

43; West *v.* Reid (1843), 2 Hare, 249; Hewitt *v.* Loosemore (1851), 9 Hare, 449. **Mentd.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1; Cockerell *v.* Dickens (1840), 2 Moo. Ind. App. 353; Fuller *v.* Benett (1843), 2 Hare, 394; Lang *v.* Purves (1862), 15 Moo. P. C. C. 389; Dresser *v.* Norwood (1863), 32 L. J. C. P. 201.

1918. Incumbrancer taking protection—Priority as against incumbrancer failing to take protection.]—FOSTER *v.* COCKERELL, No. 2095, *post*.

1919. Release of prior charge—Without knowledge of incumbrancer.]—(1) A. was entitled to a legacy, which was charged on real estates devised to D. A. by a deed, to which D. was a party, & which recited that it had been agreed that the legacy should remain on the security of the estate, assigned it to E. A. without the concurrence of E., afterwards released the charge upon the estate, & A. & D. together afterwards mortgaged the estates, first to C. & afterwards to pltf., a judgment creditor, who released his judgment:—*Held*: pltf. had priority over E.

(2) A mtge. was made, "subject to prior incumbrances":—*Held*: under the circumstances, a prior equitable charge was not included, it being unknown to the mtgee., & it not appearing to have been the intention of the mtgors. to include it.—GREENWOOD *v.* CHURCHILL (1843), 6 Beav. 314; 12 L. J. Ch. 400; 49 E. R. 846.

Annotation:—**Distd.** Jones *v.* Williams (1857), 24 Beav. 47.

1920. Three successive mortgages—Part of mortgage money in hands of third mortgagee—Right of second mortgagee to part thereof—After release of security induced by fraud.]—Where there are three successive mtgees., the first of whom has the legal estate & the third mtgee. joining with the mtgor. in making a fourth mtge. part of the mtge. money gets into the hands of the third mtge., there is no equity to entitle the second mtgee. to any part of that money; & although the second mtgee. has been induced by fraud to release his security, which release has afterwards been set aside, the fact of his having been so defrauded gives him no better right as against the third mtgee., who was a *bonâ fide* creditor of the mtgor. without notice of the fraud.—EYRE *v.* BURMESTER (1864), 4 De G. J. & Sm. 435; 4 New Rep. 385; 33 L. J. Ch. 652; 10 L. T. 673; 10 Jur. N. S. 687; 12 W. R. 993; 46 E. R. 987, L. C.; *previous proceedings* (1862), 10 H. L. Cas. 90, H. L.

1921. Priority as against beneficiary or cestui que trust.]—J. being about to mortgage an estate, upon which his younger brothers & sisters had charges, got them to join in the conveyance, & acknowledge the receipt of their portions, giving them an undertaking, that he would grant them a subsequent mtge., & enter into no prior security. He afterwards makes a subsequent mtge. to pltf. for money lent before on bond, & a fresh sum advanced: the claims of the younger children have priority in equity, & shall be preferred to pltf.'s mtge.—BECKETT *v.* CORDLEY (1784), 1 Bro. C. C. 353; 28 E. R. 1174.

Annotations:—**Apprvd.** *Re* Foot, *Ex p.* Cawthorne (1822), 1 Gl. & J. 240. **Consd.** Martinez *v.* Cooper (1826), 2 Russ. 198. **Dbtd.** Layard *v.* Maud (1867), 36 L. J. Ch. 669. **Reld.** Plumb *v.* Fluitt (1791), 2 Anst. 432; Evans *v.* Bicknell (1801), 6 Ves. 174; Jones *v.* Jones (1837), 8 Sim. 633; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482. **Mentd.** Cory *v.* Gerteken (1816), 2 Madd. 40; Leslie *v.* Sheill, [1914] 3 K. B. 607.

1922. ——.]—In 1805 C. agreed to sell a piece of land to W. in fee-simple, for a sum of £380. On investigating the title it was found that C. was only tenant for life, with remainder to his second son in tail. It was agreed, however, that the purchase-money should be paid to C. & W. took a bond from C., dated Jan. 1, 1806, whereby he was bound to W., in the penalty of £760, conditioned to be void if C. & his second son would, within three calendar months after the latter came of age, execute a proper conveyance to W. in fee. W. died in 1819, having by will devised all his residuary real & personal estate to deft., then a single woman. In 1820 deft. married B., & in 1836 B., acting as deft. alleged, without her knowledge, & under a misapprehension of his rights as her husband, obtained from C., & his second son G., who had then attained twenty-one, a conveyance to himself of the land in fee-simple On Oct. 18, 1858, B. deposited the title deeds of the estate with pltf. by way of equitable mtge. B. died in Dec. 1858. B. devised all his real & personal estate to deft. After his death she purchased a judgment which had been entered up & registered before Oct. 18, 1858:—*Held*: deft. was not entitled to any priority in respect of the judgment over pltf.'s security.—CHESSHYRE *v.* BISS (1860), 2 Giff. 287; 2 L. T. 404; 6 Jur. N. S. 596; 66 E. R. 120.

1923. ——.]—HARPHAM *v.* SHACKLOCK, No. 1892, *ante*.

1924. ——.]—Pltf. & W. were trustees under a settlement, & in 1877 W., who was a solr. in partnership with M., proposed to pltf. an investment of £1,000 of the trust money upon a mtge. of two houses of which M. was the lessee, & he concealed from pltf. the fact that he was interested in the houses. Pltf. accepted the investment, & the lease to M. was assigned by way of mtge. to W. & pltf., & the deeds of the mtged. property were left in the custody of W., who, with the approval of pltf., collected the rents, gave receipts, & paid the money to the *cestuis que trust*. This went on until 1890. Previously, in 1881, W. had allowed M. to get possession of the lease, & M. granted to deft. an underlease of one of the houses, receiving a premium of £750. The lease was shown by M. to deft.'s solr. to satisfy him that M. had power to grant the underlease, & the lease was then returned to W. Deft. entered into possession under the lease, & has remained in possession since. It was found as a fact that the premium of £750 went into the account of the firm of W. & M., & that W. was an active party to the fraud, which was discovered in 1890, when this firm became bkpt. W. retired from the trust & released & assigned his interest in the trust property to pltf., who brought this action against deft to recover possession of the house & mesne profits. The defence was that, as W., one of the persons in whom the legal estate was at the date of deft.'s purchase, had been a party to the fraud, the legal estate of W. & pltf. must be postponed to the equitable estate of deft. acquired from M.:—*Held*: as deft. was only an equitable incumbrancer, & as the equitable title of the *cestuis que trust* was prior in point of time, deft. had no equitable right, as against pltf., to his interest in the trust property, & there should therefore be judgment for pltf.—ISAAC *v.* WORSTENCROFT (1892), 67 L. T. 351; 56 J. P. 393; 8 T. L. R. 627.

1925. —— **Mortgagee without notice—Mortgage by executor—As beneficial owner.**]—EXOR., six years after the death of testator, surrendered a lease belonging to testator, & took a renewed lease, including additional property, & at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, & the mtgee. did not know that the borrower was an exor., or that he was not the beneficial owner of the lease. He did not, however, made any inquiry into the title. An action was afterwards, brought to administer testator's

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estate, & a consent order was made for the sale of the leasehold property, without prejudice to any right, the mtgee., giving up the lease to facilitate the sale. He claimed to be paid the amount due to him by the exor. out of the proceeds of sale:—*Held:* the lease was in equity part of testator's estate, & the equity of the estate being prior to the equity of the mtgee., must prevail against it.—*Re* MORGAN, PILLGREM *v.* PILLGREM (1881), 18 Ch. D. 93; 50 L. J. Ch. 834; 45 L. T. 183; 30 W. R. 223, C. A.

Annotations:—**Refd.** Graham *v.* Drummond, [1896] 1 Ch. 968; Jennings *v.* Mather, [1901] 1 K. B. 108. **Mentd.** *Re* Gorton, Dowse *v.* Gorton (1889), 60 L. T. 305.

1926. —— ——.]—Bankers take from a customer an equitable mtge. by deposit of title deeds The property comprised in the deeds is subject to a trust of which the bankers have no notice, & the deposit is made in breach of that trust. The trust must prevail against the bankers' lien.

A sum of £3,000 is paid to a person out of the Ct. of Ch. upon his undertaking to apply £2,000 of it in the purchase of a suitable house for himself & wife, which he is to convey to the trustees of his marriage settlement upon certain trusts, & to apply the remaining £1,000 in setting himself up in business. Upon the receipt of the £3,000 he pays the whole to his bankers. He afterwards draws out nearly the whole amount in various sums at various times. Amongst the drafts is one which he delivers in payment for the purchase of a house suitable for himself & wife. Having procured the house to be conveyed to himself in fee, he deposits the title deeds with his bankers as a security for advances without notice to the bankers of the trusts of the settlement. In considering the conflicting claims of the bankers & the trustees of the settlement with respect to the house it must be presumed that the purchase-money for the house was paid out of that portion of the £3,000 which was properly applicable to that purpose.—MANNINGFORD *v.* TOLEMAN (1845), 1 Coll. 670; 14 L. J. Ch. 160; 9 Jur. 438; 63 E. R. 591.

Annotations:—**Refd.** Stackhouse *v.* Jersey (1861), 1 John. & H. 721; Cory *v.* Eyre (1862), 1 De G. J. & Sm. 149. **Mentd.** Pennell *v.* Deffell (1853), 23 L. J. Ch. 116, n.

1927. —— ——.]—Trustee, a solr., used trust funds in purchasing an estate which was conveyed to his brother, & afterwards acted as solr. for his brother, the mtgee. in raising money on the estate by legal & afterwards by equitable mtges.:—*Held:* (1) the legal mtgee. had priority over the *cestuis que trust*, for the fraud of the solr. ran through the whole transaction, & prevented the imputation of notice; (2) the claim of the *cestuis que trust* was an equitable estate of the same quality as the estates of the equitable mtgees., & had priority over them as being prior in time.—CAVE *v.* CAVE (1880), 15 Ch. D. 639; 28 W. R. 798; *sub nom.* CHAPLIN *v.* CAVE, CAVE *v.* CAVE, 49 L. J. Ch. 505; 42 L. T. 730.

Annotations:—*As to* (1) **Refd.** Gordon *v.* James (1885), 53 L. T. 641. *As to* (2) **Refd.** Dixon *v.* Winch (1900), 82 L. T. 437. *Generally*, **Mentd.** Cloutte *v.* Storey, [1911] 1 Ch. 18.

1928. Priority as against co-owners of mortgagor—Sale under partition order—Division of proceeds.]—HECKLES *v.* HECKLES, [1892] W. N. 188.

Annotation:—**Dbtd.** Hill *v.* Hickin, [1897] 2 Ch. 579.

Land improvement charges.]—*See* LAND IMPROVEMENT, Vol. XXX., pp. 295, 296, Nos. 218–220.

Mortgagee with better right to call for legal estate.]—*See* Sub-sect. 2, C., *ante*.

B. Notice.

1929. Necessity to give notice—To legal mortgagee.]—A. mortgaged an estate first to B., secondly to C., & thirdly to D., by virtue of a power reserved to him by his marriage settlement. C. had no notice of the first mtge. D. had notice of the first, but not of the second; & he caused a notice of his mtge. to be indorsed on the settlement, which, together with the title deeds, was in the possession of B.:—*Held:* D. did not thereby gain priority over C.—JONES *v.* JONES (1838), 8 Sim 633; 7 L. J. Ch. 164; 2 Jur. 589; 59 E. R. 251.

Annotations:—**Apld.** Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377. **Distd.** Etty *v.* Bridges (1843), 2 Y. & C. Ch. Cas. 486. **Consd.** Wilmot *v.* Pike (1845), 5 Hare, 14. **Apld.** Rooper *v.* Harrison (1855), 2 K. & J. 86. **Distd.** West London Commercial Bank *v.* Reliance Permanent Bldg. Soc. (1884), 53 L. J. Ch. 860. **Refd.** *Re* Wight's Mortgage Trust (1873), 28 L. T. 491; Ward *v.* Duncombe, [1893] A. C. 369.

1930. —— ——.]—A first mtge. of real estate was made to A. in fee. A second mtge. was then made to B. of the same estate, together with other real estate, by a release & conveyance of the respective premises to C., as a trustee for B., with power of sale. B. afterwards advanced a further sum to the mtgor. on the security of the same estates, but gave no notice of the advance to A. or C. Subsequently C., after inquiry of A. whether he had notice of any incumbrance other than his own & that of which C. was a trustee for B., advanced a further sum to the mtgor. on the same security, & gave notice of his mtge. to A.:—*Held:* (1) the several mtges. took effect, with regard to the different estates, according to the order of time at which they were respectively created; & their priorities were not affected by the giving, or the omitting to give, notice to the party in whom the legal estate was vested: (2) the doctrine of notice, applicable in determining the priority of charges on choses in action, does not prevail as to equitable estates in land.—WILMOT *v.* PIKE (1845), 5 Hare, 14; 14 L. J. Ch. 469; 9 Jur. 839; 67 E. R. 808.

Annotations:—*As to* (2) **Apld.** Rooper *v.* Harrison (1855), 2 K. & J. 86. **Refd.** Arden *v.* Arden (1885), 29 Ch. D. 702; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. *Generally*, **Refd.** Ward *v.* Duncombe, [1893] A. C. 369.

1931. —— ——.]—First mtge. to W., with power of sale, & declaration of trust of residue of moneys arising from the sale, for the persons entitled to the equity of redemption. Second mtge. to R. Third mtge., without notice of the second, to H., who was W.'s solr., & as such had possession of the deeds. Afterwards, other incumbrances. Then W. died, having devised mtge. & trust estates to H., & appointed him & another exors. H. sold under the power, & conveyed the mtged. estate, paid off W.'s mtge. out of the purchase-money, & retained the balance. Subsequently H., for the first time, had notice of R.'s mtge.:—*Held:* (1) R.'s omission to give notice did not give priority either to H. or to a subsequent incumbrancer, who gave notice before R.; the estate, though subsequently converted, being real estate when the securities were executed; & to real estate the rule, as to notice giving priority, does not apply; (2) since R. was not bound to give notice, his motives for abstaining from giving notice were, in the absence of fraud, immaterial; the rule being that an equitable incumbrancer on real estate is not postponed by any absence of activity in asserting his rights, except such as amounts to participating in fraud, or to constructive fraud; (3) if before the sale H. had the legal estate in the premises (&, as to part,

semble, that he had), still, having since parted with it, his opportunity of using it as a *tabula in naufragio*, to protect his own charge, was gone; & H., having, as devisee of W., paid off W.'s mtge. held the surplus upon trust for the persons entitled to the equity of redemption; & though he might, before notice of R.'s mtge., have paid the surplus to other subsequent incumbrancers, he could not be heard to say he had appropriated it to himself.

A party getting the legal estate acquires no new right in equity in any way. But, equity, regarding all the persons who have incumbrances according to their priorities, considering that the equitable interests pass, first as the legal interest does, by the effect of the deeds, finds itself checked at times . . . by an incumbrancer saying "I have got the legal estate interposed; I insist it is mine at law & there must be a superior equity shown in order to deprive me of my legal estate." It is merely staying the hands of the ct., by resting on that legal estate which this ct. will not deal with, unless a superior equity can be shown (PAGE WOOD, V.-C.).—ROOPER *v.* HARRISON (1855), 2 K. & J. 86; 69 E. R. 704.

Annotations:—*As to* (1) **Apld.** Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139. **Refd.** Ward *v.* Duncombe, [1893] A. C. 369. *As to* (3) **Consd.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. *Generally*, **Refd.** R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420.

1932. —— To mortgagor.]—A solr. having in 1883 received from a client a sum of money for investment represented to the client that he had invested it on a specified mtge., whereas in fact the mtge. specified was one previously taken by the solr. in his own name. The solr. paid interest on the amount of the specified mtge. debt to the client down to the client's death in 1885, & to the client's exors. down to his own death in 1888. Shortly before his death, the solr. deposited the title deeds of the mtged. property with his own bankers to secure the overdraft of his account; & he died leaving his account overdrawn to an extent exceeding the value of the mtged. property. Immediately after the solr's death the bank gave notice to the mtgors. of the deposit of the deeds with them. At the date of the deposit the bank had no notice of any claim on behalf of the client, & their notice was prior in point of date to any notice given the exors. of the client:—*Held*: (1) the solr. was a trustee for his client of the mtge. specified, & there was no negligence on the part of the client, or of his exors. sufficient to deprive them of the prior equity; (2) the bank were not entitled to any priority by reason of their notice to the mtgors. being prior in point of time to that of the exors.—*Re* RICHARDS, HUMBER *v.* RICHARDS (1890), 45 Ch. D. 589; 59 L. J. Ch. 728; 63 L. T. 451; 39 W. R. 186.

Annotations:—*As to* (1) **Refd.** Hill *v.* Peters, [1918] 2 Ch. 273. *As to* (2) **Apld.** Hopkins *v.* Hemsworth, [1898] 2 Ch. 347.

1933. —— ——.]—An equitable sub-mtgee. by deposit made by a legal mtgee. of land has an equitable estate in land, & therefore, as between two such equitable sub-mtgees., the doctrine of obtaining priority by notice does not prevail. Thus the equitable sub-mtgee. who is later in time does not obtain priority over the earlier by being the first to give notice to the original mtgor.—HOPKINS *v.* HEMSWORTH, [1898] 2 Ch. 347; 67 L. J. Ch. 526; 78 L. T. 832; 47 W. R. 26; 42 Sol. Jo. 611.

1934. —— To building lessors of mortgagors.]—A co. held land under a building agreement from the corpn. of London, under which separate leases of the houses were to be granted as they were built. In Apr. 1883, the co. borrowed money from pltfs., & covenanted to mortgage the houses to them by demise when the leases were granted, & that in the meantime the premises comprised in the building agreement should be a security to pltfs. The building agreement was handed over to pltfs., but no notice of their security was given to the corpn. of London. In Feb. 1886, leases of two of the houses were granted to the co. & immediately afterwards the co. deposited them by way of equitable mtge. with B., J. & co., who had no notice of pltfs.' security:—*Held*: although the giving notice to the corpn. would probably have prevented the handing over the leases to the co., still, as notice is not requisite to complete a security on real estate, the omission to give such notice was not a neglect of duty by pltfs. on the ground of which they ought to be postponed to the subsequent equitable incumbrancers.—UNION BANK OF LONDON *v.* KENT (1888), 39 Ch. D. 238; 57 L. J. Ch. 1022; 59 L. T. 714; 37 W. R. 364; 4 T. L. R. 634, C. A.

Annotations:—**Apld.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Refd.** Taylor *v.* Russell, [1891] 1 Ch. 8.

1935. —— Priority of mortgages of personalty distinguished.]—Testator bequeathed a leasehold estate to trustees, upon trust as therein mentioned; &, first, he charged the estate with the payment of an annuity, to his daughter, during all his interest in the estate. The daughter afterwards mortgaged her annuity, first to A. & afterwards to B.; but B. gave the trustees notice of his mtge. before A. did:—*Held*: the annuity was not a chose in action, but a chattel interest; & B. had not gained any priority over A.—WILTSHIRE *v.* RABBITS (1844), 14 Sim. 76; 13 L. J. Ch. 284; 8 Jur. 769; 60 E. R. 285.

Annotations:—**Dbtd.** Consolidated Investment & Insce. *v.* Riley (1859), 1 Giff. 371. **Apld.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Refd.** Lee *v.* Howlett (1856), 2 K. & J. 531; Ward *v.* Duncombe, [1893] A. C. 369.

1936. —— ——.]—WILMOT *v.* PIKE, No. 1930, *ante*.

1937. —— ——.]—ROOPER *v.* HARRISON, No. 1931, *ante*.

1938. —— ——.]—UNION BANK OF LONDON *v.* KENT, No. 1934, *ante*.

1939. —— ——.]—*Re* RICHARDS, HUMBER *v.* RICHARDS, No. 1932, *ante*.

1940. —— ——.]—HOPKINS *v.* HEMSWORTH, No. 1933, *ante*.

1941. Motives for abstaining from giving notice—Immaterial—In absence of fraud.]—ROOPER *v.* HARRISON, No. 1931, *ante*.

C. Effect of Possession of Title Deeds.

See Sect. 13, sub-sect. 3, B. (*a*), *post*.

SUB-SECT. 4.—EFFECT OF REGISTRATION OF DEEDS.

A. Registration in Middlesex.

See Middlesex Registry Act, 1708 (c. 20); Land Registry (Middlesex Deeds) Act, 1891 (c. 64); Land Registry (Middlesex Deeds) Rules, 1892; Law of Property Act, 1925 (c. 20), ss. 11, 197; Land Charges Act, 1925 (c. 22), s. 18.

1942. Whether registration determines priority.]—Pltf. a judgment creditor upon an estate in Middlesex, prays to be let in upon it preferably to deft. a mtgee. of the same estate, on a suggestion he had notice of the judgment before the mtge. was executed. The judgment was entered on

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Mar. 12, 1733, but not registered till June 12, 1735; the mtge. was made on May 24, 1735, & registered on June 2, 1735. Decreed, so far as the bill seeks to postpone deft.'s mtge. it should be dismissed with costs.—HINE *v.* DODD (1741), 2 Atk. 275; 26 E. R. 569; *sub nom.* HINDS *v.* DODS, Barn. Ch. 258, L. C.

Annotations:—**Folld.** Benham *v.* Keane (1861), 1 John. & H. 685. **Reld.** Jolland *v.* Stainbridge (1797), 3 Ves. 478; Essex *v.* Baugh (1842), 6 Jur. 1030; Wormald *v.* Maitland (1865), 6 New Rep. 218; Rolland *v.* Hart (1871), 6 Ch. App. 678; Lee *v.* Clutton (1875), 45 L. J. Ch. 43. **Mentd.** Jones *v.* Smith (1841), 1 Hare, 43; West *v.* Reed (1843), 7 Jur. 147.

1943. ——.]—Deed of appointment of lands in a register county pursuant to a power in a former deed which was not registered, postponed to a mtge. made subsequent to it, & registered before it.—SCRAFTON *v.* QUINCEY (1752), 2 Ves. Sen. 413; 28 E. R. 264.

Annotation:—**Reld.** A.-G. *v.* Pickard (1838), 3 M. & W. 552.

1944. ——.]—Where premises had been sold under a decree:—*Held:* the lien of an incumbrancer was not transferred to the purchase-money, so as to be out of the Middlesex Registry Act, 1708 (c. 20); & he was therefore postponed to subsequent incumbrancers.

The priority of deft. was founded on a latent deed which ought to have been registered . . . & as the deed was within Middlesex Registry Act, 1708 (c. 20), was void against pltf. (*per* CUR.).—HENNAND *v.* MOORE, VERNON *v.* MOORE, MOORE *v.* MOORE (1759), 1 Eden. 327; 28 E. R. 710.

1945. ——.[—An unregistered equitable charge on the equity of redemption of a property in Middlesex postponed to a subsequent registered mtge. of it.—MOORE *v.* CULVERHOUSE (1860), 27 Beav. 639; 29 L. J. Ch. 419; 6 Jur. N. S. 115; 54 E. R. 254; *sub nom.* THORN *v.* CULVERHOUSE, 1 L. T. 386.

Annotations:—**Folld.** Neve *v.* Pennell, Hunt *v.* Neve (1863), 2 Hem. & M. 170. **Apld.** *Re* Wight's Mortgage Trust (1873), L. R. 16 Eq. 41.

1946. ——.]—NEVE *v.* PENNELL, HUNT *v.* NEVE, No. 1024, *ante*.

1947. —— **Prior charge not capable of registration—Agreement to execute mortgage.**]—An agreement to mortgage a Middlesex property does not come within Middlesex Registry Act, 1708 (c. 20), therefore, where the owner of property in that county had first mortgaged to A. & then agreed to mortgage to B., & had subsequently mortgaged to C. & C. had registered, & B. had not:—*Held:* C. had not obtained priority over B.—WRIGHT *v.* STANFIELD (1858), 27 Beav. 8; 28 L. J. Ch. 183; 32 L. T. O. S. 171; 5 Jur. N. S. 5; 54 E. R. 3.

Annotations:—**Distd.** Moore *v.* Culverhouse (1860), 29 L. J. Ch. 419. **N.F.** Neve *v.* Pennell, Hunt *v.* Neve (1863), 2 Hem. & M. 170; *Re* Wight's Mortgage Trust (1873), L. R. 16 Eq. 41.

1948. —— **In absence of actual notice or fraud—Title deeds not in possession of vendor—No inquiry by purchaser.**]—Pltfs., a firm of solrs., took an equitable charge, by a memorandum & deposit of title deeds, from their client A., upon certain premises in the county of Middlesex, which they omitted to register. A. subsequently sold the premises to deft., who duly registered the conveyance. Pltfs. filed a bill claiming priority for their charge, alleging that deft., when he took his conveyance, knew that the deeds were in the hands of pltfs., & made no inquiry:—*Held:* the facts alleged amounted only to constructive notice, & in order that an unregistered charge should have priority over a subsequent registered conveyance, it must be shown that the purchaser or his agent had actual notice of the prior charge.—LEE *v.* CLUTTON (1876), 46 L. J. Ch. 48; 35 L. T. 84; 24 W. R. 942, C. A.

1949. Effect of notice of prior incumbrance—Prior incumbrance unregistered.]—(1) Mtgee. held, notwithstanding a recital in the declaration of trust, to have obtained a security to the extent of the interest of mtgor. in the premises.

(2) Notice of an unregistered mtge. held to affect subsequent mtgees., who had registered.

(3) Notice to agent held to affect principals & no difference in this case by being owner of the estate.—SHELDON *v.* COX (1764), 2 Eden, 224; Amb. 624; 28 E. R. 884, L. C.

Annotations:—*As to* (2) **Reld.** Rolland *v.* Hart (1871), 6 Ch. App. 678. *As to* (3) **Reld.** Dryden *v.* Frost (1838), 3 My. & Cr. 670; Dresser *v.* Norwood (1863), 14 C. B. N. S. 574; Berwick *v.* Price, [1905] 1 Ch. 632.

1950. —— —— **Actual notice.**]—To affect a registered deed by notice of a prior unregistered deed, the policy of which has been much doubted, actual notice must be clearly proved, amounting to fraud.—WYATT *v.* BARWELL (1815), 19 Ves. 435; 34 E. R. 578.

Annotations:—**Reld.** Metcalfe *v.* York (Archbp.) (1833), 6 Sim. 224; Essex *v.* Baugh (1842), 6 Jur. 1030; Wormald *v.* Maitland (1865), 6 New Rep. 218; Chadwick *v.* Turner (1866), 1 Ch. App. 310; Natal Land, etc., Co. *v.* Good (1868), L. R. 2 P. C. 121; Rolland *v.* Hart (1871), 6 Ch. App. 678; Lee *v.* Clutton (1875), 45 L. J. Ch. 43; Cooper *v.* Vesey (1881), 45 L. T. 532.

1951. —— ——.]—Property in Middlesex was mortgaged to A., & afterwards to B., & subsequently to C., with notice of B.'s incumbrance. C. registered before B. & afterwards assigned to D., who had no notice of B.'s mtge.:—*Held:* the interests being equitable, D. had no priority over B.—FORD *v.* WHITE (1852), 16 Beav. 120; 51 E. R. 723.

Annotations:—**Distd.** Chadwick *v.* Turner (1866), 1 Ch. App. 310. **Consd.** *Re* Monolithic Building Co., Tacon *v.* The Co., [1915] 1 Ch. 643.

1952. —— ——.] — Judgments Act, 1838 (c. 110), does not repeal Middlesex Registry Act, 1708 (c. 20), but the two are to be read together; & a judgment registered in the Common Pleas is no charge against land in Middlesex until entered on the Middlesex register under Middlesex Registry Act, 1708 (c. 20). Therefore, where a judgment creditor, having notice of a prior judgment registered in the Common Pleas, but not in Middlesex, registered his judgment in Middlesex before the earlier judgment was so registered:—*Held:* he was entitled to priority. *Secus* as to a mtgee. having such notice.—BENHAM *v.* KEANE (1861), 3 De G. F. & J. 318; 31 L. J. Ch. 129; 5 L. T. 439; 8 Jur. N. S. 604; 10 W. R. 67; 45 E. R. 901, L. JJ.

Annotations:—**Apld.** Neve *v.* Flood (1864), 33 Beav. 666. **Reld.** Rolland *v.* Hart (1871), 6 Ch. App. 678; *Re* Wyatt, White *v.* Ellis, [1892] 1 Ch. 188; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231.

1953. —— ——.]—BRADLEY *v.* RICHES, No. 2073, *post*.

1954. —— ——.] — Middlesex Registry Act, 1708 (c. 20), was intended to prevent fraud by secret conveyance, &, consequently, if there has been notice, a subsequent incumbrancer who was first to register does not gain priority.

A married woman, who was equitably entitled for life for her separate use to property in Middlesex, charged her separate estate by an instrument, dated May 29, 1880, with the payment of a debt due from her husband. The property had been previously mortgaged by a deed, dated Apr. 8, 1880, which had not been registered. A receiver had been obtained by pltfs. in the action, who claimed under the deed of May 29:—*Held:* the

deed of Apr. 8 was entitled to priority, notwithstanding the want of registration, on the ground that the instrument of May 29 only operated upon what the married woman could honestly charge.—PUNCHARD *v.* TOMKINS (1882), 31 W. R. 286.

1955. —— —— Constructive notice.]—(1) Constructive notice of a prior unregistered incumbrance affecting lands in Middlesex is as effectual as actual notice.

Pltfs. were equitable mtgees., by deposit, of title deeds of lands in Middlesex, but the memorandum of deposit was not registered. Defts. were trustees of a settlement to whom the same lands had been subsequently conveyed by the husband, in consideration of marriage. Upon the occasion of the preparation of the marriage settlement no mention was made of the prior charge. Neither the trustees nor the wife's friends carried their investigation of the title far enough to discover that the title deeds were in the hands of pltfs. Defts. duly registered the assignment, & upon the death of the husband some years after, discovered the fact of the prior mtge.: —*Held:* the gross negligence of defts. at the time of the preparation of the marriage settlement was equivalent to notice to them of a prior adverse title.

(2) The equitable mtgee. held entitled to tack to his security advances made subsequently to the date & registration of the settlement, of which he had no notice at the time of such advances.—WORMALD *v.* MAITLAND (1865), 6 New Rep. 218; 35 L. J. Ch. 69; 12 L. T. 535; 13 W. R. 832.

Annotations:—As to (1) **N.F.** Agra Bank *v.* Barry (1874), L. R. 7 H. L. 135. **Refd.** Kettlewell *v.* Watson (1882), 30 W. R. 402.

1956. —— —— —— —.]—A solr. induced a client to advance money for A., on mtge. of lands in Middlesex, & soon afterwards induced a second client to advance money on mtge. of the same lands without informing him of the existence of the first mtge. The solr. afterwards left the country, & the holder of the second mtge. registered it before the first mtge. was registered:—*Held:* the holder of the second mtge. must be taken to have had, through the solr., notice of the first mtge., & could not by the prior registration obtain priority.—ROLLAND *v.* HART (1871), 6 Ch. App. 678; 40 L. J. Ch. 701; 25 L. T. 191; 19 W. R. 962, L. C.

Annotations:—**Consd.** Bradley *v.* Riches (1878), 9 Ch. D. 189. **Distd.** *Re* Southampton's Estate, Roper's Claim (1880), 50 L. J. Ch. 155. **Consd.** Berwick *v.* Price, [1905] 1 Ch. 632. **Refd.** Lee *v.* Clutton (1875), 45 L. J. Ch. 43; Cave *v.* Cave (1880), 15 Ch. D. 639.

1957. —— Prior incumbrance defectively registered.]—A subsequent incumbrancer, who at the time of taking his security has no notice of the prior incumbrance, may, by properly memorialising his security, though after notice, obtain priority over the prior incumbrancer, if the memorial of the security of the latter be defective.—ESSEX *v.* BAUGH (1842), 1 Y. & C. Ch. Cas. 629; 11 L. J. Ch. 374; 6 Jur. 1030; 62 E. R. 1013.

Compare No. 1965, *post.*

1958. Whether registration constitutes notice—To subsequent incumbrancers.] — BEDFORD *v.* BACKHOUSE (OR BACCHUS) (1730), 2 Eq. Cas. Abr. 615; Kel. W. 5; 22 E. R. 516, L. C.

Annotations:—**Folld.** Morecock *v.* Dickins (1768), Amb. 678. **Refd.** Simmons *v.* Pettit (1844), 2 L. T. O. S. 438.

1959. —— ——.] — WISEMAN & BENLEY *v.* WESTLAND, FISHER, BENSON, DAVIS & STANBRIDGE, No. 1511, *ante.*

1960. —— —— Having legal estate.]—Registration in Middlesex of an equitable mtge. is not presumptive notice of itself to a subsequent legal mtgee., so as to take from him his legal advantage. —MORECOCK *v.* DICKINS (1768), Amb. 678; 27 E. R. 440, L. C.

Annotations:—**Refd.** Mill *v.* Hill (1852), 3 H. L. Cas. 828; *Re* Russell Road Purchase-Moneys (1871), L. R. 12 Eq. 78; Manks *v.* Whiteley, [1912] 1 Ch. 735.

1961. —— —— ——.]—A legal estate to give priorities as between incumbrancers having equal equities is not of necessity such an estate as will enable the holder to bring ejectment.

A. having a legal term of ninety-nine years in a house, mortgaged it to B. by way of sub-lease, reserving a reversion of two days. He then made an equitable charge by a memorandum to C. He then assigned the term to D. to secure a further advance. D. had notice of B.'s incumbrance, but not of C.'s. C. registered in Middlesex, but D. did not search the register, & was therefore not affected by notice:—*Held:* the equities between C. & D. being equal, the reversion of two days which D. acquired by his assignment was a legal estate which entitled him to priority.—*Re* RUSSELL ROAD PURCHASE-MONEYS (1871), L. R. 12 Eq. 78; 40 L. J. Ch. 673; 23 L. T. 839; 19 W. R. 520.

1962. —— —— Without notice.]—The register of a mtge. will not by itself affect a subsequent incumbrance without notice.—CATOR *v.* COOLEY (1785), 1 Cox, Eq. Cas. 182; 29 E. R. 1119, L. C.

Annotation:—**Distd.** Simmons *v.* Pettit (1844), 8 Jur. 209.

See Law of Property Act, 1925 (c. 20), s. 197.

1963. Right to tack further advances—Notwithstanding intervening registered incumbrance—No notice at time of further advance.]—BEDFORD *v.* BACKHOUSE (OR BACCHUS) (1730), 2 Eq. Cas. Abr. 615; Kel. W. 5; 22 E. R. 516, L. C.

Annotations:—**Refd.** Morecock *v.* Dickins (1768), Amb. 678; Simmons *v.* Pettit (1844), 2 L. T. O. S. 438.

**1964. —— —— ——

Sect. 1.—Mortgages of land: Sub-sect. 4, B. & C.]

Q. B. 161; 62 L. J. Q. B. 213; 68 L. T. 66; 41 W. R. 291; 9 T. L. R. 120; 37 Sol. Jo. 99; 4 R. 171, C. A.

Annotation:—**Refd.** Whitbread *v.* Watt, [1901] 1 Ch. 911.

1967. —— —— Prior unregistered charge—Subsequent registered assignment for benefit of creditors.]—On Oct. 3, 1906, C. executed a legal mtge. of land situate in Yorkshire to a bank, & that mtge. was duly registered under Yorkshire Registries Act, 1884 (c. 54). C. had previously created an equitable charge on the land in favour of H. & W., but that charge was not registered until Oct. 5, 1907. On Aug. 30, 1907, C. executed a deed of assignment in common form of all his real & personal estate to a trustee for the benefit of his creditors generally, & that deed was registered on Sept. 11, 1907. There were other equitable mtges. which had been created by C. prior to 1907, but which had not been registered. In 1908 the bank sold the property comprised in their security, & after satisfying their claim had a balance in their hands. This balance was claimed by the trustee as against H. & W. on the ground that his deed, though later in date of execution than H. & W.'s charge, was prior to it in date of registration:—*Held:* (1) upon the construction of the deed, only such interest in the property as C. then possessed passed to his trustee, namely, the property subject to the equitable mtges. upon it, & therefore the question as to priority of registration did not arise; (2) therefore the claim of the trustee must be postponed to the claims of all the prior equitable mtgees. who established them, whether their mtges. were registered or not.—JONES *v.* BARKER, [1909] 1 Ch. 321; 78 L. J. Ch. 167; 100 L. T. 188.

1968. —— Effect of notice—Of prior unregistered charge.]—METCALFE *v.* YORK (ARCHBP.), No. 2535, *post.*

1969. —— —— What notice sufficient to postpone registered incumbrance—Suspicion of notice.]—To affect the duly registered title of a mtgee., a suspicion of notice to him of the existence of a title in some third person, which is prior to & conflicting with that of his mtgor., is not sufficient; the notice must be clear & distinct, amounting in fact to fraud.

S. died in 1854, seised of real estate in the East Riding. The person believed to be her heir-at-law entered into possession, obtained the deeds, mortgaged the property to pltf., & delivered the deeds to him. The mtge. was duly registered as 6 Ann. c. 62, required. Subsequently a will & codicil were discovered, which contained a devise of the property to certain of defts., who then asserted their right, whereupon pltf. filed this bill, claiming priority. The will & codicil were registered, but not until after the bill was filed:—*Held:* under 6 Ann. c. 62, the mtgee. was entitled to priority over the devisees.—CHADWICK *v.* TURNER (1866), 1 Ch. App. 310; 35 L. J. Ch. 349; 14 L. T. 86; 30 J. P. 484; 12 Jur. N. S. 239; 14 W. R. 491, L. JJ.

Annotations:—**Apld.** Lee *v.* Clutton (1875), 45 L. J. Ch. 43 **Refd.** *Re* Monolithic Building Co., Tacon *v.* The Co. [1915] 1 Ch. 643.

1970. —— —— —— Fraud.]—The expression "actual fraud" used in Yorkshire Registries Act, 1884 (c. 54), s. 14, means fraud in the ordinary popular acceptation of the term.

A. acted as solr. on behalf of B. in arranging that D. should deposit with a bank the deeds relating to a certain property in Yorkshire for the purpose of indemnifying B. against an overdraft at the bank. The deposit was made but not registered. Subsequently A. took from D. a mtge. by deed of the same property, & having registered such mtge., claimed priority against the mtge. by deposit to the prejudice to B.:—*Held:* if A.'s claim to priority were allowed he would be guilty of actual fraud towards B., & consequently he ought not to obtain such priority.—BATTISON *v.* HOBSON, [1896] 2 Ch. 403; 65 L. J. Ch. 695; 74 L. T. 689; *sub nom. Re* HOBSON, BALLISON *v.* HOBSON, 44 W. R. 615.

Annotation:—**Refd.** Manks *v.* Whiteley, [1912] 1 Ch. 735.

1971. —— Mortgage of interest in proceeds of sale.]—A mtge. of an interest in the proceeds of sale under an imperative trust for sale of land in Yorkshire is not registrable under Yorkshire Registries Act, 1884 (c. 54), & consequently the priorities of successive mtges. are determined by the dates of notices to the trustees.

By a settlement of Sept. 9, 1885, freehold land in Yorkshire was conveyed to trustees upon trust to sell the same & hold the proceeds of sale upon trust for B. for life & after her death for C. absolutely. The settlement contained a power to postpone the sale, a trust in the meantime to hold the property upon such trusts as should correspond with the trusts thereinbefore declared concerning the trust funds, & a power to manage the real estate. The settlement was registered in Yorkshire. In 1892 C. borrowed money on mtge. of her reversion; the mtgees. gave notice of their mtge. to the trustees of the settlement, but did not register it under the Yorkshire Registries Act, 1884 (c. 54). In 1895 C. borrowed a further sum on the security of the land, which was still undisposed of. This mtge. & a transfer thereof to L. were registered at Wakefield:—*Held:* the trust for sale was imperative, & effected an immediate conversion of the realty into personalty & mtges. of proceeds of sale under an imperative trust for sale did not require registration, & the mtge. of 1892 had priority over that of 1895.—GRESHAM LIFE ASSURANCE SOCIETY *v.* CROWTHER, [1915] 1 Ch. 214; 84 L. J. Ch. 312; 111 L. T. 887; 59 Sol. Jo. 103, C. A.

1972. Whether registration amounts to notice.]—WRIGHTSON *v.* HUDSON (1737), 2 Eq. Cas. Abr. 609; 22 E. R. 511.

Annotation:—**Refd.** Simmons *v.* Pettit (1844), 2 L. T. O. S. 438.

See, now, Yorkshire Registries Act, 1884 (c. 54), s. 16, & Law of Property Act, 1925 (c. 20), s. 197.

1973. Right to tack further advances—Against subsequent registered incumbrancer—No notice of such incumbrance.]—WRIGHTSON *v.* HUDSON (1737), 2 Eq. Cas. Abr. 609; 22 E. R. 511.

Annotation:—**Refd.** Simmons *v.* Pettit (1844), 2 L. T. O. S. 438.

1974. —— —— Subsequent incumbrancer without notice of further advance—Where further advance not registered.]—A further charge in favour of the first mtgee. of land in the West Riding of Yorkshire requires registration, & in the absence of registration will be postponed to a subsequent registered mortgage taken without notice of the further charge; & notice of the first mtge. does not impose on the subsequent incumbrancer the duty of making inquiry of the first mtgee., & so affect him with notice of the further charge.—CREDLAND *v.* POTTER (1874), 10 Ch. App. 8; 44 L. J. Ch. 169; 31 L. T. 522; 39 J. P. 73; 23 W. R. 36, L. C. & L. JJ.

Annotations:—**Distd.** Rodger *v.* Harrison, [1893] 1 Q. B. 161. **Apprvd.** Fullerton *v.* Provincial Bank of Ireland, [1903] A. C. 309. **Refd.** Kettlewell *v.* Watson (1882), 21 Ch. D. 685; Kinnaird *v.* Trollope (1889), 42 Ch. D. 610; *Re* Calcott & Elvin's Contract, [1898] 2 Ch. 460. **Mentd.** Carlton Main Colliery Co. *v.* Clawley, [1917] 2 K. B. 691.

1975. —— —— —— What amounts to notice of further advance.]—CREDLAND *v.* POTTER, No. 1974, *ante*.

See, now, Yorkshire Registries Acts, 1884 (c. 54), 1885 (c. 26).

1976. Search as from certain date—Notice of incumbrances prior thereto—Whether imputed.]—Where it appears that an incumbrancer on an estate in Yorkshire searched the register from a certain date only, it will not be presumed that he had notice of any of the contents prior to that date.—HODGSON *v.* DEAN (1825), 2 Sim. & St. 221; 3 L. J. O. S. Ch. 95; 57 E. R. 330; *affd.*, 3 L. J. O. S. Ch. p. 99, L. C.

Annotations:—**Refd.** West *v.* Reid (1843), 12 L. J. Ch. 245; Procter *v.* Cooper (1855), 3 Eq. Rep. 364; Manks *v.* Whiteley, [1912] 1 Ch. 735. **Mentd.** Castellain *v.* Blumenthal (1841), 12 Sim. 47.

C. Registration in Ireland, Scotland and the Dominions.

1977. Registration in Ireland—Equitable mortgage unregistered—Subsequent registered legal mortgage.]—The non-production, in Ireland, of title deeds to the solr. instructed to prepare a mtge. upon an estate there, will not of itself be deemed a proof that the solr. has acted fraudulently, or even negligently, so as to affect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case.

Where, therefore, the owner of an estate in Ireland had already created an equitable mtge. upon it by depositing the title deeds with a creditor, which equitable mtge. was not registered, &, afterwards, on being asked for them by a solr. who was about to prepare, for another creditor, a legal mtge. of the same estate, gave an excuse for their non-production, which, under the circumstances, appeared quite satisfactory, & also supplied in his own handwriting a summary statement of their contents; & the solr., in total ignorance of the equitable mtge., & of all that had been previously done, prepared the legal mtge., which was duly registered:—*Held*: the legal mtge. had priority over the equitable mtge., & was not assailable on the ground that the solr. had improperly acted in preparing it without insisting on the production of the deeds.

It is inconsistent with the policy of the Irish Registration Law to impose on a mtgee., or

PART XII. SECT. 1, SUB-SECT. 4.—C.

n. *Action on covenant—While foreclosure suit pending.*]—Upon an originating summons issued by a mtgee. under Ord. 55, r. 7, there is no jurisdiction to make a personal order for payment of the mtge. debt, & therefore if the mtgee., pending such proceedings, brings an action in the K. B. Div. on the covenant for payment in the mtge. deed, such action will not be stayed.—BRADSHAW *v.* M'MULLAN, [1915] 2 I. R. 187.—**IR.**

o. *Whether registration amounts to notice.*]—CAMPBELL *v.* JOSEPHSON (1862), 1 N. S. W. S. C. R. (Eq.) 35.—**AUS.**

p. ——.]—D. knowing that the title deeds of A. were in C.'s hands, but not that they were held as a security, & without inquiry of C., subsequently made advances to A., & took a legal mtge. of the land comprised in the deeds, which mtge. was duly registered:—*Held*: D.'s registration did not give him priority over C.—WHITE *v.* HUNTER (1868), 5 W. W. & A'B. 178.—**AUS.**

q. ——.]—JONES *v.* COLLINS (1891), 12 N. S. W. L. R. (L.) 247; 8 N. S. W. W. N. 71.—**AUS.**

r. ——.]—A. sold certain lots of an estate by auction to B., & subsequently mtged. the whole estate to C., who knew that certain unspecified portions of the estate had been sold:—*Held*: according to Colonial Acts (7 Vict. No. 16, ss. 11, 22, & 22 Vict. No. 1, s. 18) C. gained no priority from registration, but took subject to B.'s purchase.—SYDNEY & SUBURBAN MUTUAL BUILDING & LAND INVESTMENT ASSOCN., LTD. *v.* LYONS, [1894] A. C. 260, P. C.—**AUS.**

t. ——.]—BUTLER *v.* FAIRCLOUGH, [1917] V. L. R. 175.—**AUS.**

s. ——.]—*Registration is not notice* in this country.—STREET *v.* COMMERCIAL BANK (1844), 1 Gr. 169.—**CAN.**

b. ——.]—MACKECHNIE *v.* MACKECHNIE (1858), 7 Gr. 23.—**CAN.**

c. ——.]—FERGUSON *v.* KILTY (1863), 10 Gr. 102.—**CAN.**

d. ——.]—Where a person executed a mtge. & had it registered, but did not for some time give it to the mtgee. & it was afterwards sold to a third person, who was not aware of the facts, it was held entitled to priority over another mtge. previously executed, but not registered till after the other security had been registered, though before it had been delivered to the mtgee.—MUIR *v.* DUNNET (1864), 11 Gr. 85.—**CAN.**

e. —— .]—FOSTER *v.* BEALL (1868), 15 Gr. 244.—**CAN.**

f. ——.]—DUNLOP *v.* TOWNSHIP OF YORK (1869), 16 Gr. 216.—**CAN.**

g. —— .]—FIELDING *v.* ACKERLY (1872), 8 N. S. R. (2 G. & O.) 526.—**CAN.**

h. —— .]—HARTY *v.* APPLEBY (1872), 19 Gr. 205.—**CAN.**

k. —— .]—COGSWELL *v.* GRAHAM (*circa* 1872), R. E. D. 30.—**CAN.**

l. ——.]—TRUST & LOAN CO. *v.* GALLAGHER (1879), 8 P. R. 97.—**CAN.**

m. ——.]—Several parcels of land were embraced in one mtge. Subsequently the mtgor. further mtged. some of them to pltfs. with the usual mtgor.'s covenants. He afterwards conveyed another parcel to S., who, when he took his conveyance, was not aware of pltfs.' mtge., but it was registered against the parcels embraced in it, though not against the other parcels:—*Held*: the registration of the prior mtge. against the parcel bought by S. was notice to him of the right of persons who purchased other parcels before he purchased, to throw the mtge. upon his parcel, & S. was affected with notice of pltfs.' mtge., & the right it conferred.—CLARK *v.* BOGART (1880), 27 Gr. 450.—**CAN.**

aa. ——.]—MCDOUGALL *v.* CAMPBELL (1881), 6 S. C. R. 502.—**CAN.**

bb. ——.]—BRIDGES *v.* REAL ESTATE LOAN & DEBENTURE CO. (1885), 8 O. R. 493.—**CAN.**

cc. ——.]—*Re* HIME & LEDLEY (1889), 13 P. R. 1.—**CAN.**

dd. ——.]—MILLER *v.* DUGGAN (1892), 21 S. C. R. 33.—**CAN.**

ee. ——.]—*Re* REED *v.* WILSON (1893), 23 O. R. 552.—**CAN.**

ff. —— .]—PIERCE *v.* CANADA PERMANENT LOAN & SAVINGS CO. (1894), 25 O. R. 671; *affd.*, 23 A. R. 516.—**CAN.**

—.]—MCMILLAN *v.* MCMILLAN (1894), 21 A. R. 343.—**CAN.**

hh. ——.]—The policy of B. C. Land Registry Act is to free the purchaser of a registered title from the imputation of constructive notice, & in the absence of express notice such a purchaser of lands for valuable consideration will under sect. 35, have priority over a prior unregistered charge, notwithstanding that he knew that the title deeds were in the possession of persons other than the vendor & abstained from inquiry. To take such a purchaser out of the protection of sect. 35, he must be guilty of conduct equivalent to fraud, & as fraud is never presumed, it will not be imputed by inference, or in the absence of proof of express notice of the facts, the knowledge of which constitutes the fraud.—HUDSON'S BAY CO. *v.* KEARNS & ROWLING (1896), 4 B. C. R. 536.—**CAN.**

kk. ——.]—YORKSHIRE GUARANTEE & SECURITIES CORPN. *v.* E (1900), 7 B. C. R. 348.—**CAN.**

ll. —— .]—SAWYER-MASSEY CO. *v.* WADDELL (1904), 6 Terr. L. R. 45.—**CAN.**

mm. —— .]—Where a mtge. had been registered as to some of the lands, comprised therein, but remained unregistered as to one parcel, owing to the non-production of the certificate of title:—*Held*: a subsequent mtge. of the remaining parcel was entitled to priority of registration when the duplicate certificate was sent to the registrar at the instance of the subsequent mtgee., & he made the first request for registration after its receipt by the registrar.—*Re* GREENSHIELDS CO. (Alta.) (1905), 2 W. L. R. 421.—**CAN.**

nn. ——.]—*Re* AMERICAN-ABELL ENGINE & THRESHER CO. & NOBLE (N. W. T.) (1906) 3 W. L. R. 324.—**CAN.**

oo. ——.]—INDEPENDENT LUMBER CO. *v.* GARDINER (1910), 3 Sask. L. R. 140; 13 W. L. R. 548.—**CAN.**

pp. ——.]—Under Land Titles Act, ss. 73 & 81, priority of registration gives priority of interest.—GILBERT *v.* ULLERICH (1911), 16 W. L. R. 490; 4 Sask. L. R. 56.—**CAN.**

qq. ——.]—SIEMEN *re* DIRKS (1913), 25 W. L. R. 633; 5 W. W. R. 252; 14 D. L. R. 149; 23 Man. L. R. 581.—**CAN.**

rr. ——.]—COAST LUMBER CO., LTD. *v.* MCLEOD (1914), 29 W. L. R. 357; 7 W. W. R. 113; 20 D. L. R. 343.—**CAN.**

tt. ——.]—MULLER *v.* SCHWALBE (1914), 30 W. L. R. 472; 7 W. W. R. 817; 19 D. L. R. 19.—**CAN.**

aaa. ——.]—JOHN MACDONALD & CO. *v.* TEW (1915), 7 O. W. N. 325; 32 O. L. R. 262.—**CAN.**

bbb. ——.]—UNION BANK OF

Sect. 1.—*Mortgages of land: Sub-sect.* 4, *C.; sect.* 5. *Sect.* 2: *Sub-sects.* 1 *&* 2, *A., B., C., D. & E.; sub-sects.* 3, 4 *&* 5. *Sects.* 3, 4, 5 *&* 6.]

purchaser, the duty of inquiry with a view to the discovery of previous unregistered interests, but quite consistent with it, if he knows of the existence of those interests, to estop him from contending that, as to him, they are void merely because they are unregistered.—AGRA BANK, LTD. *v.* BARRY (1874), L. R. 7 H. L. 135, H. L.

Annotations :—**Apld.** Lee *v.* Clutton (1876), 46 L. J. Ch. 48. **Consd.** Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482; Garnham *v.* Skipper (1885), 53 L. T. 940. **Refd.** Bradley *v.* Riches (1878), 38 L. T. 810; Kettlewell *v.* Watson (1884), 26 Ch. D. 501; Manners *v.* Mew (1885), 29 Ch. D. 725; Oliver *v.* Hinton, [1899] 2 Ch. 264. **Mentd.** *Re* Mackay, Mackay *v.* Gould, [1906] 1 Ch. 25.

1978. —— Duty of mortgagee to inquire as to previous unregistered interests.]—AGRA BANK, LTD. *v.* BARRY, No. 1977, *ante*.

——.]—*See, also*, cases *infra*.

Scotland & Dominions.]—*See* cases *infra*.

SUB-SECT. 5.—WHERE TITLE TO LAND REGISTERED.

See Land Registration Act, 1925 (c. 21), ss. 29, 106, 147; Land Registration Rules, 1925, rr. 139–166.

1979. Order for foreclosure absolute—Not transfer for valuable consideration.]—*Re* DE LEEUW, JAKENS *v.* CENTRAL ADVANCE & DISCOUNT CORPN., No. 2009, *post*.

SECT. 2.—MORTGAGES OF PERSONALTY.

SUB-SECT. 1.—NOTICE.

See CHOSES IN ACTION, Vol. VIII., pp. 468 *et seq.*; COMPANIES, Vols. IX., X., pp. 344, 769, Nos. 2177–2179, 4808; INSURANCE, Vol. XXIX., pp. 376–378, Nos. 3012–3016, 3030.

SUB-SECT. 2.—REGISTRATION.

A. Under Registry Acts.

See, now, Land Charges Act, 1925 (c. 22), s. 18.

1980. Whether registration gives priority—Assignment of legacy charged on realty.] — An assignment of a legacy charged upon land is an assignment of money only, & does not affect the land within the meaning of Registry Acts. The registration of such an assignment, therefore, does not postpone a prior unregistered assignment of the same legacy.—MALCOLM *v.* CHARLESWORTH (1836), 1 Keen, 63; Donnelly, 20; 48 E. R. 230; *sub nom.* WILKINSON *v.* CHARLESWORTH, 5 L. J. Ch. 172.

Annotations :—**Apld.** Arden *v.* Arden (1885), 29 Ch. D. 702. **Apprvd.** Gresham Life Assce. Soc. *v.* Crowther, [1915] 1 Ch. 214.

1981. —— Incumbrance on land held in trust for sale.]—Land held in trust for sale is not land within Middlesex Registration Act, 1708 (c. 20), so that incumbrancers on an interest in land subject to such a trust acquire no priority by registration.—ARDEN *v.* ARDEN (1885), 29 Ch. D. 702; 54 L. J. Ch. 655; 52 L. T. 610; 33 W. R. 593.

Annotations :—**Apprvd.** Gresham Life Assce. Soc. *v.* Crowther, [1915] 1 Ch. 214. **Refd.** *Re* Anglesey, De Galve *v.* Gardner, [1903] 2 Ch. 727; *Re* Dallas, [1904] 2 Ch. 385; Ipswich Permanent Money Club *v.* Arthy [1920] 2 Ch. 257.

Mortgage of interest in proceeds of sale of land.]—*See* No. 1971, *ante*.

B. Under Shipping Acts.

See SHIPPING.

C. Under Companies Acts.

See COMPANIES, Vol. X., pp. 786 *et seq.*

D. Judgments.

See EXECUTION, Vol. XXI., pp. 566 *et seq.*; EXECUTORS, Vol. XXIII., pp. 353, 354; JUDGMENTS, Vol. XXX., p. 171.

E. Patents.

See Patents & Designs Acts, 1907 (c. 29), s. 71, & 1919 (c. 80), s. 16, & *generally*, PATENTS.

SUB-SECT. 3.—STOP ORDERS ON FUNDS IN COURT.

See CHOSES IN ACTION, Vol. VIII., pp. 474–477, Nos. 442–462; EXECUTION, Vol. XXI., pp. 661–662, Nos. 2412–2419.

CANADA *v.* TAYLOR (1915), 8 O. W. N. 72; 33 O. L. R. 255.—**CAN.**

p. ——.] — UNION BANK OF CANADA *v.* LUMSDEN MILLING CO. (1915), 31 W. L. R. 801; 8 W. W. R. 1167; 23 D. L. R. 460.—**CAN.**

q. ——.] — Neither in England nor in Ireland has mere registration been held to amount to notice to subsequent mtgees. or purchasers.—LAKSHMAN-DAS SARUPCHAND *v.* DAS-RAT (1880), I. L. R. 6 Bom. 168.—**IND.**

r. ——.] — TILAKDHARI LAL *v.* KHEDAN LAL (1920), L. R. 47 Ind. App. 239.—**IND.**

t. ——.] — BUSHELL *v.* BUSHELL (1803), 1 Sch. & Lef. 90.—**IR.**

a. ——.]—Registry is not notice.—UNDERWOOD *v.* COURTOWN (LORD) (1804), 2 Sch. & Lef. 41.—**IR.**

b. ——.]—DREW *v.* NORBURY (EARL) (1846), 3 Jo. & Lat. 267.—**IR.**

c. ——.]—A registered mtge. takes priority of a previous equitable mtge. created by parol on the deposit of the instrument, of which the owner of the registered mtge. had not express notice.—*Re* M'KINNEY'S ESTATE (1872), 6 I. R. Eq. 445.—**IR.**

d. ——.]—FULLERTON *v.* PROVINCIAL BANK OF IRELAND, [1903] A. C. 309.—**IR.**

e. ——.]—*Re* GREER, GREER *v.* GREER, [1907] 1 I. R. 57.—**IR.**

f. ——.]—In the absence of registration there can be no valid equitable mtge., by deposit of title deeds, & the holder of such mtge. acquires no priority over the unsecured creditors of the mtgor.—MUNRO *v.* DIDCOTT (1910), 80 L. J. P. C. 65.—**S. AF.**

g. *Statutory mortgage — Effect of when unregistered.*]—MATHIESON *v.* MERCANTILE FINANCE & AGENCY CO., LTD. (1891), 17 V. L. R. 271.—**AUS.**

h. *Who may be registered as sole owner—Purchaser of equity of redemption.*]—The purchaser of the equity of redemption in fee is entitled to be registered in the "Register of Absolute Fees," as the sole owner of the "absolute fee" under Land Registry Ordinance, 1870, s. 19.—*Re* LAND REGISTRY ORDINANCE, 1870, *Re* DOUGLAS (1876), 1 B. C. R., pt. 1, 84.—**CAN.**

k. *Unregistered mortgages—Effect of —Under Land Titles Act.*]—A mtge. of land under Land Titles Act, immediately upon its execution, constitutes an effective security as binding as between the parties as if registered.—HORNE *v.* GALT (1908), 1 Alta. L. R. 392.—**CAN.**

l. —— *Mortgagees without notice of breach of trust—Whether registration allowed subsequent to notice.*]—GREAT WEST PERMANENT LOAN CO. *v.* FRIESEN, [1925] A. C. 208.—**CAN.**

m. *Caveat — Registration of — Whether amounting to registration of mortgage.*]—REEVES & CO. INCORPORATED *v.* STEAD (1913), 25 W. L. R. 37; 4 W. W. R. 1353; 13 D. L. R. 422.—**CAN.**

n. —— *When filing allowed.*]—A mtgee. can file a caveat only for the temporary purpose of having his mtge. completed in a registerable form.—*Re* LAND TITLES ACT, UNION SUPPLY CO.'S CASE, [1918] 2 W. W. R. 305; 11 Sask. L. R. 157.—**CAN.**

o. —— *Mortgagee taking with knowledge of — Effect.*] — A mtgee., although at the time of taking his mtge. having knowledge of a prior claim, then protected by caveat, against the land, but not being guilty of fraud, was held, under Land Titles Act, R. S. S., 1909, c. 41, s. 162, entitled to hold his mtge. clear of such claim upon the lapse of the caveat.—BOULTER-WAUGH & CO., LTD. *v.* UNION BANK OF CANADA (Sask.), [1919] 1 W. W. R. 1046.—**CAN.**

SUB-SECT. 4.—SERVICE OF DISTRINGAS.

1982. As between two mortgagees—Impossibility of giving notice—Second mortgagee serving writ.]—A. for valuable consideration takes a security upon a reversionary sum of stock at a time when, by reason of the death of the person in whose name the stock stood without legal representatives, no notice of the incumbrance could be given to the trustee of the fund. A., however, does not attempt, by *distringas* or otherwise, to perfect the security. Afterwards B., for valuable consideration & without notice of A.'s incumbrance, takes a security upon the same fund, & at the same time serves a writ of *distringas* on the Bank of England. B.'s security has priority over that of A.—ETTY *v.* BRIDGES (1843), 2 Y. & C. Ch. Cas. 486; 12 L. J. Ch. 474; 7 Jur. 936; 63 E. R. 218.

Annotations:—**Distd.** Brearcliff *v.* Dorrington (1850), 4 De G. & Sm. 122. **Refd.** *Re* Sketchley, *Ex p.* Boulton (1857), 1 De G. & J. 163; Case *v.* James (1861), 3 De G. F. & J. 256; Ward *v.* Duncombe, [1893] A. C. 369.

1983. As between mortgagee & cestui que trust—Trustee mortgaging share in trust fund—Mortgagee placing distringas on mortgaged share—Fraudulent sale of remainder by trustee.]—A trustee of a sum of stock, having also a beneficial interest in an undivided moiety of the fund, assigned his moiety, by way of mtge.; & the mtgee. caused a *distringas* to be placed on a moiety of the fund. Afterwards the trustee fraudulently sold out the other moiety, & absconded:—*Held*: the moiety upon which the *distringas* had been placed, being at the time of the assignment subject to the equitable rights of pltf., the *cestui que trust* was not relieved from such equity by the application of the *distringas*, & pltf. was entitled to the same as against deft., the mtgee.; but considering that it was by his diligence that the fund was preserved, the mtgee. was not compelled to pay the costs of the suit.—WILKINS *v.* SIBLEY (1863), 4 Giff. 442; 8 L. T. 760; 9 Jur. N. S. 888; 11 W. R. 897; 66 E. R. 780.

1984. Alternative remedy to obtaining transfer of fund into court—Or indorsement on original deed.]—PHIPPS *v.* LOVEGROVE, PROSSER *v.* PHIPPS, No. 1854, *ante*.

SUB-SECT. 5.—CHARGING ORDERS.

See EXECUTION, Vol. XXI., pp. 656 *et seq.*

SECT. 3.—COMPANY DEBENTURES.

See COMPANIES, Vol. X., pp. 768–771, 786–791, 1178–1193, 1221, Nos. 4803–4825, 4918–4970, 8360–8465, 8634.

SECT. 4.—AS AGAINST EXECUTION CREDITORS.

Under writ of elegit.]—*See* EXECUTION, Vol. XXI., pp. 562, 563, Nos. 1389–1397.

Under writ of sequestration.]—*See* EXECUTION, Vol. XXI., p. 603, Nos. 1901–1904.

Stop orders.]—*See* EXECUTION, Vol. XXI., pp. 661, 662, Nos. [illegible].

Equitable execution.]—*See* EXECUTION, Vol. XXI., pp. 673, 674, Nos. 2528–2535.

Equitable mortgagee has priority of execution creditor.]—*See* INTERPLEADER, Vol. XXIX., p. 454, No. 31.

SECT. 5.—AS AGAINST JUDGMENT CREDITORS.

See, generally, JUDGMENTS, Vol. XXX., pp. 155, 156, Nos. 266–275.

Mortgage by statutory company.]—*See* COMPANIES, Vol. X., p. 1221, No. 8634.

SECT. 6.—IN RELATION TO EXECUTORS.

1985. Legacy has priority over mortgage.]—Testator devised his real estate, charged with the payment of his debts & legacies, to his eldest son in fee, & appointed him exor. Nine years after testator's death, the devisee, being then in possession, mortgaged the estate, & covenanted against all incumbrances except the legacies. In a suit subsequently instituted by one of the legatees for payment of his legacy, the estate was sold, & the proceeds proved insufficient to satisfy testator's unpaid debts & legacies, together with the mtge. money:—*Held*: the mtgee.'s title was complete, subject only to the amount of the legacies; &, therefore, after reserving the amount of the legacies, the mtgee. was entitled to the residue of the fund as a security for his debt, & the amount so reserved was assets of testator unadministered, & was, therefore, to be applied, first in satisfaction of his debts, & then, so far as it would extend, in payment of his legacies.—ELAND *v.* ELAND (1839), 4 My. & Cr. 420; 8 L. J. Ch. 289; 3 Jur. 474; 41 E. R. 162, L. C.

Annotations:—**Apld.** Lyon *v.* Colville (1844), 1 Coll. 449. **Consd.** Howard *v.* Chaffer, Howard *v.* Robinson (1863), 32 L. J. Ch. 686. **Refd.** Beavan *v.* Oxford (1856), 6 De G. M. & G. 507. **Mentd.** Page *v.* Adam (1841), 4 Beav. 269; Forbes *v.* Peacock (1816), 1 Ph. 717.

1986. ——.]—If there are general gifts of legacies, & then of the rest & residue, real & personal, blending the whole in one mass, though accompanied by a power to the legatee of the residue, "to dispose of the same in any manner he may think proper," the legacies are a charge on the realty.

Testator gave a legacy, which, if not received, was to form "part of the residue of my property." Then followed a legacy to B.; but if the legatee should die before time for payment, it was to be considered "as part of the residue of my property, & to go & merge in the same." After some small legacies, his will concluded, "All the rest, residue, & remainder of any property I may die possessed of, whether estates, freeholds, etc., etc., bonds, bills, etc., annuities, etc., I devise & bequeath to my son, in the fullest manner I can, with liberty to him to dispose of the same in any manner he may think proper." The son was named as one of the exors., but did not act as such. The will was proved by the other exor. The son mortgaged the real estates:—*Held*: the legacy to B. was a charge on the real estates, & on a sale of them in the Incumbered Estates Ct., took precedure over the mtges., notwithstanding the general power to the devisee to dispose of the estates in any manner he thought proper.—GREVILLE *v.* BROWNE (1859), 7 H. L. Cas. 689; 34 L. T. O. S. 8; 5 Jur. N. S. 849; 7 W. R. 673; 11 E. R. 275, H. L.

Annotations:—**Apld.** *Re* Smith, Smith *v.* Smith, [1899] 1 Ch. 365. **Refd.** Elliott *v.* Dearsley (1880), 16 Ch. D. 322; *Re* Grainger, Dawson *v.* Higgins, [1900] 2 Ch. 756. **Mentd.** Gyett *v.* Williams (1862), 2 John. & H. 429; Browning *v.* French (1871), 24 L. T. 649; Skiller *v.* Halsman (1871), 24 L. T. 745; Gainsford *v.* Dunn (1874), L. R. 17 Eq. 405; Brooke *v.* Rooke (1876), 35 L. T. 301; *Re* Bellis' Trusts (1877), 5 Ch. D. 504; Bray *v.* Stevens (1879), 12 Ch. D. 162; Wells *v.* Row (1879), 48 L. J. Ch. 476; *Re* Ovey, Broadbent *v.* Barrow (1882), 46 L. T. 613; *Re* Stokes, Parsons *v.* Miller (1892), 67 L. T. 223; *Re* Bawden, National Provincial Bank of England *v.* Cresswell, Bawden *v.* Cresswell, [1894] 1 Ch. 693; *Re* Brooke,

Sect. 6.—*In relation to executors. Sects.* 7, 8, 9, 10, 11, 12 & 13: *Sub-sect.* 1, *A.* (*a*).]

Brooke *v.* Brooke, [1894] 1 Ch. 43; *Re* Boards, Knight *v.* Knight, [1895] 1 Ch. 499; *Re* Dyson & Fowke, [1896] 2 Ch. 720; *Re* Adams & Perry's Contract, [1899] 1 Ch. 554; *Re* Yates, Throckmorton *v.* Pike (1907), 96 L. T. 758; *Re* Balls, Trowby *v.* Balls, [1909] 1 Ch. 791.

1987. Mortgagee has priority over creditors.]—JACOMB *v.* HARWOOD (1751), 2 Ves. Sen. 265; 28 E. R. 172.

Annotations:—**Mentd.** Taner *v.* Ivie (1752), Belt's Sup. 386; Hoare *v.* Contencin (1779), 1 Bro. C. C. 27; Farr *v.* Newman (1792), 4 Term Rep. 621: Devaynes *v.* Noble, Sleech's Case (1816), 1 Mer. 539; Kendall *v.* Hamilton (1878), 3 C. P. D. 403; *Re* Hodgson, Beckett *v.* Ramsdale (1885), 31 Ch. D. 177.

1988. ——.]—HARDWICK *v.* MYND (1794), 1 Anst. 109; 145 E. R. 815.

1989. ——.]—An exor., who is also a devisee of an estate charged with the payment of debts, may be presumed by a *bonâ fide* purchaser or mtgee. of that estate, to be dealing with it for the purposes of the administration, & may give a valid title to it. Such purchaser or mtgee., therefore, will not be bound to look to the application of the money. Mere absence of statement of the purpose for which the money obtained by the sale or mtge. is to be used, will not make the purchaser or mtgee. liable, on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts. In a case, therefore, in which the Lords were satisfied that the mtgee. himself was, as a matter of fact, entirely ignorant of any intended misapplication of the money by the exor. & devisee of the estate charged & that he had not constructive notice of it through his solr., who distinctly denied any knowledge or even suspicion of it:—*Held:* though the money was entirely misapplied, the mtge. could not be treated as subject to the debts of testator, & the mtgee.'s title was not, therefore, to be postponed to the claims of the testator's creditors On a creditor of testator, who impeached the validity of the mtge. or purchase, lies the burden of proving that the mtgee. or purchaser had notice of the true state of the facts.—CORSER *v.* CARTWRIGHT (1875), L. R. 7 H. L. 731; 45 L. J. Ch. 605, H. L.

Annotations:—**Consd.** *Re* Henson, Chester *v.* Henson, [1908] 2 Ch. 356. **Reld.** Ricketts *v.* Lewis (1882), 46 L. T. 368; *Re* Venn & Furze's Contract, [1894] 2 Ch. 101; *Re* Major, Taylor *v.* Major, [1914] 1 Ch. 278. **Mentd.** West of England & South Wales District Bank *v.* Murch (1883), 23 Ch. D. 138.

1990. ——.]—Devisees of an equitable estate in a freehold house deposited the title deeds to secure the payment of a loan made to them by the depositee. The deposit was accompanied by a written memorandum charging the interest of the depositors in the property with the repayment of the sum advanced. Before the deposit a decree had been made, in a suit instituted for the administration of testator's estate, which contained a declaration that the depositors were entitled to the house as tenants in common. After the deposit a creditor of testator obtained in another suit a decree declaring her entitled to a charge upon the house in respect of a debt due to her from the testator. The depositee of the deeds had no notice of this claim when he advanced the money:—*Held:* the depositee was entitled to priority over the creditor.—BRITISH MUTUAL INVESTMENT Co. *v.* SMART (1875), 10 Ch. App. 567; 44 L. J. Ch. 695; 32 L. T. 849; 23 W. R. 800, C. A.

Annotations:—**Apld.** *Re* Atkinson, Proctor *v.* Atkinson, [1908] 2 Ch. 307. **Reld.** Price *v.* Price (1887), 35 Ch. D. 297; *Re* Moon, Holmes *v.* Holmes, [1907] 2 Ch. 304.

1991. ——.]—The rule—**that a purchaser for value of an asset of testator, from an exor. who is also residuary legatee, acquires a title free from the claims of unsatisfied creditors of testator, if the purchaser took without notice of the unsatisfied debts or of anything which made it improper for the exor. so to deal with the asset**—applies in the case of equitable as well as legal assets; provided that neither the exor. nor the ct. administering testator's estate still retain control over the asset.

In 1878 the registered holder of railway stocks covenanted to pay an annuity to the trustees of a settlement during the joint lives of himself & his wife & the life of the survivor. In 1882 he died having bequeathed all his property to his widow, & appointed her his extrix. The widow proved the will, & by various deeds from 1886 to 1892 transferred the stocks to her bankers to secure a debt of her own. In Dec. 1892, the widow gave an equitable charge on the stocks to the pltf. to secure advances made to her. Neither the bankers nor the pltf. when taking their respective securities had knowledge or notice that any debt of testator remained unpaid, or that the widow was not entitled to deal with the stocks as she did, & the pltf., before he had notice that there was any indebtedness of testator, gave notice of his charge to the bankers. The bankers sold the stocks, &, having retained the amount owing to them, paid the balance into ct.:—*Held:* the pltf.'s charge on the balance had priority over the claims of the settlement trustees.—GRAHAM *v.* DRUMMOND, [1896] 1 Ch. 968; 65 L. J. Ch. 472; 74 L. T. 417; 44 W. R. 596; 12 T. L. R. 319.

Annotation:—**Distd.** Bank of Bombay *v.* Suleman Somji (1908), 99 L. T. 532.

Where executor in default to estate.]—*See* EXECUTORS, Vol. XXIII., p. 445, Nos. 5158–5160.

Effect of covenant by executor to refund.]—*See* EXECUTORS, Vol. XXIII., p. 428, No. 4986.

SECT. 7.—EXTENTS.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 221–231.

1992. Whether extent gives priority over mortgage.]—Dett. had deposited his title deeds with T. & co. for securing money advanced by them at the time of such deposit; afterwards this extent issued & the estate was ordered to be sold without regard to the claim of T., who were considered to have had no lien against the extent, though they retained the title deeds. T. & co. afterwards filed a bill in Chancery, which they suffered to be dismissed for want of prosecution.—R. *v.* BENSON (1809), 1 Price, 220, n.; 145 E. R. 1383.

Annotation:—**Reld.** Casberd *v.* A.-G. (1819), 6 Price, 411.

1993. ——.]—Equitable mtge. by deposit of title deeds by an accountant of the Crown, in the hands of one who has an opportunity of knowing that the depositor is, or may become, a debtor of the Crown, is not available against an extent. *Qu.:* whether such a deposit by the King's debtor good in any case against the Crown?—BROUGHTON *v.* DAVIS & A.-G. (1814), 1 Price, 216; 145 E. R. 1381.

1994. ——.]—An equitable mtge., by a deposit of title deeds, established against the claim of the Crown under an extent.—CASBERD *v.* A.-G. (1819), 6 Price, 411; Dan. 238; 146 E. R. 850, Ex. Ch.

Annotations:—**Consd.** Whitworth *v.* Gaugain (1841), Cr. & Ph. 325; Whitworth *v.* Gaugain (1846), 1 Ph. 728. **Reld.** Giles *v.* Grover (1832), 6 Bli. N. S. 277; Watts *v.* Porter (1854), 3 E. & B. 743; Swanley Coal Co. *v.* Denton (1906), 95 L. T. 659.

SECT. 8.—**LAND IMPROVEMENT CHARGES.**

See LAND IMPROVEMENT, Vol. XXX., pp. 295, 296, Nos. 218–220.

SECT. 9.—**RENTCHARGES AND ANNUITIES.**

See RENTCHARGES & ANNUITIES.

SECT. 10.—**MORTGAGES OF SHIPS.**

See SHIPPING.

SECT. 11.—**SOLICITOR'S LIEN OR CHARGING ORDER.**

See SOLICITORS.

SECT. 12.—**AS AGAINST VOLUNTEERS.**

See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 242–252.

SECT. 13.—**FAILURE TO GAIN OR LOSS OF PRIORITY.**

SUB-SECT. 1.—BY NOTICE OF PRIOR RIGHT.

A. Constructive Notice.

(a) In General.

See Law of Property Act, 1925 (c. 20), s. 199.

1995. Nature of—Presumption of knowledge—Too strong for rebuttal.]—(1) Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the ct. will not allow even of its being controverted. Thus, if a mtgee. has a deed put into his hands which recites another deed which shows a title in some other person, the ct. will presume him to have notice, & will not permit any evidence to disprove it (EYRE, C.B.).

(2) With respect to the general question, the effect of leaving the title deeds in the hands of the mtgor., the most intelligible rule, & in my opinion the most agreeable to justice would have been to say, that if a man takes, as his security for his mtge. a single deed, & leaves the other deeds in the hands of the mtgor. so as to enable him to commit a fraud, that he shall, in all such cases, be postponed, without reference to the quantity of pains or diligence which he exercised to obtain the deeds; for whether the pains be more or less, the mischief is the same; & if I had found the rule so laid down I should have been perfectly satisfied. But it has been decided otherwise in the late cases *Beckett* v. *Cordley*, No. 1921, *ante*, *Penner* v. *Jemmat*, No. 2102, *post*, & *Tourle* v. *Rand*, No. 2161, *post*, which establish the rule that nothing but fraud or gross & voluntary negligence in leaving the title deeds, will oust the priority of the legal claimant. As for the case of *Goodtitle* v. *Morgan*, No. 2153, *post*, the mtgee. must always risk there being an outstanding term in which case the legal estate is out of him (EYRE, C.B.).—PLUMB *v.* FLUITT (1791), 2 Anst. 432; 145 E. R. 926.

Annotations:—As to (1) **Consd.** Espin v. Pemberton (1859), 3 De G. & J. 547. *As to* (2) **Apld.** Evans *v.* Bicknell (1801), 6 Ves. 174. **Consd.** Whitbread *v.* Jordan (1835), 1 Y. & C. Ex. 303. **Apld.** Hewitt *v.* Loosemore (1851), 9 Hare, 449; Taylor *v.* Russell, [1891] 1 Ch. 8. **Reld.** Jones *v.* Smith (1841), 1 Hare, 43; Meux *v.* Bell (1841), 1 Hare, 73; West *v.* Reid (1843), 2 Hare, 249.

1996. —— —— ——.]—HEWITT *v.* LOOSEMORE, No. 2124, *post*.

1997. Investigation of mortgagor's title—Nature of derivation—Will.]—A. devises land to B. in tail, remainder to C. in tail, subject to the payment of legacies. C. levies a fine & five years non-claim pass, & mortgages the lands. Fine & non-claim no bar of the legacies. C. having no title but under the will, the mtgee. must be supposed to have notice of the legacies.—DRAPERS' CO. *v.* YARDLEY (1710), 2 Vern. 662; 23 E. R. 1031, L. C.

1998. —— —— ——.]—Testator, who died in 1885, by his will left all his property to his four sons by his first wife, subject to a charge for a legacy in favour of his four sons by his second wife. The legacy remained unpaid. The four elder sons in 1890 deposited the title deeds of part of the property with a bank as security for an advance, &, in 1899, they executed a formal mtge. of the property to the bank. The bank, if they had made an investigation of title, would have obtained cognisance of the will which created the charge. The mtgors. practised no concealment:—*Held:* as the four younger sons were legatees, & as the bank had constructive notice of the charge, the claim of the four younger sons must prevail over the mtge. to the bank.—BANK OF BOMBAY *v.* SULEMAN SOMJI (1908), 99 L. T. 532; 24 T. L. R. 840; 52 Sol. Jo. 727, P. C.

1999. —— —— **Settlement.**]—By marriage articles, a husband covenanted, in consideration of his wife's portion to settle an estate to his own use, & after his decease to the use of his heirs of the body of his intended wife, & for want of such issue to his own right heirs for ever. The articles did not express any further intention of providing for the children of the marriage & made a provision for the intended wife in lieu of dower. No settlement was executed; & the husband mortgaged the estate, & at the same time delivered the articles to the mtgee.:—*Held:* on his death, under the articles, he was entitled to a life estate only, & the mtgee. took with notice, & could not therefore hold as against the issue of the marriage.—DAVIES *v.* DAVIES (1841), 4 Beav. 54; 49 E. R. 258.

2000. —— **Disclosure of facts thereby.**]—Where a purchaser cannot make out his title, but through a deed, which leads to a fact, he will be affected with notice of that fact.

One affected with notice conveys to another without notice: the assignee having legal estate, shall not be affected with the notice to assignor: & so *vice versa*.—MERTINS *v.* JOLLIFFE (1756), Amb. 311; 27 E. R. 211, L. C.

2001. —— **Improper sale of property to mortgagor.**]—J., the owner of four freehold houses, mortgaged them in fee for £1,500 each. The mtgees. transferred their mtge. to B. in consideration of the principal & interest then due, amounting to £1,579 1*s.* 5*d.* on each house. Two days afterwards, B. sold the houses to H. for exactly the same sum as he paid for the transfer to himself, & conveyed them to H. in exercise of the power of sale in the mtges., freed from the equity of redemption. H. soon afterwards mortgaged the four houses for

1995 i. *Nature of—Presumption of knowledge—Too strong for rebuttal.*]—MEYERS *v.* HARRISON (1850), 1 Gr. 449.—**CAN.**

1995 ii. —— —— ——.]—FAKI IBRAHIM *v.* FAKI GULAM (1920), I. L. R. 45 Bom. 910.—**IND.**

Sect. 13.—*Failure to gain or loss of priority: Subsect.* 1, *A.* (*a*) & (*b*).]

£6,000, & on her death her successor in title, E., sold the equity of redemption to L. for £2,500 subject to the prior mtge. for £6,000. Certain creditors of J., the original owner, who had recovered judgment in an action against him, & obtained equitable execution on his equity of redemption, brought an action against B. & E., impeaching the validity of the sale to H., & obtained judgment setting it aside as a fraudulent execution of the power of sale, & declaring pltfs. entitled to a right of redemption. L. was not a party to the action, but on receiving notice of it he paid off the mtge. for £6,000, & took a conveyance of the legal estate from the mtgees. At the time when L. purchased the equity of redemption from E., he had no actual notice of any impropriety in the sale by B. to H., nor of any facts affecting the sale not disclosed by the deeds, except that he had seen a valuation which appeared to show that the purchase by H. was at an undervalue, nor did he make any inquiries concerning the circumstances of the sale:—*Held:* L. was not affected by constructive notice of the impropriety of the sale, & he was protected against the prior equitable interest of pltfs. by his acquisition of the legal estate; the not obtaining further information as to the circumstances under which the sale took place did not amount to culpable negligence.

The maxim *Qui prior est tempore, potior est jure* is in our law subject to an important qualification that where equities are equal the legal title prevails. Equality here does not mean or refer to priority in point of time. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, & makes it less meritorious than that of the other. Equitable owners who are upon an equality in this respect may struggle for the legal state, & he who obtains it, having both law & equity on his side, is in a better situation than he who has equity only (LINDLEY, L.J.).—BAILEY *v.* BARNES, [1894] 1 Ch. 25; 63 L. J. Ch. 73; 69 L. T. 542; 42 W. R. 66; 38 Sol. Jo. 9; 7 R. 9, C. A.

Annotations:—**Consd.** *Re* Scott & Alvarez's Contract, Scott *v.* Alvarez, [1895] 1 Ch. 596. **Reid.** *Re* White & Smith's Contract, [1896] 1 Ch. 637; Life Interest & Reversionary Securities Corpn. *v.* Hand-in-Hand Fire & Life Insce. Soc., [1898] 2 Ch. 230; Freeman *v.* Laing, [1899] 2 Ch. 355; *Re* Alms Corn Charity, Charity Comrs. *v.* Bode (1901), 71 L. J. Ch. 76; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231; Hunt *v.* Luck, [1902] 1 Ch. 428. **Mentd.** *Re* Handman & Wilcox's Contract, [1902] 1 Ch. 599; *Re* Childe & Hodgson's Contract (1905), 54 W. R. 234.

2002. Possession retained by unpaid vendor.]—Where a vendor signs a receipt for the whole purchase-money, but suffers the purchaser to retain part of it, & remains in possession of the estate as tenant to the purchaser; his possession is no notice, to a subsequent purchaser or incumbrancer, of his lien on the estate for the sum retained.—WHITE *v.* WAKEFIELD (1835), 7 Sim. 401; 4 L. J. Ch. 195; 58 E. R. 891.

Annotations:—**Apld.** Hunt *v.* Luck, [1901] 1 Ch. 45. **Consd.** Powell *v.* Browne (1907), 97 L. T. 854. **Reid.** Rimmer *v.* Webster, [1902] 2 Ch. 163. **Mentd.** Holmes *v.* Powell (1856), 8 De G. M. & G. 572.

2003. Notice of incumbrance generally—Whether notice of particular incumbrance.]—FARROW *v.* REES, No. 2106, *post*.

2004. —— ——.]—JONES *v.* SMITH, No. 2605, *post*.

2005. —— ——.]—JONES *v.* WILLIAMS, No. 2021, *post*.

2006. —— **Purporting not to affect mortgaged property.**]—JONES *v.* SMITH, No. 2605, *post*.

2007. Disregard of fact—Negligent disregard—Necessity for fraudulent motive.]—In 1816, D. assigned a policy of insurance on his life to a trustee to secure a sum of money owing to W.; & soon afterwards, the solr. of W. caused a memorandum to be entered in the office of the Insurance co., directing that all letters were to be sent to such solr., & the premiums were thenceforth paid by W., through the hands of such solr.; but the insurance co. were not informed on whose behalf the solr. acted. In 1826, D. became bkpt., & his assignees declined to interfere respecting the policy. The premiums continued to be paid by W., through his solr., during his life, & by the exors. of W., through their bankers, after his death. D. died in 1839:—*Held:* (1) the policy was in the order & disposition of the bkpt., & there was not any notice given to the insurance office of the assignment of the policy to take it out of such order & disposition; (2) the conduct of the assignees did not amount to an abandonment of any right which they had to the benefit of the policy; (3) the exors. of W. had a lien on the policy for the amount of the premiums which had been paid by W., & his estate, & the interest thereon; & they were entitled to payment of the amount thereof out of the moneys payable under the policy.

(4) *Semble:* negligence, as applied to cases of constructive notice, supposes the disregard of a fact known to the purchaser, which indicated the existence of the fact, the knowledge of which the ct. imputes to him; & such negligence may, without a fraudulent motive, be so gross as to justify the charge of constructive notice.

(5) *Semble:* a purchaser may be presumed to have investigated every instrument, which directly or inferentially forms a link in the title to the property, but not instruments which are neither directly nor presumptively connected with it, & may only by possibility affect it.—WEST *v.* REID (1843), 2 Hare, 249; 12 L. J. Ch. 245; 7 Jur. 147; 67 E. R. 104.

Annotations:—*As to* (2) **Reid.** Drysdale *v.* Piggott (1856), 22 Beav. 238. *As to* (3) **Consd.** Falcke *v.* Scottish Imperial Insce. (1886), 34 Ch. D. 234. *As to* (5) **Reid.** Lloyd's Banking Co. *v.* Jones (1885), 29 Ch. D. 221. *Generally*, **Reid.** Saunders *v.* Dunman (1878), 7 Ch. D. 825; *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552.

2008. Documents disclosing possible incumbrance.]—The owners of a public house agreed to grant a lease of it at a premium. The intended lessee deposited the agreement with M. & co., brewers, to secure repayment of an advance. The lease was executed & was deposited by the lessee with the landlord's solr. to secure the premium. The lessee obtained it from them for the purpose as he alleged of producing it to the magistrates to enable him to procure a licence. He undertook to return it forthwith but instead of doing so instructed an auctioneer to obtain an advance upon it from other brewers, R. & co. The auctioneers produced to R. & co.'s agent an order from the lessee for the delivery of the lease to R. & co. noticing that this advance was for the purpose of enabling the lessee to pay M. & co. The agent objected to recognise this memorandum & inquired whether the lessee owed anything to M. & co. He was informed by the auctioneers & by the lessee there was nothing due to M. & co. except for goods supplied. He had previously obtained from the lessee himself an order for the delivery of the lease not mentioning M. & co. at all & he obtained the lease on delivering that order. R. & co. advanced money on the deposit. On the lessee's bkpcy.:—*Held:* the security of R. & co. must be postponed to those of the landlord & of M. & co. although there

had been subsequently a demise of the property by the bkpt. to a trustee upon trusts which would extend to the debt of R. & co. & not to that of M. & co. or that of the landlord: the above circumstances being held sufficient to affect R. & co. with notice of the prior equities.—*Re* BUCKLAND, *Ex p.* REID (1848), De G. 600: 17 L. J. Bcy. 19; 11 L. T. O. S. 248; 12 Jur. 533.

Annotation:—**Consd.** Hall *v.* West-End Advance Co. (1883), Cab. & El. 161.

2009. —— Land registry indorsements on documents of title.]—In 1918 C., an exor. & trustee, who bore the same names as his father, testator, who had died in 1908, mortgaged to deft. co., for his own purposes & without the knowledge of his mother who was his co-exor. & co-trustee, leasehold houses which had been assigned in 1907 to the testator by whom the leases, or an attested copy, & the assignments had been registered at the Land Registry, & they bore a red ink indorsement to that effect. The exors. had also been registered as proprietors of the houses in question & were described in the Register as "exors." of testator. When obtaining the loan C. produced the documents which his father had registered but did not produce the probate of his father's will or the land certificates, & fraudulently represented himself to be the person to whom the leases had been assigned. The co. advanced the money to C. without inspecting the Register, believing that he was the absolute owner of the leaseholds, & in executing the mtges. C. in fact personated his father. Upon the instalments falling into arrear the co. made inquiries of C. & obtained the land certificates from him, & discovered that he was one of two exors. & had personated his father, but he assured the co. that the money was borrowed for exorship. purposes. The co. then commenced foreclosure proceedings against the exors., C. & his mother, for whom C., without her authority, entered an appearance. The statement of claim alleged that the mtge. money had been raised by the exors. for exorship. purposes & had been duly executed by C. as exor. & with the knowledge & consent of his mother, & alternatively that the two exors. had been guilty of fraud. No defence was delivered & the subsequent proceedings were served at an address for service given by C., which was not the address of his mother's residence, & she did not have any actual cognisance of them. The co. obtained judgment &, after the order for foreclosure absolute was made, the co. was entered on the Land Register as proprietor of the leaseholds in question, & put the property up for sale. The children of testator, other than C., who, subject to their mother's life interest, were, with C., the ultimate beneficiaries under testator's will, then commenced this action for a declaration that the mtges. & foreclosure order were invalid as against them. New trustees of the will had been appointed before the trial of the action & were co-pltfs.:—*Held:* (1) C.'s signature to the mtges. was a forgery & as against pltf. beneficiaries the deeds were void; (2) in the circumstances, pltf. beneficiaries were not in fact represented by the exors. in the foreclosure action & were not bound by the judgment therein, or, by virtue of R. S. C., Ord. 16, r. 8, estopped from establishing their rights; Ord. 16, r. 8, applies where the exor. or trustee in fact represents the beneficiaries whose interest it is his duty to protect, but does not apply where the beneficiaries have solid grounds for impeaching a transaction between a fraudulent exor. or trustee & pltf.; (3) the mtges. being void, except by estoppel as against the beneficial interest of C., no estate passed, & the question of purchaser for value did not arise. If it had been necessary to determine that question, the Land Registry indorsements on the documents of title were actual notice of the registration & constructive notice of the facts which the co. would have ascertained by inspecting the Register or by requiring the land certificates to be handed over; (4) an Order for foreclosure absolute was not a "transfer for valuable consideration" within Land Transfer Act, 1875 (c. 87), s. 35, & the Land Transfer Rules 140 & 142, so as to confer on the co. a title which pltfs. could not impeach: (5) the ct. had power under Land Transfer Act, 1875 (c. 87), ss. 95, 96, to direct the Register to be rectified by inserting the names of pltf. trustees as proprietors of the leaseholds in question.—*Re* DE LEEUW, JAKENS *v.* CENTRAL ADVANCE & DISCOUNT CORPN., [1922] 2 Ch. 540; 91 L. J. Ch. 617; 127 L. T. 350.

2010. —— Letter disclosing existence of a principal.]—Bankers advanced to customers £300 to redeem some railway stock which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently the customers in a letter to the bankers, stated that they had been requested by their "principal" to extend the term of the loan on the stock. The stock actually belonged to a third party, B.:—*Held:* after the receipt of this letter, the bankers had constructive notice of B.'s right to the stock, & that no subsequent advances made by the bankers to the customers could affect the stock.—LOCKE *v.* PRESCOTT (1863), 32 Beav. 261; 55 E. R. 103.

Knowledge of nature of mortgagor's business—Mortgage by one partner.]—C. & B., tenants in common in fee, in equal shares, of a messuage & premises, entered into partnership, & it was agreed by the articles that this property should be partnership assets; & it became the place where the business of the firm was carried on. After this B. made a legal mtge. in fee of one moiety to secure his private debt to a person who knew that the property was the place of business of the firm. Some years afterwards B. absconded, & C. was obliged to pay the debts of the firm, all of which had been contracted since the mtge., & a large balance thus became due to him:—*Held:* as the mtgee., when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, & his claim must be postponed to that of C.; & the circumstance of the debts paid by C. having been incurred since the mtge. did not affect the case.—CAVANDER *v.* BULTEEL (1873), 9 Ch. App. 79; 43 L. J. Ch. 370; 29 L. T. 710; 38 J. P. 213; 22 W. R. 177, L. JJ.

Annotation:—**Refd.** *Re* Bourne, Bourne *v.* Bourne, [1906] 1 Ch. 113.

Assignment of choses in action.]—*See* CHOSES IN ACTION, Vol. VIII., pp. 466, 474, 475, Nos. 371–377, 442–456.

Assignment of insurance policies.]—*See* INSURANCE, Vol. XXIX., p. 376, Nos. 3013, 3014.

Registration of deeds.]—*See* Sect. 1, sub-sect. 4, *ante.*

(b) Failure to Make Inquiries.

See Law of Property Act, 1925 (c. 20), s. 199.

2012. Failure to gain or loss of priority.]—The title deeds of an estate were deposited with pltf. as

2012 i. *Failure to gain or loss of priority.*]—GILLELAND *v.* WADSWORTH (1877), 1 A. R. 82.—CAN.

Sect. 13.—*Failure to gain or loss of priority: Subsect.* 1, *A.* (*b*).]

a security for his demand. Deft. fourteen years afterwards, upon the eve of a bkpcy. of the mtgor., took a mtge., antedated; he had notice of the deposit, but avoided inquiring the purpose for which it was made. The ct. decreed for pltf.

The deposit of title deeds, as security for a debt, is now settled to be evidence of an agreement to make a mtge. & that agreement is to be carried into execution by the ct. against the mtgor., or any who claim under him with notice, either actual or constructive, of such deposit having been made (MACDONALD, C.B.).—BIRCH *v.* ELLAMES (1794), 2 Anst. 427; 145 E. R. 924.

Annotations:—**Refd.** Parker *v.* Housefield (1834), 2 My. & K. 419; Whitbread *v.* Jordan (1835), 1 Y. & C. Ex. 303; Hewitt *v.* Loosemore (1851), 9 Hare, 449.

2013. ——.]—The right to title deeds of an estate follows the right to the estate. Where the purchaser of an estate, in the absence of any fraudulent motive, suffered the vendor to retain the title deeds, & the latter mortgaged the estate, & delivered over the title deeds to the mtgee.:—*Held*: the mtgee. was equally guilty of negligence, in not ascertaining who was in possession of the estate to which the deeds related, as the purchaser was in not getting possession of the deeds; & there was nothing to deprive the latter of the right, which, by the above proposition of law, he had; therefore, he might maintain trover for the deeds against the mtgee.—HARRINGTON *v.* PRICE (1832), 3 B. & Ad. 170; 110 E. R. 63; *sub nom.* HARRINGTON *v.* GLENN, 1 L. J. K. B. 122.

2014. ——.]—CORY *v.* EYRE (1863), 1 De G. J. & Sm. 149; 46 E. R. 58, L. JJ.

Annotations:—**Distd.** Perrin *v.* Burbey, [1869] W. N. 160. **Consd.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292. **Apprvd.** Dixon *v.* Muckleston (1872), 8 Ch. App. 155. **Consd.** Shropshire Union Rys. & Canal Co. *v.* R. (1875), L. R. 7 H. L. 496. **Apld.** Bradley *v.* Riches (1878), 9 Ch. D. 189. **Consd.** *Re* Vernon, Ewens (1886), 33 Ch. D. 402. **Apld.** Carritt *v.* Real & Personal Advance Co. (1889), 58 L. J. Ch. 688. **Consd.** Taylor *v.* Russell, [1891] 1 Ch. 8; Walker *v.* Linom, [1907] 2 Ch. 104; Hill *v.* Peters, [1918] 2 Ch. 273. **Refd.** Allan *v.* Scott (1865), 12 L. T. 449; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231.

2015. ——.]—Trust money was so placed to a banking account that any of the trustees could draw out separately. One of them drew out money & brought a house as a residence for some of the *cestuis que trust*, but took a conveyance to himself alone. He then deposited the deeds with another bank to secure his private balance, & afterwards became bkpt. The co-trustees neglected to examine the banker's book, for a long time after the purchase:—*Held*: by reason of their negligence they were not entitled to priority over the security by deposit.—ALLAN *v.* SCOTT (1865), 12 L. T. 449.

2016. ——.]—L., the owner of real estate, deposited the title deeds with his bankers to secure the balance of his account current, & executed a memorandum whereby he agreed, at their request, to execute any deed or deeds necessary for legally carrying out the security. Afterwards, being about to be married, he agreed to settle the property. Two days before the marriage the solr. of the intended wife, having only then received instructions to prepare arts. of settlement, inquired of L. whether he had the title deeds in his possession unincumbered; he replied that he had, but that they were at his bankers. The solr. made no further inquiry, & prepared arts. of settlement, which were executed. After the marriage L. conveyed the property to the trustee of the arts. upon the trusts therein contained, being for the benefit of the wife & issue of the marriage. A suit was afterwards instituted by the bankers for foreclosure; & the wife claimed to be a purchaser for value without notice:—*Held*: (1) the solr. had not made sufficient inquiry, & the wife must be taken to have had constructive notice of the mtge.; (2) the husband having contracted to execute a legal mtge. to his bankers, could not deprive them of priority by conveying the property to a party with whom he had entered into a subsequent contract for value, even although such party was a purchaser without notice.—MAXFIELD *v.* BURTON (1873), L. R. 17 Eq. 15; 43 L. J. Ch. 46; 29 L. T. 571; 22 W. R. 148.

Annotations:—*As to* (1) **Apld.** Spencer *v.* Clarke (1878), 9 Ch. D. 137. **Refd.** Berwick *v.* Price, [1905] 1 Ch. 632. *As to* (2) **Consd.** Garnham *v.* Skipper (1885), 55 L. J. Ch. 263. **Refd.** Oliver *v.* Hinton, [1899] 2 Ch. 264. *Generally*, **Refd.** Lee *v.* Clutton (1875), 24 W. R. 106.

2017. ——.]—H., a banker, was the banker of a railway co., he was also one of its directors. Under certain business arrangements of the co. he was entrusted with the possession of certificates which represented shares, & those shares he held as trustee for the company; he converted the shares; the conversion was noticed; he gave an explanation, replaced the shares, & continued to hold the certificates as before, & stood on the register as the apparent owner of them. He borrowed money of R., & deposited the certificates with R., who held them for some time, & died without having taken any step to be registered as the owner of the shares. R.'s widow & extrix. applied to be registered as the owner; her application was refused. She moved for a *mandamus* to compel registration, the ct. of Q. B. refused the *mandamus*. The Exch. Chamber reversed that decision, & ordered it to issue. On appeal to this House:—*Held*: this was the ordinary case of a trustee abusing his trust; if R. had made proper inquiries he would have found that H. was only a trustee; negligence sufficient to affect their equitable title could not be imputed to the directors & the co., & consequently, the equitable title of R. could not prevail against the earlier equitable title of the co.—SHROPSHIRE UNION RAILWAYS & CANAL CO. *v.* R. (1875), L. R. 7 H. L. 496; 45 L. J. Q. B. 31; 32 L. T. 283; 23 W. R. 709, H. L.; *revsg.* S. C. *sub nom.* R. *v.* SHROPSHIRE UNION CO. (1873), L. R. 8 Q. B. 420; *sub nom.* ROBSON *v.* SHROPSHIRE UNION RAILWAYS & CANAL CO., 42 L. J. Q. B. 193, Ex. Ch.

Annotations:—**Consd.** Ortigosa *v.* Brown (1878), 47 L. J. Ch. 168. **Apld.** *Re* Vernon, Ewens (1886), 33 Ch. D. 402. **Consd.** Union Bank of London *v.* Kent (1888), 39 Ch. D. 238. **Apld.** Carritt *v.* Real & Personal Advance Co. (1889), 42 Ch. D. 263. **Distd.** Lloyds Bank *v.* Bullock, [1896] 2 Ch. 192. **Consd.** Rimmer *v.* Webster, [1902] 2 Ch. 163; Burgis *v.* Constantine, [1908] 2 K. B. 484. **Refd.** Bradley *v.* Riches (1878), 9 Ch. D. 189; Soc. Générale de Paris *v.* Walker (1885), 11 App. Cas. 20; Roots *v.* Williamson (1888), 38 Ch. D. 485; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; Taylor *v.* Russell, [1891] 1 Ch. 8; Powell *v.* London & Provincial Bank, [1893] 1 Ch. 610; Ward *v.* Duncombe, [1893] A. C. 369; *Re* Wasdale, Brittin *v.* Partridge, [1899] 1 Ch. 163; Lloyd's Bank *v.* Pearson, [1901] 1 Ch. 865; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231; Walker *v.* Linom, [1907] 2 Ch. 104; Coleman *v.* London County & Westminster Bank, [1916] 2 Ch. 353; Hill *v.* Peters, [1918] 2 Ch. 273. **Mentd.** R. *v.* Charnwood Forest Ry. (1884), Cab. & El. 419; R. *v.* Lambourn Valley Ry. (1888), 22 Q. B. D. 463; Longman *v.* Bath Electric Tramways, [1905] 1 Ch. 646; Rainford *v.* Keith & Blackman Co., [1905] 1 Ch. 296.

2018. ——.]—D. was entitled to a share of residue contingently on attaining twenty-five.

2012 ii. ——.]—MCCULLOUGH *v.* ELLIOTT, [1921] 2 W. W. R. 361.—CAN.

2012 iii. ——.]—STEIN *v.* STEIN (1867), 16 W. R. 69.—IR.

During the contingency H., one of the trustees, made advances to D., who subsequently executed a mtge. to A., the money being lent without inquiry:—*Held:* H. was entitled to recoup his advances out of the share in priority to A.'s mtge.—*Re* GODDARD, HOOKER *v.* BUCKLEY (1912), 57 Sol. Jo. 42, C. A.

2019. ——.]—On Sept. 29, 1904, pltf. was a customer of the Union Bank of London, where she had a current account & a loan account. On the loan account £1,900 was advanced, & there were certain securities deposited to secure that amount. Pltf., being anxious to change her account for family reasons, consulted her solr., C., who had acted for her for many years. As a result, C. informed pltf. that he had arranged with deft. bank to grant the loan on the same terms as she had had with the Union Bank of London, & asked her to sign certain documents in connection with the transaction. The material document was on the common printed form of deft. bank & was as follows: "At the request of Messrs. Rose Innes, Son, & Crick I have transferred or caused to be transferred . . ."—then the shares were mentioned & the names of the manager & sub-manager of deft. bank—" or their nominees as trustees for you to be held as collateral security for your advance to Rose Innes, Son, & Crick." With this document C. went to the deft. bank after the securities were transferred, obtained an addition to the loan of £1,900, & effected the transfer of the securities in such a way as to make them available to secure his general indebtedness to deft. bank, which amounted to some £16,000 which he had from time to time obtained upon other securities. In the year 1911 pltf. required the return of her securities from C., which he promised to do, but they were never in fact returned, as C. absconded. In these circumstances pltf. brought this action to have her securities delivered to her by deft. bank subject to her paying the £1,900 which she admitted having received. It appeared that the general nature of the transactions between C. & deft. bank were that advances were made by deft. bank to C. upon securities which belonged to third parties who were clients of C. in the ordinary sense, & that this was known to deft. bank, though in a number of cases it might be that the clients were clients in respect of a mere financial business carried on by C. independent of his solr.'s business. It was contended for pltf. (*inter alia*) that the deft. bank had such notice of the fiduciary relationship of C. to pltf. as to prevent their acting on the document:—*Held:* there was here sufficient notice of the relationship existing or that probably existed between pltf. & C. to have put deft. bank upon inquiry, & accordingly they could not claim to be in a better position than they would have been if they had made inquiries, & therefore pltf. was entitled to redeem the securities upon payment of £1,900.—JAMESON *v.* UNION BANK OF SCOTLAND (1913), 109 L. T. 850.

2020. Degree of failure to inquire—Dishonest or fraudulent.]—JONES *v.* SMITH, No. 2605, *post.*

2021. —— ——.]—Adjoining premises X. & Y. were respectively conveyed to testator by deeds of 1840 & 1843, & then united. He devised them to his sons, who made an equitable mtge. by deposit of the deeds of Y. & the probate of the will. The mtgee. believed, from the sons' statement, that the whole property was comprised:—*Held:* the property X. was not comprised in the equitable mtge.

A mtgee., who is informed that there are "charges" affecting the property, & is cognisant of two only, cannot claim to be a purchaser without notice of other charges, because he believes that the two, which satisfy the word "charges," are all the charges upon it. He is bound to inquire whether there are any others.

The rule with respect to the consequence of a purchaser abstaining from making inquiries, does not depend exclusively on a fraudulent motive for such abstinence. When the circumstances of a case put a purchaser on inquiry, a false answer or a reasonable answer given to any inquiry, may dispense with the necessity of further inquiry; but where no inquiry has been made, it is impossible to conclude that a false answer would have been given if an inquiry had been made, or such as would have precluded the necessity of any further inquiry.

A real estate belonged to three partners; one retired & conveyed his share to the two others, "subject to all charges & mtges. affecting same," & the two made an equitable mtge. to defts. There were three charges on the property, but defts. knew of two only, & made no inquiry as to there being more:—*Held:* having notice of the terms of the conveyance to the surviving parties, defts. were bound to inquire whether there were any other charges, & not having done so, that they could not, as against the third equitable charge, insist on being purchasers for valuable consideration without notice.—JONES *v.* WILLIAMS (1857), 24 Beav. 47; 30 L. T. O. S. 110; 3 Jur. N. S. 1066; 5 W. R. 775; 53 E. R. 274.

Annotation:—**Mentd.** Underwood *v.* Bank of Liverpool & Martin's, Same *v.* Barclays Bank (1924), 93 L. J. K. B. 690.

2022. Gross negligence.]—WORMALD *v.* MAITLAND, No. 1955, *ante.*

2023. ——.]—In 1908 the legal mtgees. of a freehold house accepted as sufficient root of title a principal deed of 1888 by which the property was conveyed in fee to their mtgor. free from incumbrances, & they did not call for an abstract of title or make any further investigations. The deed of 1888 referred to an earlier deed of 1883 which contained restrictive covenants applicable to the property mtged., but the mtgees. made no inquiry as to the custody or contents of this earlier deed, nor was its production insisted on. It had been in the mtgor.'s possession continuously from 1901, together with the other title deeds of the property. The mtgor. had given an equitable charge on the same property in 1889 to the trustees of his marriage settlement, of whom he was one:—*Held:* although there had been some negligence by the mtgees. in not requiring an abstract & not further investigating the mtgor.'s title, & also in not inquiring as to the deed of 1883, yet the sum of their carelessness did not amount to such gross negligence as would disentitle them, or a purchaser from them, to the protection of the legal estate, as against the holders of the prior equitable charge. The "gross negligence" in cases of this description which would render it unjust to deprive a prior incumbrancer of his priority meant, at least, carelessness of so aggravated a nature as to amount to the neglect of precautions which an ordinary reasonable man would have observed, & to indicate an attitude of mental indifference to obvious risks.

I apprehend that by the words "gross negligence" something more is meant than mere carelessness; it must at least be carelessness of so aggravated a nature as to amount to the neglect of precautions which the ordinarily reasonable man would have observed & to indicate an attitude of mental indifference to obvious risks. If there are no circumstances suggestive of risk I doubt

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whether the neglect to make inquiries by which the existence of such risk might have been disclosed would as a general rule amount to "gross negligence" (EVE, J.).—HUDSTON *v.* VINEY, [1921] 1 Ch. 98; 90 L. J. Ch. 149; 124 L. T. 305; 65 Sol. Jo. 59.

2024. —— Culpably negligent.]—BAILEY *v.* BARNES, No. 2001, *ante*.

2025. Extent of notice imputed.]—WEST *v.* REID, No. 2007, *ante*.

2026. ——.]—HUNTER *v.* WALTERS, CURLING *v.* WALTERS, DARNELL *v.* HUNTER, No. 2036, *post*.

2027. ——.]—A purchaser or mtgee. who takes his purchase or security without investigation of title is affected with constructive notice of all that he would have discovered upon the usual investigation of title, although not of such matters as he would not have ascertained without going behind the documents of title themselves.—GAINSBOROUGH (EARL) *v.* WATCOMBE TERRA COTTA CLAY CO., LTD., DUNNING *v.* GAINSBOROUGH (EARL) (1885), 54 L. J. Ch. 991; 53 L. T. 116; 1 T. L. R. 486.

2028. ——.]—A purchaser who without requiring delivery or production of the title deeds takes a title from a mtgee. who has deposited the deeds by way of sub-mtge. is affected with constructive notice of the sub-mtge., & the legal estate conveyed to the purchaser is in his hands subject to the equitable incumbrance, & this notice will raise a trust to the amount of the sub-mtge. It is immaterial whether the purchaser employs a solr. or not, & whether the solr., if one is employed, informs the purchaser of the sub-mtge. or not.

B. mortgaged two freehold houses to C., a solr., for £2,100. C. then deposited the mtge. & title deeds with his bankers to secure the balance of his banking account, which continued to be overdrawn for more than £10,000, until his bkpcy. in 1902. The bank advisedly omitted to give notice of their security to B. Subsequently B. & C. mortgaged one of the houses to H. for £650, which was paid to C. in partial discharge of the original mtge. debt, & the house was expressed to be discharged from that mtge.; & they mortgaged the other house to W. for £550 on precisely similar terms. B. also gave C. a second mtge. on both houses to secure £900, the balance remaining due on the original mtge. In the three last-mentioned mtges. C. acted as solr. for all parties, none of whom had any actual knowledge of the bank's sub-mtge. In an action by the bank to enforce their security:—*Held:* (1) H. & W. were affected with constructive notice of the sub-mtge., & were respectfully trustees of the legal estate for the bank; but (2) B. was not bound to require production of the title deeds on paying off part of the original mtge. debt; (3) *semble:* he was not affected with notice of the sub-mtge. & was discharged from liability under the original mtge. to the extent of the two sums of £650 & £550.

It is well settled that a purchaser, in which term I must be understood to include a mtgee. or a transferee of a mtge. of land will be deemed to have notice of all the facts which he would have learned upon a proper investigation of the title, under a contract containing no restrictions of his right in that respect (JOYCE, J.).—BERWICK & CO. *v.* PRICE, [1905] 1 Ch. 632; 74 L. J. Ch. 249; 92 L. T. 110.

Annotation:—*Generally*, **Refd.** Walker *v.* Linom, [1907] 2 Ch. 104.

2029. Circumstances putting mortgagee upon inquiry—Notice of judgment.]—(1) Notice of a judgment against a vendor, is sufficient notice to put a purchaser upon making further inquiry; & if he neglect it, & it afterwards appear that instead of a judgment the party has a specific incumbrance on the property, he will be bound by it.

(2) The mtgee. in this case has acted in an extremely dishonest way; knowing of pltf.'s incumbrance he deals with the mtgor. behind his back. He says, I know pltf. has this charge, but will oust him of his right; I cannot allow such a mtgee. to have his costs; they are not costs imposed by any contract between the parties (RICHARDS, C.B.).—TAYLOR *v.* BAKER (1818), 5 Price, 306; Dan. 71; 146 E. R. 616.

Annotations:—*As to* (1) **Refd.** Jones *v.* Smith (1841), 1 Hare, 43; Gibson *v.* Ingo (1847), 6 Hare, 112; Steadman *v.* Poole (1847), 16 L. J. Ch. 348; Penny *v.* Watts (1849), 1 H. & Tw. 266; Wilson *v.* Hart (1865), 2 Hem. & M. 551.

2030. —— Trade usage.]—An equitable mtge. may be created of copyholds, by the mere deposit of the copy of ct. roll. It is therefore not sufficient for the protection of a purchaser or mtgee. of copyholds, that he should search the ct. rolls for incumbrances; he ought to require the vendor or mtgor. to produce an abstract of his title & the copy of his admission to the copyhold premises; & if the latter document is not forthcoming, its non-production must be reasonably accounted for.

Where the creditor of a publican in London took from the latter a legal mtge. of copyhold premises as a security for an antecedent debt, &, at the time of taking this security, knew that the publican was indebted to his brewers, & likewise was aware of the ordinary practice in London of publicans depositing their leases with their brewers by way of mtge.:—*Held:* the creditor had such notice of the transactions between his debtor & the brewers, as would have put a prudent man on further inquiry; &, having omitted to make such further inquiry, the equitable security of the brewers had priority over his legal security.—WHITBREAD *v.* JORDAN (1835), 1 Y. & C. Ex. 303; 4 L. J. Ex. Eq. 38; 160 E. R. 123.

Annotations:—**Consd.** Jones *v.* Smith (1843), 1 Ph. 244. **Mentd.** *Re* Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 56 L. T. 622.

2031. —— Disclosure in deeds—Abstract.]—(1) Under a marriage settlement containing the usual powers of sale & exchange, with power to the trustees, of whom one was a minor, with the consent in writing of the wife, to lend the whole or part of the proceeds to the husband on his bond, the trustees, in order to make the loan, inconsiderately sold the estate under the power of the family solr., who, as owner thereof, raised a sum of money by way of mtge., of which part was paid to the husband. The solr. afterwards resold the estate, no money being paid to the husband, who, for valuable consideration, mortgaged it to other persons, & soon after became insolvent. On a bill filed by the infants interested under the settlement, impeaching the sale:—*Held:* they were entitled to have the inheritance reconveyed, free from incumbrance, to the uses of the settlement.

(2) The solr. having funds in his hands, the property of another client, applied them in discharging the prior mtge. for raising the money lent to the husband, &, as owner of the estate, executed a mtge. to his client for the amount advanced:—*Held:* there being an infirmity in his own title, he could convey no valid equitable interest to his mtgee.

(3) The husband, as purchaser from the solr., being in treaty for a loan on mtge. of the estate, abstracts were delivered, which disclosed the marriage settlement, the conveyance to the solr. as purchaser under the power, the covenant to

[illegible] by the husband, & the deed of confirmation by the infant trustee; the mtge. being completed:—*Held:* the abstract disclosed what ought to have put the mtgees. on inquiry; & that they were affected with notice.

The duties of trustees selling under a trust or power to sell are not properly discharged by selling to the family solr. without proper caution & previous inquiry as to the value, the sale being a contrivance to raise money to lend to one of the *cestuis que trust*, to whom the trustees had power to lend it.—ROBINSON *v.* BRIGGS (1853), 1 Sm. & G. 188; 21 L. T. O. S. 30; 1 W. R. 223; 65 E. R. 81.

Annotation:—As to (3) **Distd.** Gainsborough *v.* Watcombe Terra Cotta Clay Co., Dunning *v.* Gainsborough (1885), 54 L. J. Ch. 991.

2032. —— —— **Recitals.**]—FARROW *v.* REES, No. 2106, *post.*

2033. —— —— ——.]—A mtge. given by B. in 1832 to an insurance co. from which he had obtained a loan of money, recited a previous deed, dated in 1823, executed by A. & B., for the settlement of certain family estates, & for the payment of some of A.'s debts, & recited that in that deed a sum of £3,200 was due to D., as trustee for an infirmary, on a judgment against A. & B., that that money, with interest, had been paid off, & that it was intended to enter satisfaction on that & all other judgments affecting the mtged. lands. There were separate judgments, at the suit of D., against A. & against B., dated in 1810 & 1812, but a warrant of attorney given by D. in 1819, authorised satisfaction to be entered on the roll as to them. There was no judgment against them jointly for the sum stated in the mtge. The mtgee. caused satisfaction to be entered on the roll as to the separate judgments of 1810 & 1812, but made no further inquiries:—*Held:* as the mtge. itself had recited a joint judgment for a specific sum, the mtgee. had been guilty of negligence in not looking further into the matter, & must therefore be taken to have had a proper notice of the unsatisfied claim under the deed of 1823.—MONTEFIORE *v.* BROWNE (1858), 7 H. L. Cas. 241; 4 Jur. N. S. 1201; 11 E. R. 96, H. L.

Annotations:—**Apld.** English & Scottish Mercantile Investment Trust *v.* Brunton, [1892] 2 Q. B. 1. **Mentd.** Johns *v.* James (1878), 8 Ch. D. 744; Priestley *v.* Ellis, [1897] 1 Ch. 489.

2034. —— —— —— ——.]—Under a deed of assignment & transfer of mtge. dated in Dec. 1852, pltf. became the absolute mtgee. of four leasehold houses, the equity of redemption being vested in H., who was pltf.'s solr. In Apr. 1856, H. wrote to pltf., asking him to come to his office & sign leases of the four houses, as he thought it was a good time to put up the property for sale. Pltf. accordingly called at the office of H., & there executed, without examination, four deeds, which H., represented, & pltf. believed, to be leases of the four houses at a rack rent. In Aug. 1858, H. absconded, & was made bkpt. Pltf. then discovered that the four deeds which he had signed were made between himself of the first part, H. of the second part, & J., therein described as of 10, Canonbury-place, spinster, of the third part. Each of them witnessed that, in consideration of £1,000 paid by J. to H., with the consent of pltf., as the purchase-money for the premises, pltf. demised & H. demised & confirmed one of the four houses to J., her exors., etc., for a term of years, being the whole of the original term less one year. It turned out that 10, Canonbury-place was H.'s private residence, that J. was his nursemaid, & that no consideration money was paid to pltf. by her, or by any one. In the meantime three deeds, purporting to be mtges., had been executed. By one of them, executed in Dec. 1856, to which J., still described as of 10, Canonbury-place, H. & one of defts., N., were parties, reciting two of the said indentures of Apr. 1856, two of the houses were, in consideration of £1,300 paid by deft. N., assigned by J. to deft. N. by way of mtge., to secure the repayment of £1,300 & interest, with a [illegible] & several covenant for payment by J. & H. [illegible] mtges., to which H. was not a party, each reciting one of the deeds of Apr. 1856, were effected by way of demise of the remaining two houses by J. to two other defts. The mtge. moneys were paid to H., as agent for J. Afterwards, by a deed of Apr. 1858, made between J. & H., reciting that J. was a trustee only for H., all the interest of J. under the deeds of Apr. 1856, was assigned to H. Pltf. filed the bill to have the deeds of Apr. 1856, set aside as fraudulent & void. Defts. claimed to hold the property as securities for the sums advanced by them:—*Held:* the deeds of Apr. 1856, were wholly void, & must be delivered up to be cancelled.

Both parties being the victims of fraud, the occasion of defts. being imposed upon, namely, when they were advancing money, required extraordinary caution; but otherwise as to pltf.

The employment by all defts. of same solr., & the way in which they conducted the transaction, exposed them to the consequences of notice communicated through him.

By the recital of the deeds of Apr. 1856, in their mtge. deeds defts. had constructive notice that pltf. was a mtgee., & that the transaction of Apr. 1856, was an extraordinary transaction; & were put upon inquiry as to whether the pretended mtgor. was not a fictitious client.—OGILVIE *v.* JEAFFRESON (1860), 2 Gift. 353; 29 L. J. Ch. 905; 2 L. T. 778; 6 Jur. N. S. 970; 8 W. R. 745; 66 E. R. 147.

Annotation:—**Consd.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292.

2035. —— —— ——.]—Testator gave his real estate for a term of eight hundred years to A. his son, & B. a stranger, to secure payment of so much of his debts & legacies as his personal estate should be insufficient to pay. Subject thereto, he gave his residuary real estate to A. & C., another son. A. & C. were his exors.; they paid his debts & legacies, except two legacies of £1,500 each. At testator's death, his personal estate was sufficient to pay the two £1,500 legacies; but the exors. wasted it & the two legacies of £1,500 were not paid. A. & C., B. being dead, made two mtges.: one to persons who knew, or had the means of knowing, that the advance was for the personal use of A. & C., but the money was paid into the hands of A. alone, the surviving trustee of the term; the other mtge. was to a person without notice of any improper application of the money, the deed recited truly that the debts were paid, but untruly that the two legacies not paid were provided for, & the trusts satisfied:—*Held:* the second mtgee. was liable to be postponed by his own neglect in verifying the recital of the deed.—HOWARD *v.* CHAFFERS, HOWARD *v.* ROBINSON (1863), 2 Drew. & Sm. 236; 2 New Rep. 381; 32 L. J. Ch. 686; 9 L. T. 243; 9 Jur. N. S. 767; 11 W. R. 1057; 62 E. R. 612.

Annotation:—**Mentd.** Richardson *v.* Morton (1871), L. R. 13 Eq. 123.

2036. —— —— **Plans.**]—The solr. of two mtgees. put up for sale by auction, without any authority, the mtged. estate. He professed to have bought the estate, & prepared a conveyance which purported to be made by the second mtgee. under his power of sale. The mtgees. both

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executed the conveyance, & also signed indorsed receipts for money as paid to them, though no money was in fact paid to them. The solr. took possession of the estate & continued to pay the interest to the mtgees., & afterwards made an equitable mtge. of the estate, representing it to be his own & unincumbered. As to the first mtgee., there was evidence that he was deceived by the solr.; as to the second mtgee., there was evidence that he trusted the solr. implicitly. There were inconsistencies on the plans upon the different deeds, & the solr. had attested some of the prior deeds:—*Held:* (1) under the circumstances, the equitable mtgee. had priority over the second mtgee.; (2) the inconsistencies in the plans & the attestation by the solr. did not put the equitable mtgee. on inquiry so as to fix him with constructive notice.—HUNTER *v.* WALTERS, CURLING *v.* WALTERS, DARNELL *v.* HUNTER (1871), 7 Ch. App. 75; 41 L. J. Ch. 175; 25 L. T. 765: 20 W. R. 218, L. C. & L. JJ.

Annotations:—*As to* (2) **Refd.** *Re* Vernon, Ewens (1886), 33 Ch. D. 402. *Generally.* **Refd.** *Re* Russell Road Purchase-moneys (1871), L. R. 12 Eq. 78; R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420; Ortigosa *v.* Brown (1878), 47 L. J. Ch. 168; Favell *v.* Wright (1891), 64 L. T. 85; Lloyds Bank *v.* Bullock, [1896] 2 Ch. 192; King *v.* Smith, [1900] 2 Ch. 425; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489. **Mentd.** Onward Bldg. Soc. *v.* Smithson, [1893] 1 Ch. 1; Howatson *v.* Webb, [1908] 1 Ch. 1.

2037. —— —— **Attestation.**] — HUNTER *v.* WALTERS, CURLING *v.* WALTERS, DARNELL *v.* HUNTER, No. 2036, *ante.*

2038. —— —— —— ——.]— Testator at the time of his death was the registered owner of certain shares in an American railroad, for which he held certificates of ten shares each. After testator's death, in order that the shares might be registered in their names, so that they might be enabled to receive the dividend, &, if necessary, to sell, the exors. signed blank transfers indorsed on the certificates, & delivered them to their broker. The broker fraudulently deposited them with a bank as security for advances. According to American law, the transferee of the certificates properly indorsed has a good legal & equitable title to the shares. In the present case the indorsement was not attested according to the requirements of the rules of the co. The exors. brought an action against the bank, claiming to be entitled to the shares. The judge decided in favour of the bank:—*Held:* although according to American law the transfers signed in blank would have given the bank a legal & equitable title to the shares, yet that as the certificates were not negotiable instruments, & the transaction took place in England, the question whether the bank had a good title must be decided according to English & not American law; & the bank were put upon inquiry by the absence of the due attestation, & could not have a better title than their transferor, who had no authority to dispose of the shares, but held them for the exors.; & the exors. had not done anything by which they were estopped from questioning the title of the bank.—COLONIAL BANK *v.* CADY & WILLIAMS, LONDON CHARTERED BANK OF AUSTRALIA *v.* CADY & WILLIAMS (1890), 15 App. Cas. 267; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17; 6 T. L. R. 329, H. L.; *affg.* S. C. *sub nom.* WILLIAMS *v.* COLONIAL BANK, WILLIAMS *v.* LONDON CHARTERED BANK OF AUSTRALIA (1888), 38 Ch. D. 388, C. A.

Annotations:—**Refd.** Venables *v.* Baring, [1892] 3 Ch. 527; Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120; Fry *v.* Smellie, [1912] 3 K. B. 282; Fuller *v.* Glyn, Mills Currie, [1914] 2 K. B. 168. **Mentd.** Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank, [1891] 1 Ch. 270; Alcock *v.* Smith, [1892] 1 Ch. 238; Fox *v.* Martin (1895), 64 L. J. Ch. 473; Scholfield *v.* Londesborough, [1896] A. C. 514; Stern *v.* R., [1896] 1 Q. B. 211; Bechuanaland Exploration Co. *v* London Trading Bank, [1898] 2 Q. B. 658; Montagu *v.* Weston, Clevedon & Portishead Light Rys. (1903), 19 T. L. R. 272.

2039. —— —— **Terms of security.**]—(1) Purchase for value without notice is not an absolute defence to a suit to set aside on equitable grounds a mtge. of a fund in ct.; the ct. will determine the rights to the fund as between the parties, without waiting till it becomes distributable, & according to such determination will declare a deed under which the purchaser claims as mtgee. to be void as against one of the parties thereto whose property was thereby mortgaged.

(2) Circumstances under which an assignee of a security may be held to be put upon inquiry by the terms of the security itself as to matter of equitable fraud affecting its validity.—TABOR *v.* CUNNINGHAM (1875), 24 W. R. 153.

2040. —— —— ——.]—Title deeds, securing a sum, in which A. & B. were jointly interested as trustees, were deposited by A. with a banking co., as a security for advances made to him:—*Held:* the trust, of which the banking co. received notice upon the deeds must prevail over their lien, & order made for delivery of the deeds to B.—WELCHMAN *v.* COVENTRY UNION BANK (1860), 8 W. R. 729.

2041. —— **Statements by party.**]—On Jan. 18, 1883, A., a solr., obtained from his sisters B. & C., their signatures to two deeds, by which, in alleged consideration in each case of the release of a debt of £400 & payment to them of £300, they conveyed their shares of freehold property, which was subject to a mtge. to K., to A. in fee. No money was at the time due from B. & C. to A., nor was any payment whatever made to them. The deeds were not read over or explained to B. & C., who had no idea that they were thereby conveying their property, & signed in full reliance on A.'s statement that he was going to clear off the mtge. & wanted to send the deeds to K. On the next day A. deposited the deeds with a bank as security for an advance. In applying for the advance before the execution of the deeds, A. had told the managers that B. & C., who were joint owners with himself of the property, were going to convey & "were assisting with the deeds," but that nothing would be paid to them as consideration money, as the money was to be invested in a colliery in which A. was interested. The manager handed over the deeds to the solr. of the bank & merely told him that he was to exercise great care & diligence in investigating the title. The solr. being dead, it did not appear what inquiries were made by him, but the advance was made to A. A. having absconded, the property was claimed by the bank as equitable mtgees., & the claim was resisted by B. & C. on the ground that the conveyances, having been obtained by fraud & misrepresentation, were void as against them. They also relied on deeds which purported to be reconveyances of the property by A. to B. & C., of Jan. 18, 1883, which were attested but did not bear a seal, & which had only been discovered amongst A.'s papers after he absconded:—*Held:* (1) inasmuch as B. & C., though they might not understand the nature of the deeds, knew they were executing something which dealt in some way with their property, the deeds of Jan. 18, 1883, were not void but voidable only. But as the statements made by A. to the bank manager were such as to have clearly put the bank upon inquiry,

which would, if made, have led to the detection of the fraud & to a refusal of the advance, & therefore to have affected the bank with constructive notice of the fraud, the equity of the bank must, on the ground of their negligence, be postponed to that of B. & C.

(2) The rule that the ct. will not postpone a legal mtgee. to a subsequent equitable mtge. on the ground of any mere carelessness or want of prudence does not apply as between two equitable claims.—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* JACKSON (1886), 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597, C. A.

Annotations:—As to (1) **Refd.** Lloyds Bank *v.* Bullock [1896] 2 Ch. 192; Howatson *v.* Webb, [1907] 1 Ch. 537. *As to* (2) **Consd.** Farrand *v.* Yorkshire Banking Co. (1888), 40 Ch. D. 182. *Generally*, **Mentd.** *Re* Smith, Oswell *v.* Shepherd (1892), 67 L. T. 64; Bagot *v.* Chapman, [1907] 2 Ch. 222.

2042. No inquiry as to authority of mortgagor—To deal with property—Revocation of authority.]—J. was entitled at the time of his death to the benefit of an agreement for a lease of property on the completion of rebuilding & repairs. He died intestate, leaving his three daughters, pltfs., & his son F., his next of kin. F. took out letters of administration. On F.'s representation that £400 was necessary to enable him to complete the building, his sisters signed an authority to him to borrow upon mtge. of the houses such money as he might require for that purpose, & to charge their respective shares with the interest thereof. F. completed the repairs, & obtained a lease to himself as legal personal representative of J. This lease together with the authority given him by pltfs., he deposited with S. as security for a loan. He subsequently settled the administration account with pltfs., & informed them, as they deposed, that he had not borrowed any money under the authority they had given him. They did not require him to deliver up the authority. Some years after, F., who had already mortgaged his own share in the property to S., executed a further mtge. of his sister's shares, purporting to be made under the authority, & falsely reciting that £2,712 had been advanced by S. for the completion of the rebuilding. F. afterwards became bkpt. An action having been brought by pltfs. against S. for re-assignment of pltfs.' shares in the leaseholds:—*Held:* S., having neglected to inquire of pltfs. whether the authority was a subsisting one when he advanced the money, or to require their concurrence in the mtge., they were entitled to an assignment of their three fourths of the lease.—JONES *v.* STÖHWASSER (1881), 16 Ch. D. 577; 50 L. J. Ch. 625; 44 L. T. 333; 29 W. R. 497.

2043. ——— ———]—S., to enable E. to procure an advance, executed blank transfers of registered stock, & handed them to E. with the certificates, & also delivered to E. bonds of American cos. payable to bearer. E. obtained advances from M., & delivered to him the transfers, certificates, & bonds. M. in turn delivered them, along with other securities, to several banks to secure loans made to himself for a larger amount. The blank transfers were then filled up with the names of the banks' nominees & registered. M. had acted according to a course of business usual with money-lenders & known to the banks, to mix the securities pledged by borrowers & obtain advances on the entire mass. M. having become bkpt., the banks claimed to hold S.'s securities against the whole amount of M.'s indebtedness to them:—*Held:* the banks, having reason to believe that the securities were not, or might not be, the property of M., were bound to inquire as to his authority to deal with them, & having neglected to do so, were not purchasers for value without notice; it made no difference whether the bonds) were negotiable instruments or not; & S. was entitled to redeem on payment of the advances obtained by E. from M.—SHEFFIELD (EARL) *v.* LONDON JOINT STOCK BANK (1888), 13 App. Cas. 333; 57 L. J. Ch. 986; 58 L. T. 735; 37 W. R. 33; 4 T. L. R. 389, H. L.; *revsg.* S. C. *sub nom.* EASTON *v.* LONDON JOINT STOCK BANK (1886), 34 Ch. D. 95, C. A.

Annotations:—**Consd.** London Joint Stock Bank *v.* Simmons, [1892] A. C. 201. **Refd.** Kacmena *v.* Central Bank of London (1888), 4 T. L. R. 657; Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388; Levy *v.* Richardson (1889), 5 T. L. R. 236; Colonial Bank *v.* Cady & Williams, London Chartered Bank of Australia *v.* Cady & Williams (1890), 15 App. Cas. 267; Venables *v.* Baring, [1892] 3 Ch. 527; Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120; Cuthbert *v.* Robarts, Lubbock (1909), 78 L. J. Ch. 529; Jameson *v.* Union Bank of Scotland (1913), 109 L. T. 850; Fuller *v.* Glyn, Mills, Currie, [1914] 2 K. B. 168. **Mentd.** Colonial Bank *v.* Hepworth (1887), 36 Ch. D. 36; Redfern *v.* Rosenthal (1901), 85 L. T. 313.

2044. Where rents of mortgaged property paid to agent—Duty to inquire as to principal.]—A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; but actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights. H. executed a conveyance of freehold property to one G., an auctioneer, which purported to be made in consideration of £12,000. It was assumed, although not proved, that no part of the purchase-money was in fact paid, & that H. remained the true owner of the property. The tenants of the property continued to pay their rents to W., a house agent who collected them on behalf of H. G. obtained advances to himself on the security of the property, & executed legal mtges. of it to defts. Defts. had no express notice that G. was trustee of the property on behalf of H., or that H. was in receipt of the rents, but a valuer, who surveyed the property on their behalf, inquired of the tenants as to whom they paid their rents, & discovered that they paid them to W. He was not, however, told on whose behalf W. received them. H. & G. had since died. Pltf., who was H.'s widow & tenant for life under his will, brought an action against defts. to have the conveyance delivered up to be cancelled:—*Held:* it is not the duty of a purchaser or mtgee. to inquire of the tenants as to whom they pay their rents, either under Conveyancing Act, 1882 (c. 39), s. 3, or under the law as it stood independently of that Act, & the action must be dismissed.—HUNT *v.* LUCK, [1902] 1 Ch. 428; 71 L. J. Ch. 239; 86 L. T. 68; 50 W. R. 291; 18 T. L. R. 265; 46 Sol. Jo. 220, C. A.

Annotations:—**Apld.** Green *v.* Rheinberg (1911), 104 L. T. 149. **Refd.** Powell *v.* Browne (1907), 97 L. T. 854.

Land improvement charges.]—*See* LAND IMPROVEMENT, Vol. XXX., p. 296, No. 220.

Mortgage of railway stock.]—*See* COMPANIES, Vol. X., p. 1146, No. 8101.

(c) Conduct in relation to Title Deeds.

See Sub-sect. 3, *post.*

(d) Notice to Agent.

See Sub-sect. 1, B., *post.*

B. Notice to Agent.

(a) In General.

See, generally, AGENCY, Vol. I., pp. 610 *et seq.*; EQUITY, Vol. XX., pp. 312 *et seq.*

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2045. Notice to agent is notice to principal.]—SHELDON *v.* COX, No. 1949, *ante.*

2046. ——.]—ESPIN *v.* PEMBERTON, No. 2064, *post.*

2047. —— **Agency not disclosed to other party.**]—When moneys, which form part of a larger sum placed by his client in the hands of a solr. for purposes of investment, are lent by him on the security of a mtge. in which he has affected to act as principal, the client is bound by notice of all the circumstances which come within his (the solr.'s) knowledge. Where in such a case the mtge. debt is afterwards settled upon trusts which are substantially trusts for the benefit of the original mtgee., the trustees have no higher rights than their *cestuis que trust* has before the settlement. Where a mtge. professes to be made in consideration of a sum down, & which is by the deed made immediately payable, whereas the contract was for an annuity, & the consideration was not to be payable till after the death of a person named, such mtge. is fraudulent & void as against a mtgor. who joined therein as surety only.—SPAIGHT *v.* COWNE, EDWARDS *v.* SPAIGHT (1863), 1 Hem. & M. 359; 1 New Rep. 550; 71 E. R. 156.

2048. —— **Solicitor heir-at-law—Priorities of devisees.**]—Testatrix, who died in 1871, by her will devised real estate in Middlesex to trustees upon trust for sale The will was not registered in Middlesex. The heir-at-law of testatrix having learned that the will had not been registered, mortgaged the property to different mtgees., & registered the mtges. The mtge. deeds were prepared & registered by the heir-at-law himself. The surviving trustee received the rents of the property down to 1878, when he died; & in 1879 a receiver was appointed in an action to administer the estate of testatrix. The property was sold in 1882 under an order of the ct., & notice of the mtges. was then given by the mtgees. to the purchasers, & the purchase-moneys were paid into ct., subject to the claims of the mtgees. The heir-at-law died in 1885. An application was made to transfer the purchase-moneys to the account of the devisees under the will. The mtgees. resisted the application on the ground that Middlesex Registry Act, 1708 (c. 20), gave them a title, because the will had not been registered. Neither of the securities was for moneys advanced, but both for old debts, & the heir-at-law acted in the mtge. transactions as agent of both the mtgees.:—*Held:* if persons claiming under the Act had notice of the will, they could not set up the title of the heir-at-law; in the present case the mtgees. were affected by the notice which their agent the heir-at-law possessed; & consequently their claims failed.—*Re* WEIR, HOLLINGWORTH *v.* WILLING (1888), 58 L. T. 792.

(*b*) *Must be in Same Transaction.*

2049. General rule.]—The rule of affecting a person with notice of the title of another by reason of his agent's having notice of it, had not been carried so far as to affect him with such notice, unless where the agent has it at the time of his transaction with him; & that, as the notice which the attorney had of the settlement in the present case was two years before the mtge., the mtgee. could not be affected by it. This is one ingredient for continuing the injunction; & another ingredient is, that the mtgee. has laid by, & let Samuel Steed go on & build upon the premises without giving him notice of the mtge. (LORD HARDWICKE, C.).—STEED *v.* WHITAKER (1740), Barn. Ch. 220; 27 E. R. 621.

Annotation:—**Refd.** Fuller *v.* Benett (1843), 2 Hare, 394.

2050. ——.]—WYLLIE *v.* POLLEN, No. 1888, *ante.*

2051. ——.]—BULPETT *v.* STURGES, No. 1730, *ante.*

2052. ——.]—Deft. H. was entitled to an interest under a will, & the trustees of the will, who were entitled to make advances for her benefit, advanced money for the purchase of a leasehold house, & a settlement was executed under which the money was paid to the trustees of the settlement upon trust to invest it in the purchase of the house & furniture & they were to permit H. to reside in it until she directed a sale. The settlement contained no power to mtge. the property. The house required repairs & one S., a solr., arranged with pltfs., who were clients of his, for an advance on the security of the house. S. attended to the completion of the assignment to the trustees & also attended to the completion of the mtge. to pltfs., which was afterwards executed, but he did not investigate the title & the existence of the trust was not disclosed, though he was aware of it:—*Held:* as S. had acquired his knowledge of the settlement as the solr. of the mtgees., while he was carrying through the transaction of the loan on mtge., the mtgees. were affected with constructive notice of the trust & were not entitled to judgment for foreclosure. —MEYER *v.* CHARTERS (1918), 34 T. L. R. 589.

2053. Solicitor acting in previous mortgage transactions—Recollection not inferred.]—In June, 1875, A. mortgaged his share of trust property to E. by deed, which did not disclose any prior charge, & contained the usual covenant by A. that he was entitled to assign free from incumbrances. Notice of this mtge., & of a further charge created in May, 1877, was served on behalf of E. on the trustees of the property in Nov. 1881. A.'s share was subject to a prior mtge. to B., a solr., who was paid off in 1873, when a fresh mtge. was executed to C. which in July, 1874, was transferred by C. to D., with a further charge in Feb. 1881. B. was solr. for the trustees & A. the mtgor., & had acted as solr. for C. & D. in the mtge. transactions of 1873 & 1874, & also as solr. for E. in the mtge. transaction of June, 1875. The trustees had not received notice of any charge before receiving notice of E.'s mtge. in Nov. 1881:—*Held:* having regard to Conveyancing Act, 1882 (c. 39), s. 3 (1), clause 2, that E.'s charge of which notice was first given, was entitled to priority, as his mtge. deed showed a title in A. free from incumbrances; & that as the ct. declined to infer that B. had any recollection, or that inquiries made by him when acting as solr. for E. in the transaction would have elicited from A. the existence of any prior incumbrance, it could

PART XII. SECT. 13, SUB-SECT. 1.—B. (a).

2045 i. *Notice to agent is notice to principal.*]—If a party, in the matter of a purchase, employ a solr. who has any knowledge of an incumbrance affecting the property, such knowledge is in law communicated to the principal, although the latter may be wholly unconscious of the existence of the incumbrance.—MARJORIBANKS *v.* HOVENDEN (1843), Drury *temp.* Sug. 11.—**IR.**

2045 ii. ——.]—SANKEY *v.* ALEXANDER (2) (1874), 9 I. R. Eq. 259.—**IR.**

p. *Whether notice must be in same transaction.*]—LENEHAN'S EXECUTORS *v.* M'CABE (1840), 2 I. Eq. R. 342.—**IR.**

q. ——.]—A solr. taking a mtge. of an estate will not be held necessarily to have had notice of a prior incumbrance because it appeared in searches instituted by him as solr. in another transaction some years before. —*Re* SMALLMAN'S ESTATE (1867), 16 W. R. 419.—**IR.**

not be said that although B. had acted as solr. for the parties in the previous mtge. transactions, notice of any prior charge affecting the property had come to his knowledge as the solr. of E. in the mtge. transactions of June, 1875.—*Re* COUSINS (1886), 31 Ch. D. 671; 55 L. J. Ch. 662; 54 L. T. 376; 34 W. R. 393.

(c) *Agent acting for All Parties.*

2054. Whether notice to all parties.]—A. made several mtges. to B. C. & D., & in the last mtge. B. was a party & agreed that after he was paid, he would stand trustee for D. All the mtges. were transacted at the same scriveners:—*Held:* the scriveners were agents of the several lenders & notice to them was notice to the lenders; & that C. should be paid before D. as notice to the scriveners of C.'s charge was notice to D.—BROTHERTON *v.* HATT (1706), 2 Vern. 574; 23 E. R. 973.

Annotations:—**Apld.** Fuller *v.* Benett (1843), 2 Hare, 394. **Distd.** Bulpett *v.* Sturges (1870), 22 L. T. 739. **Consd.** Kettlewell *v.* Watson (1882), 21 Ch. D. 685. **Refd.** Le Neve *v.* Le Neve (1747), Amb. 436.

2055. ——.]—KENNEDY *v.* GREEN, No. 2070, *post.*

2056. ——.]—A solr. employed by two mtgees., fixes the second mtgee. with notice of the first mtge.—HARGREAVES *v.* ROTHWELL (1836), 1 Keen, 154; Donnelly, 38; 5 L. J. Ch. 118; 47 E. R. 211.

Annotations:—**Distd.** Bulpett *v.* Sturges (1870), 22 L. T. 739. **N.F.** *Re* Cousins (1886), 31 Ch. D. 671. **Refd.** Clough *v.* French (1842), 6 Jur. 636; Fuller *v.* Benett (1843), 2 Hare, 394; Dresser *v.* Norwood (1863), 14 C. B. N. S. 574.

2057. ——.]—After the commencement of a treaty for the sale of an estate by A. & the purchase of it by B., A. agreed to give C. a mtge. on the estate as a security for an antecedent debt, & notice of the agreement was given to the solrs. of B. The treaty for the sale afterwards ceased to be prosecuted for upwards of five years, during part of which time the suit of an adverse claimant of the estate was pending. A. then died & B. purchased the estate at a lower price from the heir & devisee of A. B. conveyed the estate in mtge. to D. The same solrs. were concerned for B. from the commencement of the treaty with A. until the final purchase of the estate, & for D. in the business of the mtge.:—*Held:* under the circumstances of the case, B. & D. had, through their solrs., constructive notice of the agreement with C. & the estate in their hands was subject to the lien of C. for the amount agreed to be secured by the proposed mtge.—FULLER *v.* BENETT (1843), 2 Hare, 394; 12 L. J. Ch. 355; 7 Jur. 1056; 67 E. R. 162.

Annotations:—**Distd.** Bulpett *v.* Sturges (1870), 22 L. T. 739. **Refd.** Dresser *v.* Norwood (1863), 14 C. B. N. S. 574.

2058. ——.]—A. conveyed an estate to B., &, according to the conveyance, an acceptance was given "in full satisfaction for the absolute purchase," but in reality, it was agreed that the vendor should have a mtge. for the money. Before the acceptance became due, B. mortgaged to C., who employed the same solr. as had been engaged in the purchase, & C. had notice that the bill had not been paid & of the form of the conveyance:—*Held:* (1) C. was affected by the notice in his solr.; (2) under the circumstances, he was bound to inquire into the true nature of the transaction between A. & B., & consequently his security ought to be postponed to A.'s.—FRAIL *v.* (1852), 16 Beav. 350; 22 L. J. Ch. 467; 20 L. T. O. S. 197; 1 W. R. 72; 51 E. R. 814.

2059. ——.]—ROLLAND *v.* HART, No. 1956, *ante.*

2060. ——.]—In 1878, resps., as first mtgees., sold the property under their power of sale, employing S., who was also the mtgor.'s solr., to conduct the sale. S. received the sale moneys, & after satisfying resps.' mtge., kept the balance for himself instead of paying off the second mtgee. S. did not inform the second mtgee. of the sale but, acting as the mtgor.'s solr., continued to pay him interest on the second mtge. as if it were still subsisting. Until 1892 resps. either did not know that there was a second mtge. or believed a false representation made to them by S. that he had the authority of the second mtgee. to receive the balance. In 1892 the second mtgee. discovered the fraud & brought an action against resps. for an account & payment of the amount due to him.

Qu.: whether the knowledge acquired by S. as the mtgor.'s solr. was constructive notice to resps. of the existence of the second mtge., so as to make them trustees for the second mtgee.—THORNE *v.* HEARD & MARSH, [1895] A. C. 495; 64 L. J. Ch. 652; 73 L. T. 291; 44 W. R. 155; 11 T. L. R. 464; 11 R. 254, H. L.

Annotations:—**Mentd.** Mara *v.* Browne, [1895] 2 Ch. 69; How *v.* Winterton, [1896] 2 Ch. 626; Whitwam *v.* Watkin (1898), 78 L. T. 188; *Re* McCallum, McCallum *v.* McCallum, [1901] 1 Ch. 143; Hambro *v.* Burnand, [1903] 2 K. B. 399; Ruben *v.* Great Fingall Consolidated, [1904] 2 K. B. 712; *Re* Fountaine, Fountaine *v.* Amherst (1909), 78 L. J. Ch. 648; Lloyd *v.* Grace, Smith (1912), 81 L. J. K. B. 1140; *Re* Allsop, Whittaker *v.* Bamford, [1914]

2061. ——.]—BERWICK & CO. *v.* PRICE, No. 2028, *ante.*

2062. Concealment with acquiescence of party claiming prior charge—Mortgagee not affected with notice.]—In a settlement made on the marriage of a female infant, the husband covenanted that in case his wife attained twenty one he would concur with her, if she would consent, & would use his utmost endeavours to induce her to concur with him, in settling her real estate. This was never done. In 1862, after the wife had attained her majority, the husband & wife mtged. the wife's real estate to secure money advanced to the husband. The mtgee. was informed by the husband & wife that there was no settlement, & although the person who acted as solr. for both parties was aware of its existence, he concealed it with the acquiescence of the husband & wife from the mtgee. In 1865 the mtgee. discovered the existence of the settlement. The mtge. deed, by mistake, was not effectually acknowledged by the wife till after the mtgee. had received notice of the settlement. On a bill filed by the mtgee:—*Held:* in the face of the evidence of concealment the mtgee. was not affected by notice to the person who acted as his solr; although the wife's estate did not pass to the mtgee. till after he had received notice of the settlement, yet the misrepresentations of the wife constituted a fraud, which bound her estate, & prevented her from disappointing the mtgee., &, consequently, the mtgee. had priority over the persons interested under the settlement.—SHARPE *v.* FOY (1868), 4 Ch. App. 35; 19 L. T. 541; 17 W. R. 65, L. JJ.

Annotations:—**Distd.** Rolland *v.* Hart (1871), 40 L. J. Ch. 701; Cave *v.* Cave, Chaplin *v.* Cave (1880), 42 L. T. 730. **Mentd.** Bateman *v.* Faber (1897), 77 L. T. 576.

2054 i. *Whether notice to all parties.*]—DONALDSON *v.* HALDANE (1841), 1 Robin. App. 226.—SCOT.

Sect. 13.—Failure to gain or loss of priority: Sub-sect. 1, B. (d) & (e); sub-sect. 2, A.]

(d) Agent also concerned as Principal.

2063. Solicitor mortgagor acting for mortgagee—Whether knowledge of solicitor imputed to mortgagee.]—HEWITT *v.* LOOSEMORE, No. 2124, *post.*

2064. —— ——.]—(1) The circumstances of a mtgor. being a solr., & preparing the mtge. deed, & of the mtgee. employing no other solr., are not sufficient to constitute the former the solr. of the latter, so as to affect him with notice of an incumbrance known to the solr.

(2) Notice to a solicitor is actual notice to his client.

(3) Where a *bonâ fide* inquiry is made for title deeds on a mtge. or purchase, & a reasonable excuse is made for their not being forthcoming, their absence does not affect the purchaser or mtgee. with constructive notice of an incumbrance created by the deposit of them.—ESPIN *v.* PEMBERTON (1859), 3 De G. & J. 547; 28 L. J. Ch. 311; 32 L. T. O. S. 345; 5 Jur. N. S. 157; 7 W. R. 221; 44 E. R. 1380, L. C.

Annotations:—As to (1) **Apld.** Eastham *v.* Wilkinson (1859), 33 L. T. O. S. 234. *As to* (2) **Consd.** Cave *v.* Cave (1880), 15 Ch. D. 639. **Refd.** Austin *v.* Tawney (1867), 15 W. R. 463; Bradley *v.* Riches (1878), 9 Ch. D. 189; Davis *v.* Hutchings (1907), 96 L. T. 293. *As to* (3) **Apld.** Brown *v.* Stedman (1896), 44 W. R. 458. *Generally,* **Mentd.** Manners *v.* Mew (1885), 29 Ch. D. 725.

2065. —— ——.]—Where A. & B., tenants in common in fee, borrowed money on the security of an equitable mtge. of their property, & B. afterwards, without the knowledge of A., executed a legal mtge. of his moiety, acting as the mtgee.'s solr. in the transaction, & subsequently the rights of the equitable mtgee. became vested in A.:—*Held:* he was entitled to priority over the legal mtgee.—TURTON *v.* MEACHAM (1869), 19 L. T. 760; 17 W. R. 429.

2066. —— ——.]—CAVE *v.* CAVE, No. 1927, *ante.*

2067. —— ——.]—BOUTS *v.* STENNING (1892), 8 T. L. R. 600.

2068. Solicitor mortgagee—Acting for mortgagor & mortgagee—In previous transaction.]—A solr. who prepared a deed of charge on behalf of the mtgor. & mtgee., held to have notice of that incumbrance on the occasion of taking a subsequent mtge. of same property to himself.—PERKINS *v.* BRADLEY (1842), 1 Hare, 219; 6 Jur. 254; 66 E. R. 1013.

Annotations:—**Refd.** Fuller *v.* Benett (1843), 2 Hare, 394. **Mentd.** Cash *v.* Belcher (1842), 1 Hare, 310; Esquimalt & Nanaimo Ry. *v.* Wilson, [1920] A. C. 358.

2069. —— **Acting for trustees—& mortgagor cestui que trust.**]—N., a solr., in 1864, acted for M., one of the *cestuis que trust,* under a settlement on the occasion of certain shares, subject to the settlement trusts being transferred to him, & then knew that the shares were affected by the trusts. Between 1864 & 1871, N. on several occasions lent money to M. on the security of the shares, which were transferred & re-transferred from one to the other on the occasion of loans & repayments. In 1871 N. acted as solr. to the trustees of the settlement, on their wishing to re-invest their trust fund, & he then read a part of the deed relating to the powers of investment, but no other part. He subsequently, &, as he swore, without knowledge that the trusts of the settlement affected the shares, advanced money to N. on them & obtained a transfer to himself:—*Held:* he was not affected with constructive notice of the trusts.—BRIGGS *v.* MASSEY (1880), 42 L. T. 49.

Solicitor party to fraud.]—*See* Sub-sect. 1, B. (*c*), *post.*

(e) Agent Party to Fraud.

2070. Whether knowledge imputed to mortgagee—Presumption that fraud concealed by agent.]—Where one solr. is employed in a mtge. transaction, he is to be considered as solr. both for mtgee. & mtgor., & notice to such solr. is notice to the mtgee.; & where the solr. was himself the author of a fraud which affected the title, & the fraud was committed under circumstances, apparent upon the face of the deed fraudulently obtained, which would have excited the suspicion of a professional man, & have led to inquiry:—*Held:* the circumstances, under which the fraud was committed, was sufficient to fix the mtgee. with constructive notice, & if, in any mtge. or other transaction, a party does not use the precaution, which common prudence requires, to employ a solr., he is in the same situation with respect to constructive notice, as he would have been, if he had employed a solr.—KENNEDY *v.* GREEN (1834), 3 My. & K. 699; 40 E. R. 266, L. C.

Annotations:—**Apld.** Fuller *v.* Benett (1843), 2 Hare, 394. **Consd.** Jones *v.* Smith (1843), 1 Ph. 244; Marjoribanks *v.* Hovenden (1843), Drury *temp.* Sug. 11. **Distd.** Hewitt *v.* Loosemore (1851), 9 Hare, 449. **Apld.** Frail *v.* Ellis (1852), 16 Beav. 350. **Consd.** Greenslade *v.* Dare (1855), 20 Beav. 284. **Distd.** Atterbury *v.* Wallis (1856), 8 De G. M. & G. 454. **Consd.** Perry *v.* Holl (1860), 2 De G. F. & J. 38. **Folld.** Thompson *v.* Cartwright (1863), 33 Beav. 178. **Distd.** Greenfield *v.* Edwards (1865), 2 De G. J. & Sm. 582. **Apld.** *Re* European Bank, *Ex p.* Oriental Commercial Bank (1870), 5 Ch. App. 358. **Distd.** Rolland *v.* Hart (1871), 6 Ch. App. 678. **Folld.** Waldy *v.* Gray (1875), L. R. 20 Eq. 238. **Distd.** Bradley *v.* Riches (1878), 38 L. T. 810. **Expld.** Cave *v.* Cave, Chaplin *v.* Cave (1880), 42 L. T. 730. **Distd.** Kettlewell *v.* Watson (1882), 21 Ch. D. 685. **Refd.** Hiorns *v.* Holton, Fortnum *v.* Holton (1852), 16 Beav. 259; Robinson *v.* Briggs (1853), 1 Sm. & G. 188; Jones *v.* Williams (1857), 24 Beav. 47; Eastham *v.* Wilkinson (1859), 33 L. T. O. S. 234; Espin *v.* Pemberton (1859), 3 De G. & J. 547; Ogilvie *v.* Jeaffreson (1860), 2 Giff. 353; Willes *v.* Greenhill (No. 2) (1860), 29 Beav. 387; *Re* Cartwright, Thompson *v.* Cartwright (1863), 2 New Rep. 569; Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1871), 7 Ch. App. 75; Agra Bank *v.* Barry (1874), L. R. 7 H. L. 135; Gordon *v.* James (1885), 53 L. T. 641; Favell *v.* Wright (1891), 64 L. T. 85; Dixon *v.* Winch, [1900] 1 Ch. 736; Berwick *v.* Price, [1905] 1 Ch. 632; Bagot *v.* Chapman, [1907] 2 Ch. 222; Howatson *v.* Webb (1907), 97 L. T. 730. **Mentd.** Spencer *v.* Topham (1856), 22 Beav. 573; *Re* Carew's Estate Act (No. 2) (1862), 31 Beav. 39; Lee *v.* Clutton (1875), 45 L. J. Ch. 43; *Re* Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 56 L. T. 622.

2071. —— ——.]—The case of *Kennedy* v. *Green,* No. 2070, *ante,* establishes a very important principle but one which must be very cautiously applied to the cases of notice of facts given to the solr. employed by a client. That case establishes that if the solr. employed by the client was the actual perpetrator of a fraud, it is reasonably certain that he would not communicate that fact to his client & that consequently the client cannot be treated as having had notice of that fact (ROMILLY, M.R.).—THOMPSON *v.* CARTWRIGHT (1863), 33 Beav. 178; 33 L. J. Ch. 234; 9 L. T. 138; 27 J. P. 692; 9 Jur. N. S. 940; 11 W. R. 1091; 55 E. R. 335; *affd. on appeal,* 2 De G. J. & Sm. 10, L. JJ.; *sub nom. Re* CARTWRIGHT, THOMPSON *v.* CARTWRIGHT, 2 New Rep. 569.

Annotations:—**Apld.** Waldy *v.* Gray (1875), 44 L. J. Ch. 394; Cave *v.* Cave (1880), 15 Ch. D. 639.

2072. —— ——.]—W., the acting trustee of a marriage settlement, duly advanced £2,000, part

2063 i. *Solicitor mortgagor acting for mortgagee—Whether knowledge of solicitor imputed to mortgagee.*]—*Re* RORKE'S ESTATE (1863), 14 I. Ch. R. 442; 15 Ir. Jur. 245.—IR.

of the trust funds, upon mtge. of real estate, of which he took a conveyance to himself & his co-trustees, & obtained possession of the title deeds. C., the mtgor., was a client of W., who was a solr. Afterwards W. fraudulently handed over all the deeds to C. C. suppressed the mtge. deeds, & deposited the rest, in Mar. 1865, with a bank to secure his current account. The manager of the bank requiring a certificate of title, C. referred him to W., who signed a certificate, in the manager's handwriting, at the foot of the memorandum of deposit: "I hereby certify that Mr. C. has a good title to the above properties," for which the bank paid him a fee. In 1868 W. became bkpt., whereupon the fact of the deposit with the bank was discovered by the co-trustee & the beneficiaries; & the bank were informed of the trustees' claim. In 1869 C. died, & the mtge. deeds could not be found. In 1873 W. died. On bill by the beneficiaries & surviving trustee of the settlement against the bank, praying for a declaration that pltfs. were first mtgees., & for delivery up of the title deeds:—*Held:* by reason of the fraud of W. notice of the first mtge. could not be imputed through him to the bank, & the bank were mtgees. for value without notice of the prior mtge.—WALDY *v.* GRAY (1875), L. R. 20 Eq. 238; 44 L. J. Ch. 394; 32 L. T. 531; 23 W. R. 676.

Annotations:—**Distd.** Bradley *v.* Riches (1878), 38 L. T. 810. **Refd.** Cave *v.* Cave (1880), 28 W. R. 798.

2073. ——.]—(1) Pltf. through his solr. contributed £500 & the solr. £300 to a loan of £800 on deposit of deeds. The solr. subsequently took a mtge. to himself for the £800. The solr. afterwards deposited the title deeds of the mtged. property with a bank as security for a loan of £400:—*Held:* pltf. had priority for his £500 over the security of the bank.

(2) Pltf. had lent money to a solr. on the security of the deposit of title deeds of land in Middlesex with a letter charging the land, the legal estate in which was outstanding. The solr. afterwards, by way of security for money due to a client, made a mtge. of the land to the client, which mtge. was registered:—*Held:* the client must be presumed to have had notice of pltf.'s charge, which therefore, though unregistered, retained priority.

In cases of this sort it is familiar law that *qui prior est tempore, potior est jure.* That priority no doubt may be displaced by showing negligence or fraud on the part of the mtgee. who is earlier in time or by showing a better equity on the part of the later mtgee. but one or other of these things must be shown (FRY, J.).—BRADLEY *v.* RICHES (1878), 9 Ch. D. 189; 47 L. J. Ch. 811; 38 L. T. 810; 26 W. R. 910.

Annotations:—**Refd.** Allen *v.* Southampton, Roper's Claim (1880), 43 L. T. 625; Berwick *v.* Price, [1905] 1 Ch. 632; Hill *v.* Peters, [1918] 2 Ch. 273. **Mentd.** *Ex parte* Payne, Young *v.* Payne, [1904] 2 Ch. 608; Wells *v.* Smith, [1914] 3 K. B. 722.

2074. ——.]—KENDALL *v.* HULLS, No. 1508, *ante.*

2075. ——.]—ATTERBURY *v.* WALLIS, No. 2163, *post.*

2076. ——.]—It was alleged that a solr. was a party to a fraud, by obtaining conveyances from a judgment debtor to defeat the judgment creditor. To enable him to raise the money to complete these conveyances, he applied to A. to lend the judgment debtor money on mtge. of the lands affected with the judgment. A. had not the money to lend; but told the solr. that he had a niece who had, & which she desired to invest on mtge. A. obtained the assent of his niece to lend her money, & she having entrusted it to A., A. paid the money to the solr.'s clerk, & took a deposit of the title deeds to the lands. A formal mtge. to the niece was afterwards completed:—*Held:* the niece was not affected with constructive notice of the fraud through the solr., & bill dismissed as against her with costs.—EASTHAM *v.* WILKINSON (1859), 33 L. T. O. S. 234.

Solicitor concerned as principal.]—*See* Sub-sect. 1, B. (*d*), *ante.*

SUB-SECT. 2.—BY CONDUCT.

A. In General.

2077. Prior mortgagee privy to subsequent mortgage—Not giving notice of own incumbrance.]—CLARE *v.* BEDFORD (EARL) (prior to 1690), cited in 2 Vern. at p. 151; 13 Vin. Abr. 536; 23 E. R. 703; *sub nom.* CLERE *v.* BEDFORD (EARL), cited in 9 Mod. Rep. at p. 38.

Annotations: **Refd.** Hunsden *v.* Cheyney (1690), 2 Vern. 150; Albemarle & Monk *v.* Bath (1693), Freem. Ch. 193; Savage *v.* Foster (1723), 9 Mod. Rep. 35; Beckett *v.* Cordley (1784), 1 Bro. C. C. 353; Cory *v.* Gerteken (1816), 2 Madd. 40. **Mentd.** Buckinghamshire *v.* Drury (1761), 2 Eden, 60.

2078. ——.] A counsel having a security from A. advises B. his client to lend A. £1,000 on a mtge., & draws the mtge. with a covenant against all incumbrances, & conceals his own security. The security shall be postponed to the mtge.—DRAPER *v.* BORLACE (1699), 2 Vern. 370; 23 E. R. 833.

Annotations: **Apld.** Stronge *v.* Hawkes (1853), 4 De G. M. & G. 186. **Consd.** Low *v.* Bouverie, [1891] 3 Ch. 82. **Refd.** Brown *v.* Thorpe (1841), 11 L. J. Ch. 73; Bell *v.* Marsh, [1903] 1 Ch. 528.

2079. ——.] Where a first mtgee. is a witness to the second mtge., although no actual proof of his knowing the contents thereof, yet since the presumption is that he might have known the same, this shall postpone him.—MOCATTA *v.* MURGATROYD (1717), 1 P. Wms. 393; 24 E. R. 440, L. C.

Annotations: **Consd.** Beckett *v.* Cordley (1784), 1 Bro. C. C. 353. **Refd.** Digby *v.* Craggs (1763), 2 Eden, 200; Plumb *v.* Fluitt (1791), 2 Anst. 432; Toulmin *v.* Steere (1817), 3 Mer. 210; Watts *v.* Symes (1851), 1 De G. M. & G. 240; Stevens *v.* Mid-Hants Ry., London Financial Assocn. *v.* Stevens (1873), 8 Ch. App. 1064; Adams *v.* Angell (1877), 5 Ch. D. 634; Manks *v.* Whiteley, [1911] 2 Ch. 448. **Mentd.** Allen *v.* Wedgwood (1845), 4 L. T. O. S. 492.

2080. ——.] A client, in 1869, entrusted money to a solr. to invest on mtge. of land, trusting to representations by the solr., who acted for both parties, that the property was of fee simple tenure, & free from incumbrances. The mtgor. died in 1879, & the solr. died in 1881, when the client discovered that part of the property was only leasehold for lives, & also that the solr. held a prior mtge. on part of the lands. In an action to make the solr.'s estate liable for the deficiency of the security:—*Held:* (1) though on the evidence the solr. would have had no defence to the action if brought in his lifetime, yet it was not maintainable against his exors; (2) the solr.'s mtge. must be postponed to pltf.'s mtge.—YOUNG *v.* WALLINGFORD (1883), 52 L. J. Ch. 590; 48 L. T. 756; 31 W. R. 838.

2081. First mortgagee stating he has no charge on property—Second mortgagee induced to advance money.]—A. lends money to B. on mtge., but before he does so, sends C. to inquire of D. who had a prior mtge., whether he had any incumbrance on B.'s estate, who denied he had any. This was proved by C. D. by answer confessed C. inquired of him what money B. owed him, but denied C. told him that A. was about to lend B.

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any money:—*Held:* the estate should stand charged in the first place with A.'s debt.—IBBOTSON *v.* RHODES (1706), 2 Vern. 554; 1 Eq. Cas. Abr. 321; 23 E. R. 958.

Annotations:—**Consd.** Beckett *v.* Cordley (1784), 1 Bro. C. C. 353. **Mentd.** Only *v.* Walker (1746), 3 Atk. 407; Hughes *v.* Garner (1836), 2 Y. & C. Ex. 328.

2082. Mortgagee laying by—Builder expending money on estate without notice of mortgage.]—STEED *v.* WHITAKER, No. 2049, *ante.*

2083. —— After notice of second incumbrance—Making payments inconsistent with own mortgage.]—*Semble:* where a party who has a prior equitable lien upon a fund, receives notice of a second incumbrance made without any previous communication with or inquiry from him, but conceals his prior equity & makes payments to the second incumbrancer inconsistent with it, he will be postponed.—MANGLES *v.* DIXON (1849), 1 H. & Tw. 542; 1 Mac. & G. 437; 19 L. J. Ch. 240; 47 E. R. 1525, L. C.; *on appeal* (1852), 3 H. L. Cas. 702, H. L.

Annotations:—**Refd.** Rolt *v.* White (1862), 3 De G. J. & Sm. 360. **Mentd.** Watson *v.* Mid Wales Ry. (1867), L. R. 2 C. P. 593; Higgs *v.* Assam Tea Co. (1869), L. R. 4 Exch. 387; Rodger *v.* Comptoir d'Escompte de Paris (1869), L. R. 2 P. C. 393; Leask *v.* Scott (1877), 2 Q. B. D. 376; Watts *v.* Driscoll, [1901] 1 Ch. 294; Stoddart *v.* Union Trust (1911), 81 L. J. K. B. 140.

2084. —— —— Mortgagee trustee—Duty to inform second mortgagee.]—A trustee who himself has a valid charge upon the trust funds is not as a general rule bound, on receiving notice from a subsequent incumbrancer, to disclose the existence of his charge.—*Re* LEWER, *Ex p.* WILKES (1876), 4 Ch. D. 101; 35 L. T. 557; 25 W. R. 64; *affg.* S. C. *sub nom. Re* LEWER, *Ex p.* GARRARD (1877), 5 Ch. D. 61, C. A.

Annotation:—**Mentd.** *Re* Sendall, *Ex p.* Cochrane (1878), 9 Ch. D. 698.

2085. —— Allowing sale of mortgaged property under fi. fa.]—Pltf. having a mtge. upon the goods in question, which were afterwards taken under a *fi. fa* at the suit of a third party, against the mtgor., in whose possession they remained, allowed them to be sold to defts. without giving notice of his claim, although he attended twice at the premises, on which the goods were seized, & knew that a sale was in contemplation:—*Held:* the opinion of the jury should have been taken whether he had not in point of fact parted with his property in the goods.—PICKARD *v.* SEARS (1837), 6 Ad. & El. 469; 2 Nev. & P. K. B. 488; Will Woll. & Dav. 678; 112 E. R. 179.

Annotations:—**Distd.** Fletcher *v.* Manning (1844), 12 M. & W. 571. **Consd.** Freeman *v.* Cooke (1848), 2 Exch. 654; Harding *v.* Hall (1866), 14 L. T. 410. **Apld.** Webb *v.* Herne Bay Comrs. (1870), L. R. 5 Q. B. 642. **Refd.** Gregg *v.* Wells (1839), 10 Ad. & El. 90; Brown *v.* Thorpe (1841), 11 L. J. Ch. 73; Hawker *v.* Hallewell (1856), 3 Sm. & G. 194; Richards *v.* Johnson (1859), 5 Jur. N. S. 520; Metters *v.* Brown (1863), 7 L. T. 795; Stimson *v.* Farnham (1871), L. R. 7 Q. B. 175; Shropshire Union Rys. & Canal Co. *v.* R. (1875), L. R. 7 H. L. 496; Goodwin *v.* Roberts (1876), 1 App. Cas. 476; Johnson *v.* Credit Lyonnais Co. (1877), 3 C. P. D. 32; Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1884), Cab. & El. 262; Roe *v.* Mutual Loan Fund (1887), 19 Q. B. D. 347; Low *v.* Bouverie, [1891] 3 Ch. 82; Coleman *v.* London County & Westminster Bank, [1916] 2 Ch. 353; Maclaine *v.* Gatty, [1921] 1 A. C. 376; Jones (Holloway) *v.* Woodhouse, [1923] 2 K. B. 117. **Mentd.** Sandys *v.* Hodgson (1839), 10 Ad. & El. 472; Cheltenham & Grand Junction Western Union Ry. *v.* Daniel, Same *v.* De Medina (1842), 6 Jur. 577; Doe d. Muston *v.* Gladwin (1845), 6 Q. B. 953; Boydell *v.* Eckstein (1846), 7 L. T. O. S. 261; Banks *v.* Newton (1847), 16 L. J. Q. B. 142; Nickells *v.* Atherstone (1847), 10 Q. B. 944; Machu *v.* L. & S. W. Ry. (1848), 2 Exch. 415; Price *v.* Groom (1848), 2 Exch. 542; Ringham *v.* Clements (1848), 12 Q. B. 260; Doe *v.* Challis (1851), 17 Q. B. 166; West & Green *v.* Elmore (1851), 18 L. T. O. S. 207; Howard *v.* Hudson (1853), 2 E. & B. 1; R. *v.* Ambergate, etc. Ry. (1853), 20 L. T. O. S. 246; Foster *v.* Mentor Life Assce. (1854), 3 E. & B. 48; Jorden *v.* Money (1854), 5 H. L. Cas. 185; Tyerman *v.* Smith (1856), 6 E. & B. 719; Bill *v.* Richards (1857), 26 L. J. Ex. 409; Dunston *v.* Paterson (1857), 2 C. B. N. S. 495; Simpson *v.* Accident Death Insce. (1857), 2 C. B. N. S. 257; Clarke & Chapman *v.* Hart (1858), 6 H. L. Cas. 633; Cornish *v.* Abington (1859), 4 H. & N. 549; Levy *v.* Hale (1859), 29 L. J. C. P. 127; *Re* North British Australasian Co., *Ex p.* Swan (1859), 7 C. B. N. S. 400; Piggott *v.* Stratton (1859), 1 De G. F. & J. 33; Cairncross *v.* Lorimer (1860), 3 L. T. 130; Broadbent *v.* Barlow (1861), 3 De G. F. & J. 570; Cave *v.* Mills (1861), 8 Jur. N. S. 363; White *v.* Greenish (1861), 11 C. B. N. S. 209; Loffus *v.* Maw (1862), 3 Giff. 592; Palmer *v.* Met. Ry. (1862), 31 L. J. Q. B. 259; Ashpitel *v.* Bryan (1863), 3 B. & S. 474; Swan *v.* North British Australasian Co. (1863), 2 H. & C. 175; M'Cance *v.* L. & N. W. Ry. (1864), 11 L. T. 426; Phillips *v.* Im Thurn (1866), L. R. 1 C. P. 463; M'Evoy *v.* Drogheda Harbour Comrs. (1867), 16 W. R. 34; *Re* Bahia & San Francisco Ry. (1868), L. R. 3 Q. B. 584; Knights *v.* Wiffen (1870), L. R. 5 Q. B. 660; Goddard *v.* Smith (1872), L. R. 3 P. & D. 7; Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (1873), L. R. 6 H. L. 352; Le Clere *v.* Greene (1873), 22 W. R. 428; Morrison *v.* Universal Marine Insce. (1873), L. R. 8 Exch. 197; Wadling *v.* Oliphant (1875), 1 Q. B. D. 145; Walrond *v.* Hawkins (1875), L. R. 10 C. P. 342; Polak *v.* Everett (1876), 1 Q. B. D. 669; Angus *v.* Dalton (1877), 3 Q. B. D. 85; Rumball *v.* Metropolitan Bank (1877), 2 Q. B. D. 194; *Re* Church & Empire Fire Insce. Fund, Andress' Case (1878), 8 Ch. D. 126; Simm *v.* Anglo-American Telegraph Co., Anglo-American Telegraph Co. *v.* Spurling (1879), 5 Q. B. D. 188; Alderson *v.* Maddison (1880), 5 Ex. D. 293; Manchester & Oldham Bank *v.* Cook (1883), 49 L. T. 674; Ashby *v.* Day (1885), 54 L. J. Ch. 935; Colonial Bank *v.* Cady & Williams, London Chartered Bank of Australia *v.* Cady & Williams (1890), 15 App. Cas. 267; Tomkinson *v.* Balkis Consolidated Co. (1891), 64 L. T. 816; Flatau *v.* Sawyer (1892), 8 T. L. R. 656; Sarat Chunder Dey *v.* Gopal Chunder Lala (1892), 56 J. P. 741; *Re* Bentley & Yorkshire Breweries, *Ex p.* Harrison (1893), 69 L. T. 204; Henderson *v.* Williams, [1895] 1 Q. B. 521; Scholfield *v.* Londesborough (1895), 14 R. 151; Hunt *v.* Fripp (1897), 77 L. T. 516; Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658; *Re* National Bank of Wales, [1899] 2 Ch. 629; Palmer *v.* Moore, [1900] A. C. 293; Farquharson *v.* King, [1901] 2 K. B. 697; Morison *v.* London County & Westminster Bank (1913), 108 L. T. 379; London Joint Stock Bank *v.* MacMillan & Arthur, [1918] A. C. 777; Pearl Mill Co. *v.* Ivy Tannery Co., [1919] 1 K. B. 78; Colley *v.* Overseas Exporters, [1921] 3 K. B. 302; Bradford *v.* Price (1923), 92 L. J. K. B. 871.

2086. Parting with legal estate.]—ROOPER *v.* HARRISON, No. 1931, *ante.*

2087. Fraud—Negligence amounting to fraud—Wilful abstention from inquiry.]—RATCLIFFE *v.* BARNARD, No. 2118, *post.*

2088. —— Assistance in or connivance at—In creation of subsequent charge.]—C., the manager of a joint stock co., executed a legal mtge. to the co. of his own freehold estate, & handed over the title deeds to them. The deeds were placed in a safe of the co., which had only one lock having duplicate keys, one of which was intrusted to C., as manager. Some time afterwards C. took out of the safe the deeds, except the mtge., & handed them to W., to whom at the same time he executed a mtge. for money advanced to him by her, without notice of the co.'s security:—*Held:* the mtge. of the co. had priority over the mtge. to W.

The ct. will postpone a legal mtge. to a subsequent equitable security: (*a*) where the legal mtgee. has assisted in or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title deeds may be sufficient evidence where such conduct cannot otherwise be explained; or (*b*) where the legal mtgee. has made the mtgor. his agent with authority to raise money, & the security given for raising such money has by misconduct of the agent been represented as the first estate.

But the ct. will not postpone a legal mtgee. to a subsequent equitable mtgee. on the ground of any mere carelessness or want of prudence on

the part of the legal mtgee.—NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. *v.* WHIPP (1884), 26 Ch. D. 482; 53 L. J. Ch. 629; 51 L. T. 806; 32 W. R. 626, C. A.

Annotations:—**Consd.** Garnham *v.* Skipper (1885), 53 L. T. 940. **Apld.** Manners *v.* Mew (1885), 29 Ch. D. 725. **Distd.** Farrand *v.* Yorkshire Banking Co. (1888), 40 Ch. D. 182. **Consd.** Taylor *v.* Russell, [1891] 1 Ch. 8. **Folld.** Garside *v.* Liverpool Railway Permanent Benefit Bldg. Soc. (1897), 13 T. L. R. 189; Cottey *v.* National Provincial Bank of England (1904), 20 T. L. R. 607. **Apld.** Walker *v.* Linom, [1907] 2 Ch. 104. **Refd.** National Provincial Bank of England *v.* Jackson (1886), 33 Ch. D. 1; Isaac *v.* Worstencroft (1892), 67 L. T. 351; Brocklesby *v.* Temperance Permanent Bldg. Soc., [1893] 3 Ch. 130; *Re* Ingham, Jones *v.* Ingham, [1893] 1 Ch. 352; *Re* Castell & Brown, Roper *v.* Castell & Brown, [1898] 1 Ch. 315; Oliver *v.* Hinton, [1899] 2 Ch. 264; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231; Berwick *v.* Price (1904), 74 L. J. Ch. 249; Ruben *v.* Great Fingall Consolidated, [1904] 2 K. B. 712; Longman *v.* Bath Electric Tramways, [1905] 1 Ch. 646. **Mentd.** *Re* Whitehead (1885), 28 Ch. D. 614.

2089. —— Necessity for —To postpone legal mortgagee.]—In order to postpone an equitable mtgee. to another equitable mtgee. whose security is of later date, it is not necessary, as it would be in order to deprive a legal mtgee. of the advantage of the legal estate, to show that the first mtgee. has been guilty of negligence amounting to, or which is evidence of, fraud. Negligence, such as omission to obtain possession of or to make inquiries about the title deeds, may be sufficient. —FARRAND *v.* YORKSHIRE BANKING CO. (1888), 40 Ch. D. 182; 58 L. J. Ch. 238; 60 L. T. 669; 37 W. R. 318.

Annotations:—**Distd.** Flinn *v.* Fountain (1889), 60 L. T. 484. **Refd.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231; Walker *v.* Linom, [1907] 2 Ch. 104.

2090. —— Priority by registration. BATTISON *v.* HOBSON, No. 1970, *ante*.

2091. —— Mortgagee antedating mortgage To over-reach prior settlement.]—(1) If a mtgee. fraudulently antedate the mtge. deed, for the purpose of over-reaching a marriage settlement, the mtge. is void; but the fact of fraud must be previously tried at law.

(2) A mtgee. need not give notice of his mtge. to a purchaser of the estate.—OSBORN *v.* LEA (1724), 9 Mod. Rep. 96; 88 E. R. 339, L. C.

Annotation:—*Generally*. **Mentd.** Wright *v.* Horton (1887), 56 L. J. Ch. 873.

2092. —— False recital Enabling mortgagor to retain deed.]—In a mtge. deed of an equity of redemption for securing the repayment of a sum of money due from A. to B., it was falsely recited that the mtged. premises were liable to an equitable charge in favour of C. by deposit of a deed, to the possession of which B. would otherwise have been entitled. A. retained this deed in his possession, & subsequently deposited it with C. as a security for a sum of money:—*Held*: C.'s security was subject to B.'s mtge., & B. was entitled as against C. to a decree for payment or foreclosure, & also to delivery up of the deed on default, it being clear that C. was a party to the fraud.—FRAZER *v.* JONES (1848), 17 L. J. Ch. 353; 12 Jur. 443; *sub nom.* FRASER *v.* JONES, 11 L. T. O. S. 369, L. C.

Annotations:—**Apld.** Lake *v.* Brutton (1854), 18 Beav. 34. **Consd.** Stackhouse *v.* Jersey (1861), 1 John. & H. 721. **Refd.** Jones *v.* Thomas (1862), 11 W. R. 50; Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139; *Re* Tasker, Hoare *v.* Tasker, [1905] 2 Ch. 587; *Re* Russian Petroleum & Liquid Fuel Co., London Investment Trust *v.* Russian Petroleum & Liquid Fuel Co., [1907] 2 Ch. 540. **Mentd.** Beck *v.* Kantorowicz, Kantorowicz *v.* Carter, Kalb *v.* Kantorowicz (1857), 3 K. & J. 230.

2093. —— By agent of mortgagee.]—A. executed a mtge. to B. for £1,000. This was not acted on, but A. afterwards executed another mtge. for £2,000 to B. The solr. employed retained the first deed, & afterwards fraudulently induced B., without consideration, to sign a memorandum, undertaking to transfer the first mtge. to C., & he executed such transfer. C. on the faith of B.'s acts, advanced £1,000, which was received by the solr. & misapplied:—*Held*: B. must be postponed to C.—HIORNS *v.* HOLTOM, FORTNUM *v.* HOLTOM (1852), 16 Beav. 259; 20 L. T. O. S. 188; 16 Jur. 1077; 51 E. R. 778.

2094. —— Misrepresentation.]—YOUNG *v.* WALLINGFORD, No. 2080, *ante*.

—— Waiver induced by.]—*See* No. 2096, *post*.

—— Shares—Fraudulent dealings by brokers.]—*See* COMPANIES, Vol. IX., pp. 306-308, Nos. 2333-2335, 2337-2340, 2342.

2095. Failure to take protection Giving of notice to trustees.]—A second incumbrancer of an equitable interest, by giving notice of his incumbrance to the trustees in whom is vested the legal estate, obtains priority over a previous incumbrancer who has not given such notice. FOSTER *v.* COCKERELL (1835), 3 Cl. & Fin. 456; 9 Bli. N. S. 332; 6 E. R. 1508, H. L.; *affg.* S. C. *sub nom.* FOSTER *v.* BLACKSTONE (1833), 1 My. & K. 297.

Annotations:—**Distd.** Peacock *v.* Burt (1834), 4 L. J. Ch. 33. **Consd.** Meux *v.* Bell (1841), 1 Hare, 73. **Apld.** Ellwood *v.* Bridges (1843), 2 Y. & C. Ch. Cas. 486. **Consd.** Willshire *v.* Rabbits (1844), 14 Sim. 76. **Folld.** Wilmot *v.* Pike (1845), 5 Hare, 14. **Apld.** Lee *v.* Howlett (1856), 2 K. & J. 531; *Re* Hughes' Trusts (1861), 2 Hem. & M. 89. *Re* Wyatt, White *v.* Ellis, [1892] 1 Ch. 188. **Consd.** Ward *v.* Duncombe, [1893] A. C. 369. **Folld.** *Re* Lake, *Ex p.* Cavendish, [1903] 1 K. B. 151. **Consd.** *Re* Dallas, [1904] 2 Ch. 385. **Refd.** Timson *v.* Ramsbottom (1837), 2 Keen, 35; Jones *v.* Jones (1838), 8 Sim. 633; Meeke *v.* Kettlewell (1842), 11 L. J. Ch. 293; Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377; Rice *v.* Rice (1854), 2 Drew. 73; Warburton *v.* Hill, Stent *v.* Wickens (1854), Kay, 470; Rooper *v.* Harrison (1855), 2 K. & J. 86; Consolidated Investment & Insce. *v.* Riley (1859), 1 Giff. 371; Macleod *v.* Buchanan (1864), 4 De G. J. & Sm. 265; Ford *v.* Tynte (1865), 34 L. J. Ch. 452; Arden *v.* Arden (1885), 29 Ch. D. 702; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; English & Scottish Investment Co. *v.* Brunton (1892), 41 W. R. 133; *Re* Wasdale, Brittin *v.* Partridge, [1899] 1 Ch. 163; Montefiore *v.* Guedalla, [1903] 2 Ch. 26. **Mentd.** Sheehy *v.* Muskerry (1839), 7 Cl. & Fin. 1.

2096 Waiver of prior right Induced by fraud.]—Property, including a leasehold house, was mortgaged by A. to C. who was afterwards induced by a representation from A. that a purchaser had been found for the house, to waive that portion of his security, & accept a part of the principal. The representation was wholly untrue:—*Held*: the waiver, which was made upon a fraudulent representation, did not affect the right of C. to insist upon his security for the balance of the principal as against A. & subsequent equitable incumbrancers under A.—JONES *v.* THOMAS (1862), 11 W. R. 50.

Annotations:—**Refd.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1871), 7 Ch. App. 75.

2097. — Resp., a Chinese resident of Chicago, & his nephew, who resided at Victoria in Hong Kong, had names which were each properly rendered in English as Tong Shun but which differed when written in Chinese characters. By a deed signed, sealed, & delivered by the nephew in 1909 leasehold land was conveyed to "Tong Shun, of Victoria, in the Colony of Hong Kong," thereinafter called "the purchaser;" the deed witnessed that "the purchaser" had paid the consideration, & contained covenants on his part. The nephew signed the deed with resp.'s name written in Chinese character; he paid the consideration, but with money supplied by resp. In 1913 the nephew, in fraud of resp., created an equitable mtge. upon the land in favour of applts. In 1914 resp. took from his nephew a conveyance of the legal estate subject to applts.' mtge., the

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nephew covenanting to pay resp. the amount due upon the mtge. Resp. subsequently sued for a declaration that he was entitled to the land free from applts.' mtge.:—*Held:* (1) under the conveyance of 1909 the legal estate did not pass to resp., but passed to his nephew subject to a trust in favour of resp.; (2) resp. by the transaction of 1914 had elected not to keep alive against applts. his prior equitable state, & applts. could claim the benefit of that transaction although they were not parties to it.—FUNG PING SHAN *v.* TONG SHUN, [1918] A. C. 403; 87 L. J. P. C. 22; 118 L. T. 380, P. C.

2098. Carelessness or want of prudence—Insufficiency to postpone legal mortgagee.]—NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. *v.* WHIPP, No. 2088, *ante.*

2099. —— Sufficiency to postpone equitable mortgagee.]—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* JACKSON, No. 2041, *ante.*

2100. —— —— ——.]—A client left moneys for investment in the hands of his solrs. The solrs. represented that the sum of £11,000, part of these moneys, was invested on mtge. of freehold property at A. belonging to a firm, & the client made no further inquiry. The solrs. were in fact the holders of a mtge. for £55,000 upon property X. at A., belonging to the firm, & they repaid themselves £11,000, of the £55,000 with the client's money. The firm afterwards bought property Y. at A., & mortgaged it in fee to a bank. The solrs. released the firm from the mtge. debt of £55,000 on property X., & took from them a mtge. for £50,000 on properties X. & Y., subsequently by arrangement with the firm purchasing the equity of redemption in both properties, & selling them for shares to a limited co. into which the firm was, through their instrumentality, converted. These transactions all took place without the knowledge of the client:—*Held:* (1) the solrs. must be treated as having become trustees for the client of £11,000 out of the £55,000 secured by mtge. on property X.; & having improperly as against the client up that mtge. in exchange, the client had a right under the circumstances to claim a charge for £11,000 & interest upon property Y., in which the legal estate was outstanding, as well as upon property X.; (2) there had been under the circumstances no such negligence or want of prudence on the part of the client as to postpone him, & he was entitled to priority to the limited co. to a charge on property Y. in which the legal estate was outstanding.—*Re* VERNON, EWENS & CO. (1886), 33 Ch. D. 402; 56 L. J. Ch. 12; 55 L. T. 416; 35 W. R. 225, C. A.

Annotations:—**Apld.** Hartopp *v.* Huskisson (1886), 55 L. T. 773. **Folld.** Carritt *v.* Real & Personal Advance Co. (1889), 58 L. J. Ch. 688. **Apld.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Refd.** Taylor *v.* Russell, [1891] 1 Ch. 8; Walker *v.* Linom, [1907] 2 Ch. 104; Hill *v.* Peters, [1918] 2 Ch. 273.

2101. —— ——.]—FARRAND *v.* YORKSHIRE BANKING CO., No. 2089, *ante.*

B. In relation to Title Deeds.

See Sub-sect. 3, *post.*

SUB-SECT. 3.—BY CONDUCT IN RELATION TO TITLE DEEDS.

A. Postponement of Legal Mortgagee.

(*a*) *Failure to Obtain Deeds.*

2102. Sufficiency of failure to affect priority—Voluntary & unjustifiable.]—PENNER *v.* JEMMATT (1785), cited 2 Bro. C. C. 652, n.; 29 E. R. 361, L. C.

Annotation:—**Apld.** Plumb *v.* Fluitt (1791), 2 Anst. 432.

2103. —— ——.]—COLYER *v.* FINCH, No. 2136, *post.*

2104. —— **Fraud or gross negligence.**]—PLUMB *v.* FLUITT, No. 1995, *ante.*

2105. —— ——.]—BARNETT *v.* WESTON, No. 1705, *ante.*

2106. —— ——.]—A tenant for life, with a reversion in fee subject to terms to secure a jointure to his wife & portions to his younger children, mortgaged his reversion, & retained the title deeds in his possession, which related to other property. He afterwards devised his reversion to his daughter in fee; & on her marriage the estates were settled on her husband & children—the settlement reciting generally that the estates were subject to mtge. & other debts of the tenant for life:—*Held:* under the circumstances, the mtgee. was not guilty of fraudulent neglect in leaving the title deeds in the mtgor.'s possession, & the husband of the daughter must be considered to have had notice of the mtge., though not expressly mentioned in the settlement.—FARROW *v.* REES (1840), 4 Beav. 18; 4 Jur. 1028; 49 E. R. 243.

Annotations:—**Apld.** Hewitt *v.* Loosemore (1851), 9 Hare, 449. **Consd.** Carter *v.* Carter (1857), 3 K. & J. 617. **Refd.** Colyer *v.* Finch (1856), 5 H. L. Cas. 905.

2107. —— ——.]—HEWITT *v.* LOOSEMORE, No. 2124, *post.*

2108. —— ——.]—ATTERBURY *v.* WALLIS, No.

2109. —— ——.]—(1) A decree for foreclosure being made against the purchaser, at the suit of the mtgee., who was a mtgee. only for a term:—*Held:* the purchaser ought not to be directed to deliver up the deeds to the mtgee.

(2) Fraud being out of the case on both sides, the question depends entirely upon this, whether there was gross & wilful negligence on the part of the pltf. the mtgee. in not having possessed himself of the title deeds, it being now well settled by many authorities that a legal mtgee. cannot be postponed by reason of his not having possession of the title deeds unless there has been fraud or gross & wilful negligence on his part (TURNER, L.J.).—HUNT *v.* ELMES (1860), 2 De G. F. & J. 578; 30 L. J. Ch. 255; 3 L. T. 796; 7 Jur. N. S. 200; 9 W. R. 362; 45 E. R. 745, L. JJ.

Annotations:—*As to* (1) **Refd.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482. *As to* (2) **Consd.** Ratcliffe *v.* Barnard (1871), 6 Ch. App. 652. **Apld.** Dixon *v.* Muckleston (1872),

PART XII. SECT. 13, SUB-SECT. 2.—A.

2099 i. *Carelessness or want of prudence—Sufficiency to postpone equitable mortgagee.*] — HUNTINGDON *v.* VAN BROCKLIN (1860), 8 Gr. 421.—**CAN.**

r. *Release of part of premises by first mortgagee—Whether gives priority to subsequent incumbrancers.*] — First mtgees. with a power of sale released portions of the mtged. property to the mtgor.: — *Held:* this did not give priority to a subsequent incumbrancer, with respect to the remainder of the property; but might render the first mtgees. responsible to the second for the fair value of the parcels released.—TRUST & LOAN CO. OF CANADA *v.* BOULTON (1871), 18 Gr. 234.—**CAN.**

PART XII. SECT. 13, SUB-SECT. 3.—A. (a).

2102 i. *Sufficiency of failure to affect priority—Voluntary & unjustifiable.*]—If a legal mtgee. neglects to get possession of the title deeds & thereby renders possible the creation of a subsequent equally meritorious equitable claim, the legal mtgee. will be postponed to the holder of the subsequent equitable claim.—TYRELL *v.* MILLS (B. C.), [1924] 3 W. W. R. 387.—**CAN.**

2102 ii. —— ——.]—LITTLE'S TRUSTEES *v.* DULLAHANTY (1818), 1 Nfld. L. R. 114.—**NFLD.**

t. —— *Fraud or gross negligence.*] —Neglect to recover the title deeds by a vendor from a vendee who has secured the greater part of the purchase-money to the vendor by

8 Ch. App. 155. **Consd.** Heath v. Crealock (1874), 10 Ch. App. 22. **Apld.** Manners v. Mew (1885), 29 Ch. D. 725. **Consd.** *Re* Richards, Humber v. Richards (1890), 45 Ch. D. 589. **Expld.** Oliver v. Hinton, [1899] 2 Ch. 264. **Refd.** Taylor v. Russell, [1891] 1 Ch. 8. *Generally*, **Refd.** Cory v. Eyre (1862), 1 De G. J. & Sm. 149; *Re* Hughes, *Ex p.* Elmes (1864), 33 L. J. Bcy. 23.

2110. ——— ———.]—Where, by reason of the contemporaneous delivery of their mtge. deeds, two independent mtgees. are jointly seised of the legal estate, but one of them has received the title deeds without notice of the other's title, while the other has neither claimed the deeds nor made any inquiry for them, the party holding the deeds is entitled in equity to priority over the other, whose gross negligence disentitles him from deriving any benefit in equity from his legal title; & this, though the negligence is not that of the mtgee. himself, but of his solr.—HOPGOOD v. ERNEST (1865), 3 De G. J. & Sm. 116; 13 W. R. 1004; 46 E. R. 581, L. JJ.

Annotations:—**Refd.** Berwick v. Price, [1905] 1 Ch. 632. **Mentd.** Hopgood v. Parkin (1870), L. R. 11 Eq. 74.

2111. ——— ———.]—A legal mtgee. had asked for the deeds which the mtgor., who was his solr., made excuses for not giving to him. The mtgor. afterwards deposited the deeds with another mtgee. as security for money advanced without notice of the legal mtge.:—*Held*: in an action by the legal mtgee. for foreclosure, he had not been guilty of fraud or negligence amounting to fraud, & he could not be postponed to the mtgee. by deposit by reason of any negligence short of that.—MANNERS v. MEW (1885), 29 Ch. D. 725; 54 L. J. Ch. 909; 53 L. T. 84; 1 T. L. R. 421.

Annotations:—**Folld.** Cottey v. National Provincial Bank of England (1904), 20 T. L. R. 607. **Consd.** Walker v. Linom (1907), 51 Sol. Jo. 483. **Refd.** Farrand v. Yorkshire Banking Co. (1888), 40 Ch. D. 182; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon (1901), 84 L. T. 397.

2112. ——— ———.] The owner of leasehold premises charged them with the payment of certain moneys to the G. & M. Bank & deposited the lease as security. He then mortgaged the premises by sub-demise expressly subject to the bank's charge. The legal mtgee. did not give the bank notice of his mtge. The mtgor. subsequently, without the knowledge of the legal mtgee., paid off the G. & M. Bank, obtained the lease from them, & deposited it with the deft. bank, who had no knowledge of the legal mtge., to secure moneys advanced by them. In an action by the exors. of the legal mtgee. to establish their priority over the deft. bank:—*Held*: the legal mtgee. had not been guilty of any misconduct, negligence, or want of caution for which he could be held directly or indirectly responsible; & nothing had happened to take away or affect his original priority.—GRIERSON v. NATIONAL PROVINCIAL BANK OF ENGLAND, LTD., [1913] 2 Ch. 18; 82 L. J. Ch. 481; 108 L. T. 632; 29 T. L. R. 501; 57 Sol. Jo. 517.

2113. ——— ——— **Onus of proof.**]—(1) The authorities establish that a purchaser from a person in possession, purchasing without notice of any prior charge or trust, & obtaining a conveyance of the legal estate from a trustee of a satisfied term, or a mtgee. whose mortgage is satisfied, will be protected in this ct. against a prior incumbrancer or *cestui que trust*, provided the party so conveying the legal estate have no notice of the prior trust or incumbrance. But it has never yet been decided that, where a party so conveying has notice of an express prior trust or incumbrance, the purchaser can protect himself therefrom by means of the legal estate.

Semble: such a decision would be contrary to the principles of this Court.

(2) J., believing himself & three others to be entitled under a will to four-eighths of certain freehold & copyhold estates, joined them in a mtge. of all his estate in the four-eighths to P. Subsequently it was discovered that the supposed last will had been revoked by a later will, by which all the estates were devised to J. for life but subject to several annuities, with remainders over:—*Held*: although P. had acquired the legal estate in this one-eighth for valuable consideration, as it were, by accident, & without notice that the former will had been revoked, so that his conscience was not affected by any of the trusts to which, by the subsequent will, the estate was subjected, he must hold subject to those trusts, since the will by which they were created was the very instrument upon which his title to the legal estate depended.

(3) In order to postpone any party to a cause in respect of a prior mtge. or incumbrance, on the ground that you have got the title deeds, it must be shown that you have got them through gross negligence on the part of the person you seek to postpone; & the *onus* is on you of showing this.

(4) To allow title deeds to remain with a party who, besides having a beneficial interest in the property, is also a trustee for others, not gross negligence; for, *qua* trustee, he is the right person to hold them.

(5) To allow them to remain with one of several tenants in common after he had mortgaged his share, not gross negligence.—CARTER v. CARTER (1857), 3 K. & J. 617; 27 L. J. Ch. 74; 30 L. T. O. S. 349; 4 Jur. N. S. 63; 69 E. R. 1256.

Annotations:—*As to* (1) **Consd.** Bates v. Johnson (1859), John. 304; Prosser v. Rice (1859), 28 Beav. 68; Wilkinson v. Castle (1868), 37 L. J. Ch. 467. **Refd.** Young v. Young (1867), L. R. 3 Eq. 801; Bailey v. Barnes, [1894] 1 Ch. 25. *As to* (2) **Dbtd.** Pilcher v. Rawlins (1872), 7 Ch. App. 259; Mumford v. Stohwasser (1874), 22 W. R. 833. *As to* (3) **Refd.** *Re* Palmer, Clarke v. Palmer (1882), 51 L. J. Ch. 634. *Generally*, **Refd.** Heath v. Crealock (1874), 31 L. T. 650; Williams v. Pinckney (1897), 67 L. J. Ch. 31; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231. **Mentd.** Blackwood v. London Chartered Bank of Australia (1873), L. R. 5 P. C. 92.

2114. Incumbrancer no primary right to call for title deeds.]—Trustees in trust to raise £35,000, grant an annuity secured by a term of years for £5,000, part of the £35,000, & the title deeds remain in their hands. They afterwards make a mtge. without informing the mtgee. of the first incumbrance: *Held*: the annuitant was not postponed to the second incumbrancer by reason that the trustees retained the title deeds.—HARPER v. FAULDER (1819), 4 Madd. 129; 56 E. R. 656.

Annotations:—**Apld.** Hewitt v. Loosemore (1851), 9 Hare 449. **Dbtd.** Layard v. Maud (1867), L. R. 4 Eq. 397.

2115. ——— **Mortgagor in fiduciary position—Trustee.** CARTER v. CARTER, No. 2113, *ante*.

2116. ——— **Mortgagor a tenant in common.**]—CARTER v. CARTER, No. 2113, *ante*.

2117. Extent of postponement—To party holding deeds—To party inquiring as to deeds at time of advance.—P. mortgaged estates to M., & was

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giving him a mtge. on the property itself, when the vendor has full notice that the vendee is impecunious & a bad paymaster, & thereby the vendee is enabled to obtain a second mtge. on the property by deposit of the title deeds, is gross & culpable negligence, which postpones the prior mtgee.—NANDA LAL ROY v. ABDUL AZIZ (1916), I. L. R. 43 Calc. 1052.—**IND.**

a. ———.]—The mere possession of the title deeds by a second mtgee., though a purchaser for value without notice, will not give him priority. There must be some act or default of the first mtgee. to have this effect.—SOMASUNDARA TAMBIRAN v. SAKKARAI PATTAN (1869), 4 Mad. 369.—**IND.**

Sect. 13.— Failure to gain or loss of priority: Subsect. 3, A. (c) & (d).]

2132. ——.]—HUDSTON *v.* VINEY, No. 2023. *ante.*

(d) Negligence in Custody of Deeds.

2133. Mere parting with deeds—Unaccompanied by fraud or gross negligence.]—Bill to charge a trustee, as having by delivering the title deeds to the tenant for life enabled him to make a mtge. of a settled estate as tenant in fee, dismissed; the fraudulent purpose of enabling him to mtge. resting upon the evidence of a single witness, & being positively denied by the answer; as far as the allegations of the bill gave an opportunity of answering; but without costs, on the ground of negligence; & without prejudice to an action; & with an option to pltf. to take an issue.

The doctrine at last is, that the mere circumstance of parting with the title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose or that gross negligence, that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mtgee. (LORD ELDON, C.).—EVANS *v.* BICKNELL (1801), 6 Ves. 174; 31 E. R. 998, L. C.

Annotations:—**Consd.** Hunt *v.* Elmes (No. 2) (1860), 28 Beav. 631; Dowle *v.* Saunders (1864), 2 Hem. & M. 242; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482; Walker *v.* Linom, [1907] 2 Ch. 104. **Refd.** Martinez *v.* Cooper (1826), 2 Russ. 198; Wiseman *v.* Westland (1826), 1 Y. & J. 117; Horlock *v.* Priestley (1827), 2 Sim. 75; Jones *v.* Jones (1838), 8 Sim. 633; Farrow *v.* Rees (1840), 4 Beav. 18; Jones *v.* Smith (1841), 1 Hare, 43; West *v.* Reid (1843), 2 Hare, 249; Allen *v.* Knight (1846), 5 Hare, 272; Hewitt *v.* Loosemore (1851), 9 Hare, 449; Colyer *v.* Finch (1856), 5 H. L. Cas. 905; Slim *v.* Croucher (1860), 1 De G. F. & J. 518; Stackhouse *v.* Jersey (1861), 1 John. & H. 721; Sharples *v.* Adams (1863), 32 Beav. 213; *Re* Tichener (1865), 35 Beav. 317; Lloyd *v.* Banks (1867), 15 W. R. 1006; Newton *v.* Newton (1868), L. R. 6 Eq. 135; Ramshire *v.* Bolton (1869), L. R. 8 Eq. 294; Keith *v.* Burrows (1876), 1 C. P. D. 722; Manners *v.* Mew (1885), 29 Ch. D. 725; Low *v.* Bouverie, [1891] 3 Ch. 82; Taylor *v.* Russell, [1891] 1 Ch. 8; *Re* Ingham, Jones *v.* Ingham, [1893] 1 Ch. 352. **Mentd.** Burrowes *v.* Lock (1805), 10 Ves. 470; Clifford *v.* Brooke (1806), 13 Ves. 131; Harrison *v.* Gardner (1817), 2 Madd. 198; Hall *v.* Maltby (1819), 6 Price, 240; Dearle *v.* Hall (1828), 3 Russ. 1; Adamson *v.* Evitt (1830), 2 Russ. & M. 66; Dryden *v.* Frost (1837), 1 Jur. 330; Attwood *v.* Small (1838), 6 Cl. & Fin. 232; Meux *v.* Bell (1841), 1 Hare, 73; Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542; Stevens *v.* Stevens (1845), 2 Coll. 20; Blair *v.* Bromley (1847), 2 Ph. 354; Ingram *v.* Thorp (1848), 7 Hare, 67; Phillipson *v.* Gatty, Gatty *v.* Phillipson (1848), 7 Hare, 516; Wilson *v.* Short (1848), 6 Hare, 366; Money *v.* Jordan (1852), 2 De G. M. & G. 318; Jorden *v.* Money (1854), 5 H. L. Cas. 185; Hutton *v.* Rossiter (1855), 7 De G. M. & G. 9; *Re* Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576; Clark *v.* Hoskins (1868), 37 L. J. Ch. 561; Hill *v.* Lane (1870), L. R. 11 Eq. 215; Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1871), 20 W. R. 218; Schroeder *v.* Mendl (1877), 37 L. T. 452; Moore *v.* Knight (1890), 63 L. T. 831; Brocklesby *v.* Temperance Bldg. Soc., [1895] A. C. 173; Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234; Nocton *v.* Ashburton, [1914] A. C. 932.

2134. ——.]—*Qu.:* where a mtgee. has without fraud or gross neglect parted with the possession of title deeds, which are deposited with another person equally innocent, whether the ct. will take the possession from him.

I concur entirely in the opinion, that Messrs. Meux & Co. would not lose their priority unless by fraud or gross negligence, & that there is nothing in this case to indicate a waiver of their lien (LORD ELDON, C.).—*Re* FOOT, *Ex p.* CAWTHORNE (1822), 1 Gl. & J. 240. L. C.

Annotation:—**Refd.** Jones *v.* Jones (1837), 8 Sim. 633.

2135. ——.]—Certain stock, of which A., B., C., & D. were trustees, was sold out, & the proceeds lent to C. & D., upon the security of the title deeds of property belonging to C. & D., as tenants in common, the deposit being accompanied by a memorandum of agreement to execute a legal mtge. C. having obtained the deeds from B., in whose custody they were deposited, made a second equitable mtge. of his moiety to S., who, at the time of taking his security, had no notice of the prior charge. C. became bkpt., & the security being insufficient, S., who had then notice of the prior charge, took a conveyance, under the bkpcy., of C.'s moiety, in satisfaction of his charge. On bill by A. against B., D., C. being dead, the *cestuis que trust* of the stock, & the second mtgee., claiming to have his charge satisfied in priority to S.:—*Held:* (1) the acquisition by S. of the legal estate would not alter the relative position of the incumbrancers, the conveyance being taken from the assignees of C., after notice of the express trusts with which it was affected in his hands; (2) the allowing the mtgor. to have possession of the title deeds was not of itself fraudulent so as to postpone the first mtgee.—ALLEN *v.* KNIGHT (1847), 16 L. J. Ch. 370; 11 Jur. 527, L. C.

Annotations:—*As to* (1) **Apld.** Hewitt *v.* Loosemore (1851), 21 L. J. Ch. 69. **Distd.** Bates *v.* Johnson (1859), John. 304. **Apld.** Mumford *v.* Stohwasser (1874), L. R. 18 Eq. 556. **Refd.** Worthington *v.* Morgan (1849), 16 Sim. 547; Carter *v.* Carter (1857), 3 K. & J. 617; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. *As to* (2) **Consd.** Rice *v.* Rice (1854), 2 Drew. 73; Carter *v.* Carter (1857), 3 K. & J. 617; Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292. **Refd.** Colyer *v.* Finch (1856), 5 H. L. Cas. 905.

2136. —— ——.]—To postpone a first mtgee. on the ground of his leaving the title deeds in the hands of the mtgor., there must be a distinct, voluntary & unjustifiable concurrence on the part of the mtgee. in the mtgor.'s retaining them.

S., seised in fee of an estate subject to an outstanding term, executed a mtge. of same to F. H., a solr., who was employed for both parties, handed over to the mtgee. certain documents, representing them to be title deeds, but which turned out not to be the case. The mtgor. subsequently sold the estate to C. without notice of the prior incumbrance:—*Held:* F. was not guilty of such negligence in respect to leaving the title deeds in the possession of the mtgor. so as to deprive him of his security.—COLYER *v.* FINCH (1856), 5 H. L. Cas. 905; 26 L. J. Ch. 65; 28 L. T. O. S. 27; 3 Jur. N. S. 25, H. L.; *affg.* S. C. *sub nom.* FINCH *v.* SHAW, COLYER *v.* FINCH (1854), 19 Beav. 500.

Annotations:—**Apld.** Carter *v.* Carter (1857), 3 K. & J. 617. **Consd.** Hipkins *v.* Amery (1860), 2 Giff. 292. **Apld.** Hunt *v.* Elmes (1860), 2 De G. F. & J. 578; Dixon *v.* Muckleston (1872), 8 Ch. App. 155. **Expld.** Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482. **Refd.** Perry Herrick *v.* Attwood (1857), 2 De G. & J. 21; Phillips *v.* Phillips (1861), 4 De G. F. & J. 208; Hooper *v.* Gumm, McLellan *v.* Gumm (1865), 13 L. T. 187; Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139; Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292; Heath *v.* Crealock (1873), L. R. 18 Eq. 215; R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420; Corser *v.* Cartwright (1875), L. R. 7 H. L. 731; Heath *v.* Pugh (1881), 6 Q. B. D. 345; *Re* Hawthorne, Graham *v.* Massey (1883), 23 Ch. D. 743; Manners *v.* Mew (1885), 29 Ch. D. 725; Taylor *v.* Russell, [1891] 1 Ch. 8; *Re* Rebbeck, Bennett *v.* Rebbeck (1894), 63 L. J. Ch. 596; *Re* Henson, Chester *v.* Henson, [1908] 2 Ch. 356. **Mentd.** Thompson *v.* Finch (1856), 8 De G. M. & G. 560; Wilkinson *v.* Castle (1868), 37 L. J. Ch. 467; *Re* Venn & Furze's Contract, [1894] 2 Ch. 101.

2137. —— ——.]—The ct. will not postpone a legal mtgee. to a subsequent equitable mtgee. on the ground of any mere carelessness or want of prudence on the part of the legal mtgee.—GARSIDE *v.* LIVERPOOL RAILWAY PERMANENT BENEFIT BUILDING SOCIETY (1897), 13 T. L. R. 189, C. A.

2138. Delivery to solicitor of mortgagee—Fraudulent conduct of solicitor.]—A solr. took a mtge.

in fee from a client, & entered into possession of the mtged. premises. He afterwards transferred the mtge. of another client, & delivered to him the title deeds, but remained in possession as the visible owner of the property, paying interest on the mtge. money to the transferee. Afterwards, in Jan. 1841, the transferee, upon the application of the solr., delivered to him the title deeds, except the deeds of transfer, for the purpose of preparing an abstract for a proposed purchaser of the estate. The purchase was delayed some time, in consequence of a defect of title, but was completed in May, 1841, when the purchase-money was paid to the solr., & the title deeds, with the exception before mentioned, were delivered to the purchaser, who was let into possession, without notice of the transferee's title. In July, 1842, the solr. absconded, & then, for the first time, the purchaser had notice of the transferee's title:—*Held:* if the transferee had not, before July, 1842, notice of the payment of the purchase-money to the solr., & had not authorised or assented to such payment, he was not to be postponed to the purchaser.—STEVENS *v.* STEVENS (1845), 2 Coll. 20; 14 L. J. Ch. 252; 4 L. T. O. S. 491; 9 Jur. 984; 63 E. R. 617.

2139. —— ——.]—Pltfs. were trustees of a settlement, under which H. was tenant for life. P. was their solr. P., having trust funds in hand, arranged with H. that a certain sum should be invested on a mtge. P. advanced the money in his own name but entered it in his firm's books as a loan on behalf of the trust & treated it as such in correspondence with H. Pltfs. were not told of the investment. P. fraudulently deposited the mtge. with defts. to secure a debt of his firm, defts. taking *bonâ fide*:—*Held:* though pltfs. could not delegate their trust so as to constitute H. their agent to authorise the investment, & although P. did not hold the fund in trust for investment on any specific security, pltfs. were entitled to priority over defts.—HARTOPP *v.* HUSKISSON (1886), 55 L. T. 773.

2140. Mortgagee temporarily parting with deeds to mortgagor—Reasonable purpose—Exhibition of lease.]—PETER *v.* RUSSELL (1716), Gilb. Ch. 122; 2 Vern. 726; 25 E. R. 85, L. C.

Annotations:—**Distd.** Layard *v.* Maud (1867), L. R. 4 Eq. 397. **Consd.** Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482. **Refd.** Evans *v.* Bicknell (1801), 6 Ves. 174. **Mentd.** Ryall *v.* Rolle (1749), 1 Atk. 165; Beckett *v.* Cordley (1784), 1 Bro. C. C. 353; Loveridge *v.* Cooper (1823), 2 L. J. O. S. Ch. 75.

2141. —— —— ——.]—A mtgee. of a leasehold house gave up the indenture of lease to his mtgor., in order that it might be shown to an intending purchaser, who wished to see what the covenants in it were; the mtgor. concealed from the purchaser the fact of the existence of an incumbrance on the property, & produced the lease to him, & left it in his possession; within a week afterwards, the purchaser accepted a conveyance, paid his purchase-money, & took possession of the house without any notice of the existence of the mtge.; but the solr. of the mtgee. deposed, that, in an interview which he had had before the completion of the purchase with the solr. of the purchaser, he had informed the latter that a client of his was to receive a considerable sum out of the purchase-money, & had requested to have notice of the time when the money was to be paid; &, though the solr. of the purchaser denied that any such interview had taken place, before the completion of the purchase, a jury gave a verdict in favour of the statement made on that point by the solr. of the mtgee.:—*Held:* the mtgee. was not to be postponed to the purchaser.—MARTINEZ *v.* COOPER (1826), 2 Russ. 198; 38 E. R. 309, L. C.

Annotations:—**Distd.** Dowle *v.* Saunders (1864), 2 Hem. & M. 242. **Consd.** Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482. **Refd.** Jones *v.* Jones (1837), 8 Sim. 633; Hewitt *v.* Loosemore (1851), 9 Hare, 449; Brocklesby *v.* Temperance Bldg. Soc., [1895] A. C. 173. **Mentd.** Gordon *v.* Horsfall (1846), 5 Moo. P. C. C. 393; National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391.

2142. —— **Sale by mortgagor—Mortgagee having no notice of fraud.**]—Where a mtgee. not in possession lent the title deeds to the mtgor., who thereby was enabled to effect a sale to the occupier of the mtged. premises:—*Held:* the mtgee. having no notice of the fraud, & not having any reason to suppose the lessee to be anything more than an ordinary tenant, an injunction to stay an action of ejectment by the mtgee. was refused.—TEMPERLEY *v.* RAPER (1847), 9 L. T. O. S. 511.

2143. —— **Purported return of same deeds—Different deeds in fact returned.**]—Under the will of a mtgee. of two leasehold properties, who died in 1880, A. & B. were exors. & joint devisees & legatees of trust & mtge. estates, & A. was entitled to a life interest in all testator's own property, with remainder to B. In 1884 the mtgor. told A., who had possession of the title deeds of the mtged. property, & was pressing for repayment of the mtge. debt, that he could not borrow the money to pay it off unless the title deeds were sent to him; & A., without B.'s knowledge, sent the mtgor. a parcel containing the title deeds, which consisted of two assignments & one mtge., in order to enable him to raise money to pay off the mtge. debt or part of it. The mtgor. did not pay off any part of the mtge. debt, but after some time he returned to A. a parcel which was supposed to contain the deeds.

After A.'s death in 1890 it was found that the parcel returned contained the mtge. deed only, & that the mtgor. had purported to execute a legal mtge. in favour of a bank, to secure money lent to him by them without notice of the existing mtge., & had handed over the two assignments to them.

In an action for the administration of the mtgor.'s estate:—*Held:* (1) whatever rights the bank might have had against A., the acts of A. did not preclude B. from setting up his legal title as surviving exor. & devisee & legatee of the mtge. estate of testator, & B. was entitled to priority over the bank in respect of the mtge. of 1879; (2) the bank must deliver up to B., as the surviving exor. & legal owner of the mtged. property, the title deeds in their possession.—*Re* INGHAM, JONES *v.* INGHAM, [1893] 1 Ch. 352; 62 L. J. Ch. 100; 68 L. T. 152; 41 W. R. 235; 37 Sol. Jo. 80; 3 R. 126.

2144. —— **Mortgagee guilty of laches—Loan of deeds forgotten.**]—Pltf., mtgee. of a policy of life insurance, handed it to the mtgor. for a particular purpose. On pltf. demanding it back from time to time, the mtgor. made excuses for not doing so; & pltf. then forgot that it had not been returned. Afterwards the mtgor. deposited the policy with defts. to secure an advance. Pltf. gave notice of his interest to the insurance co. before defts.:—*Held:* pltf. was entitled to the policy as against defts., & the conduct of pltf. had not been such as to estop him from asserting his claim against defts.—HALL *v.* WEST END ADVANCE CO., LTD. (1883), Cab. & El. 161.

2145. —— **To enable mortgagor to raise money—Lender not informed of prior mortgage.**]—A. voluntarily gave to his sisters a mtge. to secure

Sect. 13.—*Failure to gain or loss of priority: Subsect.* 3, *A.* (*d*), *&* *B.* (*a*).]

an antecedent debt. The sisters allowed him to retain the title deeds, that he might be enabled to give a first mtge. to secure another debt, for which he was being sued by B. A. deposited the deeds with B. to secure that debt & afterwards, without B.'s concurrence, got possession of them & mortgaged the estate to pltfs. for a considerably larger sum, & delivered the title deeds to them, they having no notice of the mtge. to the sisters:—*Held:* the mtge. to the sisters must be postponed to that of pltfs., for that the sisters, having, with a view to A.'s raising a certain sum in priority to their mtge., put it into his power to represent himself as unincumbered owner, could not, as against pltfs., who advanced money on the faith of A.'s possession of the deeds, complain that A. had raised more than was agreed upon.—PERRY HERRICK *v.* ATTWOOD (1857), 2 De G. & J. 21; 27 L. J. Ch. 121; 30 L. T. O. S. 267; 11 Jur. N. S. 101; 6 W. R. 204; 44 E. R. 895, L. C.

Annotations:—**Extd.** Lloyd *v.* Attwood (1859), 3 De G. & J. 614. **Distd.** Cory *v.* Eyre (1863), 1 De G. J. & Sm. 149. **Folld.** Jones *v.* Rhind, Rhind *v.* Jones (1869), 17 W. R. 1091. **Apld.** Briggs *v.* Jones (1870), L. R. 10 Eq. 92. **Consd.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292. **Distd.** Fox *v.* Hawks, Hawks *v.* Fox (1879), 13 Ch. D. 822. **Folld.** Clarke *v.* Palmer (1882), 21 Ch. D. 124. **Expld.** Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482. **Distd.** Manners *v.* Mew (1885), 29 Ch. D. 725; National Provincial Bank of England *v.* Jackson (1886), 33 Ch. D. 1. **Apprvd.** Brocklesby *v.* Temperance Permanent Bldg. Soc., [1895] A. C. 173. **Apld.** Lloyds Bank *v.* Bullock, [1896] 2 Ch. 192; *Re* Castell & Brown, Roper *v.* Castell & Brown, [1898] 1 Ch. 315; Rimmer *v.* Webster, [1902] 2 Ch. 163. **Refd.** Shropshire Union Rys. *v.* R. (1875), L. R. 7 H. L. 496; *Re* Ingham, Jones *v.* Ingham, [1893] 1 Ch. 352; Brown *v.* Stedman (1896), 44 W. R. 458; West *v.* Williams, [1898] 1 Ch. 488; Powell *v.* Browne (1907), 97 L. T. 854; Fry *v.* Smellie, [1912] 3 K. B. 282. **Mentd.** Freeman *v.* Pope (1870), 23 L. T. 208; Truman *v.* Attenborough (1910), 103 L. T. 218; Lloyds Bank *v.* Swiss Bankverein, Union of London & Smith's Bank *v.* Swiss Bankverein (1912), 107 L. T. 309; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777; Jones *v.* Waring & Gillow, [1926] A. C. 670.

2146. —— —— ——.]—B., a mtgee. of leasehold property, lent the lease to the mtgor. for the purpose of raising money upon it, but at the same time told the mtgor. to inform the person from whom he proposed to borrow the money that B. had a prior charge. The mtgor. borrowed money from his bankers upon the security of a deposit of the lease without giving them notice of B.'s mtge.:—*Held:* B.'s mtge. must be postponed to that of the bankers.—BRIGGS *v.* JONES (1870), L. R. 10 Eq. 92; 23 L. T. 212.

Annotations:—**Distd.** Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482; Manners *v.* Mew (1885), 29 Ch. D. 725. **Apld.** Brocklesby *v.* Temperance Permanent Bldg. Soc., [1893] 3 Ch. 130; *Re* Castell & Brown, Roper *v.* Castell & Brown, [1898] 1 Ch. 315. **Refd.** *Re* Ingham, Jones *v.* Ingham, [1893] 1 Ch. 352.

2147. —— —— —— **Fraud.**]—WALDY *v.* GRAY, No. 2072, *ante*.

2148. —— —— **Security represented as first estate—Mortgagor acting as agent for mortgagee.**]—NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. *v.* WHIPP, Mo. 2088, *ante*.

2149. —— —— **Within stated limit—Limit imposed exceeded.**]—The mtgee. of land, having deposited the title deeds with a bank for an advance, & being desirous of obtaining a larger advance, gave, on two consecutive days, two written authorities to his son, to receive the deeds on payment of the amount due to the bank. The first authority was in general terms, but in the second authority he specified the bank which had agreed to make the larger loan & directed payment to be made to that bank. The son, by means of the first authority, obtained possession of the deeds, & procured from a different bank than the one specified in the second authority a loan largely in excess of the amount authorised by his father, paid his father the additional amount which he was instructed to raise, & kept the balance. Subsequently, as the bank pressed for payment, the son forged a transfer of mtge. from his father to himself, & having obtained an assignment of the equity of redemption, sold the land to resp. societies, who paid off the bank:—*Held:* applt., having entrusted his son with the control of the deeds for the purpose of raising money, could only redeem the property upon payment of the whole amount advanced by resps. for the purpose of paying off the bank.—BROCKLESBY *v.* TEMPERANCE PERMANENT BUILDING SOCIETY, [1895] A. C. 173; 64 L. J. Ch. 433; 72 L. T. 477; 59 J. P. 676; 43 W. R. 606; 11 T. L. R. 297; 11 R. 159, H. L.

Annotations:—**Apld.** Lloyds Bank *v.* Bullock, [1896] 2 Ch. 192; Rimmer *v.* Webster, [1902] 2 Ch. 163; Lloyd's Bank *v.* Cooke, [1907] 1 K. B. 794; Fry *v.* Smellie, [1912] 3 K. B. 282. **Refd.** Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489. **Mentd.** Farquharson *v.* King, [1902] A. C. 325; Herdman *v.* Wheeler, [1902] 1 K. B. 361; Jared *v.* Walke (1902), 18 T. L. R. 569; Thurstan *v.* Nottingham Permanent Benefit Bldg. Soc., [1902] 1 Ch. 1; Truman *v.* Attenborough (1910), 103 L. T. 218; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777; Jones *v.* Waring & Gillow, [1926] A. C. 670.

2150. Deeds delivered to agent for sale—Deposit by agent on own behalf.]—R. delivered to a stockbroker a mtge. bond for £2,000 with instructions to sell it. The bond was one of a series issued by the Tyne Improvement Comrs. under a private Act which incorporated the Commissioners Clauses Act, 1847 (c. 16). That Act requires that all transfers of mtges. should be registered. Induced by the false representations of the broker, R. executed two deeds of transfer, by which the mtge. bond was transferred to the broker in two portions of £1,500 & £500 respectively. These transfers were in a form prescribed by the schedule to the Commissioners Clauses Act, 1847 (c. 16), & were expressed to be made in consideration of £1,500 & £500 respectively paid by the broker to R. They were duly registered. The broker borrowed £1,000 from deft. W. & executed a formal submtge. of the bond to him, producing the transfers as proof of title. This mtge. was not registered. The broker had applied the money to his own use & absconded. This action was brought by R. for retransfer of the bond free from the mtge. to W.:—*Held:* where an owner of property gives all the *indicia* of title to another person with the intention that he should deal with the property, the principles of agency apply, & any limit which he has imposed on his agent's dealing cannot be enforced against an innocent purchaser or mtgee. from the agent, who has no notice of the limit.

The statement in a transfer of mtge. made in a form prescribed by statute, that the mtge. is transferred in consideration of £—— paid by A. to B., without any express receipt clause, is sufficient to create this estoppel.—RIMMER *v.* WEBSTER, [1902] 2 Ch. 163; 71 L. J. Ch. 561; 86 L. T. 491; 50 W. R. 517; 18 T. L. R. 548.

Annotations:—**Distd.** Burgis *v.* Constantine, [1908] 2 K. B. 484. **Apld.** Fry *v.* Smellie, [1912] 3 K. B. 282. **Refd.** Weiner *v.* Gill, Same *v.* Smith, [1906] 2 K. B. 574; Truman *v.* Attenborough (1910), 103 L. T. 218; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489. **Mentd.** Lloyds Bank *v.* Swiss Bankverein, Union of London & Smith's Bank *v.* Swiss Bankverein (1912), 107 L. T. 309.

2151. Evidence of assistance in or connivance at fraud—As against equitable mortgagee.]—NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. *v.* WHIPP, No. 2088, *ante*

B. Postponement of Equitable Mortgagees.

(a) Failure to obtain Deeds.

2152. Whether possession gives priority.]—Where there is a subsequent mtgee. without notice, who has possession of the title deeds, the first mtgee. shall not compel a delivery of the writings from him without paying him his mtge. money.—HEAD *v.* EGERTON (1734), 3 P. Wms. 280; 24 E. R. 1065, L. C.

Annotations :—**Distd.** Harrington *v.* Price (1832), 3 B. & Ad. 170. **Consd.** Meux *v.* Bell (1841), 1 Hare, 73. **Folld.** Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139. **Consd.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292; *Re* Russell Road Purchase-moneys (1871), L. R. 12 Eq. 78; Heath *v.* Crealock (1873), L. R. 18 Eq. 215; Manners *v.* Mew (1885), 29 Ch. D. 725. **Reld.** Ryall *v.* Rolle (1749), 1 Atk. 165; Evans *v.* Bicknell (1801), 6 Ves. 174; *Ex p.* Kensington (1813), 2 Ves. & B. 79; Layard *v.* Maud (1867), 36 L. J. Ch. 669.

2153. ——.]—A second mtgee., who takes an assignment of a term to attend the inheritance, & has all the title deeds, may recover in ejectment against the first mtgee., not having had notice of such prior mtge.—GOODTITLE d. NORRIS *v.* MORGAN (1787), 1 Term Rep. 755; 99 E. R. 1360.

Annotations :—**Consd.** Plumb *v.* Fluitt (1791), 2 Anst. 432. **Dbtd.** Evans *v.* Bicknell (1801), 6 Ves. 174. **Overd.** Bailey *v.* Fermor (1821), 9 Price, 262. **Consd.** Right d. Jefferys *v.* Bucknell (1831), 2 B. & Ad. 278. **Reld.** Dryden *v.* Frost (1837), 1 Jur. 330; Jones *v.* Jones (1838), 8 Sim. 633; Cooper *v.* Emery (1840), 10 Sim. 609. **Mentd.** Doe d. Courtail *v.* Thomas (1829), 9 B. & C. 288.

2154. ——.]—T. being the equitable owner of a moiety in lands, under the will of a testator who had, in 1806, purchased the entirety, in 1812 conveyed the moiety upon trust to pay an annuity, &, subject thereto, for himself in fee. In 1823, he purchased the legal fee simple in the second moiety. By a settlement in 1825 he charged the two moieties with a sum to be raised at his death. In 1830 he again mortgaged the first moiety only, & he, or his solr., who was also a trustee of the settlement, deposited with the second mtgee. the purchase deeds of 1806, & the deeds of charge of 1812. In 1832 the second mtgee. first had notice of the settlement, & in 1835 she bought in the annuity. The annuitant died in 1837. In 1851 the trustee of the settlement died. Since 1832 the second mtgee. had been in possession. T. died in 1866 :—*Held :* (1) a title by adverse possession had not been acquired by the second mtgee.; (2) the second mtgee. had not, by purchase of the annuity, acquired priority over the first mtgee.; (3) possession of the title deeds did not give the second mtgee. priority.—THORPE *v.* HOLDSWORTH (1868), L. R. 7 Eq. 139; 38 L. J. Ch. 194; 17 W. R. 394.

Annotations :—*As to* (2) **Consd.** Isaac *v.* Worstencroft (1892), 67 L. T. 351. *As to* (3) **Consd.** Heath *v.* Crealock (1873), L. R. 18 Eq. 215; Taylor *v.* Russell, [1891] 1 Ch. 8. **Reld.** *Re* Russell Road Purchase-moneys (1871), L. R. 12 Eq. 78; Union Bank of London *v* Kent (1888), 39 Ch. D. 238.

2155. ——.]—PERRIN *v.* BURBEY, [1869] W. N. 160.

Annotation :—**Folld.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292.

2156. ——.]—The possession of the title deeds by the equitable incumbrancer, without any default on the part of the person who has contracted to purchase, does not give the former any right to priority over the latter, or to require the latter to redeem him, or be foreclosed.—FLINN *v.* POUNTAIN (1889), 58 L. J. Ch. 389; 60 L. T. 484; 37 W. R. 443.

2157. —— **Accompanying declaration of trust in favour of incumbrancer.**]—The custody of the deeds creating a term, accompanied by a declaration of the trust of it in favour of a second incumbrancer without notice of the prior mtge., held to give him an advantage over the first incumbrancer, which a ct. of equity would not deprive him of.

The person claiming under such second incumbrancer, upon purchasing the equity of redemption from the mtgor., was held not to have relinquished such advantages by having covenanted to retain part of the purchase-money to redeem the prior mtge., as it was also agreed that he might use the money adversely in case he could not adjust the matter amicably.—STANHOPE *v.* VERNEY (EARL) (1761), 2 Eden, 81; 28 E. R. 826, L. C.

Annotations :—**Distd.** Wilmot *v.* Pike (1845), 5 Hare, 14. **Consd.** Rice *v.* Rice (1853), 2 Drew. 73. **Distd.** Cory *v.* Eyre (1862), 1 De G. J. & Sm. 149. **Reld.** Dearle *v.* Hall (1828), 3 Russ. 1; Pease *v.* Jackson (1868), 3 Ch. App. 578, n.; Keate *v.* Phillips (1881), 18 Ch. D. 560; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231.

2158. —— **Estate of mortgagor charged with jointure & portions.**]—FARROW *v.* REES, No. 2106, *ante*.

2159. —— **Fraud of mortgagor on first mortgagee.**]—A subsequent mtgee. acquiring title by a deposit of the title deed & memorandum of mtge. through a fraud of the mtgor. upon the first mtgee., does not thereby acquire a prior charge to that of the first mtgee., though he should have advanced his money without notice of such first mtge.; & his mtge. deed bears date prior to the date of the first mtge., & was wholly ignorant of the fraud committed.

The principle upon which all decisions are made in respect to mtges. is that as between the mtgor. & mtgee., that the mtgee. carries the mtgor.'s entire interest, subject only to the rights of prior incumbrancers (WIGRAM, V.-C.).—FRASER *v.* POWELL (1846), 8 L. T. O. S. 154.

2160. —— **Possession through breach of trust.**]—CORY *v.* EYRE (1863), 1 De G. J. & Sm. 149; 46 E. R. 58, L. JJ.

Annotations :—**Distd.** Perrin *v.* Burbey, [1869] W. N. 160. **Expld.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292. **Consd.** Dixon *v.* Muckleston (1872), 8 Ch. App. 155. **Apprvd.** Shropshire Union Rys. & Canals Co. *v.* R. (1875), L. R. 7 H. L. 496. **Apld.** Bradley *v.* Riches (1878), 9 Ch. D. 189; *Re* Vernon, Ewens (1886), 33 Ch. D. 402; Carritt *v.* Real & Personal Advance Co. (1889), 58 L. J. Ch. 688. **Consd.** Taylor *v.* Russell, [1891] 1 Ch. 8; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231. **Distd.** Walker *v.* Linom, [1907] 2 Ch. 104. **Reld.** Allan *v.* Scott (1865), 12 L. T. 449; Hill *v.* Peters, [1918] 2 Ch. 273.

2161. Sufficiency of failure to affect priority—Fraud or gross negligence.]—Mtgee. of a reversion, not having the title deeds, shall not be postponed to another mtgee., whose mtge. was made after mtgor. came into possession, who has the title deeds; there being neither fraud nor gross negligence.—TOURLE *v.* RAND (1789), 2 Bro. C. C. 650; 29 E. R. 360, L. C.

Annotations :—**Consd.** Plumb *v.* Fluitt (1791), 2 Anst. 432. **Mentd.** Loveridge *v.* Cooper (1823), 2 L. J. O. S. Ch. 75.

2162. —— ——.]—Indenture of lease from A. to B. for twenty-one years, at a rent of £50. B. by indenture assigned the lease to C., to secure money previously advanced to him by C., great part of which was laid out by B. in repairing & improving the premises demised. C. registered the assignment, but did not take the indenture of lease from B. B. afterwards gave up the indenture to A., in consideration of receiving a further advance from

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PART XII. SECT. 13, SUB-SECT. 3.—B. (a).

2152 i. *Whether possession gives priority.*]—HENTY *v.* HODGSON (1862), 1 W. & W. 250.—**AUS.**

2161 i. *Sufficiency of failure to affect priority—Fraud or gross negligence.*]—KELLY *v.* MUNSTER & LEINSTER BANK (1891), 29 L. R. Ir. 19.—**IR.**

Sect. 13.—Failure to gain or loss of priority: Sub sect. 3, B. (a) & (b), & C.]

him of £200, to be laid out in further improvements; & A. granted him a new lease, at an increased rent of £70 a year. B. afterwards again gave up that lease, on having another advance made to him of £200 more by A., & took a third lease from him, at a rent of £90:—*Held:* pltf., having recovered a verdict in action of trover, against the lessor & his attorney, for the original lease, C. was not, under the circumstances, precluded by the neglect to take from B. the indenture of lease, from availing himself of the assignment against A. Therefore a rule to show cause, obtained on the ground of pltf. having, by leaving the indenture in the possession of the mtgor., enabled him to practise a fraud, on the authority of *Goodtitle* d. *Norris* v. *Morgan*, No. 2153, *ante*, was discharged.

The jury have found that there was no culpable neglect on his [pltf.'s] part so as to deprive him of the security advanced (GRAHAM, B.).—BAILEY *v.* FERMOR (1821), 9 Price, 262; 147 E. R. 87.

2163. —— ——.]—L., a solr., who was a mtgee. of land subject to a prior legal mtge., assigned his mtge. debt as a security to pltf. L. a few months after joined with the mtgor. & the first mtgee. in conveying the land to deft. Deft.'s conveyance recited L.'s mtge., but made no mention of the assignment of it to pltf. Deft. employed no solr. in the transaction other than L., & did not insist upon the production of L.'s mtge. deed, which was then in pltf.'s possession:—*Held:* deft.'s omission to insist upon the production of L.'s mtge. deed was culpable negligence, & he took the estate subject to pltf.'s security; also, L. must be treated as the solr. of deft. in the transaction, & deft. therefore took with constructive notice of pltf.'s interest; also, the fraud of the solr. in not informing his client of what he himself knew, did not prevent his knowledge being notice to his client.—ATTERBURY *v.* WALLIS (1856), 8 De G. M. & G. 454; 25 L. J. Ch. 792; 27 L. T. O. S. 301; 2 Jur. N. S. 1177; 4 W. R. 734; 44 E. R. 465, L. JJ.

Annotations:—**Consd.** Waldy *v.* Gray (1875), L. R. 20 Eq. 238. **Apld.** Berwick *v.* Price, [1905] 1 Ch. 632. **Refd.** Rolland *v.* Hart (1871), 6 Ch. App. 678.

2164. —— ——.]—A. having contracted to purchase an advowson, borrowed from B. £2,500, & covenanted with him to pay for & convey the advowson to him within six months. A. completed the purchase of the advowson, but never conveyed it under the covenant. He subsequently borrowed £1,000 from C., & covenanted to convey to him the advowson, & deposited with him the title deeds, but there was no conveyance of the legal estate:—*Held:* the first mtge. must be postponed to the second.—LAYARD *v.* MAUD (1867), L. R. 4 Eq. 397; 36 L. J. Ch. 669; 16 L. T. 618; 15 W. R. 897; *subsequent proceedings*. 16 L. T. 738.

Annotations:—**Expld.** Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139. **Folld.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292. **Consd.** Spencer *v.* Clark (1878), 9 Ch. D. 137. **Distd.** Harpham *v.* Shacklock (1881), 45 L. T. 569; Union Bank of London *v.* Kent (1888), 39 Ch. D. 238. **Refd.** R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon (1901), 84 L. T. 397.

2165. —— ——.]—FARRAND *v.* YORKSHIRE BANKING Co., No. 2089, *ante*.

2166. Failure to obtain all title deeds—Part only delivered.]—Where the title deeds deposited in pursuance of an agreement for an equitable mtge. do not extend to all the property mentioned in the agreement, the ct. will, notwithstanding, decree the sale of the whole of the property mentioned in the agreement belonging to the mtgor.

There can be no question upon the rights of pltfs.; a clear fraud has been committed by J. Let D. stand as a first incumbrancer on so much of the property as his lien extended to, & pltfs. be second incumbrancers upon that property, & first incumbrancers upon the property covered by the deeds contained in the bundle, & not comprised in D.'s security. In other respects I make the usual decree in a suit by an equitable mtgee. on behalf of himself & all other creditors of testator (WIGRAM, V.-C.).—OAKES *v.* BEAR (1845), 5 L. T. O. S. 345.

2167. —— ——.]—A lady lent money to her solr. upon a deposit of title deeds, with a written memorandum. The deeds thus deposited did not comprise the later title deeds, & so did not show that the depositor had any interest in the estate. The solr. afterwards deposited the remaining deeds with his bankers to secure the balance of his account:—*Held:* the lady had not, in omitting to call for the other deeds, been guilty of such gross negligence as to postpone her security to that of the bankers.—ROBERTS *v.* CROFT (1857), 2 De G. & J. 1; 27 L. J. Ch. 220; 30 L. T. O. S. 111; 3 Jur. N. S. 1069; 6 W. R. 144; 44 E. R. 887, L. C.

Annotations:—**Apld.** Hunt *v.* Elmes (1860), 2 De G. F. & J. 578. **Consd.** Layard *v.* Maud (1867), L. R. 4 Eq. 397; **Distd.** Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139. **Consd.** Taylor *v.* Russell, [1891] 1 Ch. 8. **Refd.** Stackhouse *v.* Jersey (1861), 1 John. & H. 721; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482; Manners *v.* Mew (1885), 29 Ch. D. 725.

2168. —— —— **Declaration by mortgagor as to completeness.**]—The owner in fee of a farm deposited deeds of conveyance of the farm dated 1774, by way of security for money then due, writing at the same time a letter which stated that the deeds were the title deeds of the farm, & were to be a security. He afterwards deposited the subsequent title deeds of the farm, the earliest being dated 1787, with bankers, by way of security for money due to them; the title was investigated by the bankers, & they had no notice of the prior charge:—*Held:* the letter created an equitable charge on the farm, & under the circumstances credit must be taken to have been given by the owner of the prior charge to the statement made by the mtgor., that the deposited deeds were the whole of the title deeds; & the owner of the prior charge had therefore not been guilty of negligence so as to deprive herself of her priority.—DIXON *v.* MUCKLESTON (1872), 8 Ch. App. 155; 42 L. J. Ch. 210; 27 L. T. 804; 21 W. R. 178, L. C.

Annotations:—**Consd.** *Re* McMahon, McMahon *v.* McMahon (1886), 55 L. T. 763; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; Taylor *v.* Russell, [1891] 1 Ch. 8. **Refd.** R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420; Garnham *v.* Skipper (1885), 53 L. T. 940.

2169. Incumbrancer no primary right to call for deeds—Fiduciary relationship between parties—No ground to suppose want of good faith.]—TAYLOR *v.* LONDON & COUNTY BANKING Co., LONDON & COUNTY BANKING Co. *v.* NIXON, No. 1830, *ante*.

(b) Negligence in Custody of Deeds.

2170. Mortgagee parting with deeds to mortgagor—Failure to return — Laches of mortgagee.]—

2166 1. *Failure to obtain all title deeds—Part only delivered.*]—*Held:* the Bank, by not registering their memorandum of deposit, & by allowing L. to retain all the title deeds but one, & thereby enabling him to raise further sums on the property, without notice of their charge, were guilty of negligence so as to deprive them of their priority.—*Re* LAMBERT'S ESTATE, LAMBERT, PETITIONER (1884), 13 L. R. Ir. 234.—IR.

Sloper, in 1833, mortgaged certain real estate to Sievewright, with a power of sale, under which the property was sold in 1842 to a purchaser who transferred his contract to Sievewright. There was a balance after paying off Sievewright, & there being accounts between Sloper & Matthews, this balance was placed, under a deed of June 25, 1842, in the hands of trustees, to be dealt with by arbitration between Sloper & Matthews. In 1834, Sloper had made an equitable mtge. of the property to Matthews. In Jan. 1840, Matthews deposited these deeds with Waldron, pltf., by way of equitable mtge. In Apr. 1842, Matthews applied to pltf. for the loan of the deeds, telling him he wanted them to enable the purchase to be completed, & promising to return them forthwith. He did not return them forthwith, & pltf. never applied to have the deeds back for more than four years. In May, 1843, Matthews deposited the deeds, by way of mtge., with Pinckney, who now held them. In 1846, Matthews became bkpt. Waldron filed his claim to be treated as first incumbrancer, & to have the balance in the hands of the trustees of the deeds of 1842 paid to him :—*Held :* as between Waldron, pltf. & Pinckney, pltf. had, by his laches, enabled Matthews to commit a fraud, & had no equity against deft., Pinckney.—WALDRON *v.* SLOPER (1852), 1 Drew. 193 ; 61 E. R. 425.

Annotations :—**Consd.** Shropshire Union Rys. & Canal Co. *v.* R. (1875), L. R. 7 H. L. 496. **Distd.** *Re* Vernon, Ewens (1886), 33 Ch. D. 402. **Reld.** Cory *v.* Eyre (1862), 1 De G. J. & Sm. 149 ; Layard *v.* Maud (1867), L. R. 4 Eq. 397 ; Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292 ; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482 ; Taylor *v.* Russell, [1891] 1 Ch. 8 ; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231 ; Walker *v.* Linom, [1907] 2 Ch. 104. **Mentd.** Barnes *v.* Pinkney (1867), 36 L. J. Ch. 815.

2171. —— ——.]—The title deeds of property equitably charged by deed with payment of £1,000 were deposited with the mtgees.' solrs., S. & T. The mtgor., who was also a client of S. & T., applied to S., to lend him the deeds to show to the agents of an alleged railway co. who, as he said, desired to take the land. S., without communicating with his clients or his partner, &, as he alleged, under pressure, lent the deeds, which the mtgor. deposited with another incumbrancer, D. The mtgor. died six or seven months after this transaction, & ultimately S. & T. paid off their clients, & took a transfer of the first charge. They alleged that frequent applications had been made to the mtgor. for a return of the deeds, but gave no further particulars, & did not state whether any & what answers were received :—*Held :* the equitable mtge. of D. took priority over the prior charge vested in S. & T.—DOWLE *v.* SAUNDERS (1864), 2 Hem. & M. 242 ; 4 New Rep. 478 ; 34 L. J. Ch. 87 ; 10 L. T. 840 ; 10 Jur. N. S. 901 ; 12 W. R. 1074 ; 71 E. R. 456.

2172. Omission to use ordinary care—Evidence of fraud.]—NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. *v.* WHIPP, No. 2088, *ante*.

2173. Deed in possession of trustee for mortgagee—Fraud of trustee.]—Pltf. purchased an equity of redemption in leaseholds, & for his own convenience took the assignment in the name of C. as trustee, who executed a declaration of trust in favour of pltf. C. fraudulently borrowed money of defts., representing himself as the absolute owner, executed an equitable charge by demise of the equity of redemption to defts., deposited with them the deed of assignment, & absconded. C. was a confidential clerk, whose duty it was to put away in the safe pltf.'s securities. In an action by pltf. for a declaration that defts. had no interest or claim in the leaseholds, & for delivery up of the deed of assignment :—*Held :* the fact that pltf. had under the circumstances allowed C. to have the custody of the deed of assignment was not negligence sufficient to deprive him of the benefit of his prior equitable title.

If trustees are lending money on mtge. the trustees do not disclose their trust on the face of the deed. . . . The recital runs or the deed in substance shows that the money is the money of the trustees belonging to them on a joint account, & so it is in law, & they may be trustees simply for one equitable owner or for several (CHITTY, J.). —CARRITT *v.* REAL & PERSONAL ADVANCE CO. (1889), 42 Ch. D. 263 ; 58 L. J. Ch. 688 ; 61 L. T. 163 ; 37 W. R. 677 ; 5 T. L. R. 559.

Annotations :—**Distd.** Rimmer *v.* Webster, [1902] 2 Ch. 163. **Apld.** Hill *v.* Peters, [1918] 2 Ch. 273. **Reld.** *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589 ; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231 ; *Re* West & Hardy's Contract, [1904] 1 Ch. 145 ; Walker *v.* Linom, [1907] 2 Ch. 104.

C. Postponement of Unpaid Vendor.

2174. Postponement to equitable mortgagee by deposit.]—*Qu. :* whether the vendor's lien could prevail against an equitable mtge. by deposit of deeds.—NAIRN *v.* PROWSE (1802), 6 Ves. 752 ; 31 E. R. 1291.

Annotations :—**Mentd.** Mackreth *v.* Symmons (1808), 15 Ves. 329 ; *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346 ; Winter *v.* Anson (1827), 6 L. J. O. S. Ch. 7.

2175. Purchaser obtaining title deeds—Mortgage by purchaser—Receipt endorsed on title deeds.]—Vendor conveyed without receiving his purchase-money ; the receipt of it was endorsed on a deed, & the title deeds delivered to the purchaser. The purchaser then made a mtge. by deposit & absconded :—*Held :* as between the vendor's lien for his unpaid purchase-money & the right of the mtgee. that the possession of the title deeds & the fact of the endorsement of the receipt on the deed, gave the mtgee. the better equity.—RICE *v.* RICE (1854), 2 Drew 73 ; 2 Eq. Rep. 341 ; 23 L. J. Ch. 289 ; 22 L. T. O. S. 208 ; 2 W. R. 139 ; 61 E. R. 646.

Annotations :—**Consd.** Layard *v.* Maud (1867), L. R. 4 Eq. 397. **Apld.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292. **Consd.** Shropshire Union Rys. & Canal Co. *v.* R. (1875), L. R. 7 H. L. 496 ; Cave *v.* Cave (1880), 15 Ch. D. 639. **Distd.** Kettlewell *v.* Watson (1882), 21 Ch. D. 685. **Apld.** Bickerton *v.* Walker (1885), 31 Ch. D. 151. **Consd.** *Re* Vernon, Ewens (1886), 33 Ch. D. 402. **Apld.** Farrand *v.* Yorkshire Banking Co. (1888), 40 Ch. D. 182. **Consd.** Taylor *v.* Russell, [1891] 1 Ch. 8. **Apld.** Lloyds Bank *v.* Bullock, [1896] 2 Ch. 192 ; *Re* Castell & Brown, Roper *v.* Castell & Brown, [1898] 1 Ch. 315. **Consd.** Capell *v.* Winter, [1907] 2 Ch. 376. **Reld.** Roberts *v.* Croft (1857), 24 Beav. 223 ; Cory *v.* Eyre (1863), 1 De G. J. & Sm. 149 ; Keith *v.* Burrows (1876), 1 C. P. D. 722 ; Ortigosa *v.* Brown (1878), 47 L. J. Ch. 168 ; Spencer *v.* Clarke (1878), 9 Ch. D. 137 ; Northern Counties of England Fire Insce. *v.* Whipp (1884), 51 L. T. 806 ; Union Bank of London *v.* Kent (1888), 39 Ch. D. 238 ; Carritt *v.* Real & Personal Advance Co. (1889), 42 Ch. D. 263 ; *Re* Eyton, Bartlett *v.* Charles (1890), 45 Ch. D. 458 ; Rimmer *v.* Webster, [1902] 2 Ch. 163 ; Bateman *v.* Hunt (1904), 73 L. J. K. B. 782 ; *Re* Bourne, Bourne *v.* Bourne, [1906] 1 Ch. 113 ; Burgis *v.* Constantine, [1908] 2 K. B. 484. **Mentd.** *Re* Maskell & Goldfinch's Contract (1895), 13 R. 685.

2176. —— —— ——.]—A solr. purchased through a third party property belonging to his clients ; the solr. paid no purchase-money to his clients, but their trustee, acting under his direction,

2173 1. *Deed in possession of trustee for mortgagee—Fraud of trustee.*]—COUBROUGH (MUIR'S EXECUTORS) *v.* CRAIG (CRAIG'S TRUSTEES), [1913] S. C. 349.—SCOT.

Sect. 13.—*Failure to gain or loss of priority: Sub-sect.* 3, *C.; sub-sect.* 4. *Part XIII. Sect.* 1: *Sub-sect.* 1.]

indorsed on a conveyance to a third party, whom the client treated as the real purchaser, a receipt for the purchase-money payable by the third party; the solr. afterwards deposited the title deeds by way of equitable mtge. became bkpt. & left the country:—*Held:* notwithstanding the relation of solr. & client, the claim of the equitable mtgee. had priority over the clients lien for unpaid purchase-money.—WORTHINGTON *v.* GERMAN, FRASER *v.* HILL (1867), 16 W. R. 187.

Annotations:—**Folld.** Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292; Lloyds Bank *v.* Bullock, [1896] 2 Ch. 192.

2177. —— —— ——.]—In 1887 freeholds were mortgaged to a building society by H. to secure advances. In Oct. 1892, H. died, having devised these freeholds to N. upon trust for sale. In Dec. 1892, C., the solr. who acted for the society, & also for H., &, after his death, for N., having fraudulently represented to the society that notice to pay off their mtge. had been given, procured the statutory receipt to be indorsed on the mtge. of 1887, & obtained possession of the title deeds of the property: the money owing to the society was never paid off, N. at this time being unaware of the existence of the mtge. N. shortly afterwards agreed to sell the property to C., who was at this time in good repute and supposed to be well off, and by a deed of Dec. 29, 1892, which recited the trust for sale in H.'s will, N., in consideration of £700, paid to him by C. at or before the execution of the deed the receipt whereof N. thereby acknowledged, conveyed the property to C. in fee. The purchase-money was not in fact paid. This conveyance & the other title deeds, except the mtge. of 1887 & the statutory receipt, were shortly afterwards deposited by C. with pltfs. as security for an advance of £650. In 1893, C. was adjudicated bkpt., his frauds were discovered, & he was convicted & sentenced. Pltfs. now claimed to enforce their security against the society, & against C. & his *cestui que trust.* It was admitted that the society had priority over N. & his *cestui que trust,* & the main contention was between the pltfs. and the society, & pltfs. & N. & his *cestui que trust:*—*Held:* (1) the society were entitled under the circumstances to show that they had never been paid off, that the statutory receipt & the mtge. of 1887 were delivered only as an escrow, & the mtge. not having been paid off, & the legal estate being still in the society, they had priority over the pltfs.; (2) the conveyance of Dec. 1892, was not void as between the pltfs. & N. & his *cestui que trust;* (3) as N. had authority to deal with the property, the pltfs., in the absence of express notice, were entitled to rely on the receipt in the body of the deed, & had priority over the *cestui que trust.*—LLOYDS BANK, LTD. *v.* BULLOCK, [1896] 2 Ch. 192; 65 L. J. Ch. 680; 74 L. T. 687; 44 W. R. 633; 12 T. L. R. 435; 40 Sol. Jo. 545.

Annotations:—*As to* (2) **Refd.** King *v.* Smith, [1900] 2 Ch. 425. *As to* (3) **Distd.** Capell *v.* Winter, [1907] 2 Ch. 376. *Generally,* **Mentd.** Hunt *v.* Luck (1900), 49 W. R. 155.

2178. —— —— —— **Conduct of agent of vendor.**]—Trustees of a charity, with the sanction of the Charity Comrs., sold a piece of land in Yorkshire to R. & W. A receipt for the whole of the purchase-money was indorsed on the conveyance, but part of it was allowed to remain unpaid. On the application of R. & W. the conveyance was registered, but the deed was retained by D., the solr. & agent of the trustees, who was authorised to receive the unpaid purchase-money, as security for it. The piece of land was cut up into building plots by R. & W. & sold to various sub-purchasers. One plot was granted by R. & W. one of their clerks, who mortgaged it to P., who had no actual notice of the trustees' lien; he did not employ any solr. to act for him, but left it to R. & W. to manage the business for him. Another plot was granted to the same clerk, who, after raising a sum on mtge. on it, sold the equity of redemption to O. The clerk was a nominee of R. & W., they failed to pay the purchase-money:—*Held:* the trustees had by the conduct of their agent D. induced the purchasers to believe that R. & W. had power to deal with the different plots, & they had thereby lost their lien.—KETTLEWELL *v.* WATSON (1884), 26 Ch. D. 501; 53 L. J. Ch. 717; 51 L. T. 135; 32 W. R. 865, C. A.

Annotations:—**Refd.** National Provincial Bank of England *v.* Jackson (1886), 33 Ch. D. 1; Farrand *v.* Yorkshire Banking Co. (1888), 40 Ch. D. 182; Manks *v.* Whiteley, [1912] 1 Ch. 735. **Mentd.** *Re* Payne, Young *v.* Payne, [1904] 2 Ch. 608; Berwick *v.* Price, [1905] 1 Ch. 632; Barker *v.* Stickney, [1919] 1 K. B. 121.

2179. —— ——.]—**Sale obtained through fraud—Transaction declared void.**]—OGILVIE *v.* JEAFFRESON, No. 2034, *ante.*

2180. —— ——.]—Pltf. agreed with H., in consideration of his erecting some houses thereon, to grant him a building lease of some land, with the option of purchasing the fee. Pltf. advanced H. £970 to enable him to build. Afterwards E. & P., jointly, made further advances to H. for the same purpose. Subsequently E., who was the solr. both of pltf. & of P., induced pltf. to execute a conveyance to H., without receiving the consideration, in order that H. might then execute a mtge. to E. & P. to secure their advances; but on the promise of E. alone, that the conveyance & the mtge. should be held, on behalf of pltf., until the "land could be sold or a transfer of the said mtges. obtained, & that in either case pltf. should, in the first place, out of the moneys obtained by such sale or transfer, be paid the purchase-money" & advances:—*Held:* pltf. had lost his lien for his purchase-money, & his priority for it & his advances over the mtge.—SMITH *v.* EVANS (1860), 28 Beav. 59; 29 L. J. Ch. 531; 2 L. T. 227; 6 Jur. N. S. 388; 54 E. R. 288.

Annotation:—**Distd.** Wall *v.* Cockerell (1860), 29 L. J. Ch. 816.

2181. Fraudulent deposit of deeds by agent of vendor—Receipt endorsed on transfer deed.]—RIMMER *v.* WEBSTER, No. 2150, *ante.*

SUB-SECT. 4.—OTHER CASES.

2182. Difference in form of instrument creating charges.]—A difference in the form of the instruments under which a prior & a subsequent incumbrancer claimed, that of the prior incumbrancer giving only an equitable right, & that of the subsequent incumbrancer giving a legal right to come upon the estates charged, does not affect the equities of the parties, so as to postpone the prior incumbrancer.—FOSTER *v.* BLACKSTONE (1833), 1 My. & K. 297; 2 L. J. Ch. 84; 39 E. R. 694; *affd. sub nom.* FOSTER *v.* COCKERELL (1835), 9 Bli. N. S. 332, H. L.

Annotations:—**Consd.** Peacock *v.* Burt (1834), 4 L. J. Ch. 33; Wiltshire *v.* Rabbits (1844), 14 Sim. 76. **Distd.** Rooper *v.* Harrison (1855), 2 K. & J. 86. **Apld.** *Re* Hughes' Trusts (1864), 2 Hem. & M. 89. **Consd.** Ward *v.* Duncombe, [1893] A. C. 369. **Refd.** Timson *v.* Ramsbottom (1837), 2 Keen, 35; Jones *v.* Jones (1838), 8 Sim. 633; Meux *v.* Bell (1841), 1 Hare, 73; Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377; Etty *v.* Bridges (1843), 2 Y. & C. Ch. Cas. 486; Wilmot *v.* Pike (1845), 5 Hare,

14; Rice v. Rice (1853), 2 Drew. 73; Warburton v. Hill (1854), Kay, 470; Lee v. Howlett (1856), 2 K. & J. 531; Consolidated Investment & Insce. v. Riley (1859), 1 Giff. 371; Macleod v. Buchanan (1864), 4 De G. J. & Sm. 265; Ford v. Tynte (1865), 34 L. J. Ch. 452; Arden v. Arden (1885), 29 Ch. D. 702; *Re* Richards, Humber v. Richards (1890), 45 Ch. D. 589; English & Scottish Mercantile Investment Trust v. Brunton, [1892] 2 Q. B. 1; *Re* Wyatt, White v. Ellis, [1892] 1 Ch. 188; *Re* Wasdale, Brittin v. Partridge, [1899] 1 Ch. 163; *Re* Lake, *Ex p.* Cavendish, [1903] 1 K. B. 151; Montefiore v. Guedalla, [1903] 2 Ch. 26; *Re* Dallas, [1904] 2 Ch. 385. **Mentd.** Sheehy v. Muskerry (1839), 7 Cl. & Fin. 1; Meeke v. Kettlewell (1842), 11 L. J. Ch. 293.

2183. No money passing on second mortgage.]—In Mar. 1853, a bank advanced £400 to G. on the security of a bill of exchange & a deposit of a lease. The deposit was accompanied by a memorandum that G. thereby undertook, when called upon, to execute a mtge. to secure the sum of £400 "or any sum or sums of money which might at any time be owing by him to the bank for principal, interest & costs." In Dec. 1853, the bank made a further advance of £300 to G. On Dec. 2, 1854, F. advanced £1,000 to a solr. for investment on mtge. The solr. obtained from G. his signature to a deed purporting to be a mtge. of the above-mentioned leasehold property to F. Shortly after the solr. stopped payment & no part of the £1,000 was paid to G. In Mar. 1855, G. executed a mtge. to the bank, to secure the £700 F. obtained from the Ct. of Q. B. an order that the solr. should pay him £550 part of the £1,000 in one month, & should enter into an arrangement for the residue. Afterwards W., a brother of the solr., paid F. the £550 whereupon F. assigned his security to W. W. claimed to be a mtgee. of the property assigned to F., subject to a prior charge of the bank of £400.

The bank claimed to be mtgee. for the whole £700 in priority to W.:—*Held:* the claim of the bank must prevail. In order to sustain the claim of W., it must be shown that a valid debt subsisted, as between G. & F., which had not been established.—CORY v. WATTS (1857), 30 L. T. O. S. 230.

2184. Registration of lis pendens.]—Interests of defts. *inter se*, arising out of the rights of pltfs., protected by the doctrine of *lis pendens*.

In a suit instituted by creditors for the administration of the testator's estate, the deficiency of the personal estate for payment of the debts was payable out of two real estates devised separately to the defts. A. & B. In 1846, the debts were ordered to be paid out of A.'s estate alone, without prejudice to his right of contribution against B.'s estate. In 1852, the suit was registered as a *lis pendens*, & two months afterwards B. mortgaged his estate to C., who had no notice of A.'s rights:—*Held:* there was a *lis pendens* as regarded A.'s rights, & C.'s mtge. must be postponed to A.'s claims.—TYLER v. THOMAS (1858), 25 Beav. 47; 53 E. R. 553.

Annotation:—**Mentd.** *Re* Hyatt, Bowles v. Hyatt (1888), 38 Ch. D. 609.

Part XIII.—Remedies of Mortgagee.

SECT. 1.—RIGHT TO PURSUE REMEDIES CONCURRENTLY.

SUB-SECT. 1.—UNDER MORTGAGE OR MORTGAGE AND COLLATERAL SECURITY.

2185. General rule.]—Mtgee. has a right to pursue his remedies at law, though there is also a suit instituted in Chancery, which would give him the same or equal relief.—BARLOW v. GAINS (1845), 5 L. T. O. S. 190, 283.

2186. ——.]—(1) Where a debt is secured by mtge., covenant, & bond, the mtgee. may pursue all his remedies at the same time.

(2) If he obtain full payment on the bond or covenant, the mtgor. becomes entitled to the estate, but if he obtain part payment only, he may go on with his foreclosure suit & foreclose for the remainder.

(3) On the other hand, if he forecloses first, & the value of the estate proves insufficient to satisfy the debt, he may, while the mtged. estate remains in his power, sue on the bond or covenant, but he thereby opens the foreclosure, & the mtgor. may thereupon redeem.

(4) After foreclosure, the mtgee. fairly sold the estate for less than what was due to him:—*Held:* he could not afterwards recover from the mtgor. upon his collateral personal securities, the amount still remaining unpaid.—LOCKHART v. HARDY

PART XII. SECT. 13, SUB-SECT. 4.

2184 i. *Registration of lis pendens.*]—WALLACE v. DONEGAL (MARQUIS) (1837), 1 Dr. & Wal. 461.—**IR.**

2184 ii. ——.]—Registration of a petition for sale by the second mtgee. as a *lis pendens* has not the effect of notice to the first mtgee. so as to affect the priority of further advances made by him in ignorance of such petition & registration.—*Re* O'BYRNE'S ESTATE, HAWES, PETITIONER (1885), 15 L. R. Ir. 189, 373.—**IR.**

b. *Priority of mortgage over unrecorded deed—Concealment of deed from mortgagee.*]—WEST v. MATHESON (1875), 9 N. S. R. (3 G. & O.) 429.—**CAN.**

c. *Creation of second mortgage—After commencement of foreclosure proceedings by first mortgagee.*]—L. created a second mtge. after a bill had been filed to foreclose a prior incumbrance on the same land:—*Held:* the mtgee. in the mtge. took subject to the *lis pendens*, even though service of the bill had then not been effected.—ROBSON v. ARGUE (1878), 25 Gr. 407.—**CAN.**

d. *Loss of priority by consent—Rights of assignee without notice of assignor's consent to postponement.*]—CAMPBELL v. MCDOUGALL (1879), 26 Gr. 280.—**CAN.**

e. *Subsequent incumbrancer taking with notice of prior incumbrancer's defective title.*]—EDWARDS v. MORRISON (1883), 3 O. R. 428.—**CAN.**

f. *Priority of lessee over mortgagee.*]—ANDERSON v. STEVENSON (1888), 15 O. R. 563.—**CAN.**

g. *Priority of prior unregistered mortgage over assignee for creditors.*]—*Re* WILSON ESTATE (1915), 8 O. W. N. 229; 24 D. L. R. 792.—**CAN.**

PART XIII. SECT. 1, SUB-SECT. 1.

2185 i. *General rule.*]—A ct. of equity has no power to restrain a mtgee. from exercising all his remedies at law & in equity at the same time.—SACHS v. BEAUMONT (1887), 8 N. S. W. Eq. 5; 3 N. S. W. W. N. 101.—**AUS.**

2185 ii. ——.]—IMPERIAL LOAN & INVESTMENT CO. v. BOULTON (1875), 22 Gr. 121.—**CAN.**

2185 iii. ——.]—The right of a mtgee. to pursue all his remedies contemporaneously extends to all remedies which a mtgee. ordinarily has an incident to a mtge., but does not include a right of distress.—FAWELL v. ANDREW, [1917] 2 W. W. R. 400; 34 D. L. R. 12; 10 Sask. L. R. 162.—**CAN.**

2185 iv. ——.]—A mtgee. of lands, who has brought an action to recover the mtge. moneys, & for possession of the mtged. lands until paid, is not thereby prevented from taking proceedings under a power of sale contained in the mtge. deed.—SHIELDS v. SHIELDS (1918), 43 O. L. R. 111.—**CAN.**

h. *Application of rule—Effect of Administration of Justice Act.*]—A mtgee. proceeded in ejectment against a mtgor., & afterwards filed a bill in chancery against him for a sale:—*Held:* as the mtgee. could, since Administration of Justice Act, obtain in the chancery suit all the remedies

Sect. 1.—*Right to pursue remedies concurrently: Sub-sects.* 1 & 2. *Sect.* 2: *Sub-sect.* 1, *A. & B.* (*a*).]

(1846), 9 Beav. 349; 15 L. J. Ch. 347; 10 Jur. 532; 50 E. R. 378.

Annotations:—*As to* (3) **Refd.** Kinnaird *v.* Trollope (1888), 39 Ch. D. 636; *Re* Hoyles, Row *v.* Jagg, [1911] 1 Ch. 179. *As to* (4) **Refd.** Ellis' Trustee *v.* Dixon-Johnson, [1924] 1 Ch. 342; Grant *v.* Boos, [1926] A. C. 781. *Generally*, **Refd.** *Re* Kelday, *Ex p.* Meston (1888), 36 W. R. 585. **Mentd.** Huntington *v.* I. R. Comrs., [1896] 1 Q. B. 422.

2187. ——.]—COCKELL *v.* BACON, No. 2385, *post.*

2188. ——.]—PAYNTER *v.* CAREW, No. 2690, *post.*

2189. ——.]—(1) If a mtgee. so deals with the mtged. estate as to render it impossible for him to restore it on full payment, this ct. will prevent his suing at law to recover the mtge. money.

A mtgor. having transferred the equity of redemption, the transferees & mtgee. joined in a partial alienation of the property, but the money was received by the transferees alone:—*Held:* the mtgee. could not afterwards sue the mtgor. on his covenant to pay.

(2) A mortgagee may pursue all his remedies at once; he may bring actions of covenant & ejectment, & at the same time proceed to foreclose the mortgage (ROMILLY, M.R.).—PALMER *v.* HENDRIE (1859), 27 Beav. 349; 54 E. R. 136; *subsequent proceedings* (1860), 28 Beav. 341.

Annotations:—*As to* (1) **Apld.** Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451. **Refd.** Kinnaird *v.* Trollope (1888), 39 Ch. D. 636; *Re* Hoyles, Row *v.* Jagg, [1911] 1 Ch. 179. *Generally*, **Refd.** Walker *v.* Jones (1866), L. R. 1 P. C. 50; Rudge *v.* Richens (1873), L. R. 8 C. P. 358.

2190. Application of rule—Foreclosure—Action on bond.]—*Re* BIRCH (1726), Gilb. Ch. 186; 25 E. R. 130.

2191. —— —— ——.]—A party having a mtge. & also a bond, as a security for the same debt, may bring an action on the bond, & arrest deft., pending a suit in equity for a foreclosure.—BURNELL *v.* MARTIN (1780), 2 Doug. K. B. 417; 99 E. R. 268.

Annotation:—**Mentd.** The Bengal (1859), Sw. 468.

2192. —— —— ——.]—LOCKHART *v.* HARDY, No. 2186, *ante.*

2193. —— —— **Recovery of possession.**]—A mtgee. is not precluded from bringing an ejectment at law at the same time he has a bill of foreclosure depending here.—BOOTH *v.* BOOTH (1742), 2 Atk. 343; 26 E. R. 609, L. C.

2194. —— —— **Action on covenant—Mortgagee in possession.**]—Pltf., as mtgee., got possession of the estate, sued at law on the covenant for non-payment & brought this bill to foreclose; this is regular, & the ct. will not stop the proceedings at law, unless deft. brings in the money.—REES *v.* PARKINSON (1794), 2 Anst. 497; 145 E. R. 946.

2195. —— —— —— ——.]—A mtgee. having filed a bill of foreclosure & having proceeded to execution, in ejectment & being in possession of the rents & profits of £200 a year, under an ejectment, & having brought covenant for the mtge. money & obtained execution; the ct. refused to discharge deft. out of execution; for pltf. has a right to his remedy on all his securities.—COLBY *v.* GIBSON (1806), 3 Smith, K. B. 516.

2196. —— —— ——.]—LOCKHART *v.* HARDY, No. 2186, *ante.*

2197. —— —— **Sale without control of court.**]—Although a foreclosure suit is pending the ct. will allow the property to which it relates to be sold without the control of the ct., provided all parties interest are *sui juris* & consent; but the purchase-money will be ordered to be paid into ct., at least if there is any question as to priority of incumbrances.—RELPH *v.* HORTON (1870), 19 W. R. 220.

2198. —— —— **Order for personal payment—Combined in same order.**]—An order for personal payment may be combined with an order for foreclosure.—DYMOND *v.* CROFT (1876), as reported in 3 Ch. D. 512.

Annotations:—**Folld.** Gibbon *v.* Walker (1878), 38 L. T. 217. **Mentd.** Morton *v.* Miller (1876), 24 W. R. 723; The Cassiopeia (1879), 40 L. T. 869; *Re* Livesey, Fish *v.* Chatterton (1882), 31 W. R. 87; Eyre *v.* Eyre (1901), 45 Sol. Jo. 653.

2199. —— —— —— ——.]—In a foreclosure action, personal judgment for the mtge. debt being given against the mtgor. & a foreclosure judgment against the mtgor. & a purchaser from him:—*Held:* the purchaser, in the event of his redeeming the mtge., would be entitled to have transferred to him the personal judgment against the mtgor., as being one of the securities held by the mtgee. for the debt. Leave was given to the purchaser to apply in Chambers for a sale of the property.

Form of foreclosure judgment when mtge. debt is payable by instalments.—GREENOUGH *v.* LITTLER (1880), 15 Ch. D. 93; 42 L. T. 144; 28 W. R. 318.

Annotation:—**Refd.** Aman *v.* Southern Ry., [1926] 1 K. B. 59.

2200. —— —— —— ——.]—(1) Mtgee. being now entitled to combine in one action his right to judgment on the mtge. covenant against the mtgor. personally, with his right to foreclosure, is entitled, if the amount of debt & interest is proved, admitted, or agreed to at the trial, to judgment for immediate payment of the whole amount; if the amount is not so proved, admitted, or agreed to, to an account of what is due to him for principal & interest in respect thereof, & to judgment for payment of the whole amount immediately the same is certified, unless in either case the judge in his discretion gives time.

(2) *Semble:* the allowance of one month for payment from the date of the certificate is a reasonable exercise of such discretion.

(3) In the order for personal payment the costs will be limited to such costs only as would have been incurred if the action had been brought for payment only of the debt.—FARRER *v.* LACY, HARTLAND & CO. (1885), 31 Ch. D. 42; 55 L. J. Ch. 149; 53 L. T. 515; 34 W. R. 22; 2 T. L. R. 11, C. A.

Annotations:—*As to* (1) **Apld.** Instone *v.* Elmslie (1886), 54 L. T. 730. **Folld.** Jones *v.* Harris (1887), 55 L. T. 884; Poulett *v.* Hill, [1893] 1 Ch. 277; Powell *v.* Brodhurst, [1901] 2 Ch. 160. **Refd.** Bissett *v.* Jones (1886), 32 Ch. D. 635; Williams *v.* Hunt, [1905] 1 K. B. 512. *As to* (2) **Folld.** Faithfull *v.* Woodley (1889), 43 Ch. D. 287. *As to* (3) **Folld.** Bissett *v.* Jones (1886), 32 Ch. D. 635.

2201. —— —— —— ——.]—POULETT (EARL) *v.* HILL (VISCOUNT), No. 2675, *post.*

2202. —— **Sale—Action on covenant—Contract for sale above mortgage debt.**]—The circumstances that a mtgee. with power of sale, has entered into a contract to sell a portion of the property comprised in the security for a sum greater than the amount due on the mtge.:—*Held:* not a sufficient ground for restraining him from prosecuting an action upon the covenant for payment contained in the mtge. deed.—WILLES *v.* LEVETT (1847), 1 De G. & Sm. 392; 63 E. R. 1119.

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he could obtain in the ejectment suit, the latter should be stayed for ever.—HAY *v.* MCARTHUR (1880), 8 P. R. 321. —CAN.

k. —— *Sale—After appointment of receiver.*]—Where actions were brought by mtgees. without the leave of the ct. for sale of mtged. premises after the appointment of a receiver to receive the rents & profits of such premises, an order was made, upon the petition of the mtgees., allowing the proceedings in the actions to stand, & allowing the petitioners to proceed with the actions notwithstanding the appointment of the receiver.—GARDNER *v.* BURGESS (1889), 13 P. R. 250. —CAN.

2203. Action on covenant—While foreclosure suit pending.]—POULETT (EARL) *v.* HILL (VISCOUNT), No. 2675, *post.*

2204. ——— ———.]—WILLIAMS *v.* HUNT, No. 2676, *post.*

SUB-SECT. 2.—UNDER AND APART FROM MORTGAGE.

2205. General rule—Lower security not destroyed by higher—Action at common law not suspended.] —*Semble:* an express security of a higher nature does not destroy an implied security of a lower. Thus a mtge. given as a security for money lent, does not preclude the lender seeking his remedy in an action of *assumpsit* for the money lent, though, at the time of the commencement of the action, the mtge. may have become absolute by forfeiture. The mtge. is not to be treated as a satisfaction, or as a suspension of the common law right of action.—ALLENBY *v.* DALTON (1827), 5 L. J. O. S. K. B. 312.

Annotation:—**Refd.** Price *v.* Moulton (1851), 10 C. B. 561.

2206. Personal action against debtor—& remedy under mortgage.]—BURNELL *v.* MARTIN, No. 2191, *ante.*

2207. —— ———.]—ALLENBY *v.* DALTON, No. 2205, *ante.*

2208. —— ———.]—An assignment of property for the purpose of securing debts due & to be due, with a power of sale upon giving six months' notice, is only a collateral security; &, without a special clause to that effect, does not suspend the remedy by action against the debtor.—EMES *v.* WIDDOWSON (1829), 4 C. & P. 151, N. P.

2209. —— ———.]—A mtgee. who has taken the body of his debtor in execution for the mtge. debt, is nevertheless entitled to the benefit of his mtge. security.—DAVIS *v.* BATTINE (1830), 2 Russ. & M. 76; 39 E. R. 323.

2210. Sale of collateral securities—Foreclosure for balance.]—The mtgee. of a real estate made a further advance & took, as security for the same, a further charge upon the mtged. premises; the covenant of the mtgor. for payment, & an assignment of a policy of assurance on the life of the mtgor., upon trust to receive the moneys to become payable on the policy, & thereout first to pay the expenses of the trust, then to apply the residue towards payment of the mtge. debt, or so much thereof as should remain due, & subject thereto upon trust for the mtgor. Upon the bill of the mtgee., praying a sale of the policy, & payment by the mtgor. of so much of the debt as the proceeds of the sale should be insufficient to pay, or in default that the mtgor. might be foreclosed:—*Held:* the mtgee. was entitled only to the usual decree for payment or foreclosure of the real estate, & not to a decree for the sale of the policy; but he was entitled to retain the policy upon the terms of the trust, notwithstanding the foreclosure of the real estate.

The course usually recommended out of ct. to a mtgee. is, first to realise his collateral securities & then to proceed to foreclose the mtge. for so much of his debt in the collateral securities may not satisfy (*per* CUR.).—DYSON *v.* MORRIS (1842), 1 Hare, 413; 11 L. J. Ch. 241; 6 Jur. 207; 66 E. R. 1094.

Annotations:—**Refd.** Stamford, Spalding & Boston Banking Co. *v.* Ball (1862), 8 Jur. N. S. 420. **Mentd.** Crawford *v.* Fisher (1842), 1 Hare, 436; Holland *v.* Baker (1843), 3 Hare, 68; Jones *v.* Howells (1843), 2 Hare, 342; Lewis *v.* Hinton (1844), 2 L. T. O. S. 455; Parker *v.* Carter (1845), 4 Hare, 400; Wilson *v.* Short (1848), 6 Hare, 366; Wilkinson *v.* Fowkes (1851), 9 Hare, 193; Vickers *v.* Bell, Bell *v.* Vickers (1863), 9 L. T. 600.

SECT. 2.—**SALE.**

SUB-SECT. 1.—EXPRESS POWER OF SALE.

A. Concurrence of Mortgagor.

See, now, Law of Property Act, 1925 (c. 20), s. 104 (3).

2211. Necessity for—Covenant by mortgagor to join.]—CLAY *v.* SHARPE (1802), 18 Ves. 346, n.; 34 E. R. 348, L. C.

Annotations:—**Apld.** Corder *v.* Morgan (1811), 18 Ves. 344. **Consd.** Metters *v.* Brown (1863), 33 L. J. Ch. 97.

2212. —— ———.]—Specific performance against a purchaser under a power of sale in a mtge. deed without the mtgor., though under a covenant to the mtgee. to join in a sale, without costs.—CORDER *v.* MORGAN (1811), 18 Ves. 344; 34 E. R. 347.

Annotation:—**Consd.** Ford *v.* Heely (1857), 3 Jur. N. S. 1116.

2213. —— **Right of mortgagee denied by mortgagor.**]—ALLEN *v.* MARTIN (1841), 5 Jur. 239.

Annotation:—**Refd.** Tipping *v.* Power (1842), 11 L. J. Ch. 257.

2214. ———.]—FORD *v.* HEELY (1857), 3 Jur. N. S. 1116; 5 W. R. 516.

B. Provisions and Conditions of Exercise.

(a) In General.

2215. Method of sale—Power to sell by auction—Invalidity of private sale.]—A vessel was mortgaged for a nominal sum to secure an unascertained balance due to the mtgee. with power to sell by public auction; & in case the vessel could not be sold, the mtgee. was to hold, enjoy & possess the free use, control & possession thereof as sole owner, until the full amount of his claims should be satisfied. Default was made in payment of the sum named before the real balance was ascertained, & pending the investigation thereof before arbitrators, & the mtgee. caused the vessel to be sold by private contract:—*Held:* such sale was wrongful, & not warranted by the conditions of the mtge. deed, & an account of the value of the ship at the time of such sale ordered to be taken, & the amount thereof paid to the mtgee.—BROUARD *v.* DUMARESQUE (1841), 3 Moo. P. C. C. 457; 13 E. R. 186, P. C.

2216. —— **Power to sell by auction or privately—Necessity for auction before private sale.**]—(1) Lands were mortgaged in fee, with power of sale by auction or private contract in case of default in payment of the mtge. money. The mtgee. sold part of the property by private contract, containing an agreement that more than

PART XIII. SECT. 1, SUB-SECT. 2.

l. *Effect of inconsistent provisions in deed.*]—M. gave a mtge. to T. of certain lands. The mtge. was in the statutory short form, except that immediately after the printed covenant for payment, the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mtge." The distress clause remained unerased in its usual place, viz., after the covenants. T. assigned the mtge. to H., who distrained. M. now brought this action for a wrongful distress:—*Held:* M. was entitled to recover the amount distrained for with interest & costs, for the earlier provision controlled the subsequent one.—MCKAY *v.* HOWARD 6 O. R. 135.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 1.—B. (a).

m. *Sale on breach of covenant—Notice to mortgagor—Particular covenant broken must be specified.*]—STACEY *v.* HANSEN (1894), 20 V. L. R. 561.—**AUS.**

n. *Sale of timber without land.*]—A mtgee. of timbered land, whose mtge. contained the ordinary short

Sect. 2.—Sale: Sub-sect. 1, B. (a) & (b) i.]

half of the purchase-money might remain on mtge. of the land sold, for four years, if interest should be regularly paid, & that if a stated sum were laid out on the land in the erection of houses within a specified time, the mtge. money might remain for a longer stated period. On a bill filed by the owner of the equity of redemption to redeem & to set aside the sale:—*Held:* the transaction could not be impeached.

(2) A mtgee. with power of sale is not bound to wait till a more advantageous sale can be effected; neither is he bound to advertise before proceeding to a sale.

(3) To hold that the mtgee. was bound in the first instance to put the property up for sale by auction, would be to limit, cut down the power given by the deed, which expressly authorises a sale by public auction or private contract; & certainly I am not prepared to hold that a mtgee. is not justified in accepting a fair offer for the purchase of the mtged. property until he has advertised the property for sale (TURNER, L.J.).—DAVEY *v.* DURRANT, SMITH *v.* DURRANT (1857), 1 De G. & J. 535; 26 L. J. Ch. 830; 6 W. R. 405; 44 E. R. 830, L. JJ.

Annotations:—As to (1) **Consd.** Thurlow *v.* Mackeson (1868), L. R. 4 Q. B. 97; Bettyes *v.* Maynard (1883), 49 L. T. 389; Belton *v.* Bass, Ratcliffe & Gretton, [1922] 2 Ch. 449. **Refd.** Farrar *v.* Farrars (1888), 40 Ch. D. 395; Colson *v.* Williams (1889), 58 L. J. Ch. 539. *Generally,* **Refd.** Warner *v.* Jacob (1882), 20 Ch. D. 220. **Mentd.** *Re* Thackwray & Young's Contract (1888), 58 L. J. Ch. 72.

2217. Postponement for stated period—If interest regularly paid.]—The bkpt. executed a mtge. with a power of sale subject to a proviso that the power was not to be exercised for five years, if the interest was regularly paid:—*Held:* the mtgee. might have the common order for sale with liberty to prove for the residue.—*Re* THEOBALD, *Ex p.* BIGNOLD (1838), 3 Deac. 151; 3 Mont. & A. 477; 7 L. J. Bcy. 35.

Annotation:—**Refd.** Seaton *v.* Twyford (1870), 40 L. J. Ch. 122.

2218. Power on mortgagor becoming insolvent—Whether in nature of penalty.]—In a mtge. of chattels, which was duly registered as a bill of sale, to secure the repayment of £400 then advanced, & a further sum of £144 for interest & expenses, by instalments payable every three months, & in default of payment of any one instalment the whole amount remaining unpaid to become immediately due, followed by a proviso that, in default of payment of the moneys secured, or any part thereof, or if the mtgor. should become a liquidating debtor or bkpt., or upon the happening of certain other contingencies, the mtgee. might enter, sell, & repay himself the whole of the sums due to him upon the security of the mtge. The mtgor. having become a liquidating debtor:—*Held:* the provisions of this mtge. were not in the nature of a penalty, & the mtgee. was entitled to possession of the property comprised in the mtge. deed.—*Re* SENDALL, *Ex p.* COCHRANE (1878), 9 Ch. D. 698; 48 L. J. Bcy. 31; 38 L. T. 820; 26 W. R. 818.

2219. Power subject to sanction of mortgagor—Sale after sanction withdrawn.]—On May, 4, 1887, A. deposited with B., his broker, certain shares in the K. co. & signed a blank transfer. B. signed a receipt stating that the shares were deposited to secure the balance of A.'s account, & that he would not realise them without A.'s sanction. On July 23, A. wrote authorising a sale of the K. shares at a given price. On Aug. 5, A. wrote to B. that the shares in his hands would be sold by another broker, but at the same time directed him to sell certain shares other than the K. shares. On Aug. 27, B. sold the K. shares on the Stock Exchange to W., at a price above the limit fixed by A. on July 23. B. filled in the transfer with W.'s name, & W. sent the transfer to the co.'s office for registration. The co. having been warned by A. not to register the transfer, refused registration. W. moved to have the register rectified:—*Held:* on the construction of the correspondence between the parties, B. was an equitable mtgee., with a power of sale not to be exercised without A.'s sanction, but that sanction had been given & not withdrawn.—*Re* KIMBERLEY NORTH BLOCK DIAMOND CO., *Ex p.* WERNHER (1888), 59 L. T. 579, C. A.

(*b*) *Provision as to Notice.*

i. *In General.*

2220. Necessity for notice — General rule.]—Deft., a money-lender, having agreed with pltf., who was just twenty-one, & was in difficulties, to lend him £150 on his reversionary interest under his father's will, exacted securities for £200, with interest at 20 per cent., reducible to 10 per cent. on punctual payment, & advanced only £123, but claimed interest on the whole amount secured. The ct. declared that the securities should stand as a security for the money actually advanced with interest at 5 per cent., although pltf. had been assisted by a solr., who, however, stated that he was not accurately informed of the transaction.

The terms of the power of sale are oppressive, & put pltf. completely at the mercy of deft. The power to sell without any notice to pltf. enabled deft. at any moment to extinguish the right of redemption (STUART, V.-C.).—MILLER *v.* COOK (1870), L. R. 10 Eq. 641; 40 L. J. Ch. 11; 22 L. T. 740; 35 J. P. 245; 18 W. R. 1061.

Annotations:—**Mentd.** Tyler *v.* Yates (1870), L. R. 11 Eq. 265; Aylesford *v.* Morris (1873), 42 L. J. Ch. 546; Nevill *v.* Snelling (1880), 15 Ch. D. 679.

2221. —— —— Mortgage by client to solicitor.]—COCKBURN *v.* EDWARDS, No. 1409, *ante.*

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form of power of sale authorised by R. S. O., 1887, c. 107, in the exercise of such power sold the timber without the land:—*Held:* the sale as an exercise of the power was void.—STEWART *v.* ROWSOM (1892), 22 O. R. 533.—**CAN.**

o. *Postponement of payment of purchase-money.*]—In the ordinary case of a mtge. sale the ct. should not force a pltf. mtgee. to accept a condition for the postponement beyond the usual sixty days of payment of any part of the purchase-money required to satisfy the mtgee.'s claim.—MCLINTOCK *v.* LOWES, [1920] 2 W. W. R. 105; 51 D. L. R. 453; 15 Alta. L. R. 229.—**CAN.**

p. *Originating summons for delivery of possession—In order to exercise power.*]—Deft., in 1904, had executed a mortgage of a house to pltf. No part of principal had been paid, & a large sum due for arrears of interest. There was no prospect of deft. being able to pay the amount due. Deft. was in possession & living in the house, & in an affidavit made by an auctioneer it was stated that it would be difficult, if not impossible, to sell the house while deft. was in possession. Pltf. applied by originating summons under O. 55., r. 7, for delivery of possession, in order to exercise the power of sale in the mortgage:—*Held:* although such order not granted as a matter of course, the case, a proper one, to exercise the jurisdiction.—BUNYAN *v.* BUNYAN, [1916] 1 I. R. 70.—**IR.**

PART XIII. SECT. 2, SUB-SECT. 1.—B. (b) i.

2220 i. *Necessity for notice—General rule.*]—A sale, without the intervention of a ct. of justice of mtged. lands situate in the *mofussil* of Bombay, under a power of sale contained in an indenture of mtge. in the ordinary English form, is valid, if due notice be given to the mtgor. of the mtgee.'s intention to sell, & the sale be fairly conducted.—PITAMBER NARAYANDAS *v.* VANMALI SHAMJI (1875), I. L. R. 2 Bom. 1.—**IND.**

2220 ii. —— ——.]—*Re* SHORE (1890), 6 Man. L. R. 305.—**CAN.**

q. —— *Exception to rule—Power in deed to sell without notice.*]—*Re*

2222. —— —— ——.]—In a mtge. to a solr. by his client there was a power of sale without qualification. It was not explained to the mtgor. that it was usual to insert a proviso that the power should not be exercised unless interest was in arrear for three months or notice to pay off had been given:—*Held:* the power could not be properly exercised as against the mtgor., though three months' interest was in arrear.—CRADOCK *v.* ROGERS (1885), 1 T. L. R. 556, C. A.

2223. —— **Exception to rule—Exceptional circumstances—Arrangement giving time for payment.**]—In Apr. 1879, P. owed £450 to his solr. K., who was pressing for payment. On Apr. 11, 1879, he gave K. his promissory note for £466 17*s.* 10*d.*, payable three months after date, & on May 31 signed an agreement to mortgage to K. his interest in a railway for the £466 17*s.* 10*d.* The agreement contained a provision that, if that sum was not paid on July 11, K. should be at liberty to sell the property without notice. The agreement was drawn by K., & P. had no independent advice. Default having been made, K. sold without giving such notice as required in the common form of power of sale:—*Held:* as this was not an ordinary mtge. transaction, but an arrangement for giving the client time for payment of a debt presently payable, the doctrine of *Cockburn* v. *Edwards*, No. 1409, *ante*, did not apply; it was not incumbent on K. to explain to P. the unusual form of the power of sale; & the sale could not be impeached on the ground that it was not authorised by the common form of power.

A passage was read to us from the judgment in *Robertson* v. *Norris*, No. 2332, *post*, stating that the ct. will consider the exercise of a power of sale improper & will prevent it being effectual against the mtgor. if it is exercised, not for the purpose of getting the money which is due on the mtge. to secure which the power of sale is given, but for some indirect purpose, a statement of law from which I do not dissent (COTTON, L.J.).—POOLEY'S TRUSTEE *v.* WHETHAM (1886), 33 Ch. D. 111; 55 L. J. Ch. 899; 55 L. T. 333; 34 W. R. 689; 2 T. L. R. 808, C. A.

2224. —— **Fresh notice—Acceptance of bill of exchange for sum due operating as suspension of notice—Subsequent dishonour of bill.**]—Mtge. of the equity of redemption of premises as security for payment of a sum of money, with the condition that, if default should be made for seven days after notice requiring payment, the mtgee. might sell. The mtgee. subsequently gave due notice, & on the sixth day after took a bill at three months for the amount from the mtgor., who died the following day. The bill was dishonoured, & thereupon the mtgee., without giving any further notice, sold the premises to pltf., who brought ejectment against deft., the mtgor.'s widow:—*Held:* the power of sale having been well exercised, deft. was not entitled to redeem, but must give up possession to pltf.; the giving of the bill operated as a suspension of the remedy by sale, & of the running of the notice, & both revived when the bill was dishonoured; no further notice was therefore necessary.—WOOD *v.* MURTON (1877), 47 L. J. Q. B. 191; 37 L. T. 788.

Provision for protection of purchaser.]—*See* Sub-sect. 8, B. (*b*), *post*.

2225. Sufficiency of service of notice—"Usual or last known place of abode"—Notice affixed to door.]—S. took a conveyance of an estate from W., his father, & then mortgaged the estate, with a power of sale on default of payment of the mtge. money & interest within three months after notice, in writing, given to S., his heirs, exors., administrators or assigns, or left at his or their usual or last known place of abode. The conveyance to S. from W. was afterwards declared void, as against the creditors of W. Some years afterwards the mtgee. caused the notice demanding payment to be affixed to the door of the house which was the last known place of abode of S.; & the mtgee., a short time before the expiration of the three months, entered into a contract for the sale of the property:—*Held:* (1) as the right of the mtgee. under the power of sale was paramount to that of the creditors of W., the notice to S. was sufficient; (2) such notice was well served by being fixed on the door of S.'s last known place of abode; (3) the contract for sale of the property, although made before the expiration of the notice, was not therefore invalid.—MAJOR *v.* WARD (1847), 5 Hare, 598; 12 Jur. 473; 67 E. R. 1049.

Annotations:—**Consd.** Farrar *v.* Farrars (1888), 40 Ch. D. 395. **Refd.** Ford *v.* Heely (1857), 3 Jur. N. S. 1116.

2226. At what time notice given—Stipulation for six months' notice—Interest payable January & July—Not affected by interest dates.]—A declaration in covenant set out an agreement, dated Apr. 27, 1840, whereby, after reciting that deft. was indebted to pltfs. in £60, to be repaid, with interest at 5 per cent., it was agreed "that the said sum of £60 shall remain in the hands of H., deft., from the date hereof, for one whole year; that, at the expiration of that period, if the interest

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BRITISH CANADIAN LOAN & INVESTMENT CO. & RAY (1888), 16 O. R. 15.—**CAN.**

r. —— —— ——.]—A power of sale in a mtge. authorised a sale without any notice. Default having been made in payment of the mtge. money, notice of sale was given exercisable forthwith. Shortly afterwards an action was brought by the mtgees. for the possession of the mtged. premises without the leave of a judge, as required by R. S. O., 1887, c. 102, s. 30, having been first obtained:—*Held:* the Act did not apply, there being no proviso for notice in the mtge. —CANADA PERMANENT BUILDING SOCIETY *v.* TEETER (1889), 19 O. R. 156.—**CAN.**

t. —— —— ——.]—Where the words of the short form were followed by the words "Should default be made for two months a sale or lease may be made hereunder without notice":—*Held:* these words were effectual to enable the mtgee. to make a valid sale & conveyance of the whole estate mtged. without giving any notice whatever of his intention to do so.—*Re* COTTER (1903), 14 Man. L. R. 485.—**CAN.**

a. —— —— ——.]—A stipulation in a mtge. that upon default a mtgee. may sell at once, without giving any notice or waiting any period whatever, gives the mtgee. the right to sell without giving any notice to the mtgor. —PUBLIC TRUSTEE *v.* MORRISON (1894), 12 N. Z. L. R. 423.—**N.Z.**

b. —— —— ——.]—An immediate power of sale without notice upon default is not an unusual power in a mtge., but under ordinary circumstances such a power ought to be fully explained by a solr. mtgee. to the mtgor. if he is his client.—MILLS *v.* HUSSEY (1909), 28 N. Z. L. R. 382.—**N.Z.**

c. —— —— —— *After entry.*]—The power of sale contained in a mtge., purporting to be under Short Forms Act, was: "Provided that the mtgee. on default for one day may, without any notice, enter on & lease or sell said lands":—*Held:* under the power entry on the land was not necessary prior to sale.—CLARK *v.* HARVEY (1888), 16 O. R. 159.—**CAN.**

d. —— —— —— *Where title registered.*]—Where the mtge. stipulates for a power of sale, on default, without notice, & contains no proviso dispensing with the official supervision required by Real Property Act, a sale by the mtgee., purporting to be made under that power, without compliance with the requirements of Real Property Act, s. 110, or an order of the ct., cannot operate to extinguish the registered title of the mtgor.—SMITH *v.* NATIONAL TRUST CO. (1912), 21 W. L. R. 97; 1 W. W. R. 1122; 45 S. C. R. 618.—**CAN.**

e. —— —— *Acquisition of mortgage & equity of redemption by assignee.*]—KONKLE *v.* MAYBEE (1864), 23 U. C. R. 274.—**CAN.**

f. *Sufficiency of service of notice.*]—A notice of sale under the power in a mtge. was addressed to the mtgor., then resident abroad, G., as his agent, & others:—*Held:* service of it was effective where made upon & accepted by G. who acted generally as agent of

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shall be then paid, & no notice be then given to call in the same, the £60 shall continue in the hands of H. for another year, & so on from year to year, until notice in writing, shall be given by B., pltf., to call in the same; that twelve calendar months' notice, in writing, shall be given to call in the £60; & that, at the expiration of the said notice, the same shall be paid by instalments of £10, every third month, until the whole amount be paid, the first payment of £10 to be made at the expiration of fifteen months from the date of the said notice, so that the whole amount of £60 shall be paid by the end of two years & six months from the date of the said notice." Averment that notice in writing, dated May 29, 1846, was served upon deft. to call in the principal sum of £60; & that, although twelve calendar months from the date of such notice & service thereof elapsed before the commencement of the suit, & although six months from the expiration of the said twelve months had also elapsed, & although two instalments had become due, yet deft. had not paid the same:—*Held:* on demurrer after the expiration of the first year, the notice to pay off the principal might be given at any period of the year, & the time for payment of the instalments was to be calculated from the date of the notice, not from the day of the year corresponding with the date of the agreement.

It is perfectly plain, that although a mtge. deed provides for the payment of interest on Jan. 1, & July 1, the stipulation as to six months' notice for repayment of the principal does not mean that the notice is to be given on any particular day, but the mtgee. may give the notice at any moment of time.—BROWN *v.* HARTILL (1848), 2 Exch. 434; 17 L. J. Ex. 278; 154 E. R. 561.

2227. Form of notice—Notice requiring payment within six months of service.]—A power of sale in a mtge. deed declared in case of default on the day named in the proviso for redemption, & provided the mtgee. should have given six months' previous notice of his intention to sell that if the mtge. money remained unpaid at the expiration of the notice; it should be lawful for him to sell at any time after the expiration of the notice, so long as any part of the money should be unpaid:—*Held:* a notice was not invalid merely because it required payment of the money at a time less than six months from the service of the notice.

Semble: even where there has been a serious irregularity in the notice to sell by a mtgee. under a power of sale, if the purchaser has entered & expended money on the property, the ct. will not, in the absence of fraud, interfere to set aside the purchase.—METTERS *v.* BROWN (1863), 2 New Rep. 227; 33 L. J. Ch. 97; 8 L. T. 567; 9 Jur. N. S. ..., .. W. R. 744.

Irregularity of notice—Whether ground for rescission.]—*See* No. 2227, *ante*, Nos. 2274, 2429, *post*.

2228. Contract of sale before expiration of notice—Valid.]—MAJOR *v.* WARD, No. 2225, *ante*.

2229. —— ——.]—Three mtgees. in possession, of whom F. was one, & acted as their solr. in the transaction, sold under the powers of sale in their mtge. deed to a co. formed for the purpose of purchasing the property. The co. was to some extent promoted by F., who became the solr. to the co. & had a substantial interest as a shareholder:—*Held:* (1) the sale could not be set aside on the simple ground that F. was a shareholder in the co., for that a sale by a person to a corpn. of which he is a member is not either in form or substance a sale by him to himself along with other people; but (2) there was such a conflict of interest & duty in F., of which the co. had notice, as to throw upon them the burden of upholding the sale; (3) the co. had discharged themselves of this burden by showing that F. had taken all reasonable pains to secure a purchaser at the best price, & the price given was not at the time inadequate, though more might have been obtained by postponing the sale.

Every mtge. confers upon the mtgee. the right to realise his security to find a purchaser if he can & if in exercise of his power he acts *bonâ fide* & takes reasonable precautions to obtain a proper price, the mtgor. has no redress, even although more might have been obtained for the property if the sale had been postponed (LINDLEY, L.J.).

(4) We cannot see any impropriety in his [the mtgee.'s] conduct, unless it be that he ought not to have agreed in Nov., to sell at a future time for £7,700. This, however, does not without more invalidate the sale (LINDLEY, L.J.).—FARRAR *v.* FARRARS, LTD. (1888), 40 Ch. D. 395; 58 L. J. Ch. 185; 60 L. T. 121; 37 W. R. 196; 5 T. L. R. 164, C. A.

Annotations:—As to (3) **Consd.** Kennedy *v.* De Trafford, [1896] 1 Ch. 762; Nutt *v.* Easton, [1899] 1 Ch. 873. **Apld.** Hodson *v.* Deans, [1903] 2 Ch. 647. **Refd.** Colson *v.* Williams (1889), 58 L. J. Ch. 539; Tomlin *v.* Luce (1889), 41 Ch. D. 573; Bailey *v.* Barnes, [1894] 1 Ch. 25. *Generally*, **Refd.** *Re* Hurst, Addison *v.* Topp (1890), 63 L. T. 665; Field *v.* Debenture Corpn. (1896), 12 T. L. R. 469; Bath *v.* Standard Land Co., [1911] 1 Ch. 618; Belton *v.* Bass, Ratcliffe & Gretton, [1922] 2 Ch. 449.

2230. Restriction of right of mortgagor—Covenant giving action for damages only—Sale not restrained for absence of notice.]—A mtge. deed contained a covenant by the mtgees. not to exercise

the mtgor.—FENWICK *v.* WHITWAM (1901), 21 C. L. T. 122; 1 O. L. R. 24. —**CAN.**

g. *What notice should contain—Notice must specify whether principal or interest in default.*]—M'DONALD *v.* ROWE (1872), 3 V. R. (Eq.) 143.—**AUS.**

h. *When period of notice begins to run.*]—Where a power of sale in a mtge., provides that after default of payment for a month, & a month's notice of sale, the mtged. premises may be sold, the month's default & notice of sale cannot run concurrently.—GIBBONS *v.* MCDOUGALL (1879), 26 Gr. 214.—**CAN.**

k. ——.]—One of the stipulations of a mtge. was, that "interest should be payable half-yearly on . . . provided that the mtgees. on default of payment for three months, may enter on & lease or sell the said lands without notice"; "& the mtgees. covenant with the mtgors. that no sale or lease of the said lands shall be made or granted by them until such time as one month's notice in writing shall have been given to the mtgors.":—*Held:* a notice served at any time after default was sufficient, & the mtgees. were not bound to wait until default had been made for three months to give such notice.—GRANT *v.* CANADA LIFE ASSURANCE CO. (1881), 29 Gr. 256.—**CAN.**

l. *Effect of notice—On action for payment.*]—Pltf. gave to deft. a notice of sale under the power of sale in a certain mtge., & also began an action against deft. upon the covenant for payment. The notice of sale was dated May 2, & the writ was issued on May 3:—*Held:* the object of Ontario Mortgage Act, 1884, was to prevent all other proceedings while the notice of sale is running, & service of writ should be set aside.—PERRY *v.* PERRY (1884), 10 P. R. 275.—**CAN.**

m. —— ——.]—LYON *v.* RYERSON (1897), 17 P. R. 516.—**CAN.**

n. *Variation from Short Forms Act—No notice to be given.*]—*Re* GILCHRIST & ISLAND (1886), 11 O. R. 537. —**CAN.**

o. —— *One month's notice.*]—*Re* GREEN & ARTKIN (1887), 14 O. R. 697.—**CAN.**

p. *Advertisement of sale — Before expiration of notice.*]—Where a mtgee. served upon the mtgor. a notice demanding payment of the mtge. money, & stated that, unless payment were made within a month from the service, the mtgee. would proceed to sell, an injunction was granted restraining the mtgee. from publishing, until after the expiry of the month, an advertisement of the sale of the mtged. premises.—SMITH *v.* BROWN (1890), 20 O. R. 165.—**CAN.**

q. *Presumption of proper notice.*]—Where a power of sale has been exercised & enjoyment thereunder has

their power of sale without giving three months' notice, followed by a proviso that no purchaser should be affected by express notice that the notice had not been given, & a declaration of intention that the covenant should operate only so as to give the mtgor. a right to an action of damages against the mtgees. :—*Held :* a ct. of equity had no jurisdiction to restrain the mtgees. from exercising the power of sale without giving the required notice.—PRICHARD *v.* WILSON (1864), 3 New Rep. 350 ; 10 Jur. N. S. 330.

Annotation :—**Refd.** Dicker *v.* Angerstein (1876), 24 W. R. 844.

2231. Subsequent deed of arrangement—Not to prejudice powers of mortgagee—Power of mortgagee to determine deed of arrangement—Notice to sell before deed of arrangement determined.]—GILL *v.* NEWTON, No. 2374, *post.*

Notice before seizure under bill of sale.]—*See* BILLS OF SALE, Vol. VII., pp. 135–137, Nos. 765–771.

ii. *To Whom Notice to be Given.*

2232. "Mortgagor, heirs or assigns"—Notice to infant heir & guardian.]—In a mtge. power of sale it was required that notice should be given to the mtgor., his heirs or assigns. The mtgor. died, leaving an infant heir :—*Held :* notice to the infant heir & her guardian was good notice.—TRACEY *v.* LAWRENCE (1854), 2 Drew. 403 ; 2 Eq. Rep. 813 ; 24 L. T. O. S. 13 ; 18 Jur. 590 ; 2 W. R. 610 ; 61 E. R. 775.

2233. "Mortgagor, heirs, executors or administrators"—Notice given to executor—Whether devisee entitled to notice.]—GILL *v.* NEWTON, No. 2374, *post.*

2234. "Mortgagor or his assigns"—Second mortgagee—Right to damages for default.]—HOOLE *v.* SMITH, No. 1382, *ante.*

2235. Power exercisable immediately—Second mortgagee—Provision against exercise of power until default.] — TOZER *v.* BUXTON (1888), 5 T. L. R. 7.

(c) *Default in Payment.*

2236. Necessity for provision—Six months' default after notice—Or interest three months in arrear.]—COCKBURN *v.* EDWARDS, No. 1409, *ante.*

2237. ——— ——— ———.]—CRADOCK *v.* ROGERS, No. 2222, *ante.*

2238. —— **Mortgage by client to solicitor.**]—COCKBURN *v.* EDWARDS, No. 1409, *ante.*

2239. —— ——.]—CRADOCK *v.* ROGERS, No. 2222, *ante.*

2240. What amounts to default—Tender after day fixed—Post office orders—In incorrect name.]—DEMARUE *v.* ROYANT (1858), 2 John. & H. 425, n. ; 70 E. R. 1124.

2241. —— **Tender after time on day fixed.**]—Notice for payment of a mtge. at 3 o'clock, is not forfeited where there is an attendance before 4 o'clock.—KNOX *v.* SIMMONS (1793), 4 Bro. C. C. 433 ; 29 E. R. 975.

2242. —— **Reasonable opportunity must be given to comply with demand.**]—Declaration on a deed, whereby pltf., in consideration of money lent to him by deft., assigned to deft. certain goods, subject to a proviso for redemption on repayment on Mar. 5, 1870, " or at such earlier day or time as deft. should appoint for payment by notice in writing " ; with liberty on default in payment to seize & sell the goods. Breach : that deft. without giving pltf. notice of an appointment of any reasonable earlier day than Mar. 5, 1870, for payment of the money, & before any default in payment, seized & sold pltf.'s goods. Pleas : that before seizing & selling the goods, to wit, on Apr. 30, 1861, deft., in pursuance of & under the provisions in the deed, duly gave pltf. a notice in writing, appointing an earlier day than Mar. 5, 1870, for payment of the money to wit, at two o'clock of the afternoon of Apr. 30, 1861, but pltf. did not pay same :—*Held :* the plea was bad, inasmuch as a notice for payment on the same day the notice was given was insufficient ; & also it was consistent with the plea that the seizure & sale were before default in payment at the time mentioned in the notice.—ROGERS *v.* MUTTON (1862), 7 H. & N. 733 ; 31 L. J. Ex. 275 ; *subsequent proceedings*, 2 F. & F. 768.

2243. ——— ———.]—To secure a floating balance, pltf. conveyed to defts. by bill of sale the machinery, etc., in & upon pltf.'s mill ; the bill of sale contained a proviso for redemption if pltf. should instantly on demand, & without delay on any pretence whatsoever, pay the sum due ; it provided that the demand might be made personally on pltf. or by giving or leaving verbal or written notice to or for him at his place of business, etc., so nevertheless that a demand be in fact made ; that on default of payment defts. might enter, & seize, & sell, but that until default pltf. should remain in possession. In pltf.'s absence from his place of business, a demand was made there by defts. upon his son, who stated his inability to meet it ; & defts. immediately seized :—*Held :* the notice required by the deed in case of pltf.'s absence was such a notice as mght be reasonably

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continued for a long time, a presumption arises that all proper notices of its intended exercise were given.—BERARD *v.* BRUNEAU (1915), 8 W. W. R. 635.—**CAN.**

r. *Effect of registration of notice.*]—After the registration by a mtgee. of notice of intention to exercise his power of sale the registrar has no duty to consider or deal with any informal notice of misrepresentation on the part of the mtgee. regarding the consideration in the mtge. on which the proceedings are being taken before him.—*Re* REGISTRATION OF A CERTIFICATE OF LIS PENDENS, (Sask.), [1917] 1 W. W. R. 302.—**CAN.**

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t. " *Mortgagor, heirs, executors or administrators*"—*Notice to administratrix—Whether heir entitled to notice.*]—A power of sale in a mtge. required notice upon default to be given to the mtgor., " his heirs, exors., or administrators," or left for him or them at his or their last or usual place of abode, before exercising the power :—*Held :* a notice which was served upon the widow, who was also the administratrix of the deceased mtgor., & addressed to her as such widow, was insufficient, because not served also upon the heir-at-law of the mtgor.—HARTLETT *v.* JULL (1880), 28 Gr. 140.—**CAN.**

2235 i. *Power exercisable immediately—Second mortgagee—Provision against exercise of power until default.*]—DOMINION TRUST CO. *v.* BOWER (B. C.) (1906), 3 W. L. R. 157.—**CAN.**

a. *Surety.*]—Where mtgees. sold the mtged. premises without notice to a surety for part of the debt :—*Held :* they were liable as between themselves & the surety for the full value of the property.—MARTIN *v.* HALL & NICHOLS (1878), 25 Gr. 471.—**CAN.**

b. *Execution creditors.*]—In taking proceedings under a power of sale in a mtge. drawn under Short Forms Act, execution creditors of the mtgor. come within the scope of the word " assigns," & as such are entitled to notice under power of sale, but only those having executions in the sheriff's hands at the time notice of default is given need be served.—*Re* ABBOTT & MEDCALF (1891), 20 O. R. 299.—**CAN.**

c. *Party having interest in land.*]—*Held :* there being an existing interest in the land vested in or claimable by pltf. of which the mtgor. had express notice, pltf. was entitled to notice of the sale.—STEWART *v.* ROWSOM (1892), 22 O. R. 533.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 1.—B. (c).

d. *Evidence of default — What amounts to—Sale under power.*]—HUGHES *v.* RUTLEDGE (1894), 10 Man. L. R. 13.—**CAN.**

e. *Default in payment of interest—Before principal due.*] — *Qu. :* whether, if default is made in payment of interest before the principal becomes due, the mtgee. is entitled to

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supposed to reach pltf., & to give him an opportunity of complying with it within a reasonable time; & the seizure was, therefore, not justified.—MASSEY *v.* SLADEN (1868), L. R. 4 Exch. 13; 38 L. J. Ex. 34.

Annotations:—**Consd.** Wharlton *v.* Kirkwood (1873), 29 L. T. 644. **Refd.** Moore *v.* Shelley (1883), 8 App. Cas. 285.

2244. —— Demand by agent—Reasonable time must be given to inquire into agency.]—Where by the terms of a mtge. deed pltfs. were to remain in possession on their own account, & manage the mtged. property until they should make default in payment of the mtge. money upon demand in writing in manner specified, & such demand was made on the wife of one of pltfs. during pltf.'s absence by a person who represented himself as deft.'s agent, & upon non-payment deft forthwith entered upon possession & seized the mtged. property:—*Held:* in an action of trespass against the mtgee., such non-payment before pltfs. had had any opportunity to inquire into the truth of the alleged agency did not constitute default, & deft. was liable to the mtgors. in substantial damages.—MOORE *v.* SHELLEY (1883), 8 App. Cas. 285; 52 L. J. P. C. 35; 48 L. T. 918, P. C.

2245. —— "After account current had been closed"—Notice of appointment of trustee for creditors — Equivalent to closing account.] — A customer of a bank mortgaged to the bank a policy of assurance on his life to secure the amount from time to time owing by him to the bank in account current. The mtge. provided that the statutory power of sale should be exercisable by the bank if, among other events, default should be made in payment of the balance owing for the space of one calendar month after the account current had been closed. On Nov. 9, 1899, the customer wrote to the bank manager: "There was a meeting of creditors yesterday. . . . They agreed to accept all the assets I had. I gave them to understand that I was insured . . . & that you held the policy . . . as security for your account. . . . There was a trustee appointed. Trusting every one will get 20*s.* in the pound," etc. On Dec. 18, the bank sold the policy under the power in the mtge.:—*Held:* the letter amounted to a closing of the account, & the bank were justified in realising their security.—BERRY *v.* HALIFAX COMMERCIAL BANKING CO., LTD., [1901] 1 Ch. 188; 70 L. J. Ch. 85; 83 L. T. 665; 49 W. R. 164; 45 Sol. Jo. 98.

——.]—*See, further,* BILLS OF SALE, Vol. VII., pp. 135–137, Nos. 765–771.

C. Extinguishment of Power.

2246. Deed securing further advance—Omitting power of sale.]—By a deed of 1812, mtgor. assigned to mtgee. a policy of insurance; in a deed of 1813, between the same parties, upon a further advance, there was a power to sell the policy if the mtge. money were not paid on a given day; but upon a further advance in 1822, with conversion of unpaid interest into principal by a third deed, the power was omitted. The mtgee. having afterwards advertised the policy for sale under a power, & the mtgor. having refused to concur in the conveyance:—*Held:* a purchaser was entitled to recover back the deposit money paid on the sale.—CURLING *v.* SHUTTLEWORTH (1829), 6 Bing. 121; 3 Moo. & P. 368; 8 L. J. O. S. C. P. 113; 130 E. R. 1226.

Annotations:—**Mentd.** Boyman *v.* Gutch (1831), 7 Bing. 379; Young *v.* Roberts (1852), 15 Beav. 558.

2247. Recital in transfer of mortgage—No intention to exercise power—Assignment of all powers & remedies under previous mortgage.]—A mtge. deed, dated June 15, 1825, contained a covenant to pay the mtge. debt twelve months after date, with a power of sale in case of default A transfer of the mtge. dated July 2, 1830, recited that the old power of sale had not been & was not intended to be exercised, & contained a covenant to pay the mtge. debt seven years after that date, with a power of sale in case of default, & also assigned the debt & all powers & remedies for recovering the same & all the benefit of the previous mtge.—*Held:* the old power was not extinguished.—BOYD *v.* PETRIE (1872), 7 Ch. App. 385; 41 L. J. Ch. 378; 26 L. T. 460; 20 W. R. 513, L. JJ.

2248. Ineffectual attempt to sell.]—HENDERSON *v.* ASTWOOD, ASTWOOD *v.* COBBOLD, COBBOLD *v.* ASTWOOD, No. 2306, *post.*

2249. Effect of order nisi for foreclosure.]—An order *nisi* for foreclosure does not extinguish the power of sale of the mtgee. over the mtged. property, but, until foreclosure absolute, the power can only be exercised by leave of the ct.—STEVENS *v.* THEATRES, LTD., [1903] 1 Ch. 857; 72 L. J. Ch. 764; 88 L. T. 458; 51 W. R. 585; 19 T. L. R. 334.

Annotations:—**Refd.** Lloyds Bank *v.* Colston (1912), 106 L. T. 420. **Mentd.** Halkett *v.* Dudley, [1907] 1 Ch. 590.

D. Other Cases.

2250. Effect of express power—Right of foreclosure not prejudiced.]—(1) The mtgee. of a reversionary interest in stock in the public funds, with a power of sale, may bring his bill for foreclosure; & is entitled to a decree in the common form for an account, &, in default of payment, for foreclosure.

insist on the payment of the principal money as a condition of abstaining from the exercise of his power of sale, & is not bound at any time before sale to accept his interest in arrear with expenses.—BURNE *v.* STUART (1884), 3 N. Z. L. R. 247 (S. C.).—**N.Z.**

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2249 i. *Effect of order nisi for foreclosure.*]—A mtgee., having obtained a foreclosure order *nisi*, shortly afterwards, & before the period allowed for making absolute the order *nisi* had expired, entered into an agreement for the sale of the mtged. premises to a purchaser who had knowledge of the foreclosure proceedings:—*Held:* the mtgee., could not, after the order *nisi* for foreclosure & before it was made absolute, exercise his power of sale without the leave of the ct.—DEBECK *v.* CANADA PERMANENT LOAN & SAVINGS CO. (1907), 12 B. C. R. 409; 4 W. L. R. 91.—**CAN.**

f. Payment of arrears.]—Pltf., as assignee of the mtgor., was entitled to restrain proceedings under the power of sale in the mtge., upon payment of arrears of interest & costs, the principal not being due except under the acceleration clause.—TODD *v.* LINKLATER (1901), 21 C. L. T. 184; 1 O. L. R. 103.—**CAN.**

g. Lapse of time.]—A mtge. on lands was given as additional security for the same amount secured by a chattel mtge. On default in payment, a warrant was issued under the chattel mtge., & the goods were seized & taken out of the mtgor.'s possession. More than ten years afterwards, the mtgor.'s possession of the land not having been in any way interfered with, an assignee of the mtgee. attempted to exercise the power of sale in the mtge. of the lands:—*Held:* the intended sale was a "proceeding" within R. S. O. 1897, c. 133, s. 23, which the assignee was precluded from taking under that sect. after ten years.—MCDONALD *v.* GRUNDY (1904), 8 O. L. R. 113; 3 O. W. R. 731; 24 C. L. T. 356.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 1.—D.

h. Appointment of receiver — Receiver not agent of mortgagee.]—Mtgee. was to have power to sell if the interest was three months in arrear:—*Held:* not to be cause against a conditional order for a sale that the property had been mismanaged by a receiver, & that thereby the interest had fallen into arrear, the receiver not being the agent of the mtgee.—*Re* LANE (1850), 14 L. T. O. S. 472.—**IR.**

k. Application for injunction — By second mortgagee.]—When second

The only question then is, whether the circumstance, that the interest of the mtgee., from the nature of the property, can only be equitable, excludes him from the right to the decree of foreclosure which he seeks. This question is answered by the cases which affirm the title of a second mtgee. to foreclose the mtgor., although he does not redeem the first mtgee., or take any steps to get in the legal estate. These cases decide, therefore, that the mtgee. of an equitable interest in property is entitled to foreclose the equity of redemption, leaving the legal title in a third party (SHADWELL, V.-C.).

(2) Trustees appointed to sell a reversionary interest in stock, & pay off a mtge. thereon, & hold the surplus for the mtgor. are not necessary parties to a bill of foreclosure brought by the mtgee. —SLADE *v.* RIGG (1843), 3 Hare, 35; 67 E. R. 286.

Annotation:—As to (1) **Folld.** Wayne *v.* Hanham (1851), 9 Hare, 62.

2251. Threat to exercise power—By solicitor of mortgagee—Excessive charges paid under threat—Recoverable.]—The solr. of a mtgee., with a power of sale, refuses to desist from selling unless the mtgor. will pay expenses, with which he is not properly chargeable:—*Held:* money paid under such compulsion, may be recovered back.—CLOSE *v.* PHIPPS (1844), 7 Man. & G. 586; 8 Scott, N. R. 381; 135 E. R. 236.

Annotation:—**Apld.** Fraser *v.* Pendlebury (1862), 31 L. J. C. P. 1.

2252. Appointment of receiver—Trusts subject to power of sale—Not so declared in appointment—Receiver bound to join in conveyance.]—A mtgor. & a mtgee. with a power of sale joined in demising the mtged. hereditaments to a receiver upon trust at the request of the mtgee. during the continuance of the security, & at the request of the mtgor., after satisfaction of the sums secured, to grant leases of the premises in such manner as the person making such request should appoint, but to permit the mtgor. to receive the rents until default was made in payment of the mtge. money or interest, & upon trust after default to receive the rents & apply the same in keeping down the interest upon the mtge. These trusts were not declared to be subject to the power of sale in the mtge.:—*Held:* they were so in effect, & the receiver was bound without the concurrence of the mtgor. to join in conveying the hereditaments to a purchaser from the mtgee. under the power of sale.—KING *v.* HEENAN (1853), 3 De G. M. & G. 890; 43 E. R. 348, L. JJ.

2253. Equitable mortgage with agreement for legal mortgage—Sale by mortgagor to third party—Execution of mortgage—Sale by mortgagee under power—Third party trustee for purchaser.]—In May, 1849, J. W. deposited title deeds as a security for £200 to be advanced to him, & signed a memorandum engaging to execute a mtge. deed when called upon to do so. In June, 1849, & before any mtge. was executed, J. W. sold the premises comprised in the title deeds, &, treating the intended mtge. as in existence, conveyed the property to the purchasers, "subject to a certain mtge. to, etc., for securing £200 & interest, but with the benefit of the provisions for redemption, contained in the mtge. deed." The purchasers made no inquiry of the intended mtgees. respecting the contents of the supposed mtge., & shortly after the purchase the £200 was advanced, & in July, 1849, J. W. executed a mtge. with a power of sale, under which the mtgees. sold the premises to pltf. Upon a bill filed by pltf. against the purchasers from J. W.:—*Held:* the power of sale was validly created as against the latter, & they were declared to be trustees of the legal estate for pltf. & ordered to convey the same accordingly.—LEIGH *v.* LLOYD (1865), 2 De G. J. & Sm. 330; 6 New Rep. 371; 34 L. J. Ch. 646; 12 L. T. 813; 13 W. R. 1054; 46 E. R. 403, L. C.

2254. Defect in terms of power—Evidence of default in payment—Purchaser not exonerated from inquiry.]—In 1818, certain freehold property was mortgaged by the then owner, the form of the mtge. being a conveyance of the fee simple to trustees upon trust, at any time after the expiration of six months from the date named for repayment of the principal, to sell the property, & discharge the debt, etc., out of the proceeds, & to pay the residue to the mtgor., his exors., administrators, or assigns. The deed contained a proviso for redemption, & also provisions making the receipt of the trustees, their heirs or assigns, a sufficient discharge to a purchaser of the property, & exonerating any purchaser from seeing to the application of the purchase-money, & rendering unnecessary the concurrence of the mtgor., or his heirs, in any conveyance under the trust for sale. The deed, however, did not contain any provision exonerating a purchaser from inquiring whether default had been made in payment of principal or interest, nor as to whether anything was owing on the security. The mtgor. died in 1839, having by his will devised the property comprised in the mtge. to several of his children in succession, as tenants for life, with remainders over. The last surviving tenant for life died in 1887, & shortly afterwards A. & B., in whom the mtge. had become vested by transfer, there having previously been several mesne transfers, contracted to sell the property. The vendors sold as mtgees., in pursuance of the trust contained in the mtge.:—*Held:* without the concurrence of all the persons at present entitled

mtgee. applied for an injunction to stay first mtgee. from selling mtged. premises under power of sale in his mtge.:—*Held:* the ct. would not interfere to stay sale unless second mtgee. brought amount claimed into ct. or submitted to be bound to pay whatever should be found due.—BANK OF NEW SOUTH WALES *v.* TYON & SANDEMAN (1871), 11 N. S. W. S. C. R. (Eq.) 1.—**AUS.**

l. *Right of mortgagee in possession to exercise power—Although right to recover mortgage money barred by lapse of time.*]—*Re* AUSTRALIAN DEPOSIT & MORTGAGE BANK, LTD., [1907] V. L. R. 348.—**AUS.**

m. *Right of mortgagor to resale—Misdescription of property.*]—BIGELOW *v.* BLAIKLOCK (1873), R. E. D. 23.—**CAN.**

n. *Sale by way of exchange.*]—A mtgee. with power of sale under Short Forms Act can exercise the power by way of exchange for other land instead of, in the usual way, by sale for money. —SMITH *v.* SPEARS (1892), 22 O. R. 286.—**CAN.**

o. *Obligation to carry out sale.*]—PATTERSON *v.* TANNER (1892), 22 O. R. 364.—**CAN.**

p. *Defect in mortgage.*]—In a mtge. which was intended to be taken in the name of the mtgee., she, by mistake, was described by a name which was not her real name, & which was one she had never assumed or been known by:—*Held:* the legal estate did not pass to her by the mtge., whatever its operation in equity; & she could not make a good legal title to a purchaser under the power of sale contained in the mtge.—BURTON *v.* DOUGALL (1899), 30 O. R. 543.—**CAN.**

q. *Estate taken by purchaser.*]—*Held:* the purchaser under a power of sale in a mtge. which conveys the land to the mtgee. without mention of "his heirs," does not take a legal estate in fee simple in the lands.—MILLARD *v.* GREGOIRE (1913), 12 E. L. R. 401; 11 D. L. R. 539; 47 N. S. R. 78.—**CAN.**

r. *Sale by mortgagor of part of mortgaged property.*]—The right of a mtgee. to bring any portion of the mtged. property to sale is not curtailed by the mtgor. subsequently to the mtge. selling a portion of the mtged. property to a third person.—BHIKARI DAS *v.* DALIP SINGH (1895), I. L. R. 17 All. 434.—**IND.**

t. *Right of mortgagee to charge commission.*]—A mtgee. who sells the property, is not entitled to charge commission on the sale, but will be reimbursed for his expenses & loss of time.—RUTHERFORD *v.* MURRAY &

Sect. 2.—Sale: Sub-sect. 1, D.; sub-sect. 2, A., B., C. & D.; sub-sect. 3, A.]

to the equity of redemption, it was necessary, in order to enable the vendors to make a good title to the property, that they should, by obtaining statutory declarations, furnish evidence of the subsistence of the mtge. from the death of the mtgor. down to the date of the sale.—*Re* EDWARDS & RUDKIN TO GREEN (1888), 58 L. T. 789.

2255. Mortgagee selling as absolute owner—Validity as sale under power.]—HENDERSON *v.* ASTWOOD, ASTWOOD *v.* COBBOLD, COBBOLD *v.* ASTWOOD, No. 2306, *post.*

See, also, No. 2272, *post.*

2256. Sale by mortgagor with concurrence of mortgagee—Default of common agent receiving deposit—Liability for loss.]—A mtgor. contracted to sell the estate, & one of the conditions was, that the purchaser should pay a deposit to the auctioneer. The mtgee. afterwards concurred in & adopted the contract. A loss having occurred by the insolvency of the auctioneer:—*Held:* as between the purchaser & mtgee., the latter stood in the shoes of the vendor & must bear the loss.—ROWE *v.* MAY (1854), 18 Beav. 613; 52 E. R. 241.

Annotation:—**Refd.** Barrow *v.* White (1862), 2 John. & H. 580.

Compare No. 2475, *post.*

SUB-SECT. 2.—IMPLIED POWER OF SALE.

A. To What Mortgages Applicable.

2257. Mortgage of exchequer annuities.]—Exchequer annuities were assigned by way of mtge. for securing £5,000 & interest. The money not being paid, the mtgee., after repeated notice to the exor. of the mtgor., & demand of his money, sold the annuities on the Exchange, at the market price:—*Held:* this was a good sale, & there was no necessity of previously foreclosing the equity of redemption.—WILSON *v.* TOOKER (1714), 5 Bro. Parl. Cas. 193; 2 E. R. 622; *sub nom.* TUCKER *v.* WILSON, 1 P. Wms. 261, H. L.

Annotations:—**Refd.** Lockwood *v.* Ewer, Child *v.* Chanstilet (1742), 9 Mod. Rep. 275; *Re* Morritt, *Ex p.* Official Receiver (1886), 56 L. T. 42; Deverges *v.* Sandeman, Clark, [1902] 1 Ch. 579; Stubbs *v.* Slater, [1910] 1 Ch. 632.

2258. Mortgage of stock.]—In the year 1708 A. borrows of B. £2,000 & for security assigns to B. £2,500 East India stock, & gave his bond for the same sum payable July following; B. signs a defeasance, by which he covenants, that if A. paid principal & interest in July he would re-transfer. The stock sinking in value, several calls were made, which B. paid, & upon the last call B. had paid £24 over & above the £2,500; & the stock afterwards increased in its value. B. continues in possession until the year 1715, & then sells out this £2,500 stock, & united it to other stock of his own, & died; & in 1729 a bill is brought to redeem, but was dismissed on account of the length of time; & this being a personal pledge, there was no occasion to foreclose.—LOCKWOOD *v.* EWER, CHILD (LADY) *v.* CHANSTILET (1742), 9 Mod. Rep. 275; 2 Atk. 303; 88 E. R. 448, L. C.

2259. ——.]—The pawnee of stock is not bound to bring a bill of foreclosure of the equity of redemption of the stock, but may sell it (LORD HARDWICK, C.).—KEMP *v.* WESTBROOK (1749), 1 Ves. Sen. 278; 27 E. R. 1030, L. C.

Annotations:—**Refd.** Dyson *v.* Morris (1842), 1 Hare, 413; Banner *v.* Berridge (1881), 18 Ch. D. 254. **Mentd.** Leeds *v.* Amherst (1846), 2 Ph. 117.

2260. Equitable mortgage—By deposit of deeds.]—Where an equitable security is given by the deposit of deeds, pltf., on a bill brought to give effect to his security, is entitled to a decree for a sale.—PAIN *v.* SMITH (1833), 2 My. & K. 417; 39 E. R. 1003.

Annotations:—**Dbtd.** Brocklehurst *v.* Jessop (1835), 7 Sim. 438. **Consd.** Tuckley *v.* Thompson (1860), 1 John. & H. 126. **Refd.** Ashworth *v.* Mounsey (1853), 9 Exch. 175.

2261. —— ——.]—A deposit of deeds by way of mtge. gives neither mtgor. nor mtgee. a power of sale (CHITTY, J.).—*Re* REBBECK, BENNETT *v.* REBBECK (1894), 63 L. J. Ch. 596; 71 L. T. 74; 42 W. R. 473; 38 Sol. Jo. 399; 8 R. 376.

Annotations:—**Mentd.** *Re* Barrow-in-Furness Corpn. & Rawlinson's Contract, [1903] 1 Ch. 339; *Re* Henson, Chester *v.* Henson, [1908] 2 Ch. 356.

2262. —— **On death of mortgagor.**]—BROCKLEHURST *v.* JESSOP, No. 2849, *post.*

2263. ——.]—PERRY *v.* KEANE, PERRY *v.* PARTRIDGE, No. 2858, *post.*

2264. Absolute purchase held to be available as security only—Power not implied.]—Where an absolute purchase is held, in consequence of the relation between the parties, to be available as a security only, the ct. will not import into the transaction a power of sale.—PEARSON *v.* BENSON (1860), 28 Beav. 598; 54 E. R. 496.

2265. Mortgage of chattels—After default when time fixed for payment.]—When goods are deposited as a security for the repayment of a loan of money on a future day certain, though without any express stipulation that the pawnee should have power to sell on default of payment on the day, *semble:* such a power of sale is implied by law from the nature of the transaction.

But where there is no stipulated day for payment, or where the stipulated time has been rendered indefinite by a subsequent agreement between the parties, it is not competent to the pawnee to sell without a proper demand & notice.

A notice that he will sell unless an excessive sum be paid immediately is not such a notice as will justify the sale.—PIGOT *v.* CUBLEY (1864), 15 C. B. N. S. 701; 3 New Rep. 607; 33 L. J. C. P. 134; 9 L. T. 804; 10 Jur. N. S. 318; 12 W. R. 467; 143 E. R. 960.

Annotations:—**Distd.** Deverges *v.* Sandeman, Clark, [1902] 1 Ch. 579. **Expld.** Stubbs *v.* Slater, [1910] 1 Ch. 632. **Mentd.** Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Cox *v.* Liddell (1895), 2 Mans. 212.

2266. —— ——.]—As a general rule the pawnee of chattels has no right to sell them, unless a time was originally fixed for their redemption & that time has expired, or unless he has made a demand on the pawnee for payment of which is due to him (FRY, J.).—FRANCE *v.* CLARK (1883), 22 Ch. D. 830; 52 L. J. Ch. 362; 48 L. T. 185; 31 W. R. 374; *affd.* (1884), 26 Ch. D. 257, C. A.

Annotations:—**Consd.** Fry *v.* Smellie, [1912] 3 K. B. 282. **Refd.** Easton *v.* London Joint Stock Bank (1886), 55 L. T. 678. **Mentd.** Hutchison *v.* Colorado United Mining Co. & Hamill, Hamill *v.* Lilley (1886), 3 T. L. R. 265; Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388; Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank (1890), 39 W. R. 449; Moore *v.* North Western Bank (1891), 64 L. T. 456; Faulks *v.* Atkins (1893), 10 T. L. R. 178; Powell *v.* London & Provincial Bank, [1893] 2 Ch. 555; Fox *v.* Martin (1895), 64 L. J. Ch. 473; London & Midland Bank *v.* Mitchell, [1899] 2 Ch. 161; Watkin *v.* HUTCHINS (1880), 6 Nfld. L. R. 227.—**NFLD.**

a. *Application for leave to sell.*]—Where a clause in a mtge. bond confers on the mtgee. a right to sell the hypothecated property on failure of the mtgor. to make due payment of instalments of capital & interest, the proper procedure is for the mtgee. to apply to the ct. for leave to sell.—*Ex p.* INDWE MUTUAL BUILDING SOCIETY (1906), 16 C. T. R. 1137.—**S. AF.**

Lamb (1901), 85 L. T. 483; Herdman v. Wheeler, [1902] 1 K. B. 361; Montagu v. Weston, Clevedon & Portishead Light Ry. (1903), 19 T. L. R. 272; Lloyd's Bank v. Cooke, [1907] 1 K. B. 794; Stubbs v. Slater & Bond (1910), 102 L. T. 444; Macmillan v. London Joint Stock Bank, [1917] 2 K. B. 439.

2267. —— ——.]—A mtgee. of personal chattels which are in his possession is not in a worse position than a pledgee, & where there is no express power of sale given by the mtge., he has, after default in payment, & after he has given the mtgor. a reasonable time to pay the money due, a power to sell & give a good title to the purchaser (COTTON, L.J.).—*Re* MORRITT, *Ex p.* OFFICIAL RECEIVER (1886), 18 Q. B. D. 222; 56 L. J. Q. B. 139; 56 L. T. 42; 35 W. R. 277; 3 T. L. R. 266, C. A.

Annotations:—**Consd.** Calvert v. Thomas (1887), 19 Q. B. D. 204; Deverges v. Sandeman, Clark, [1902] 1 Ch. 579. **Reld.** *Re* Cleaver, *Ex p.* Rawlings (1887), 18 Q. B. D. 489; Watkins v. Evans (1887), 18 Q. B. D. 386; The Ningchow, [1916] P. 221. **Mentd.** Lumley v. Simmons (1887), 34 Ch. D. 698.

See, further, PAWNS AND PLEDGES.

Shares.]—*See* COMPANIES, Vol. IX., p. 416, Nos. 2688, 2689.

B. Requirements as to Notice.

2268. Necessity for—General rule.]—WILSON v. TOOKER, No. 2257, *ante.*

2269. —— ——.]—*Re* MORRITT, *Ex p.* OFFICIAL RECEIVER, No. 2267, *ante.*

2270. —— —— **No time for payment stipulated.**]—PIGOT v. CUBLEY, No. 2265, *ante.*

2271. —— —— ——.]—FRANCE v. CLARK, No. 2266, *ante.*

2272. —— —— ——.]—The mtgee. of shares, the mtge. not being by deed, has, in the absence of an express power of sale, an implied power to sell the shares on default by the mtgor. in payment of the amount due at the time appointed for payment, or, if no time be fixed, then on the expiration of a reasonable notice by the mtgee. requiring payment on a day certain. A month's notice, or even less, would be a reasonable notice.

I do not think that the fact found by FARWELL, J., that defts. sold *bonâ fide*, believing themselves to be absolute owners, precludes them from defending themselves on the ground of a power of sale which they were entitled to exercise (STIRLING, L.J.).

When no time for payment has been originally fixed, then, before the power of sale can be exercised, notice is to be given to the mtgor. & default must be made by him in payment after such notice. What this notice is to contain is nowhere defined; but it must, of course, be a notice which is in all respects reasonable, regard being had to the circumstances of the case. A notice demanding payment of an excessive sum has been held to be bad. The notice must give a reasonable opportunity to the mtgor. to pay what is due under the mtge.; & I think it is at least desirable that it should fix a day for that purpose, & also convey to the mind of the mtgor. that, if he fails to avail himself of the opportunity given to redeem, the mtgee. will be in a position to put in force his rights (STIRLING, L.J.).—DEVERGES v. SANDEMAN, CLARK & CO., [1902] 1 Ch. 579; 71 L. J. Ch. 328; 86 L. T. 269; 50 W. R. 404; 18 T. L. R. 375; 46 Sol. Jo. 316, C. A.

Annotation:—**Consd.** Stubbs v. Slater, [1910] 1 Ch. 632.

2273. What constitutes good notice—Claim for excessive amount—To be paid immediately.]—PIGOT v. CUBLEY, No. 2265, *ante.*

2274. —— —— **Mistake in notice—Whether liability of sale affected.**]—In the case of a mtge. of shares by deposit of the share certificate together with a blank transfer the fact that the mtgee. in giving notice requiring payment makes a mistake as to the amount due on the mtge. & demands too much is not a ground for invalidating the exercise of his implied power of sale (COZENS-HARDY, M.R.).—STUBBS v. SLATER, [1910] 1 Ch. 632; 79 L. J. Ch. 420; 102 L. T. 444, C. A.

Annotations:—**Reld.** London County & Westminster Bank v. Tompkins, [1918] 1 K. B. 515; Ellis' Trustee v. Dixon-Johnson (1924), 131 L. T. 652. **Mentd.** Aston v. Kelsey, [1913] 3 K. B. 314; Blaker v. Hawes & Brown (1913), 109 L. T. 320.

Irregularity of notice—Whether ground for rescission.]—*See* Nos. 2227, 2274, *ante*; No. 2429, *post.*

See, further, PAWNS & PLEDGES.

2275. Length of notice—Reasonable notice—One month.]—DEVERGES v. SANDEMAN, CLARK & CO., No. 2272, *ante.*

2276. —— —— **Less than one month.**]—DEVERGES v. SANDEMAN, CLARK & CO., No. 2272, *ante.*

2277. Contents of notice—Must fix date of payment.]—DEVERGES v. SANDEMAN, CLARK & CO., No. 2272, *ante.*

2278. —— **Statement of intention to sell.**]—DEVERGES v. SANDEMAN, CLARK & CO., No. 2272, *ante.*

2279. Mortgagor's address unknown—Power of court to order notice by advertisement.]—Where certain share certificates had been pledged with a firm which afterwards became bkpt. & the pledgor had disappeared without repaying the loan, the trustee in bkpcy. was given permission to sell the shares after advertising for the pledgor as directed by the ct.—*Re* HARRISON & INGRAM, *Ex p.* WHINNEY (1905), 54 W. R. 203; 14 Mans. 132.

C. Mortgagee Selling as Absolute Owner.

2280. Whether valid exercise of power.]—DEVERGES v. SANDEMAN, CLARK & CO., No. 2272, *ante.*

See, also, No. 2306, *post.*

See, further, PAWNS & PLEDGES.

D. Time for Exercise of Power.

2281. Not before date fixed for redemption.]—PHILPOT v. HELBERT (1722), 2 Eq. Cas. Abr. 746; 22 E. R. 633, L. C.

2282. —— **Determination of credit—Effect of excessive demand.**]—PIGOT v. CUBLEY, No. 2265, *ante.*

SUB-SECT. 3.—STATUTORY POWER OF SALE.

A. Under Trustees and Mortgagees Act, 1860.

See, now, Law of Property Act, 1925 (c. 20), s. 101.

2283. Scope of powers—Mortgage of leaseholds by sub-demise—Power to sell whole term.]—A mtgee. contracted to sell two properties, leasehold & freehold, to the equity of redemption in which respectively the mtgors. were entitled in different shares. The leaseholds had been mortgaged to him by underlease. The purchaser refused to complete, & the vendor filed a bill for specific performance. At the date of the filing of the bill the mtgors. were willing to concur; but before the decree was made, some of them died, leaving infants interested in the equity of redemption:—*Held:* (1) 23 & 24 Vict. c. 145, s. 15, empowered the vendor to sell the whole of the term of the leaseholds, though they were only demised to him for the residue of the term less one day; (2) the infants interested in the equity of redemption must be bound by the sale, as it appeared for their advantage that the two properties should be sold together; & the vendor could make a good title.

Sect. 2.—Sale: Sub-sect. 3, A., B. (a) & (b), C. & D.; sub-sects. 4 & 5, A.]

—HIATT *v.* HILLMAN (1871), 25 L. T. 55; 19 W. R. 694.

Annotations :—As to (1) **Distd.** *Re* Hodson & Howes' Contract (1887), 35 Ch. D. 668. **Folld.** *Re* Solomon & Meagher's Contract (1889), 40 Ch. D. 508.

2284. —— Right of equitable mortgagee by deed —Legal estate in mortgagor.]—An equitable mtgee. in fee, by deed, made before 1882, by a mtgor. who has the legal estate, can, under Lord Cranworth's Act, 1860 (c. 145), ss. 11, 15, sell & convey the legal estate; & that notwithstanding Conveyancing Act, 1881 (c. 41), s. 71.—*Re* SOLOMON & MEAGHER'S CONTRACT (1889), 40 Ch. D. 508; 58 L. J. Ch. 339; 60 L. T. 487; 37 W. R. 331.

*Annotation :—***Mentd.** *Re* Boucherett, Barne *v.* Erskine, [1908] 1 Ch. 180.

2285. Effect of Conveyancing Act, 1881 (c. 41), s. 71—Sale by equitable mortgagee—By deed made before 1882.]—*Re* SOLOMON & MEAGHER'S CONTRACT, No. 2284, *ante*.

B. Under Conveyancing Act, 1881.

(a) In General.

See, now, Law of Property Act, 1925 (c. 20), ss. 101, 104 (1), 106, 205 (1).

2286. Scope of powers—Application to copyholds.]—An equitable mtgee. by deed who sells in exercise of the power of sale conferred by Conveyancing Act, 1881 (c. 41), cannot convey the legal estate vested in the mtgor.

I was struck by Mr. P.'s observation on the exception at the end of sect. 21, but I do not think it decisive. The exception was introduced to make it plain that by the general words of the sect. it was not intended to alter the way of conveying copyholds, & I do not think this sufficient to give to the first part of the clause the effect contended for (LINDLEY, L.J.).—*Re* HODSON & HOWES' CONTRACT (1887), 35 Ch. D. 668; 56 L. J. Ch. 755; 56 L. T. 837; 35 W. R. 553, C. A.

*Annotations :—***Refd.** *Re* Solomon & Meagher's Contract (1889), 40 Ch. D. 508; London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515.

2287. —— Right of equitable mortgagee by deed —Legal estate in mortgagor—Power to convey legal estate.]—*Re* HODSON & HOWES' CONTRACT, No. 2286, *ante*.

2288. —— Whether extend to trade machinery—Apart from freehold.]—The power of sale incident to the estate of the mtgee. under Conveyancing Act, 1881 (c. 41), s. 19, which enables him to sell the "mtged. property or any part thereof," does not authorise him to sell the trade machinery apart from the freehold.—*Re* YATES, BATCHELDOR *v.* YATES (1888), 38 Ch. D. 112; 57 L. J. Ch. 697; 59 L. T. 47; 36 W. R. 563; 4 T. L. R. 388, C. A.

*Annotations :—***Consd.** Climpson *v.* Coles (1889), 23 Q. B. D. 465. **Apld.** *Re* Lusty, *Ex p.* Lusty *v.* Official Receiver (1889), 60 L. T. 160; *Re* Brooke, Brooke *v.* Brooke, [1894] 2 Ch. 600. **Distd.** Small *v.* National Provincial Bank of England, [1894] 1 Ch. 686. **Consd.** Johns *v.* Ware, [1899] 1 Ch. 359; *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110. **Refd.** Stevens *v.* Marston (1890), 60 L. J. Q. B. 192; West London Syndicate *v.* I. R. Comrs., [1898] 2 Q. B. 507; Born *v.* Turner, [1900] 2 Ch. 211. **Mentd.** *Re* Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824.

Debentures.]—*See* COMPANIES, Vol. X., p. 804, No. 5104.

—— **Bills of sale.**]—*See* BILLS OF SALE, Vol. VII., pp. 65, 66, Nos. 376-378.

2289. Improper exercise of power—Remedy of person damnified—Jurisdiction of county court.]—Conveyancing Act, 1881 (c. 41), s. 21 (2), provides that "any person damnified by an unauthorised, or improper, or irregular exercise of the power," that is, the power of sale conferred by the Act, "shall have his remedy in damages against the person exercising the power":—*Held:* this remedy in damages may be obtained by means of a common law action brought in the county ct. where the amount claimed is within the county ct. jurisdiction.—AMES *v.* HIGDON (1893), 69 L. T. 292, D. C.

2290. Express power of sale in mortgagor—Whether mortgagee's statutory power affected.]—KENT, SUSSEX & GENERAL LAND SOCIETY, LTD. *v.* HEATHCOTE & MEDLICOTT (1894), 38 Sol. Jo. 808.

2291. Assignment of part of mortgage debt—Whether mortgagee's power of sale lost.]—(1) First mtgees. declared themselves trustees for F. & Sons of part of the mtge. debt, & then assigned that part to F. & Sons without power to the latter to give receipts for any part of the principal & interest due on the security. F. & Sons did not give notice of the assignment to any person interested in the equity of redemption. The first mtgees. then, in exercise of their statutory power, sold the premises by auction to F. & Sons for the amount of principal & interest due to themselves:—*Held:* the sale was valid, & the statutory power of sale was not put an end to by the assignment.

(2) The assignees, who were also fourth mtgees. agreed with the mtgors. & F. & Sons that F. & Sons should manage the premises, & after payment of management expenses & outgoings should out of the net profits pay an annual sum of £4,500 by way of rent & interest on prior mtges.:—*Held:* by the indentures of first & second mtge. the agreement was not binding on the first or second mtgees., the first mtgees. had not entered into possession & were not accountable for this annual sum which had not been received, & was not in the circumstances receivable as the profits were not sufficient.—FLOWER & SONS, LTD. *v.* PRITCHARD (1908), 53 Sol. Jo. 178.

(b) Conditions of Exercise of Power.

Notice requiring payment—Necessity for.]—*See* Law of Property Act, 1925 (c. 20), s. 103 (1).

2292. —— Three months from date of notice.]—A notice served by a mtgee. upon a mtgor., after the mtge. money has become payable, requiring payment at the expiration of three months from the date of the notice, is a good notice under Conveyancing Act, 1881 (c. 41), s. 20. The three months' default in payment mentioned in that sect. begins to run from the service of such a notice, not from the date fixed by the notice for payment.—BARKER *v.* ILLINGWORTH, [1908] 2 Ch. 20; 77 L. J. Ch. 581; 99 L. T. 187.

2293. —— When time begins to run.]—BARKER *v.* ILLINGWORTH, No. 2292, *ante*.

Interest in arrear—Necessity for.]—*See* Law of Property Act, 1925 (c. 20), s. 103 (2).

2294. —— Instalment including interest.]—By a mtge. deed, dated Feb. 1, 1899, after reciting that deft. had agreed to lend to pltf. the sum of £100 together with £50 for interest, the whole to be repaid by 20 half-yearly instalments of £7 10*s.* each, pltf. covenanted for repayment on Aug. 1, 1899, of the sum of £150 by the half-yearly instalments, & pltf. assigned to deft. two houses as security. The deed contained a proviso that, so long as the instalments were duly paid, the mtgee. should not call in the sum remaining due. One of the instalments being more than two months in arrear, deft. proceeded to exercise the power of sale under Conveyancing Act, 1881 (c. 41), s. 20:—*Held:* as the instalments included a sum for interest, sect. 20 applied, & deft. had the right to

sell.—WALSH *v.* DERRICK (1903), 19 T. L. R. 209, C. A.

Breach of provision in mortgage deed or statute—By mortgagor—Necessity for.]—*See* Law of Property Act, 1925 (c. 20), s. 103 (3).

C. Proprietor of Registered Charge.

See Land Registration Act, 1925 (c. 21), s. 34.

2295. Removal from register by purchaser—Without consent of mortgagee—Land Registry Act, 1862 (c. 53), s. 34.]—Where the owner of an equity of redemption of real estate is entered on the register of estates with an indefeasible title, subject to a mtge. & the mtgee. afterwards exercises his power of sale, & conveys part of the registered property to a purchaser, such purchaser is entitled, after his conveyance has been entered on the register, to have the property bought by him, & all entries relating thereto, removed from the register without the consent of the mtgor.—*Re* WINTER (1873), L. R. 15 Eq. 156; 42 L. J. Ch. 318; 27 L. T. 842; 21 W. R. 320.

D. Under Colonial Statutes.

See Cases *infra*.

SUB-SECT. 4.—WHO MAY EXERCISE POWER.

See, now, Law of Property Act, 1925 (c. 20), s. 106.

2296. Joint mortgagees—Right of survivor.]—A power of sale & to give receipts in a mtge. given to the two mtgees., their heirs & assigns, it being declared that the mtge. money was advanced by them out of moneys in their possession on a joint account:—*Held:* to be exercisable by the survivor.—HIND *v.* POOLE (1855), 1 K. & J. 383; 3 Eq. Rep. 449; 1 Jur. N. S. 371; 3 W. R. 331; 69 E. R. 507.

2297. —— Partners—Right of single partner.]—Where a mtge. in the ordinary form is made to partners in trade to secure a partnership debt one of such partners takes no authority to bind the others or the mtgor. by a sale under the power in the mtge.; & if a person to whom he has contracted to sell the property expend money in repairs on the faith of such contract the money

[illegible] *v.* JONES (1878), 24 W. R. [illegible]

2298. Lunatic mortgagee—Whether committee authorised to sell & convey—Lunacy Regulation Act, 1853 (c. 70), ss. 116, 136.]—The Master in Lunacy having reported that it was desirable that property of which the lunatic was mtgee. should be sold under a power of sale in the mtge., the ct. declined to make an order [under above Act] authorising the committee to sell & to convey the estate to the purchaser, but only directed him to sell, leaving the transfer of the legal estate to be dealt with on a subsequent application under Trustee Act, 1850 (c. 60).—*Re* HARWOOD (1887), 35 Ch. D. 470; 56 L. J. Ch. 974; 56 L. T. 502; 36 W. R. 27, L. JJ.

Annotation:—**Mentd.** *Re* A., [1904] 2 Ch. 328.

See, now, Lunacy Act, 1890 (c. 5), ss. 120, 124.

2299. Agent of mortgagee—Power of attorney to sell land—& to give discharge for money—Not authorised to exercise statutory power.]—A power of attorney authorised the agent to sell any real or personal property then or thereafter belonging to the principal, & also to receive & give a discharge for any moneys then or thereafter owing to the principal by virtue of any security:—*Held:* it did not authorise the agent to sell property held by the principal as mtgee. under the mtgee.'s statutory power of sale.—*Re* DOWSON & JENKINS' CONTRACT, [1904] 2 Ch. 219; 73 L. J. Ch. 684; 91 L. T. 121, C. A.

Personal representatives of mortgagee.]—*See* Administration of Estates Act, 1925 (c. 23), s. 1 (2).

Mortgage to building society—Power limited to trustees.]—*See* BUILDING SOCIETIES, Vol. VII., p. 478, No. 146.

—— **On winding up on unincorporated society.**]—*See* BUILDING SOCIETIES, Vol. VII., p. 510, No. 341.

Representation action by debenture holders.]—*See* COMPANIES, Vol. X., p. 807, Nos. 1522-1528.

As to exercise of statutory powers.]—*See* Law of Property Act, 1925 (c. 20), ss. 106, 205; Trustees & Mortgagees Act, 1860 (c. 145), s. 11.

SUB-SECT. 5.—WHO MAY PURCHASE.

A. Mortgagee.

2300. Disabled from purchasing.]—DOWNES *v.* GRAZEBROOK, No. 2331, *post*.

2301. ——.]—Then came the proceedings of Mar. 5, 1875, under which the mtged. premises were put up for sale, as under the powers for sale contained in the indenture of assignment & instrument of mtge., & knocked down to D. . . . The sale would be impeachable by the co., on the ground that D. was merely nominal purchaser on behalf of the bank, who, as mtgees. selling under

of

(SIR JAMES W. COLVILLE).—NATIONAL BANK OF AUSTRALASIA *v.* UNITED HAND-IN-HAND & BAND OF HOPE CO. (1879), 4 App. Cas. 391; 48 L. J. P. C. 50; 40 L. T. 697; 27 W. R. 889, P. C.

2302. ——.]—NASH *v.* EADS (1880), 25 Sol. Jo. 95, C. A.

Annotations:—**Refd.** Martinson *v.* Clowes (1882), 21 Ch. D. 857; Colson *v.* Williams (1889), 58 L. J. Ch. 539; Belton *v.* Bass, Ratcliff & Gretton, [1922] 2 Ch. 449.

2303. ——.]—At a sale by auction under the direction of a building society as mtgees., the

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PART XIII. SECT. 2, SUB-SECT. 3.—D.

b. *Requirements as to notice.*]—*Held:* a notice under Real Property Act of New South Wales, 26 Vict. No. 9, s. 55, is not bad because it demands more than is due, & where a demand is made for a larger amount than that which is really due, such demand does not dispense with the necessity of tendering what is actually due, unless there is at the same time a refusal to receive less than the sum demanded.—CAMPBELL *v.* COMMERCIAL BANKING CO. OF SYDNEY, COMMERCIAL BANKING CO. OF SYDNEY *v.* CAMPBELL (1879), 40 L. T. 137, P. C.—**AUS.**

c. *Conditions of sale—Right of registrar to settle.*]—In proceedings by a mtgee. for sale under Land Titles Act (Alta.), s. 62 (*a*), the registrar has a right to settle the conditions of sale until it is shown that the sale is one authorised by the Act, & it is his duty to fix the reserve bid in settling the conditions.—*Re* SUN LIFE ASSURANCE CO. & WIDMER (1916), 33 W. L. R. 521; 9 W. W. R. 961.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 4.

d. *Agent of mortgagee.*]—It is not necessary that the seal of a building society should be affixed to an authority to its agent to sell under a power of sale in a mtge.; the entry in the books of the society is sufficient for that purpose.—OSBORNE *v.* FARMERS' & MECHANICS' BUILDING SOCIETY (1855), 5 Gr. 326.—**CAN.**

e. *Personal representatives of mortgagee.*]—WALDUCK *v.* CORBETT (1867), 4 W. W. & A'B. 48.—**AUS.**

f. *Assignee.*]—BARRY *v.* ANDERSON (1891), 18 A. R. 247.—**CAN.**

g. ——.]—HEOHN *v.* MARSHALL (1919), 44 O. L. R. 241; 46 D. L. R. 149; 15 O. W. N. 200.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 5.—A.

2300 i. *Disabled from purchasing.*]—A mtgee. with power of sale is a trustee, & cannot, without the express consent of his *cestui que trust*, purchase an estate of which he is the mtgee.—*Re* WHITE, *Ex p.* GOGGS (1866), 1 Q. S. C. R. 149.—**AUS.**

Sect. 2.—Sale: Sub-sect. 5, A., B., C. & D.]

secretary of the society openly bid for & became the purchaser of two lots on his own account. There was no proof of undervalue:—*Held:* in the circumstances the sale to the secretary could not be maintained as against the mtgor.

It is quite clear that a mtgee. exercising his power of sale cannot purchase the property on his own account, & I think it clear also that the solr. or agent of such mtgee. acting for him in the matter of the sale cannot do so either (NORTH, J.).—MARTINSON *v.* CLOWES (1882), 21 Ch. D. 857; 51 L. J. Ch. 594; 46 L. T. 882; 30 W. R. 795; *on appeal* (1885), 52 L. T. 706, C. A.

Annotations:—**Refd.** Farrar *v.* Farrars (1888), 40 Ch. D. 395; Colson *v.* Williams (1889), 58 L. J. Ch. 539; Nutt *v.* Easton (1899), 68 L. J. Ch. 367; Hodson *v.* Deans, [1903] 2 Ch. 647. **Mentd.** Bath *v.* Standard Land Co., [1911] 1 Ch. 618.

2304. —— Pledge.]—A sale by a pledgee to himself of securities pledged is void; but it does not put an end to the pledge, so as to entitle the pledgor to recover them without payment of the amount thereby secured; nor does it entitle him to damages.—NEIKRAM DOBAY *v.* BANK OF BENGAL (1891), L. R. 19 Ind. App. 60, P. C.

2305. Purchase through agent.] — DOWNES *v.* GRAZEBROOK, No. 2331, *post.*

2306. ——.]—Mtgee., his power of sale on default having arisen, sold the mtged. premises by public auction ostensibly to a third person, in reality to himself; took possession as owner & subsequently sold the same with improvements effected by himself, in full proprietary right to applt. . . . In a suit for redemption against mtgee. & applt.:—*Held:* (1) evidence failed to establish that the mtgee.'s abortive sale to himself was fraudulent; (2) the sale to applt. was a valid exercise of the power contained in the mtge. deed & extinguished the right to redeem; (3) though it was the duty of the mtgee. to account to the mtgors. until the power of sale was validly exercised & to offer so to do, it was not the duty of applt. to give notice to the mtgors. to that effect or to see to the application of the purchase-money; (4) the mtgee. should be allowed the cost of his improvements so far as they had enhanced the value of the premises.—HENDERSON *v.* ASTWOOD, ASTWOOD *v.* COBBOLD, COBBOLD *v.* ASTWOOD, [1894] A. C. 150; 6 R. 450, P. C.

Annotations:—*As to* (1) **Refd.** Deverges *v.* Sandeman, Clark, [1902] 1 Ch. 579. *As to* (4) **Refd.** Powell *v.* Brodhurst (1901), 70 L. J. Ch. 587.

2307. —— Brother of mortgagee.] — ROBERTSON *v.* NORRIS, No. 2332, *post.*

2308. Sale directed by court—Sale of ship.]—Mtgee. of ship allowed to bid as purchaser of her at a sale made by decree of the Admlty. Ct.—THE WILSONS (1843), 7 L. T. 286.

2309. —— Bidding by trustee mortgagee—Objection by cestuis que trust.] — It is a well established doctrine that when, as in this case, the duties of a trustee conflict with his personal interest as mtgee., the ct. will control him & not allow him to foreclose, especially when the estate is under his control, & the *cestui que trust* has no other means of raising money to pay off the mtge.

By a deed of trust, property was conveyed to the sons of the settlor upon certain trusts for the benefit of the children & grandchildren of the settlor. The trustees had power to sell, & extensive powers of management, & provisions were made that any trustee advancing money to the settlor, or paying off any part of a certain mtge. debt, should be entitled to a charge by way of mtge. on the estate. One of the trustees advanced considerable sums to the settlor, & paid off part of the mtge. debt:—*Held:* on the construction of the deed, the trustee was not entitled to have such a mtge. on the estate as would empower him to foreclose, & was entitled only to a sale. *Semble:* a trustee who is also mtgee. will not be allowed to foreclose.

If any of the *cestuis que trust* object, a trustee of an estate, though also a mtgee., will not be allowed to bid at a sale of the estate directed by the ct.; but, *semble:* if the estate is not sold at the sale, the trustee may be allowed to become the purchaser under proposals to the ct.—TENNANT *v.* TRENCHARD (1869), 4 Ch. App. 537; 38 L. J. Ch. 169, 661; 20 L. T. 856, L. C.

Annotations:—**Refd.** Parker *v.* McKenna (1874), 10 Ch. App. 107, n.; *Re* Owen, [1894] 3 Ch. 220; Sadler *v.* Worley, [1894] 2 Ch. 170. **Mentd.** Bennett *v.* Gaslight & Coke Co. (1882), 52 L. J. Ch. 98.

2310. —— Estate not sold at sale—Purchase under proposals to court.] — TENNANT *v.* TRENCHARD, No. 2309, *ante.*

2311. Sale to corporation—Mortgagee member of corporation—Not equivalent to sale to mortgagee.] —FARRAR *v.* FARRARS, LTD., No. 2229, *ante.*

B. Agent or Solicitor of Mortgagee.

2312. Solicitor.]—DOWNES *v.* GRAZEBROOK, No. 2331, *post.*

2313. ——.]—MARTINSON *v.* CLOWES, No. 2303, *ante.*

2314. —— Acting in mortgage.]—The widow & sole extrix. of a mtgee., in exercise of a power of sale contained in the mtge., sold the mtged. property to a solr. who had acted for her husband in all matters relating to the mtge., & for her in procuring probate of her husband's will. The sale was admittedly *bonâ fide*, & not at an undervalue, & the solr. purchased on his own account:—*Held:* it could not be set aside at the suit of the mtgor., who never stood in the relation of client to the purchaser.—NUTT *v.* EASTON, [1899] 1 Ch. 873; 68 L. J. Ch. 367; 80 L. T. 353; 47 W. R. 430; 43 Sol. Jo. 333; *affd.* on other grounds, [1900] 1 Ch. 29, C. A.

To creditors of mortgagee.]—*See* No. 2325, *post.*

2305 i. *Purchase through agent.*]—Default being made in principal & interest secured under a mtge. the property was offered for sale & bid in & conveyed to a third party who ten days later reconveyed it to the mtgee. The mtgee. subsequently sold the property. In an action by the mtgor. against the mtgee. & subsequent purchaser for a reconveyance of the property a declaration that the various conveyances were inoperative:—*Held:* the several conveyances were valid & effectual.—GAUVIN *v.* DIONEE (1919), 46 N. B. R. 377; *affd.*, 47 N. B. R. 102; 51 D. L. R. 294.—**CAN.**

2305 ii. ——.]—RYAN *v.* ——— (1920), 48 N. B. R. 148.—**CAN.**

h. Purchase with mortgagor's consent.]—A mtgee. purchasing the mtged. property with the consent of the mtgor., under the power of sale contained in the mtge. deed, acquires an unimpeachable title derived from the power of sale.—PURMANANDDAS JIWANDAS *v.* JAMNABAI (1885), I. L. R. 10 Bom. 49.—**IND.**

k. Sale by registrar.]—A mtgee. who sells through the registrar & purchases the mtged. property is not in the position of a mtgee. who has foreclosed, but stands precisely in the same position as any other person would have done who might have purchased at the sale.—*Re* BENJAMIN & JACOBS (1890), 9 N. Z. L. R. 152.—**N.Z.**

PART XIII. SECT. 2, SUB-SECT. 5.—B.

2312 i. *Solicitor.*]—On a sale the solr. of the mtgee. cannot purchase, though the proceedings for the sale were not taken in his name, & it was not shown that any loss had occurred by reason of his being the purchaser.—HOWARD *v.* HARDING (1871), 18 Gr. 181.—**CAN.**

2315. Agent.]—MARTINSON *v.* CLOWES, No. 2303, *ante.*

2316. —— Acting in mortgage.] — ORME *v.* WRIGHT, No. 2341, *post.*

2317. Clerk to mortgagee's solicitor—Bidding on behalf of purchaser.]—A sale by a mtgee., at which the purchaser employed a clerk of the mtgee.'s solr. to bid, set aside.—PARNELL *v.* TYLER (1833), 2 L. J. Ch. 195.

C. Puisne Mortgagee.

2318. Right to purchase—From mortgagee exercising power.]—PARKINSON *v.* HANBURY, No. 2428, *post.*

2319. —— ——.]—There is no rule in equity which precludes a puisne mtgee. from purchasing the mtged. property on the occasion of the exercise by a prior mtgee. of his power of sale, & a puisne mtgee. so purchasing acquires as against the mtgor. an absolute irredeemable title.—SHAW *v.* BUNNY (1865), 2 De G. J. & Sm. 468; 5 New Rep. 260; 34 L. J. Ch. 257; 11 L. T. 645; 11 Jur. N. S. 99; 13 W. R. 374; 46 E. R. 456, L. JJ.

Annotations:—**Folld.** Kirkwood *v.* Thompson (1865), 2 De G. J. & Sm. 613. **Consd.** Rajah Kishendatt Ram *v.* Rajah Mumtaz Ali Khan (1879), L. R. 6 Ind. App. 145.

2320. —— ——.]—(1) The effect of a sale under a power of sale is to destroy the equity of redemption in the land, & to constitute the mtgee. exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers, & ultimately for the mtgor. (SIR JAMES COLVILE).

(2) There seems to be no reason why the second mtgee., who might certainly have bought the equity of redemption from the mtgor., should not equally with a stranger, purchase the estate when sold under a power of sale created by the mtgor. (SIR JAMES COLVILE).—RAJAH KISHENDATT RAM *v.* RAJAH MUMTAZ ALI KHAN (1879), L. R. 6 Ind. App. 145, P. C.

2321. —— ——.]—FLOWER & SONS, LTD. *v.* PRITCHARD, No. 2291, *ante.*

2322. —— —— **Second mortgage in form of trust for sale.**]—(1) The purchase by a second mtgee. of part of the mtged. property, sold by a prior mtgee. under his power of sale, confers on the purchaser an irredeemable title.

(2) The fact that the second mtge. was in the form of a trust for sale makes no difference.

(3) *Qu.:* whether a mtgee. selling as trustee for sale has different duties from a mtgee. selling under a power.—KIRKWOOD *v.* THOMPSON (1865), 2 De G. J. & Sm. 613; 6 New Rep. 367; 34 L. J. Ch. 501; 12 L. T. 811; 13 W. R. 1052; 46 E. R. 513, L. C.

Annotations:—*As to* (2) **Reld.** Locking *v.* Parker (1872), 8 Ch. App. 30; Banner *v.* Berridge (1881), 18 Ch. D. 254; Warner *v.* Jacob (1882), 20 Ch. D. 220. *Generally*, **Reld.** *Re* Alison, Johnson *v.* Mounsey (1879), 11 Ch. D. 284; Charles *v.* Jones (1887), 35 W. R. 645.

D. Other Cases.

2323. Mortgagor—Right of auctioneer to refuse biddings.]—A mtgor. cannot, on motion, obtain an injunction to prevent the completion of a sale made by a mtgee. under an absolute power of sale, on the ground that a part of the property was not mentioned in the particulars of sale, but only stated by the auctioneer at the time of the sale; the mtgor. having waived his right to object by sending an agent to bid at the sale, who did not, at the time, protest against the sale on the ground of the omission.

The auctioneer may also refuse to receive the biddings of the mtgor.—FARRARD *v.* CLAY (1837), Donnelly, 232; 47 E. R. 340; *sub nom.* FERRAND *v.* CLAY, 1 Jur. 165.

2324. Agent of mortgagor—Purchase on own behalf.]—A person, who has managed the affairs of, & acted as agent for, a mtgor., cannot purchase from the trustee for sale who is acquainted with the fact of his having acted as agent.—EDGECUMBE *v.* STRANGER (1837), 1 Jur. 400.

2325. Solicitor to creditors of mortgagee—Name appearing in conditions of sale.]—Property sold in a foreclosure suit was purchased by W., a solr., whose name appeared on the particulars of sale as one of several solrs. from whom particulars of sale could be obtained. He was not solr. to any of the parties to the suit, but was solr. to some creditors of the mtgee., one of whom had obtained a decree for administration of the mtgee.'s estate. W. had two days before the sale taken out a summons to obtain leave for pltf. in the administration suit to attend proceedings in the foreclosure suit, such summons being returnable on the day after the sale. He had never been consulted about the sale, & did not know what was the amount of the reserved bidding:—*Held:* W. was not disqualified from purchasing, for that his client was at liberty to purchase, & therefore his being her solr. did not disqualify him, & the mere fact of his own name appearing on the particulars of sale as a person from whom copies of them might be obtained was not a disqualification.—GUEST *v.* SMYTHE (1870), 5 Ch. App. 551; 39 L. J. Ch. 536; 22 L. T. 563; 34 J. P. 676; 18 W. R. 742, L. J.

Annotation: **Reld.** Farrar *v.* Farrars (1888), 40 Ch. D. 395.

2326. Officer of society—Concerned with conduct of sale by society—Secretary.]—MARTINSON *v.* CLOWES, No. 2303, *ante.*

2327. —— —— **Member of committee.**]—In 1899 pltf. mortgaged certain property to the trustees of a friendly society to secure an advance. In 1902 they, in exercise of their power of sale, which had arisen, put up the property for sale by auction, such sale being directed & entirely managed by a committee of the society, whose duty it was to realise mtge. securities. Previous to the sale D., a member of the committee, had on his own account inspected the property. He knew the reserve, if he had not himself fixed it, & he took part in instructing the auctioneer, who was nominated by him. He attended the auction, & bought the property for himself; pltf., who had only accidentally heard of the sale three days

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2315 i. *Agent.*]—A mtgee. acting under his power of sale sold certain of the lands included in his security, & employed G. as his agent. G. sold the lands to B., &, unknown to the mtgee., took an interest in them himself. The mtgee. was subsequently paid off, & the mtge. released:—*Held:* the mtgee. was not responsible to the mtgor. for the wrongful act of the agent in purchasing, because the agent therein acted beyond the scope of his authority.—DANIELL *v.* GRIFFITHS (1883), 1 N. Z. L. R. C. A. 340.—**N.Z.**

1. *Clerk to mortgagee's solicitor.*]—On a sale under a power of sale the clerk of the mtgee.'s attorney purchased, but paid nothing; the mtgee. conveyed to him, & he immediately reconveyed to the mtgee.:—*Held:* the sale was invalid, & the property still redeemable, although the mtgor. immediately after the sale accepted a lease of the property.—ELLIS *v.* DELLABOUGH (1869), 15 Gr. 583.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 5.—C.

2318 i. *Right to purchase—From mortgagee exercising power.*]—REES *v.* BECKETT (1851), 2 Gr. 650.—**CAN.**

2318 ii. —— ——.]—If a first mtgee., with a power of sale, sells to a puisne incumbrancer, the purchaser acquires an irredeemable interest, as against the mtgor.—BROWN *v.* WOODHOUSE (1868), 14 Gr. 682.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 5.—D.

m. *Devisee—Rights of co-devisees.*]—Where there were several defts. interested in the equity of redemption, & one purchased several outstanding shares of co-devisees also interested, & so dealt & acted that the other parties interested assumed that he intended to redeem for their mutual benefit,

before it took place, being present & bidding against him. The sale was at a small undervalue. In an action against the trustees of the society & D. :—*Held:* the sale was invalid, & pltf. was still entitled to redeem the mtge.—HODSON *v.* DEANS, [1903] 2 Ch. 647; 72 L. J. Ch. 751; 89 L. T. 92; 52 W. R. 122; 19 T. L. R. 596; 47 Sol. Jo. 750.

Annotation :—**Consd.** Bath *v.* Standard Land Co., [1911] 1 Ch. 618.

2328. Co-tenant of equity of redemption.]—KENNEDY *v.* DE TRAFFORD, No. 2356, *post.*

2329. Tenant for life of equity of redemption—Mortgage of settled land.]—The mtgee. of settled land sold it under a valid power of sale to the tenant for life of the land for the price of the mtge. debt: —*Held:* the tenant for life was *primâ facie* incapable of purchasing for his own benefit. The fiduciary relationship existing between the tenant for life & remainderman throws upon the former the burden of proving that the transaction was not inequitable.—GRIFFITH *v.* OWEN, [1907] 1 Ch. 195; 76 L. J. Ch. 92; 96 L. T. 5; 23 T. L. R. 91.

2330. Receiver of mortgage property.] — The general principle that a receiver cannot, without special leave, purchase the property of which he is receiver, applies equally where the sale is not under a decree in the action in which the receiver was appointed, but is by a mtgee. selling with leave of the ct. under his power of sale.—NUGENT *v.* NUGENT, [1908] 1 Ch. 546; 77 L. J. Ch. 271; 98 L. T. 354; 24 T. L. R. 296; 52 Sol. Jo. 262, C. A.

6.—MODE OF EXERCISE OF POWER.

A. In General.

2331. Position of mortgagee—Whether a trustee.] —(1) Conveyance of an estate to D. by way of security for the re-investment of a specific sum of stock, & for payment of the dividends in the meantime, with a power of sale in case of default. Under this deed, D. is a trustee for the party making the conveyance, &, as such, disabled from purchasing for himself so long as he continues to be a trustee without the consent of his *cestui que trust.* Therefore, the estate being put up to sale by auction, at which C. as agent for D. was the only bidder, & it was knocked down to him accordingly, the sale was decreed not to stand, although no evidence of fraud or undervalue; & not to be supported by evidence of pltf.'s having known & approved of the sale taking place, & afterwards attempting to damp it, nor of a previous conversation with her attorney in which the latter exhorted the purchaser to bid a good price for the estate to keep up the sale.

(2) *Qu.:* if C. had purchased for himself, & not for D., whether the sale could have been supported; he being present in the character of solr. for D., the vendor.

(3) Mtgee. cannot be considered otherwise than as a trustee under the conveyance to him of the estate by the deed of Sept. 16 (LORD ELDON, C.).—DOWNES *v.* GRAZEBROOK (1817), 3 Mer. 200; 36 E. R. 77, L. C.

Annotations :—*As to* (1) **Distd.** Nutt *v.* Easton (1899), 47 W. R. 430. **Refd.** Farrar *v.* Farrars (1888), 40 Ch. D. 395. *As to* (2) **Consd.** Orme *v.* Wright (1839), 3 Jur. 972; *Re* Bloye's Trust (1849), 1 Mac. & G. 488. **Distd.** Farrar *v.* Farrars (1888), 40 Ch. D. 395. **Refd.** Hodson *v.* Deans, [1903] 2 Ch. 647. *As to* (3) **Expld.** Robertson *v.* Norris (1858), 1 Giff. 421. **Distd.** Warner *v.* Jacob (1882), 20 Ch. D. 220.

2332. —— ——.]—The owner of two fourth shares in a newspaper mortgaged the same in 1840 to deft. by deed, with proviso for redemption, & with a power of sale to the mtgee. in default of payment, as specified therein. Default having been made in payment, deft., the mtgee., in exercise of the power of sale, by deed, in 1841, for an expressed consideration of £1,000 assigned the two shares to his brother absolutely, freed from the mtge. debt. Afterwards the owner of the two remaining fourth shares assigned them for the benefit of his creditors to trustees, who sold them to deft.; & in 1848 deft.'s brother assigned the two first-mentioned shares to deft., who thus became legal owner of the whole newspaper. The mtgor. died in 1852. In 1855 pltf., who was the sole personal representative of the mtgor., filed a bill for redemption, alleging that the pretended sale in 1841 was a mere fraud for the purpose of excluding the mtgor. from the property; that no consideration passed; & that deft never accounted to the mtgor. :—*Held:* pltf. was entitled to redeem.

LORD ELDON has stated the principle on which this ct. proceeds when the question is as to the validity of a sale effected by a mtgee. under a power of sale, given to him as part of his security. LORD ELDON says that the mtgee. is a trustee for the benefit of the mtgor. in the exercise of that power. I stated yesterday, & I repeat, that LORD ELDON'S use of the words & the expression "the mtgee. is a trustee for the benefit of the mtgor.," is to be understood in this sense, that the power being given for a clear & distinct purpose, namely, to enable him to recover the mtge. money, inasmuch as so vast a power given to a mtgee. would render him indifferent to any other purpose, in effecting the sale, than recovering the mere amount of his mtge. money; this ct. requires that he shall exercise the power of sale with reference to his own rights as mtgee., & with a due regard to the rights & interests of the mtgor. in the surplus money to be produced by the sale. Wherever a power is given, whether it be a power of raising portions for children, a power of sale in a mtge. deed, or a power giving dominion over property for a particular & specified purpose, the ct. requires that the power shall be exercised with a view only to that which is the legitimate purpose for effecting which the power was conferred. The legitimate purpose for which the power to sell in this deft.'s mtge. deed was given, was to secure to him repayment of his mtge. money. If he uses the power to sell which he gets for that purpose for another purpose—from any ill motive to effect means & purposes of his own, or to serve the purposes of other individuals—the ct. considers that to be what it calls a fraud in the exercise of the power, because it is using the power for purposes foreign to the legitimate purpose for which it was intended (STUART, V.-C.).—ROBERTSON *v.* NORRIS (1857), 1 Giff. 421; 30 L. T. O. S. 253; 4 Jur. N. S. 155; 65 E. R. 983.; *affd.* (1858), 4 Jur. N. S. 443, L. C.

Annotations :—**Consd.** Thurlow *v.* Mackeson (1868), 9 B. & S. 975. **Overd.** Nash *v.* Eads (1880), 25 Sol. Jo. 95. **Dbtd.** Martinson *v.* Clowes (1882), 21 Ch. D. 857. **Consd.** Warner *v.* Jacob (1882), 20 Ch. D. 220; Pooley's Trustee *v.*

instead of which he arranged with the mtgee. to suffer foreclosure, & then bought from him :—*Held:* he could properly do so for his own sole benefit. —RUTTAN *v.* LEVISCONTE (1867), 2 Ch. Ch. 108.—CAN

PART XIII. SECT. 2, SUB-SECT. 6.—A.

n. *Right to sell privately.*]—CHATFIELD *v.* CUNNINGHAM (1891), 23 O. R. 153.—CAN.

o. *Agreement to lease.*]—An agreement to lease by the mtgee., with a compulsory purchasing clause within a given time, is a valid exercise of a power of sale.—PUBLIC TRUSTEE *v.* MORRISON (1894), 12 N. Z. L. R. 423.—N.Z.

Whetham (1886), 33 Ch. D. 111. **Dbtd.** Colson *v.* Williams (1889), 58 L. J. Ch. 539. **N.F.** Belton *v.* Bass, Ratcliffe & Gretton, [1922] 2 Ch. 449. **Reld.** Farrar *v.* Farrars (1888), 40 Ch. D. 395.

2333. —— ——.]—Certain mtged. premises having been advertised for sale by auction by the mtgee., the mtgor., five days before the sale, expressed a wish to redeem. The mtgee. replied by a letter, which overstated the amount secured by the mtge. The mtgor. then made a tender of the amount actually due on the mtge. for principal & interest, saying nothing about costs. This offer was refused by the mtgee. At the auction a tender of the same amount was again made, & again refused, & the property was knocked down to a purchaser for a larger sum than the amount tendered. The purchaser saw the tender made, but knew nothing of the rights of the parties. The mtge. deed relieved the purchaser from the necessity of inquiring into the propriety or regularity of any sale; & provided that, notwithstanding any impropriety or irregularity of such sale, the same should, as regarded the purchaser be deemed to be within the power, & be valid accordingly:—*Held:* under the circumstances, there had been an oppressive exercise of the power of sale by the mtgee.; though the purchaser was relieved by the terms of the deed from the obligation to inquire, yet the circumstance of his having seen the tender by the mtgor. made it his duty to inquire further; & his cognisance of the mtgor.'s struggle to redeem placed him in the same situation as the vendor, with regard to the mtgor.'s right.

It is well settled that, although a mtgee.'s power of sale is a clear right, yet it is to be regarded as a very sacred thing, for it is only a security. The mtgee. stands in a fiduciary character—he is not like an ordinary vendor selling his own property—but he is bound in a reasonable degree to consider that the property is not to be sacrificed, because he is to pay the surplus to the mtgor., or to the person entitled to the equity of redemption. . . . But although the power of sale relieves the purchaser from all obligation to inquire, the very circumstance that it is so expressed shows, that if there come to his knowledge circumstances to cast a doubt or raise an inquiry about the circumstances of the sale, he becomes a party to the transaction which is complained of (STUART, V.-C.).—JENKINS *v.* JONES (1860), 2 Giff. 99; 29 L. J. Ch. 493; 2 L. T. 128; 6 Jur. N. S. 391; 8 W. R. 270; 66 E. R. 43.

Annotation:—**Consd.** Powell *v.* Roberts (1869), 21 L. T. 451.

2334. —— ——.]—NASH *v.* EADS (1880), 25 Sol. Jo. 95, C. A.

Annotations:—**Consd.** Martinson *v.* Clowes (1882), 21 Ch. D. 857; Belton *v.* Bass, Ratcliffe & Gretton, [1922] 2 Ch. 449. **Reld.** Colson *v.* Williams (1889), 58 L. J. Ch. 539.

2335. —— ——.]—COLSON *v.* WILLIAMS, No. 2348, *post.*

2336. —— ——.]—WARNER *v.* JACOB, No. 2381, *post.*

2337. Discretion of mortgagee—Motive of sale immaterial.]—NASH *v.* EADS (1880), 25 Sol. Jo. 95, C. A.

Annotations:—**Consd.** Colson *v.* Williams (1889), 58 L. J. Ch. 539; Belton *v.* Bass, Ratcliffe & Gretton, [1922] 2 Ch. 447. **Reld.** Martinson *v.* Clowes (1882), 21 Ch. D. 857.

2338. —— ——.]—COLSON *v.* WILLIAMS, No. 2348, *post.*

2339. —— ——.]—BELTON *v.* BASS, RATCLIFFE & GRETTON, LTD., No. 2399, *post.*

B. Duty in Conducting Sale.

2340. To act in good faith—Question of fact.]—KENNEDY *v.* DE TRAFFORD, No. 2356, *post.*

2341. To get best price.]—(1) It is the duty of a mtgee. with a power of sale to use every exertion to sell the property at the best price.

(2) A person who has acted as the agent of the mtgee., being the medium through which the money is advanced, surveying the security, & receiving the interest regularly for the mtgee., is not a competent purchaser under a power of sale.—ORME *v.* WRIGHT (1839), 3 Jur. 972, L. C.

Annotation:—*Generally*, **Reld.** Farrar *v.* Farrars (1888), 40 Ch. D. 395.

2342. ——.]—MATTHIE *v.* EDWARDS, JONES *v.* MATTHIE, No. 2388, *post.*

2343. ——.]—When a mtgee. enters into possession of the mtge. property with a view to the sale of it, he is bound to act with the same care & prudence, & to use every effort which a prudent man should use to have the sale conducted under circumstances of the greatest advantage (STUART, V.-C.).—MARRIOTT *v.* ANCHOR REVERSIONARY CO., LTD. (1860), 2 Giff. 457; 30 L. J. Ch. 122; 3 L. T. 538; 7 Jur. N. S. 155; 9 W. R. 89; 1 Mar. L. C. 10; 66 E. R. 191; *affd.* (1861), 3 De G. F. & J. 177, L. C. & L. JJ.

Annotation:—**Apld.** Wolff *v.* Vandorzee (1869), 20 L. T. 353.

2344. To sell at fair value.]—ROBERTSON *v.* NORRIS, No. 2332, *ante.*

2345. —— ——.]—JENKINS *v.* JONES, No. 2333, *ante.*

2346. ——.]—NASH *v.* EADS (1880), 25 Sol. Jo. 95, C. A.

Annotations:—**Reld.** Martinson *v.* Clowes (1882), 21 Ch. D. 857; Colson *v.* Williams (1889), 58 L. J. Ch. 539; Belton *v.* Bass, Ratcliffe & Gretton, [1922] 2 Ch. 449.

2347. —— ——.]—FARRAR *v.* FARRARS, LTD., No. 2220, *ante.*

2348. ——.]—(1) A power of sale in a mtge. deed is to be regarded as limiting the exercise of the rights of legal ownership of the mtged. property, & at the same time as enabling the mtgee. to realise his security; & as the mtgee. is the sole judge of what is necessary to enable him to realise, his motives in exercising the power will not be regarded by the ct., & so long as he does all that he fairly can do to obtain a fair price, as a prudent owner intending to sell for his own advantage & to the best of his judgment, he will come under no liability to the mtgor. or *puisne* incumbrancer.

(2) A mtgee. is not a trustee for the mtgor. of his power of sale & the ct. has nothing to do with the motives of the mtgee. in exercising it, even though he be guilty of spite in so doing.—COLSON *v.* WILLIAMS (1889), 58 L. J. Ch. 539; 61 L. T. 71.

2349. No duty to advertise.]—DAVEY *v.* DURRANT, SMITH *v.* DURRANT, No. 2216, *ante.*

2350. No duty to postpone sale—Though better price thereby obtainable.]—DAVEY *v.* DURRANT, SMITH *v.* DURRANT, No. 2216, *ante.*

PART XIII. SECT. 2, SUB-SECT. 6.—B.

p. *To act in good faith.*]—FINKELSTEIN *v.* LOCKE (Man.) (1907), 6 W. L. R. 173.—**CAN.**

q. ——.]—WILSON *v.* TAYLOR (1913), 24 O. W. R. 669; 4 O. W. N. 1376; 11 D. L. R. 455.—**CAN.**

2341 i. *To get best price.*]—In the exercise of this power of sale under a mtge., the mtgee. is under a duty towards the mtgor. to realise his security in good faith, & with reasonable precautions to obtain a proper price.—BARNES *v.* QUEENSLAND NATIONAL BANK, LTD. (1906), 3 C. L. R. 925.—**AUS.**

2344 i. *To sell at fair value.*]—It is the settled rule of equity, that a mtgee., in exercising a power of sale, must take reasonable means of preventing a sacrifice of the property. Where he took no means for that purpose, & sold the property for half its cash value, the price received being near the amount due to himself, the sale was set aside.—LATCH *v.* FURLONG (1866), 12 Gr. 303.—**CAN.**

2349 i. *No duty to advertise.*]—A mtgee. who has power to sell by private contract is not bound to advertise the mtged. premises for sale before exercising his power, provided that the obtains

Sect. 2.—Sale: Sub-sect. 6, B., C., D., E., F., G. & H.; sub-sect. 7, A.]

2351. ——— ———.]—FARRAR *v.* FARRARS, LTD., No. 2229, *ante*.

2352. Duty of mortgagee selling as trustee for sale—Whether different from mortgagee selling under a power.]—KIRKWOOD *v.* THOMPSON, No. 2322, *ante*.

C. Right to Leave Purchase-Money on Mortgage.

2353. General rule—Part may be left on mortgage.]—DAVEY *v.* DURRANT, SMITH *v.* DURRANT, No. 2216, *ante*.

2354. ——— ———.]—D., a lessee for a long term of years, in 1848 mortgaged the premises to deft. for the residue of the term minus five days, subject to a proviso for redemption, with a power, in case of default in payment of the principal sum & interest, to sell & dispose of the premises by public sale or private contract for such price as could reasonably be gotten for the same, the receipt of deft. to be a full discharge to the purchaser. D. made default. On May 12, 1852, there being then a larger sum due to deft. from D., deft. contracted with P. to sell him the premises for £550, £50 being paid down; & by indenture of May 15, 1852, between deft., a trustee, & P., reciting the above agreement, & that it had been agreed that £500 of the purchase-money should remain on mtge. of the same premises, deft., in pursuance of the agreement, & in pursuance of the power in the mtge. of 1848, assigned to the trustee in trust for sale to pay the £500 & interest, in case P. should make default, & P. convenanted to pay the purchase-money by yearly instalments of £100 with interest. Deft. credited the whole of the £550 to D.; P. entered & occupied the premises for some time, & having paid £200 on account, made default. In 1859 deft. & the trustee assigned the property to pltf. with a covenant against incumbrances. On pltf. attempting to raise money on the premises, it was objected that the power of sale in the original mtge. had not been duly exercised by the contract of sale carried out by the mtge. in 1852; on which pltf. sued deft. on his covenant against incumbrances:—*Held:* as there was a valid & *bonâ fide* contract of sale between deft. & P., the power of sale had been duly exercised, & it was immaterial that the contract of purchase was carried out by a mtge.—THURLOW *v.* MACKESON (1868), L. R. 4 Q. B. 97; 9 B. & S. 975; 38 L. J. Q. B. 57; 19 L. T. 448; 17 W. R. 280.

Annotations:—**Refd.** Bettyes *v.* Maynard (1883), 49 L. T. 389; Belton *v.* Bass, Ratcliffe & Gretton, [1922] 2 Ch. 447.

2355. ——— ———.]—BETTYES *v.* MAYNARD, No. 2402, *post*.

2356. ——— ———.]—(1) There is no fiduciary relation between tenants in common of real estate as such. Nor can one tenant in common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character.

(2) The only obligation incumbent on a mtgee. selling under & in pursuance of a power of sale in his mtge. is that he should act in good faith. In determining whether the mtgee.'s conduct in that respect comes up to the required standard regard must be had to the circumstances of the particular case.

(3) Mtgees. under a mtge. by two tenants in common, one of whom became bkpt. sold by private contract to the other for a sum equal to the exact amount due in respect of the mtge. for principal, interest & costs, the bulk of the purchase-money being left on the security of the property:—*Held:* under the circumstances the transaction was a proper exercise of the power of sale, & the sale was valid for all purposes, giving rise to no claim on the part of the bkpt.'s estate either against the mtgees. or against the purchaser.—KENNEDY *v.* DE TRAFFORD, [1897] A. C. 180; 66 L. J. Ch. 413; 76 L. T. 427; 45 W. R. 671, H. L.

Annotations:—*As to* (1) **Consd.** Nutt *v.* Easton, [1899] 1 Ch. 873. **Refd.** *Re* Biss, Biss *v.* Biss, [1903] 2 Ch. 40; Birkin *v.* Smith, [1909] 2 K. B. 112. *As to* (2) **Refd.** Field *v.* Debenture Corpn. (1896), 12 T. L. R. 469; Flower *v.* Pritchard (1908), 53 Sol. Jo. 178. *Generally*, **Refd.** Griffith *v.* Owen, [1907] 1 Ch. 195.

D. Right to Sell Different Properties Together.

2357. Mortgages by different persons—Where benefit to mortgagors.]—HIATT *v.* HILLMAN, No. 2283, *ante*.

2358. ——— ——— **Purchase-money must be apportioned—On advice of competent person.**]—A trustee for sale may properly sell the trust property, together with other property, for an entire price, where a sale in that manner will be more beneficial for the *cestui que trust*, provided the purchase-money be properly apportioned, & the conditions of sale affecting the other property are not such as to injure the sale of the trust property. A purchaser under such circumstances ought to see that the purchase-money is properly apportioned before completion.

The mtgees. in the case before me must have taken & acted upon the advice of an actuary or some other person competent to give an opinion as to apportionments (JESSEL, M.R.).—*Re* COOPER & ALLEN'S CONTRACT FOR SALE TO HARLECH (1876), 4 Ch. D. 802; 46 L. J. Ch. 133; 35 L. T. 890; 25 W. R. 301.

Annotations:—**Mentd.** Wolverton *v.* A.-G., [1898] A. C. 535; Northumberland *v.* A.-G., [1905] A. C. 406; A.-G. *v.* Assheton-Smith, [1924] 2 K. B. 25.

E. Right to Impose Conditions.

2359. Condition in ordinary use—Though depreciatory—Right to rescind on objection to title.]—HOBSON *v.* BELL, GLYNN *v.* BELL, No. 2421, *post*.

2360. ——— ——— ———.]—A condition of sale on a sale by a mtgee. under a power of sale, entitling the vendor to rescind the contract in case he

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a fair price for the premises.—HICKEY *v.* HEYDON (1895), 16 N. S. W. Eq. 49; 11 N. S. W. N. 149.—**AUS.**

r. *To consider mortgagor's interests.*]—PENDLEBURY *v.* COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD. (1912), 13 C. L. R. 676.—**AUS.**

t. *Whether entitled to bid.*]—Unless all parties consent, pltf. in a mtge. suit will not be permitted to bid at a sale of which he has the conduct.—TAYLOR *v.* SHARP (1885), 3 Man. L. R. 4.—**CAN.**

a. *Right to sell on credit.*]—A sale made by a mtgee. on credit, if a real sale, is, according to the decided cases, a valid exercise of the power, if the mtgee. stands ready to account to the mtgor. for the price as so much money received by him in cash.—MENDELS *v.* GIBSON (1905), 5 O. W. R. 233; 9 O. L. R. 94.—**CAN.**

b. *Object of advertisement.*]—The primal object of advertising is not the mtgee.'s protection; it is that the property may be fairly placed in the market.—TODD *v.* SAMPSON (Sask.), [1919] 1 W. W. R. 110.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 6.—D.

c. *Mortgages by different persons.*]—JOHNSTON *v.* MCCARTNEY (1868), 12 N. B. R. (1 Han.) 220.—**CAN.**

d. *Different properties included in one mortgage.*]—A mtgee. who, under a power of sale, without previous inquiry of any kind, put up for sale by auction, & sold in one parcel a farm, & two shops in a village nearly three-quarters of a mile away, not in any way used together, was held liable for the difference between the amount realised & the amount which would have been realised had the farm & shops been sold separately.—ALDRICH *v.* CANADA PERMANENT LOAN & SAVINGS CO. (1897), 24 A. R. 193.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 6.—E.

e. *Registrar of land titles.*]—Registrar of land titles cannot impose as a condition upon the sale of land under a mtgc. any term which has not

depreciatory in a sense, but not so depreciatory as to be improper, being one that a prudent owner would introduce; & therefore held binding on the mtgor.—FALKNER *v.* EQUITABLE REVERSIONARY SOCIETY (1858), 4 Drew. 352; 4 Jur. N. S. 1214; 7 W. R. 73; 62 E. R. 136; *sub nom.* FAULKNER *v.* EQUITABLE REVERSIONARY INTEREST SOCIETY, 28 L. J. Ch. 132; 32 L. T. O. S. 181.

2361. —— —— Vendor only to join in assignment.]—HOBSON *v.* BELL, GLYNN *v.* BELL, No. 2421, *post*.

2362. —— —— Copies of deeds at purchaser's expense.]—HOBSON *v.* BELL, GLYNN *v.* BELL, No. 2421, *post*.

2363. —— —— Misstatement subject to compensation only.]—HOBSON *v.* BELL, GLYNN *v.* BELL, No. 2421, *post*.

2364. —— —— Right to resell on failure to comply with conditions.]—HOBSON *v.* BELL, GLYNN *v.* BELL, No. 2421, *post*.

2365. On sale of public-houses—Condition as to distribution of licenses.]—*Re* KAY, *Ex p.* MORE (1843), 1 L. T. O. S. 263.

2366. Where express power in mortgage—Special conditions as to defects in title.]—Where a mtgee. had a power, on default of payment on notice to sell the premises, together or in lots, by private contract or by public auction, subject to such special or other conditions of sale as he might think fit, & he proceeded to a sale after ample notice, but under very special conditions of sale, directed against certain defects of title which the mtgor. himself had, since executing the mtge., insisted upon, the ct. refused to interfere to prevent the sale under such stringent provisions.—KERSHAW *v.* KALOW (1855), 1 Jur. N. S. 974.

——.]—*See, further*, Sub-sect. 1, B., *ante*.

Under statutory powers.]—*See* Trustees & Mortgages Act, 1860 (c. 145), s. 11; Law of Property Act, 1925 (c. 20), s. 101.

As to conditions of sale generally, *see* SALE OF LAND.

F. Right to Sell Fixtures.

See Law of Property Act, 1925 (c. 20), ss. 88 (4), 89 (4).

2367. Where no express power—No right to sell—Trade fixtures—Mortgage by sub-demise.]—Words which in a conveyance in fee by way of mtge. are sufficient to pass trade fixtures will have the same effect when the mtge. is of leasehold property by sub-demise; but in the latter case the absolute property in such fixtures as separate chattels with the right to remove & sell will not pass to the mtgee. unless an intention to that effect is apparent on the deed.—SOUTHPORT & WEST LANCASHIRE BANKING CO. *v.* THOMPSON (1887), 37 Ch. D. 64; 57 L. J. Ch. 114; 58 L. T. 143; 36 W. R. 113, C. A.

Annotations:—**Apld.** Power *v.* Wells (1889), 6 T. L. R. 32. **Consd.** *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110; National Provincial & Union Bank of England *v.* Charnley, [1924] 1 K. B. 431. **Refd.** *Re* Yates, Batchelor *v.* Yates (1888), 59 L. T. 47; Gough *v.* Wood, [1894] 1 Q. B. 713; Reynolds *v.* Ashby, [1904] A. C. 466.

Right to sell apart from land.]—*See* BILLS OF SALE, Vol. VII., pp. 35, 36, 38, 39, Nos. 185–189, 200–203.

—*See* Part IV., Sect. 5, sub-sect. 3, *ante*.

G. Rights as to Minerals.

See Law of Property Act, 1925 (c. 20), ss. 92, 101.

2368. Power to reserve minerals—With sanction of court.]—Mtgees. in possession with a power of sale, after filing a bill for foreclosure, & setting down the cause for hearing on motion for a decree, presented a petition, not intituled in the cause, but in the matter of 25 & 26 Vict. c. 108, for liberty to sell the surface, excepting the mines & minerals, of the hereditaments comprised in the mtge. deeds:—*Held:* they were entitled to the order asked.—*Re* WILKINSON'S MORTGAGED ESTATES (1872), L. R. 13 Eq. 634; 41 L. J. Ch. 392.

Annotation:—**Refd.** *Re* Hirst's Mortgage (1890), 63 L. T. 444.

2369. —— —— On whom petition must be served—Subsequent incumbrancers.]—(1) Mtgees. are within 25 & 26 Vict. c. 108, & may have liberty to sell under their power of sale, with a reservation of the mines & minerals in the land sold, & incidental powers of working them. (2) It is not necessary for mtgees., in order to exercise the power of selling with such a reservation, to serve the petition on any subsequent incumbrancers.—*Re* BEAUMONT'S MORTGAGE TRUSTS (1871), L. R. 12 Eq. 86; 40 L. J. Ch. 400; 19 W. R. 707.

Annotations:—*As to* (1) **Folld.** *Re* Wilkinson's Mortgaged Estates (1872), L. R. 13 Eq. 634. **Refd.** *Re* Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824. *As to* (2) **Folld.** *Re* Wilkinson's Mortgaged Estates (1872), L. R. 13 Eq. 634. **Refd.** *Re* Hirst's Mortgage (1890), 63 L. T. 444.

2370. —— —— —— Mortgagor.]—A petition by a mtgee. of land, under 25 & 26 Vict. c. 108, s. 2, for the sanction of the ct. to his selling the surface of the mtged. property, with a reservation of the mines & minerals thereunder, must be served on the mtgor.—*Re* HIRST'S MORTGAGE (1890), 45 Ch. D. 263; 60 L. J. Ch. 48; 63 L. T. 444; 38 W. R. 685.

2371. Power to sell land & minerals separately—With sanction of court—Trustees.]—*Re* MERCHANTS TRUST & NEW BRITISH IRON CO. (1894), 38 Sol. Jo. 253.

See, generally, MINES, Vol. XXXIV., pp. 596 *et seq.*

H. Right to Grant Easements.

See Law of Property Act, 1925 (c. 20), s. 101 (2).

By implication of law.]—*See* EASEMENTS, Vol. XIX., p. 39, No. 205.

SUB-SECT. 7.—RELIEF TO MORTGAGOR.

A. Injunction.

2372. Grounds for granting or refusing—Sale without notice.]—Injunction not granted to restrain a mtgee. from selling under power in a mtge. deed; otherwise, where trustee for sale, if he proceeds precipitately, without notice to both parties.—ANON. (1821), 6 Madd. 10; 56 E. R. 992.

2373. —— —— Where condition protecting purchaser.]—PRICHARD *v.* WILSON, No. 2230, *ante*.

2374. —— —— As to subsequent deed of arrangement.]—It is not necessary to give notice

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to do with the sale of the land or the payment of the purchase-money. His terms should be directed to the obtaining of the best price & regulation of the expenses.—*Re* LAND TITLES ACT, UNION BANK OF CANADA *v.* BOGGS (Sask.), [1919] 3 W. W. R. 578.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 7.—A.

1. Grounds for granting or refusing—Tender or payment.]—Where there had been a breach of covenant to keep the building insured against fire the ct. ordered that if the amount owing under the mtge. was tendered or paid by the mtgor. to the mtgee. the injunction would be granted.—GIBERSON *v.* SECORD (1923), 51 N. B. R. 116.—**CAN.**

2. Terms on which granted.]—The

of the intention to exercise a power of sale contained in a mtge. deed to a devisee of the mtgor. when the mtge. deed provides that the notice is to be given to the mtgor., his heirs, exors., or administrators, or any or either of them.

A mtge. deed contained (*inter alia*) a power of sale, exercisable by the mtgee. on three months' notice to the mtgor., his heirs, exors., or administrators, or any or either of them. Some time after the execution of the mtge. deed a deed of arrangement was made between the same parties, by which the mtgee. was empowered to enter into possession of the mtged. property, & to receive the rents on certain trusts therein declared. There was a declaration that nothing in this deed contained should prejudice the rights or powers of the mtgee. under the mtge. deed, & a further declaration that the mtgee. might, at any time after a specified day, determine the trusts thereof, & that, on delivering of such notice, the mtgee. should be at liberty to exercise the powers vested in him by the mtge. deed to the same extent as if such trusts had never been declared. The mtgee. entered into possession under this second deed, & some time after the said specified day he gave notice to exercise his power of sale, but he never gave any notice to determine the trusts of the second deed:—*Held:* the power of sale could not be exercised so long as notice had not been given to determine the trusts of the deed of arrangement.

I also think that the injunction is due. In saying that I wish it to be clearly understood that I do not at all proceed upon the ground that the amount due upon the mtge. is in dispute. If that were so a mtgor. would have but to raise a dispute about the sum due, in order to deprive his mtgee. of his remedies under the mtge. deed (TURNER, L.J.).—GILL *v.* NEWTON (1866), 14 L. T. 240; 12 Jur. N. S. 220; 14 W. R. 490, L. JJ.

2375. —— Redemption action by mortgagor.]—A. mortgaged premises to B. to secure a certain sum plus the probable amount of costs in preparing the mtge. The mtge. contained a power of sale, upon default of payment at a fixed time. B. entered into a contract to sell to C.; after that B. commenced his action against A. upon the covenant, to recover the amount of his mtge. debt & costs. The action was compromised by D. paying to B. the whole amount minus a very small sum, which A. paid. D. took no regular assignment from B., but merely became equitable mtgee., by transfer of the title deeds. C. then, more than a year after the contract for sale, gave B. notice that he intended to enforce his contract, & thereupon paid his purchase-money, with which, plus a small sum, B. paid off D., & got back the title deeds. B. then brought his action of ejectment against A., who had remained in possession, to enable him to make a conveyance to C. A. filed his bill against B. & C. to redeem, & for an injunction. The ct. refused to interfere by injunction.—DAVIES *v.* WILLIAMS (1843), 7 Jur. 663.

2376. —— Offer of payment by puisne incumbrancer.]—A puisne incumbrancer offered to pay off the first mtge., which, being declined, he filed a bill to compel a transfer. The first mtgee. having afterwards proceeded to sell the property, was restrained from transferring the first mtge. & parting with the legal estate & title deeds.—RHODES *v.* BUCKLAND (1852), 16 Beav. 212; 51 E. R. 759.

2377. —— Existence of prior contract—When mortgagor has notice — Charterparty.]—The ct. will not affirmatively enforce a charterparty, but it is implied in such a contract, that if the charterer provides a cargo, the ship shall not be employed for any other purpose; & a mtgee., with notice of a prior charterparty effected with the mtgor., will be in general restrained from doing anything to prevent its performance.

The mtgor. in such a case was unable to put the ship into proper repair to make the voyage, or otherwise to perform the contract, & the charterer took no step for several months with respect to it:—*Held:* the mtgee. ought not to be further restrained from exercising the powers contained in his mtge.—DE MATTOS *v.* GIBSON (1859), 4 De G. & J. 276; 28 L. J. Ch. 498; 33 L. T. O. S. 193; 5 Jur. N. S. 555; 7 W. R. 514; 45 E. R. 108, L. C.

Annotations:—**Apld.** Sevin *v.* Deslandes (1860), 30 L. J. Ch. 457; Messageries Imperiles Co. *v.* Baines (1863), 7 L. T. 763. **Consd.** The Celtic King, [1894] P. 175. **Apld.** Lord Strathcona S.S. Co. *v.* Dominion Coal Co., [1926] A. C. 108. **Refd.** Bucknall *v.* Tatem (1900), 83 L. T. 121; Herne Bay Steam Boat Co. *v.* Hutton, [1903] 2 K. B. 683. **Mentd.** Peto *v.* Brighton, Uckfield & Tunbridge Wells Ry. (1863), 1 Hem. & M. 468; Adamson *v.* Gill (1868), 17 L. T. 464; Catt *v.* Tourle (1869), 4 Ch. App. 654; Greenhill *v.* Isle of Wight (Newport Junction) Ry. (1871), 23 L. T. 885; Montague *v.* Flockton (1873), L. R. 16 Eq. 189; Luker *v.* Dennis (1877), 7 Ch. D. 227; Piperno *v.* Harmston (1886), 3 T. L. R. 219; Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416; Davis *v.* Foreman, [1894] 3 Ch. 654; Formby *v.* Barker, [1903] 2 Ch. 539; Brigg *v.* Thornton, [1904] 1 Ch. 386; Wilkes *v.* Spooner, [1911] 2 K. B. 473; L. C. C. *v.* Allen, [1914] 3 K. B. 642; Barker *v.* Stickney, [1919] 1 K. B. 121; Macdonald *v.* Eyles, [1921] 1 Ch. 631.

2378. —— Breach of trust.]—On a bill by a mtgor. to restrain a mtgee. from enforcing his power of sale under the mtge. deed, & where no answer had been put in, but it was alleged by the bill that a breach of trust had been committed by the mtgee. The ct., on motion, granted an injunction until the filing of the answer or further order.—MEREST *v.* MURRAY (1866), 14 L. T. 321.

2379. —— Dispute as to amount due.]—GILL *v.* NEWTON, No. 2374, *ante*.

2380. —— Payment into court.]—In 1830, W. conveyed certain real estates to R. & T. & their heirs, by way of mtge., for securing £400, with a power of sale in case of default. W. died in 1839, having devised the same property, subject to certain charges created by his will, to his sons, A., B., & C., as tenants in common in fee. In 1839, after W.'s death, B. conveyed all his one-third share, under his father's will, to R., H. & N., by way of mtge., with power of sale in case of default. R., the surviving mtgee. of the deed of 1830, threatened to sell under the power in that deed unless A., the acting exor. of W., would redeem both mtges. Upon bill by A. to redeem & for an injunction, the ct. upon motion, on payment into ct., by A. of the money due upon the first mtge., restrained R. from selling under the power contained in the deed of 1830, & from conveying the legal estate in the one-third share of B. comprised in the mtge. of 1830.—WHITWORTH *v.* RHODES (1850), 20 L. J. Ch. 105.

Annotation:—**Refd.** Warner *v.* Jacob (1882), 20 Ch. D. 220.

ordinary rule that the ct. will not grant an interlocutory injunction restraining a mtgee. from exercising his power of sale except on the terms of the mtgor. paying into ct. the sum sworn by the mtgee. to be due for principal, interest, & costs, is not limited to cases where the mtgor. seeks to restrain the future exercise of the power, but applies also to a case where the injunction asked is to restrain the completion of a contract already entered into on the ground that the sale is an improper one.—KINGSBURY *v.* HALLORAN (1901), 1

2381. —— ——.]—(1) If a mtgee. exercises his power of sale *bonâ fide* for the purpose of realising his debt & without collusion with the purchaser, the ct. will not interfere even though the sale be very disadvantageous unless the price is so low as in itself to be evidence of fraud.

(2) A mtgee. in exercising his power of sale is not, except as to the balance of the purchase-money after a sale, a trustee for the mtgor. even if the mtge. is in the form of a trust for sale.

(3) [No attempt was made] to stay the sale by injunction which, according to the authorities I have cited & to *Whitworth* v. *Rhodes*, No. 2380, *ante*, could only have been done by paying the money into ct. (KAY, J.).—WARNER *v.* JACOB (1882), 20 Ch. D. 220; 51 L. J. Ch. 642; 46 L. T. 656; 46 J. P. 436; 30 W. R. 731.

Annotations :—As to (1) **Consd.** Colson v. Williams (1889), 58 L. J. Ch. 539. **Folld.** Field v. Debenture Corpn. (1896), 12 T. L. R. 469. *As to* (2) **Refd.** Charles v. Jones (1887), 35 Ch. D. 544; Farrar v. Farrars (1888), 40 Ch. D. 395. *Generally*, **Refd.** Martinson v. Clowes (1882), 21 Ch. D. 857; Kennedy v. De Trafford, [1896] 1 Ch. 762; Nutt v. Easton (1899), 47 W. R. 430; Haddington Island Quarry Co. v. Huson, [1911] A. C. 722.

2382. —— —— **Amount claimed by mortgagee—Unless impossible on face of security.**]—The general rule is that a sale by a mtgee. will be restrained only on payment into ct. by the mtgor. of the amount which the mtgee. swears to be due to him, but this does not apply where the ct. can see on the terms of the deed that this amount cannot be due on the security.—HICKSON *v.* DARLOW (1883), 23 Ch. D. 690; 48 L. T. 449; 31 W. R. 417, C. A.

*Annotations :—***Refd.** Brewer v. Square, [1892] 2 Ch. 111. **Mentd.** *Ex p.* Cotton (1883), 49 L. T. 52; Blackburn Corpn. v. Micklethwait (1886), 54 L. T. 539; *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547.

2383. —— —— —— **Unless fiduciary relation between mortgagor & mortgagee.**]—The ordinary rule that the ct. will not grant an interlocutory injunction restraining a mtgee. from exercising his power of sale except on the terms of the mtgor. paying into ct. the sum sworn by the mtgee. to be due for principal, interest, & costs, does not apply to a case where the mtgee. at the time of taking the mtge. was the solr. of the mtgor. In such a case the ct. will look to all the circumstances of the case, & will make such order as will save the mtgor. from oppression without injuring the security of the mtgee.

Pltf. was a lady who was entitled to a life interest in leasehold property which she had mortgaged to various persons. Deft. acted as her solr., & with her sanction in order to release her from embarrassment bought up several of the incumbrances with his own money & took a transfer of them to himself; having previously taken a mtge. of the life interest to secure his past costs & the costs which he might incur in paying off the incumbrances. Afterwards pltf. discharged deft., & employed another solr., who applied to deft. for information respecting the securities transferred. Deft. refused to give this information unless the payment of what was due to him was guaranteed, & threatened to proceed to a sale of the property. Pltf. then brought an action to impeach the securities & to restrain the sale of the property, & moved for an injunction till the hearing :—*Held :* considering all the circumstances, an injunction ought to be granted, on pltf. paying into ct. such a sum as the ct. considered would cover the amount actually advanced by deft., & amending the writ so as to make it a simple action for redemption & injunction.—MACLEOD *v.* JONES (1883), 24 Ch. D. 289; 53 L. J. Ch. 145; 49 L. T. 321; 32 W. R. 43, C. A.

—— —— **Action on bills of sale.**]—*See* BILLS OF SALE, Vol. VII., p. 132, Nos. 750–752.

—— ——.]—*See, generally*, INJUNCTION, Vol. XXVIII., pp. 384, 385, Nos. 153–167.

—— **Petition for winding up.**]—*See* COMPANIES, Vol. X., p. 831, No. 5418.

2384. Effect of waiver—Mortgagor acting unfairly.]—Motion by mtgor. to restrain completion of sale of mtged. premises by mtgee. under power of sale, & the purchaser, on the ground of surprise & under-value, refused, mtgor. having acted unfairly, & in some degree sanctioned the transactions relating to the sale.—FARRARD *v.* CLAY (1837), Donnelly, 232; 47 E. R. 340; *sub nom.* FERRAND *v.* CLAY, 1 Jur. 165.

2385. —— **Dispute as to amount.**]—(1) Right of *cigné* as against *puisné* mtgee. to enforce all his remedies at the same time. (2) By a deed, the amount due to the first mtgee. was confirmed to him by the subsequent incumbrancers, & he thereby agreed not to execute his power of sale for a limited time :—*Held :* a party who, by his bill contested the amount so admitted to be due to the first mtgee., could not take advantage of the stipulation in the deed not to sell within the time, & an injunction to restrain such sale was refused.—COCKELL *v.* BACON (1852), 16 Beav. 158; 51 E. R. 737.

(a) In General.

2386. Effect of laches.]—Mtgee. of a reversionary interest sold it under the power of sale in Jan. 1888. The reversioner had notice of the sale, & he then took legal advice as to his rights, but he took no steps to impeach the sale until Dec. 1897, when he commenced an action to set it aside. The reversion had fallen into possession in Apr. 1897 :—*Held :* by reason of his laches, pltf. could not maintain the action.—NUTT *v.* EASTON, [1900] 1 Ch. 29; 69 L. J. Ch. 46; 81 L. T. 530, C. A.

2387. Amendment of pleadings—Action by mortgagor & second mortgagee—Transfer of interest—On what terms granted.]—VIOLA *v.* HICKMAN, [1912] W. N. 109.

*Annotation :—***Mentd.** Viola v. Anglo-American Cold Storage Co. (1912), 81 L. J. Ch. 581.

(b) Grounds for Rescission.

i. In General.

See Law of Property Act, 1925 (c. 20), s. 104 (2), (3).

2388. Not oppressive sale—Where no proof of fraud or sale at undervalue.]—A few weeks after the death of a mtgor. & before probate of his will had been obtained, the mtgee. proceeded to exercise a power of sale of a reversionary interest. Several communications were taking place at the time between the solrs. of the mtgee. & the solrs. who acted on behalf of the family of the mtgor., & who protested against the sale as unnecessary & oppressive, & offered to pay all the principal

S. R. N. S. W. 114; 18 N. S. W. W. N. 178.—**AUS.**

... ...]—An interim injunction was granted upon pltf. bringing into ct. the amount of arrears.—ROBERTSON *v.* HETHERINGTON, 8 C. L. T. Occ. N. 141.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 7. B. (a).

2386 i. *Effect of laches.*]—The ct. set aside the sale, although reluctantly, as great delay had been shown on the part of the mtgor. in making the application; & he was, in the circumstances, ordered to pay the costs incurred by the new sale.—MCALPINE *v.* YOUNG (1868), 2 Ch. Ch. 171.—**CAN.**

2386 ii. ——.]—CARTER *v.* BELL (1915), 31 W. L. R. 1; 8 W. W. R. 47; 21 D. L. R. 243.—**CAN.**

Sect. 2.—Sale: Sub-sect. 7, B. (b) i. & ii., & C.; sub-sect. 8, A.]

money, interest, & costs as soon as an assignment could be prepared. It was not shown that there was any fraud in the transaction, or that the reversionary interest was sold at an undervalue. A bill, filed by the extrix. of the mtgor., to set aside the sale, was dismissed.—MATTHIE *v.* EDWARDS, JONES *v.* MATTHIE (1847), 16 L. J. Ch. 405; 11 Jur. 504, L. C.; *subsequent proceedings*, 11 Jur. 761, L. C.

Annotations:—**Consd.** Warner *v.* Jacob (1882), 20 Ch. D. 220. **Reld.** Cockell *v.* Bacon (1852), 16 Beav. 158; Pooley *v.* Whetham (1886), 54 L. T. 606. **Mentd.** Kershaw *v.* Kalow (1855), 1 Jur. N. S. 974.

2389. Not mismanagement of property—While mortgagee in possession.]—In the absence of any allegation that a power of sale in a mtge. deed has been improperly or collusively exercised by the mtgee., the averments, that the property was sold at great undervalue, & ought to have been sold in lots; that the mtgee., while in possession, had, by mismanagement of the property, rendered himself liable to an account for wilful default; & that the sale had been made pending a suit by the mtgor. to redeem, which suit was duly registered as *lis pendens*, raise no equity to support a bill to set the sale aside & enable the mtgor. to redeem.—ADAMS *v.* SCOTT (1859), 7 W. R. 213.

Annotations:—**Consd.** Warner *v.* Jacob (1882), 20 Ch. D. 220. **Reld.** Stevens *v.* Theatres, [1903] 1 Ch. 857.

2390. Not sale made pending action to redeem.]—ADAMS *v.* SCOTT, No. 2389, *ante*.

2391. Power of sale improperly exercised—Sale for indirect purpose.]—ROBERTSON *v.* NORRIS, No. 2332, *ante*.

2392. —— ——.]—POOLEY'S TRUSTEE *v.* WHETHAM, No. 2223, *ante*.

2393. —— **Breach of proviso in mortgage as to default—Knowledge of purchaser.**]—SELWYN *v.* GARFIT, No. 2429, *post*.

2394. Tender of principal & interest—Knowledge of purchaser.]—JENKINS *v.* JONES, No. 2333, *ante*.

2395. Sale to subsequent incumbrancer—Without notice.]—PARKINSON *v.* HANBURY, No. 2428, *post*.

2396. Not irregularity of notice—After entry of purchaser & expenditure of money.]—METTERS *v.* BROWN, No. 2227, *ante*.

2397. Fraud—Action by insolvent mortgagor.]—A bill was filed by T., against whom a vesting order in insolvency had been obtained, but all whose debts had been fully discharged, against a mtgee. from him, the assignees under his insolvency, & certain purchasers of the mtged. property, alleging that by collusion between the mtgee. & the assignees the former was enabled to establish a larger claim than he was entitled to & also that by collusion between the mtgee., the assignees, & purchasers, the mtged. property had been sold to the latter at a considerable undervalue, & praying that an account might be taken of what was due on the mtge., & that the sale might be set aside. No revesting order or order to annul the proceedings in the solvency had been obtained; but the bill alleged that an application, by pltf., for such an order to the comr. in insolvency had been refused, except upon the terms of his confirming the acts complained of. Upon demurrer, by the purchasers, for want of equity & multifariousness:—*Held:* the demurrer must be overruled.—TROUP *v.* RICARDO (1864), 4 De G. J. & Sm. 489; 5 New Rep. 62; 34 L. J. Ch. 91; 11 L. T. 399; 10 Jur. N. S. 1161; 13 W. R. 147; 46 E. R. 1008, L. C.

Annotations:—**Mentd.** Smith *v.* Moffatt (1865), L. R. 1 Eq. 397; Roberts *v.* Moreton (1869), 17 W. R. 397; Payne *v.* Dicker (1871), 24 L. T. 492; Motion *v.* Moojen (1872), L. R. 14 Eq. 202; Bird *v.* Philpott, [1900] 1 Ch. 822.

2398. Mistake—Not when matter for compensation only.]—BETTYES *v.* MAYNARD, No. 2402, *post*.

-.]—*See, generally*, MISTAKE, pp. 86 *et seq.*, *ante*.

2399. Not advance of purchase-money by mortgagee—Sale with option of re-purchase.]—B. mortgaged certain shares in a brewery co. The mtgees., who had full power to sell the shares, were desirous in 1914 of giving an option to F. to purchase them at a future date, but were advised by their solrs. that this would not be within their powers. They then sold the shares to F. at a fair price, & advanced him the whole of the purchase-money without interest, & gave him the right to call on them to repurchase the shares at the price he gave for them at any time before May 1, 1917. The money so advanced was secured by a deposit of the share certificate & by a promissory note, which on the face of it was expressed to be payable on demand. F. paid the mtgees. the purchase-money before May 1, 1917. In 1820 he sold the shares at a price considerably in excess of what he had paid for them. B. then brought an action, alleging that the transaction was not a valid sale, & claiming that the shares or their proceeds were still subject to redemption:—*Held:* (1) the ct. could not inquire into the motives of the mtgees.; (2) the transaction was a valid exercise of their power of sale.—BELTON *v.* BASS, RATCLIFFE & GRETTON, LTD., [1922] 2 Ch. 449; 91 L. J. Ch. 216; 127 L. T. 357.

Not leaving purchase-money on mortgage.]—*See* Sub-sect. 6, C., *ante*.

ii. *Sale at Undervalue.*

2400. General rule—Not unless amounting to fraud.]—ADAMS *v.* SCOTT, No. 2389, *ante*.

2401. —— ——.]—WARNER *v.* JACOB, No. 2381, *ante*.

2402. —— ——.]—Pltf. being entitled to a sum of £2,916 stock in reversion expectant on the death of an old lady aged eighty-two, obtained a loan of £1,650 upon mtge. The mtge. deed contained a power of sale upon three months' notice, or on interest being one month in arrear. The interest being in arrear, the stock was sold under the power for £1,950 as subject to succession duty at 3 per cent. The tenant for life was then in a precarious state of health, & died within three months. It was afterwards found that only £7 was payable for succession duty. None of the purchase-money was paid except the deposit, the remainder being left on a mtge. of the stock.

PART XIII. SECT. 2, SUB-SECT. 7.—B. (b) i.

2393 i. *Power of sale improperly exercised—Breach of proviso in mortgage as to default—Knowledge of purchaser.*]—PARSONS *v.* RYAN (1892), 7 Nfld. L. R. 655.—**NFLD.**

k. *Not irregularity of notice.*]—LOCKHART *v.* YORKSHIRE GUARANTEE & SECURITIES CORPN., LTD. (1908), 14 B. C. R. 28; 9 W. L. R. 182.—**CAN.**

l. *Fraud.*]—INGALLS *v.* MCLAURIN (1886), 11 O. R. 380.—**CAN.**

m. ——.]—TAYLOR *v.* SHARP (1892), 8 Man. L. R. 163.—**CAN.**

n. ——.]—SMITH *v.* HUNT (1902), 22 C. L. T. 429; 4 O. L. R. 653; 1 O. W. R. 598, 798; *varying* (1901), 2 O. L. R. 134.—**CAN.**

o. ——.]—WINTERS *v.* MCKINISTRY (1902), 22 C. L. T. 213.—**CAN.**

p. *Sale by sheriff.*]—GOOLD *v.* RICH (1872), 4 Ch. Ch. 87.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 7.—B. (b) ii.

q. *Persons induced to refrain from bidding.*]—Where, at a sale under a power in a mtge., out of twenty-five or thirty persons at a sale, three or four were induced to refrain from bidding, because they were informed

There was evidence that, having regard to the age & health of the tenant for life, from £100 to £200 more might have been obtained for the reversion :—*Held :* the sale could not be set aside, either on the ground of under value, as there was no fraud ; nor the leaving of the purchase-money on mtge. ; nor the mistake as to the succession duty, that being merely a matter for compensation.—BETTYES *v.* MAYNARD (1883), 49 L. T. 389 ; 31 W. R. 461, C. A.

Annotation :—**Refd.** Bolton *v.* Bass, Ratcliffe & Gretton, [1922] 2 Ch. 449.

2403. ——— ———.]—FIELD *v.* DEBENTURE CORPN. (1896), 12 T. L. R. 469.

2404. ——— ———.]—The Ct. of Appeal found that a sale by the assignees of a mtge. in the exercise of a power of sale contained therein was invalid as against the mtgor. pltfs. & decreed redemption, on the ground that there had been reckless disregard of their interests in the conduct of the sale. It appeared that the pleadings contained no charge of fraud or collusion or bad faith against deft. purchasers, that there had been no notice before trial that inadequacy of price would be relied upon as evidence thereof, & that the purchasers had accordingly given no counter-evidence of its sufficiency :—*Held :* the finding of the first ct. to the effect that the sale was valid & regular ought not to have been reversed, & the failure in the circumstances of the purchasers to produce counter-evidence did not justify a finding in effect that the sale was fraudulent.—HADDINGTON ISLAND QUARRY CO., LTD. *v.* HUSON, [1911] A. C. 727 ; 81 L. J. P. C. 94 ; 105 L. T 467, P. C.

2405. What is evidence of fraud—Condition excluding evidence of age of tenant for life.]—CRAGG *v.* ALEXANDER, [1867] W. N. 305.

2406. ——— **Lowness of price.**]—WARNER *v.* JACOB, No. 2381, *ante*.

2407. ——— **Sale for exact amount due—To one of two co-mortgagors—Though fiduciary relation between co-mortgagors.**]—KENNEDY *v.* DE TRAFFORD, No. 2356, *ante*.

2408. ——— ——— **To subsequent incumbrancer.**]—FLOWER & SONS, LTD. *v.* PRITCHARD, No. 2291, *ante*.

C. Recovery of Loss.

2409. Right to recover loss—Sale at undervalue.]—A mtgee. in possession, by not taking proper means to ascertain the right value of the mtged. property, sold it at a loss :—*Held :* he was liable to make good the difference between the price which the property was sold at, & that which it would have produced had it been sold, at a reserved price, under a decree of the ct.—WOLFF *v.* VANDERZEE (1869), 20 L. T. 350 ; 17 W. R. 547.

Loss by misdescription of property.]—A mtgee. who, in the exercise of his power of sale, personally or by his agent commits a mistake, such as a misdescription of the property, whereby a material diminution is caused in the price realised, is liable to the parties interested in the equity of redemption for the loss so occasioned ; but the amount of that diminution is not necessarily the measure of the compensation payable by the mtgee.

Mtged. property was sold for £20,800, &, in consequence of a misstatement in the particulars by the auctioneer employed by the mtgee., a compromise was come to between the purchaser & mortgagee, which the ct. held to be a reasonable one, whereby £895 was allowed to the purchaser out of the purchase-money :—*Held :* that sum was not necessarily to be taken as the measure of compensation to be allowed as between the mtgee. & the owners of the equity of redemption, & an inquiry was directed whether the property would have sold for any & if any, what sum in excess of £19,905, the original purchase-money less the sum allowed to the purchaser, in case the property had been sold without the misstatement in the particulars.—TOMLIN *v.* LUCE (1889), 43 Ch. D. 191 ; 59 L. J. Ch. 164 ; 62 L. T. 18 ; 54 J. P. 486 ; 38 W. R. 323 ; 6 T. L. R. 103, C. A.

2411. Right to action for account—Wrongful & oppressive sale.]—Mtgor. cannot maintain at common law an action against his mtgee. in respect of a wrongful & oppressive sale by the latter of the mtged. property.—FENNELL *v.* GARDNER (1885), 1 T. L. R. 397, C. A.

2412. Amount recoverable—Difference between actual & reserved price—If sold under order of court.]—WOLFF *v.* VANDERZEE, No. 2409, *ante*.

SUB-SECT. 8.—RIGHTS AND LIABILITIES OF PURCHASERS.

A. In General.

See Law of Property Act, 1925 (c. 20), s. 104 (2).

2413. Right to rescind contract for sale—Irregularity as to notice—Effect of waiver.]—Pltf. purchased land, & paid a deposit. The condition of sale stated that the sale was made by a first mtgee. under a power of sale. It afterwards appeared that the power of sale was given only in case the mtgee. should give notice in writing to the mtgor. to pay the money due, & the mtgor. should not pay within three calendar months after such notice ; & it was provided that the receipts of the mtgee. should discharge the person paying from being answerable for misapplication of the money, or inquiring into the propriety of the sale purporting to be made in pursuance of the power, & from being obliged to be satisfied whether the terms on which the sale was made by virtue of the power were complied with. After this mtge., & before the sale, the mtgor. had executed several additional mtges. on the property. No notice was in fact given to him by the mtgee., but, before the sale, & after the subsequent mtges., he agreed in writing that it should be lawful for the first mtgee. to sell without giving notice :—*Held :* the purchaser, upon discovery of these facts, was entitled to rescind the contract & recover the deposit ; although, after the sale &

that a person attending intended to buy the property for the family of the debtor, the ct. refused to set aside the sale, which was made to such person at a small advance upon the upset price.—BROWN *v.* FISHER (1862), 9 Gr. 423.—**CAN.**

r. Where purchased for value without notice—Liability of mortgagee to account.]—DUFRESNE *v.* DUFRESNE (1885), 10 O. R. 773.—**CAN.**

t. Test of value.]—UREN *v.* CONFEDERATION LIFE ASSOCN. (1917), 40 O. L. R. 536 ; 13 O. W. N. 133.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 7.—C.

2409 i. *Right to recover loss—Sale at undervalue.*]—HICKEY *v.* HEYDON (1894), 15 N. S. W. Eq. 167 ; 11 N. S. W. W. N. 13.—**AUS.**

PART XIII. SECT. 2, SUB-SECT. 8.—A.

a. Right to rescind contract for sale.]—DIOCESAN SYNOD, NOVA SCOTIA *v.* O'BRIEN (1879), R. E. D. 352.—**CAN.**

b. ———.]—LOCKING *v.* HALSTED (1888), 16 O. R. 32.—**CAN.**

c. Right of trespass against mortgagor.]—The purchaser of land under a sale by a master in chancery, in a foreclosure suit, whose deed is duly registered, may, before entry, maintain trespass *de bonis asportatis* for trees cut on the premises & carried away by a person claiming under the mtgor.—JARVIS *v.* EDGETT (1848), 6 N. B. R. (1 All.) 66.—**CAN.**

d. Sheriff's sale—Purchase of equity of redemption.]—A judgment creditor purchasing an equity of redemption at sheriff's sale, cannot set up his

Sect. 2.—Sale: Sub-sect. 8, A. & B. (a).]

before the rescinding of the contract, the mtgor. the first mtgee., & several, whether all or not did not appear, of the subsequent mtgees., had executed an indenture, whereby it was declared & agreed that the sale should be valid although no notice had been given.—FORSTER *v.* HOGGART (1850), 15 Q. B. 155; 19 L. J. Q. B. 340; 15 L. T. O. S. 134; 117 E. R. 417; *sub nom.* FOSTER *v.* HOGGART, 14 Jur. 757.

Annotation:—**Refd.** Jennings *v.* Brunt (1868), 19 L. T. 705.

2414. —— —— ——.]—A mtge., of leaseholds to the trustees of a building society, in the ordinary form of a building society mtge., contained a covenant by the mtgor. to pay, as required by the rules of the society, all subscriptions, etc., in respect of this shares in the society, & also a declaration that in case of default, the total sum for which the mtge. should be for the time being redeemable according to the said rules & the mtge., should be considered as then actually due, & that the power of sale given to mtgees. by Conveyancing & Law of Property Act, 1881 (c. 41), should apply. On the same day the mtgor. executed a second mtge. of the property to his bankers. The mtgor. subsequently became bkpt. & the second instalment of subscription under the first mtge. being in arrear, the first mtgees., a fortnight after the day on which the instalment had become due according to the rules of the society, & without any formal notice to the second mtgees. or the mtgor.'s trustee in bkpcy., though with their knowledge & consent, put up the property for sale by auction subject to conditions of sale which stipulated that the purchaser should accept a conveyance from the vendors under their power of sale, without the concurrence of any other persons. The property not being sold at the auction, the first mtgees., within three months from the date when the second instalment became due & with the approval of the second mtgees., sold the property by private contract, subject to the original conditions of sale. Upon the purchaser's requisition the mtgor.'s trustee in bkpcy. consented to join in the conveyance; but subsequently the purchaser raised the objection that the first mtgees. could not make a title at all, as their power of sale was not exercisable until three months' notice had been first given under Conveyancing & Law of Property Act, 1881 (c. 41), s. 20 (1). Upon a summons by the purchaser under the Vendor & Purchaser Act, 1874 (c. 78), the chief clerk made an order declaring that the vendors had shown a good title according to the conditions of sale. The vendors had, after being served with the summons, offered to procure the concurrence of the second mtgees. in the conveyance, in addition to that of the mtgor.'s trustee in bkpcy., & the second mtgees. had expressed their willingness to concur. The purchaser moved to discharge the chief clerk's order on the ground that the power of sale was not exercisable for want of the three months' notice under the Act, & that he could not be required to accept a title from the second mtgees., as offered by the vendors, since it had been stipulated by his contract that he should take a title from the first mtgees. only:—*Held:* the conveyance by the first mtgees. would not be the less a conveyance by them under their power of sale, according to the contract, because the second mtgees., either by the same or a separate deed, concurred in or confirmed the conveyance by passing such interest as they might have; & the second mtgees. & the mtgor.'s trustee in bkpcy. had in effect waived the notice required by the Act.—*Re* THOMPSON & HOLT (1890), 44 Ch. D. 492; 59 L. J. Ch. 651; 62 L. T. 651; 38 W. R. 524.

2415. —— **On ground of concurrence of second mortgagees.**]—*Re* THOMPSON & HOLT, No. 2414, *ante*.

Disclaimer by trustee of bankrupt mortgagor.]—*See* BANKRUPTCY, Vol V., p. 947, No. 7763.

2416. How far bound by notice in conditions in sale—Agreement between mortgagor & tenant in possession—Allowance for buildings.]—When the purchaser from mtgees. under a power of sale has notice in the conditions of sale of an agreement between the mtgor. & the tenant in possession that a certain sum shall be allowed for buildings, he is bound by such agreement & by all the equities which bind the tenant thereunder.—THOMAS *v.* DAVIES (1861), 9 W. R. 831.

2417. Right to title deeds—On payment of purchase-money into court—Though before distribution.]—A purchaser who, in a suit to realise a mtge. security, has paid the purchase-money of the mtged. property into ct., is entitled, before its distribution, to the delivery of the title deeds.—FOWLER *v.* SCOTT (1871), 25 L. T. 784; 20 W. R. 199.

2418. Right to be registered with title of mortgagor—Indefeasible title—Though subsequent incumbrancers on register.]—A mtgor. registered with an indefeasible title made three successive mtges., all of which were entered on the register of incumbrances; the first mtgee. sold under his power of sale, & conveyed the estate to a purchaser:—*Held:* the purchaser was entitled to be registered with an indefeasible title, although the second & third mtges. remained on the register of incumbrances.—*Re* RICHARDSON (1871), L. R. 12 Eq. 398; 40 L. J. Ch. 616; 25 L. T. 12; 19 W. R. 1048.

registered judgment against a mtge. made before the delivery of the writ to the sheriff.—PEGGE *v.* METCALFE (1856), 5 Gr. 628.—**CAN.**

e. —— ——.]—Where a first mtgee. acquired, as he contended, a title through a purchaser at sheriff's sale of the equity of redemption of the mtged. premises, there being mesne incumbrances, it was held that he did not acquire the fee in the lands, the sheriff not having power to sell.—*Re* KEENAN (1871), 3 Ch. Ch. 285.—**CAN.**

f. —— *Purchase at undervalue.*]—Where an execution creditor purchased property at sheriff's sale at one-sixth of its value, the ct. held that effect could only be given to such a transaction as a security for the debt & costs, & not as an absolute purchase.—KERR *v.* BAIN (1865), 11 Gr. 423.—**CAN.**

g. *Purchaser taking with notice of prior unregistered bond—Liability to be redeemed.*]—WADDELL *v.* CORBETT (1874), 21 Gr. 384.—**CAN.**

h. *Presumption of existence of power.*]—In ejectment, where pltf. claimed under a deed executed by a mtgee. under power of sale:—*Held:* the estate in the mtge. having become absolute in law in the mtgee., there was no necessity for showing that there was a power of sale in the mtge. to convey the legal estate.—NESBITT *v.* RICE (1864), 14 C. P. 409.—**CAN.**

k. *Proceeding to impeach conveyance under power of sale—Burden of proof on purchaser.*]—In a proceeding to impeach a conveyance executed in pursuance of a sale, under power of sale, the purchaser, or those claiming under him, must show a due exercise of the power of sale; the *onus* of impeaching it is not upon the party alleging the invalidity of the deed.—BARTLETT *v.* JULL (1880), 28 Gr. 140.—**CAN.**

l. *Purchase by execution creditor—Whether estopped from disputing title.*]—An execution creditor who purchases & takes a transfer of a mtge. of property is not estopped thereby from setting up in an action against him for the seizure of the same property under his execution against the grantor of the mtgor., that the said grantor was not the owner of the property in question & that the conveyance to the mtgor. by him was fraudulent & void as against the

2419. Right to separate receipts—Two mortgagees—Necessity for apportionment.]—Trustees advanced money on mtge., the deed containing the usual power of sale & a declaration that the receipts of the mtgees. or their assigns should be sufficient discharges to purchasers, & that the power of sale might be exercised by any person who for the time being should be entitled to receive & give a discharge for the moneys for the time being owing upon the security of the mtge. By a memorandum of even date it was declared that the mtge. money belonged to the mtgees. in certain unequal shares. Subsequently the mtgees. assigned their shares separately to two sets of trustees, who, in exercise of the power of sale, offered part of the property for sale by auction. The purchaser of one of the lots accepted the title, but required that the purchase-money should be apportioned between the two sets of trustees, & that each set of trustees should give a separate receipt, & that this should appear on the conveyance. On a summons taken out for the opinion of the ct.:—*Held:* upon the true construction of the power of sale in the mtge. the persons beneficially entitled to the money had power to sell & to give receipts, & the joint receipt of the vendors was therefore sufficient & no apportionment was necessary.—*Re* PARKER & BEECH'S CONTRACT (1887), 56 L. J. Ch. 358; 56 L. T. 95; 35 W. R. 353, C. A.

2420. Mortgage of sum in court—Right to payment out—Appearance of mortgagor not necessary.]—CATTERSON *v.* CLARK, [1905] W. N. 173; *affd.* (1906), 95 L. T. 42, C. A.

Right to possession—Jurisdiction of Admiralty Court.]—*See* ADMIRALTY, Vol. I., p. 114, Nos. 186, 187.

B. Protection from Irregularity in Sale.

(a) In General.

2421. Where no express provision in mortgage—Fact giving rise to power of sale must be proved—What is evidence of default—Not unsupported declaration of mortgagee.]—(1) A mtgee. had a power of sale in case of default being made in payment of mtge. money:—*Held:* the unsupported solemn declaration, under Statutory Declarations Act, 1835 (c. 62), of the mtgee. alone, of a default having been made, was not sufficient evidence of that fact, as between vendor & purchaser.

(2) A sale was made by a mtgee. under a power, subject to certain special conditions. The fourth condition of sale was as follows, "the vendor shall deliver an abstract of title to the purchaser, or his solr., within two days of the day of sale, to the stock in question, & all & every objection to the title shall be made & communicated in writing to vendor's solr. within twenty-one days after the delivery of the abstract, & if the same be found valid the vendor shall be at liberty to rescind the contract on returning to the purchaser his deposit money; but all & every objection to the title not so taken & communicated within such period of twenty-one days from the delivery of the abstract aforesaid shall be deemed waived, & in this respect, time shall be considered the essence of the contract."

There were further conditions, to the effect that the purchaser should not require any other person than the vendor to join in the assignment, that all copies of deeds, etc., should be obtained at the expense of the purchaser, that any misstatement, etc., should not annul the sale, but should be the subject of compensation; & that on the purchasers failing to comply with the conditions, a resale might be made, & that the deficiency should be made good by the purchaser:—*Held:* they were not of such a depreciating character as to invalidate the sale.

I cannot say that these conditions of sale are of such a depreciatory character as to amount to a breach of trust, or constitute an objection to this title (LORD LANGDALE, M.R.).—HOBSON *v.* BELL, GLYNN *v.* BELL (1839), 2 Beav. 17; 8 L. J. Ch. 241; 3 Jur. 190; 48 E. R. 1084.

Annotations:—*As to* (1) **Refd.** Thurlow *v.* Mackeson (1868), 9 B. & S. 975. *As to* (2) **Refd.** Borell *v.* Dann (1843), 2 Hare, 440; Falkner *v.* Equitable Reversionary Soc. (1858), 4 Drew. 352. *Generally,* **Mentd.** Blacklow *v.* Laws (1842), 2 Hare, 40; Morley *v.* Cook (1842), 2 Hare, 106; Want *v.* Stallibrass (1873), L. R. 8 Exch. 175.

2422. Where express provision in mortgage—Purchaser protected.]—JENKINS *v.* JONES, No. 2333, *ante.*

2423. ——— Though mortgage actually paid off.]—A mtge. contained a power of sale to be exercised by the mtgee. after default, with a proviso that upon any sale purporting to be made in pursuance of the power, the purchaser should not be bound to inquire whether default had been made in payment of any principal or interest, or as to the propriety or expediency of such sale, & that, notwithstanding any impropriety or irregularity in any such sale, the same should, as regarded the protection of the purchaser, be taken to be within the power, & the remedy of the mtgor. should be in damages only. The mtgee. purported to exercise the power in favour of a purchaser for value. In a suit by an incumbrancer of the mtgor. to establish his priority over the mtgee., it was alleged that if the accounts were taken it would show that the security was satisfied at the time

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creditors of the latter.—GORDON *v.* PROCTOR (1890), 20 O. R. 53.—**CAN.**

m. *Growing crops.*]—A conveyance by a mtgee. under a power of sale passes to the purchaser everything which the mtgee. could beneficially hold possession of, &, therefore, entitles the purchaser to the growing crops.—DYCK *v.* DYCK (Man.), [1926] 3 W. W. R. 762.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 8.—B. (a).

n. *Allowance for improvements.*]—A person purchased under a power of sale in a mtge., but the sale was irregular, & was set aside:—*Held:* as a condition of relief against him he should be allowed for all the improvements he had made under the belief that he was absolute owner, so far as these improvements enhanced the value of the property, but no further.—CARROLL *v.* ROBERTSON (1868), 15 Gr. 173.—**CAN.**

o. *Purchaser without notice—Whether put on inquiry.*]—GUNN *v.* DOBLE (1869), 15 Gr. 655.—**CAN.**

p. ——— ———.]—*Held:* as the power of sale was an absolute one, & was properly exercised, & the sale was to *bonâ fide* purchasers, without notice at the best available price, the purchasers were protected, notwithstanding that they made no inquiry as to the title.—WILLIAMS *v.* SUN LIFE ASSURANCE CO. (1911), 19 W. L. R. 564; 1 W. W. R. 86; 16 B. C. R. 370; *affd.* (1912), 21 W. L. R. 271; 1 W. W. R. 1222.—**CAN.**

q. *Mortgagor left in possession.*]—*Semble:* a purchaser from a mtgee. under the power of sale contained in a mtge., leaving the mtgor. in possession, is protected so long as the mtge. under which he bought has the protection given it by the registration; but when the term of the mtge. expires the purchaser is no longer protected, unless he takes actual possession, or procures & registers a bill of sale from the mtgee.—CARLISLE *v.* TAIT (1881), 32 C. P. 43.—**CAN.**

r. *Effect of long possession.*]—Plts., husband & wife, sought redemption or other relief in respect of land acquired by C., deceased, in 1903, as the purchaser at sales under the power of sale contained in mtgees. made by the husband, alleging that the sales were irregular:—*Held:* if there was any irregularity in the exercise of the powers of sale, C. & defts., representing C.'s estate or claiming under him, having been in undisturbed possession since 1903 or 1904, had a good defence under Limitation Act.—GIRARDOT *v.* CURRY (1916), 38 O. L. R. 350; 33 D. L. R. 272.—**CAN.**

t. *Voidable sale—Effect of confirmation.*]—If a mtgee. brings the mtged. property to sale in contravention of the provisions of Transfer of Property Act, 1882, s. 99, such sale is not void, but merely voidable. If

Sect. 2.—Sale: Sub-sect. 8, B. (a) & (b); sub-sects.

of the sale:—*Held:* the sale, having been made to a *bonâ fide* purchaser without notice, was valid, even if the security should prove to have been satisfied.—DICKER *v.* ANGERSTEIN (1876), 3 Ch. D. 600; 45 L. J. Ch. 754; 41 J. P. 53; 24 W. R. 844.

Annotation:—**Expld. & Distd.** Life Interest & Reversionary Securities Corpn. *v.* Hand-in-Hand Fire & Life Insce. Soc., [1898] 2 Ch. 230.

2424. Sale under statutory powers—Conveyancing Act, 1881 (c. 41), s. 21—No protection until conveyance obtained.]—The provision in above sect., sub-sect. 2, that where a conveyance is made in professed exercise of the power of sale conferred on mtgees. by the Act, the title of the purchaser shall not be impeached on the ground that the power was improperly exercised, does not apply until the conveyance has been obtained; consequently, it does not preclude a person who has contracted to purchase from a mtgee. purporting to sell under his statutory power of sale from inquiring whether the vendor was in a position to exercise the power, nor from proving *aliunde*, in answer to an action for specific performance, that the power was improperly exercised.—LIFE INTEREST & REVERSIONARY SECURITIES CORPN. *v.* HAND-IN-HAND FIRE & LIFE INSURANCE SOCIETY, [1898] 2 Ch. 230; 67 L. J. Ch. 548; 78 L. T. 708; 46 W. R. 668; 42 Sol. Jo. 592.

2425. —— —— Power abrogated.]—The exception from the prohibition against realising a security mentioned in Courts (Emergency Powers) Act, 1914 (c. 78), s. 1 (1) (b), in favour of "a mtgee. in possession" is limited to a mtgee. lawfully in possession & does not extend to a mtgee. who has wrongfully taken possession in contravention of the express provisions of the Act.

Mtgor. having become bkpt. in 1911, the second mtgees. went into & continued in possession of the mtged. property until Dec. 1914, when B., the first mtgee., without objection on the part of the second mtgees. & without having applied to the ct. for leave under Courts (Emergency Powers) Act, 1914 (c. 78), went into possession, & in Mar. 1915, under the power conferred upon her by above Act, sect. 18, appointed a receiver. In 1918, B., holding herself out as mtgee. in possession & again without the leave of the ct., purported to sell the mtged. property in lots to deft. purchasers, who completed their respective purchases with notice that their vendor was not in a position to make a good title. In an action by the second mtgees. for redemption & possession against the legal personal representative of B., since deceased, & the several purchasers from B.:—*Held:* above sect., sub-sect. 2, afforded no defence to the action, as the attempted exercise of the power of sale in contravention of Courts (Emergency Powers) Act, 1914 (c. 78), was not within the purview of that sect. a mere "improper or irregular exercise of the power"; & in default of compliance with the requirements of Courts (Emergency Powers) Act, 1914 (c. 78), the effect of that Act was to abrogate the power.—ANCHOR TRUST CO., LTD. *v.* BELL, [1926] Ch. 805; 95 L. J. Ch. 564; 135 L. T. 311; 70 Sol. Jo. 668.

See, now, Law of Property Act, 1925 (c. 20), s. 104 (2).

(b) Effect of Notice of Irregularity.

2426. Whether purchaser protected — General rule.]—JENKINS *v.* JONES, No. 2333, *ante*.

2427. —— ——.]—"I think that Mr. Lilley is entitled to the benefit of these provisions [Conveyancing Act, 1881 (c. 41), s. 21], unless it can be made out that he had notice that the powers of sale contained in the mtges. of 1888 were improperly or irregularly exercised by Barnes. . . . I think that to uphold the title of a purchaser who had notice of impropriety or irregularity in the exercise of the power of sale would be to convert the provisions of the statute into an instrument of fraud" (STIRLING, J.).—BAILEY *v.* BARNES, [1894] 1 Ch. 25; 63 L. J. Ch. 73; 69 L. T. 542; 42 W. R. 66; 38 Sol. Jo. 9; 7 R. 9, C. A.

Annotations:—**Refd.** *Re* Scott & Alvarez's Contract, [1895] 1 Ch. 596; Life Interest & Reversionary Securities Corpn. *v.* Hand-in-Hand Fire & Life Insce. Soc., [1898] 2 Ch. 230; Freeman *v.* Laing, [1899] 2 Ch. 355; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231; Hunt *v.* Luck, [1902] 1 Ch. 428. **Mentd.** *Re* White & Smith's Contract, [1896] 1 Ch. 637; *Re* Alms Corn Charity, Charity Comrs. *v.* Bode (1901), 71 L. J. Ch. 76; *Re* Handman & Wilcox's Contract, [1902] 1 Ch. 599; *Re* Childe & Hodgson's Contract (1905), 54 W. R. 234.

2428. —— Irregularity as to notice.]—(1) There is no rule in equity that a second mtgee. shall not purchase from a first mtgee. selling under his power of sale.

(2) Where a first mtgee. under his power of sale sold the mtged. premises by private contract to second mtgees., who were mtgees. in possession & also trustees for sale for the mtgor., & the mtge. deed required that, before any sale should be made, three months' notice should be given to the mtgor., & contained a clause that a purchaser should not be required to ascertain that previous notice had been given, or to inquire into the necessity or expediency of the sale, & that the mtgee.'s discharge should be a sufficient discharge. The second mtgees., at the time they purchased, knew that the three months' notice had not been given to the mtgor., he having died some time before, & no administration having then been taken out to his estate. Upon a suit for redemption by the mtgor.'s administratrix:—*Held:* she was entitled to redeem, & the clause, discharging a purchaser from ascertaining whether proper notice has been given, does not protect a purchaser who purchases with actual knowledge that such notice has not been given.—PARKINSON *v.* HANBURY (1860), 1 Drew. & Sm. 143; 8 W. R. 575; 62 E. R. 332; *on appeal* (1865), 2 De G. J. & Sm. 450, L. JJ.; (1867), L. R. 2 H. L. 1, H. L.

Annotations:—*As to* (1) **Apld.** Shaw *v.* Bunny (1865), 2 De G. J. & Sm. 468. **Consd.** Rajah Kishendatt Ram *v.* Rajah Mumtaz Ali Khan (1879), L. R. 6 Ind. App. 145. **Refd.** Kirkwood *v.* Thompson (1865), 2 Hem. & M. 392. *As to* (2) **Distd.** Kirkwood *v.* Thompson (1865), 2 Hem. & M. 392. **Folld.** Selwyn *v.* Garfit (1888), 38 Ch. D. 273. **Refd.** Bailey *v.* Barnes, [1894] 1 Ch. 25. *Generally,* **Mentd.** Whyte *v.* Ahrens (1884), 26 Ch. D. 717; Leitch *v.* Abbott (1886), 31 Ch. D. 374; Sachs *v.* Speilman (1887), 37 Ch. D. 295; Hatten *v.* Russell (1888), 38 Ch. D. 334; Gaskell *v.* Gosling, [1896] 1 Q. B. 669; *Re* Colnbrook Chemical & Explosives Co., A.-G. *v.* The Co., [1923] 2 Ch. 289.

such a sale is confirmed, the auction purchaser, whether he be an outsider or the mtgee. bidding with the leave of the ct., obtains an indefeasible title, & the right of the mtgor. & those who represent him to redeem is absolutely extinguished.—LAL BAHADUR SINGH *v.* ABHARAN SINGH (1915), I. L. R. 37 All. 165.—**IND.**

PART XIII. SECT. 2, SUB-SECT. 8.—B. (b).

2426 i. *Whether purchaser protected—General rule.*]—*Held:* the clause in the power relieving the purchaser from inquiry whether the proper notice of sale had been given did not protect B. who purchased with actual knowledge that the notice had not been given.—SWINNY *v.* RODBURN & RICE (1888), 27 N. B. R. 175.—**CAN.**

2428 i. —— *Irregularity as to notice.*]—*Re* MARTIN & MERRITT (1901), 22 C. L. T. 116; 3 O. L. R. 284.—**CAN.**

a. —— *Constructive notice.*]—HOGG *v.* WALLIS (1857), 6 Gr. 150.—**CAN.**

b. —— ——.]—LAWLOR *v.* DAY (1899), 29 S. C. R. 441.—**CAN.**

2429. —— —— When waiver might have been given.]—A proviso relieving a purchaser under a power from inquiring as to the regularity of a sale does not protect a purchaser who knows of an irregularity which cannot have been waived. *Qu.:* whether the same rule would apply where the irregularity was one which might have been waived.

A mtge. deed contained a covenant to pay at the expiration of six months, & a power of sale in the usual form, with a proviso that the power should not be executed until the mtgee. had given notice to the mtgor. to pay off the debt, & default should have been made for three months. The deed contained also the usual clause for the protection of purchasers in any sale purporting to be made under the power. The mtgor. subsequently incumbered his equity of redemption. Two months after the date of the mtge. the mtgee. gave notice to the mtgor. to pay off the debt, & seven months after the date of the mtge. sold the property to deft. In an action by the mtgor. to set aside the sale.—*Held:* three months not having elapsed since default in payment of the mtge. debt, the proviso had not been complied with, & the sale was invalid; & as the purchaser must be taken to have known that the proviso had not been complied with, she was not protected by the protection clause; the mtgor. having incumbered his equity of redemption, &, therefore, not being in a position to waive the necessity of notice, the purchaser had no right to assume that there had been any such waiver.—SELWYN *v.* GARFIT (1888), 38 Ch. D. 273; 57 L. J. Ch. 609; 59 L. T. 233; 36 W. R. 513; 4 T. L. R. 385, C. A.

Annotations:—**Consd.** *Re* Thompson & Holt (1890), 44 Ch. D. 492. **Distd.** Barker *v.* Illingworth, [1908] 2 Ch. 20. **Refd.** Bailey *v.* Barnes, [1894] 1 Ch. 25; Toronto Corpn. *v.* Russell, [1908] A. C. 493.

2430. —— —— When waiver impossible.]—SELWYN *v.* GARFIT, No. 2429, *ante*.

SUB-SECT. 9.—RIGHTS AS BETWEEN SUCCESSIVE INCUMBRANCERS.

See Law of Property Act, 1925 (c. 20), s. 50.

2431. Right of first mortgagee to sell—Duty to inform second mortgagee—Purchase of second mortgagee's interest.]—A first mtgee. by a verbal contract agreed to sell his interest to A.; a second mtgee., the value of whose interest was, by the fact of the first mtgee.'s sale, increased, but which sale was unknown to him, offered to sell at an undervalue to B., who had notice of the sale to A.:—*Held:* the concealment of the purchase by A. was no fraud upon the second mtgee.—DOLMAN *v.* NOKES (1856), 27 L. T. O. S. 178, L. C.

2432. Right of second mortgagee to sell—Subject to first mortgage—Without consent of first mortgagee.]—Property subject to two mtges. was assigned to the second mtgee. upon trust to sell, & out of the proceeds to pay off the first mtge., then the second mtge., & pay the surplus to the mtgor.:—*Held:* this did not bind the trustee not to sell unless he could so pay off the first mtge., & a sale subject to the first mtge. was valid.—MANSER *v.* DIX (1857), 8 De G. M. & G. 703; 3 Jur. N. S. 252; 44 E. R. 561, L. JJ.

2433. Right to sell jointly—Validity of title.]—The first & second mtgees. of an estate had power of sale & of giving good receipts. They joined together in selling, & each received his portion of the purchase-money, for which they have a rec ipt to the purchaser:—*Held:* a title depending on this sale was perfectly good.—M'CAROGHER *v.* WHIELDON (1864), 34 Beav. 107; 55 E. R. 574.

Right to pay into court.]—*See* SALE OF LAND.

Right of subsequent incumbrancer to buy.]—*See* Sub-sect. 7, B. (*b*), *ante*.

SUB-SECT. 10.—APPLICATION OF PROCEEDS.

A. Position of Mortgagee.

See Law of Property Act, 1925 (c. 20), ss. 105, 107; Trustees & Mortgages Act, 1860 (c. 145), s. 14.

2434. Trustee of surplus proceeds.]—A mtgee. of chattels in possession, & proceeding under the power in his deed of assignment to sell the mtge. property, is, after satisfying the amount of his mtge. security & the expenses of the sale, a trustee of the surplus proceeds; & where the mtgee., by his answer to the bill of an execution creditor, declared his intention to pay such proceeds to certain claimants, in respect of an execution & an assignment, both subsequent to the delivery to the sheriff of the writ of execution, obtained by pltf., the surplus proceeds of the property already sold were ordered to be paid into ct., & a receiver appointed of the moneys to arise by the future sales.—GOUTHWAITE *v.* RIPPON (1838), 8 L. J. Ch. 139; 3 Jur. 7.

2435. —— On behalf of mortgagor.]—A. the first mtgee. of a ship, with the sanction & authority of B., the second mtgee., sold it & received the proceeds, which exceeded the amount due to him:—*Held:* A. was accountable to B. in the character of trustee, & A. having insisted that there was a deficiency, & having neglected to account, & a balance having been found against A. in a suit by B., A. ought to pay the costs of the suit. B., however, had made charges, in which he failed, & the ct. therefore gave neither party costs.—TANNER *v.* HEARD (1857), 23 Beav. 555; 29 L. T. O. S. 257; 3 Jur. N. S. 427; 5 W. R. 420; 53 E. R. 219.

Annotations:—**Consd.** Banner *v.* Berridge (1881), 18 Ch. D. 254. **Refd.** Charles *v.* Jones (1887), 35 Ch. D. 544; Williams *v.* Jones (1911), 55 Sol. Jo. 500.

2436. —— —— ——.]—JENKINS *v.* JONES, No. 2333, *ante*.

2437. —— —— ——.]—TALBOT *v.* FRERE, No. 2451, *post*.

2438. —— —— —— Subject to mesne incumbrances.]—RAJAH KISHENDATT RAM *v.* RAJAH MUMTAZ ALI KHAN, No. 2320, *ante*.

2439. —— —— ——.]—WEST LONDON COMMERCIAL BANK *v.* RELIANCE PERMANENT BUILDING SOCIETY, No. 2477, *post*.

2440. —— ——.]—WARNER *v.* JACOB, No. 2331, *ante*.

PART XIII. SECT. 2, SUB-SECT. 9.

c. *Mortgagor purchasing at sale under first mortgage.*]—V., having mortgaged certain lands to G., subsequently sold his equity of redemption in a portion of the lands to B., from whom he took a mtge., which he assigned to pltf. G. subsequently sold the whole of the lands, under a power of sale in his mtge., & B. became the purchaser:—*Held:* B.'s purchase under the power of sale in the first mtge. did not cut out, but enured to the benefit of, V., the second mtgee.—BOX *v.* BRIDGMAN (1875), 6 P. R. 234.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 10.—A.

2434 i. *Trustee of surplus proceeds.*]—As trustee shall have nothing out of the trust fund, so mtgee. shall have nothing out of the mtgee. fund, but his principal & interest.—GUBBINS *v.* CREED (1804), 2 Sch. & Lef. 214.—**IR.**

2435 i. —— *On behalf of mortgagor.*]—Where a mtgee., who had sold under the power in the mtge., paid over the surplus on the order of J., the apparent owner of the equity of redemption:—*Held:* even if the deed under which J. claimed was voidable, nevertheless the mtgee. was entitled to act on her order.—HARPER *v.* CULBERT (1883), 5 O. R. 152.—**CAN.**

Sect. 2.—Sale: Sub-sect. 10, A. & B. (a), (b) & (c).]

2441. —— ——.]—In 1868, after the death of the mtgor. intestate & without next of kin, the mtgee. sold the mtged. property under the power of sale contained in the deed. The balance of the proceeds of sale, after payment of the mtge. debt, was retained by B.. who had acted as solr. for both parties in effecting the mtge., & for the mtgee. in the sale. The mtge. contained the usual provisions for payment of the surplus, if any, of the moneys arising from the sale to the mtgor., his heirs & assigns. In 1877 the mtgee. died. In 1881 B. died, no claim having ever been made on him for the balance of the proceeds of sale by any one representing the mtgor. In the administration of B.'s estate, a claim was made for this balance by the legal personal representative of the mtgee. :—*Held:* B. having received these surplus proceeds of sale as the fiduciary agent of the mtgee., who was himself a trustee for the mtgor., Stat. Limitations did not apply, & the claim must be allowed. —*Re* BELL, LAKE *v.* BELL (1886), 34 Ch. D. 462 ; 56 L. J. Ch. 307 ; 55 L. T. 757 ; 35 W. R. 212.

Annotation :—**Refd.** Soar *v.* Ashwell, [1893] 2 Q. B. 390.

2442. —— **On behalf of subsequent incumbrancers.**]—RAJAH KISHENDATT RAM *v.* RAJAH MUMTAZ ALI KHAN, No. 2320, *ante*.

2443. —— **Whether express trustee.**]—LOCKING *v.* PARKER, No. 2814, *post*.

2444. —— —— **Where express trust mortgage deed.**]—(1) Where under an ordinary power of sale in a mtge. there is an express trust of the moneys to be received by the mtgee., that is not a trust which the mtgor. can enforce at all, except as to the surplus. Where a trust is so expressed, he may say the mtgee. is a trustee for me of the surplus (KAY, J.).

(2) Where there was no trust expressed either in writing or verbally of the proceeds of sale, no trust can possibly arise until it is shown there is a surplus, & then I should be disposed to hold that there is sufficient fiduciary relation between the mtgor. & mtgee., to make the mtgee. constructively a trustee of the surplus, in case it is shown there is a surplus (KAY, J.).

(3) Upon the balance, if any, Berridge [mtgee.] is to be charged 4 per cent. interest (KAY, J.).—BANNER *v.* BERRIDGE (1881), 18 Ch. D. 254 ; 50 L. J. Ch. 630 ; 44 L. T. 680 ; 29 W. R. 844 ; 4 Asp. M. L. C. 420.

Annotations :—As to (2) **Refd.** The Benwell Tower (1895), 72 L. T. 664. *Generally*, **Refd.** Dooby *v.* Watson (1888), 39 Ch. D. 178 ; Firth *v.* Slingsby (1888), 58 L. T. 481 ; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196. **Mentd.** Soar *v.* Ashwell, [1893] 2 Q. B. 390 ; Price *v.* Phillips (1894), 13 R. 191 ; Friend *v.* Young, [1897] 2 Ch. 421 ; Kessisoglu *v.* Balli (1903), 47 Sol. Jo. 738.

2445. —— —— **Sale under statutory power.**]—A first mtgee. who has sold the mtged. property under his statutory power of sale is under a statutory obligation by virtue of Conveyancing & Law of Property Act, 1881 (c. 41), ss. 21 (3), 22, to hand the surplus proceeds remaining after his claim as first mtgee. has been satisfied to the second mtgee. or other the person entitled to the mtged. property & authorised to give a receipt for the proceeds of sale thereof. He is not entitled to retain the surplus proceeds & assert on behalf of a third mtgee. or the mtgor. a right to be paid the whole surplus after payment to the second mtgee. of the principal moneys owing on the second mtge. & six years' arrears of interest only.—*Re* THOMSON'S MORTGAGE TRUSTS, THOMSON *v.* BRUTY, [1920] 1 Ch. 508 ; 89 L. J. Ch. 213 ; 123 L. T. 138 ; 64 Sol. Jo. 375.

2446. When constructive trust arises—Existence of surplus must be shown.]—BANNER *v.* BERRIDGE, No. 2444, *ante*.

B. Rights of Mortgagee.

(a) In General.

2447. Priority of payment—Sale under special Act — Express provision for priority — Effect of general saving clause.]—Act of Parliament for sale of S.'s estate, & that the moneys arising by sale should be first applied to pay off the mtges., & afterwards for payment of statutes, judgments, & recognisances, with a saving to all but the right of the heirs of S. Decreed that subsequent mtges. shall be paid before precedent statutes.—WARD *v.* CECIL (1715), 2 Vern. 711 ; 23 E. R. 1068, L. C.

Annotations :—**Refd.** Mitford *v.* Elliott (1817), 8 Taunt. 1. **Mentd.** Riddell *v.* White (1794), 1 Anst. 281 ; Dawson *v.* Paver (1847), 5 Hare, 415.

2448. —— **Over subsequent Crown debt.**]—An agreement on borrowing, by recital in a bond, money, on the part of the borrower, that certain real property, freehold & leasehold, should stand pledged for repayment of it, & a delivery of the title deeds, amounting in equity to a mtge., or right to a mtge., creates a lien binding as against the prerogative lien of the Crown in respect of a debt accruing due to the King subsequently ; & the equitable mtgees. are entitled to be first paid their principal & interest out of the produce of the sale of the premises, the property of the Crown debtor, seized under an extent in chief. Where part of the property so equitably pledged was leasehold, renewable by the lessee, & the equitable mtgee. had procured a renewal of the lease in the name of the lessee, the Crown debtor, by surrendering the original lease & taking a new one of the same premises after the Crown debt had accrued—such new lease, & the premises leased thereby, held to be subject to the equitable lien on the old lease, & the lien to be preferable to the demand on the part of the Crown against the Crown debtor in respect of priority of satisfaction out of the proceeds of the sale.—FECTOR *v.* PHILPOTT & A.-G. (1823), 2 Price, 197 ; 147 E. R. 697, Ex. Ch.

2449. —— **Effect of general lien—Particular appropriation.**]—A merchant deposited with his broker bills of lading for cotton to arrive per Sultan, as a security for a bill of exchange drawn by the merchant, & accepted by the broker. The broker made various other advances on a general account to the merchant, but without any particular security ; &, subsequently, the merchant arranged with the broker, for his acceptance of another bill drawn by the merchant, & as a security deposited bills of lading for other cotton to arrive by the same ship ; the bill of exchange being expressed to be drawn " against cotton per Sultan." Both the bills of exchange were discounted by a third party, to whom the merchant gave a memorandum giving him the same security on the cotton as he had before given to the broker. The merchant & broker both stopped payment, & the bills were not met at maturity. Upon a bill filed

2442 i. —— *On behalf of subsequent incumbrancers.*]—Mtgee. who has sold under his power of sale is trustee in equity for subsequent incumbrancers of any surplus in his hands after his claim is satisfied.—MORRIS *v.* FENNELL (P. E. I.) (1914), 14 E. L. R. 263.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 10.—B. (a).

d. *Mortgage by principal — Exoneration of surety.*]—Deft. gave his bond in £1,000 as security for pltfs.' agent. The agent misapplied a larger sum than this, but gave a mtge. to pltfs. of lands, which were sold under an order in chancery, & the proceeds applied towards payment of the sum due, leaving a balance larger than the amount of deft.'s bond :—*Held:* pltfs. were entitled to apply the proceeds of the sale of the mtged. lands in reduction of the general balance, & not in

by the discounters & holders of the bills of exchange:—*Held:* there having been a particular appropriation of the cotton for that purpose, the proceeds of the cotton must be first applied in discharging the bills of exchange, to secure which they had been deposited, the particular appropriation taking priority over any general lien which might exist over the security deposited.—INMAN *v.* CLARE (1858), John, 769; 32 L. T. O. S. 353 5 Jur. N. S. 89; 70 E. R. 629.

Annotations:—**Refd.** *Re* Francis & Hooper, *Ex p.* London & Westminster Bank (1860), 3 L. T. 484; Frith *v.* Forbes (1862), 31 L. J. Ch. 792; *Re* Streatfeild, Laurence & Mortimore, *Ex p.* Cunliffe (1862), 6 L. T. 695; *Re* Barned's Banking Co., *Ex p.* Stephens (1868), 3 Ch. App. 753 *Re* Leggatt, *Re* Gledstanes, *Ex p.* Dewhurst (1873), 8 Ch App. 965; *Re* Yglesias, *Ex p.* Gomez (1875), 10 Ch. App. 639; *Re* Suse, *Ex p.* Dever (1884), 13 Q. B. D. 766; Brown, Shipley *v.* Kough (1885), 29 Ch. D. 848. **Mentd** *Re* Strachan, *Ex p.* Cooke (1876), 4 Ch. D. 123; Spartal *v.* Crédit Lyonnais (1885), 2 T. L. R. 178.

(*b*) *As to Unsecured Debts.*

2450. Right to retain surplus—In satisfaction of unsecured debt — After death of mortgagor.]—The mtgees. of a policy of assurance, mortgaged to them by deceased testator to secure a sum of money, received after testator's death, under the policy, a sum exceeding the amount due to them for principal & interest in respect of the mtged. debt. They were also creditors of testator for other debts not secured:—*Held:* they were entitled to retain the balance in their hands in discharge of their unsecured debts.—*Re* HASELFOOT'S ESTATE, CHAUNTLER'S CLAIM (1872), L. R. 13 Eq. 327; 41 L. J. Ch. 286; 26 L. T. 146.

Annotations:—**Apld.** *Re* General Provident Assce., *Ex p.* National Bank (1872), L. R. 14 Eq. 507. **Distd.** Pile *v.* Pile (1875), 23 W. R. 440. **Dbtd.** Talbot *v.* Frere (1878), 9 Ch. D. 568; *Re* Gregson, Christison *v.* Bolam (1887), 36 Ch. D. 223.

2451. —— —— —— Not in preference to other creditors.]—Where a mtgor. dies insolvent, & the mtgee. then realises his security &, after paying himself the mtge. debt out of the proceeds, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due to him from the mtgor., & so give himself a preference over the other creditors, but must hand it over to the mtgor.'s legal personal representative as part of his estate; the mtgee. being merely in the position of a trustee of the surplus for the estate; & if the mtgee. in such a case happens to be the exor. of the mtgor., still he cannot, under an exor.'s general right of retainer or preference, retain the surplus in payment of the simple contract debt, to the prejudice of a creditor of a higher degree, whether the debt is due to himself individually or to a partnership of which he happens to be a member.

A., having mortgaged certain life policies to B. & C., a firm of solrs., to secure a bill of costs, died insolvent. B. & C. then received the policy moneys, & after paying themselves their mtge. debt thereout, had a surplus remaining in their hands. A.'s widow & extrix. then filed a bill against B. & C. for accounts & payment of the surplus, & a decree was made directing the usual mtgor. & mtgee. accounts against B. & C., under which a balance was found due from them as mtgees. After the decree A.'s extrix. died, having appointed B. her exor., & the action was revived against B. & C. by substituting a judgment creditor of A. as pltf. A summons by B. & C. to be allowed to retain the balance in payment of a simple contract debt due to them from A. was refused, with costs.—TALBOT *v.* FRERE (1878), 9 Ch. D. 568; 27 W. R. 148.

Annotations:—**Folld.** *Re* Gregson, Christison *v.* Bolam (1887), 36 Ch. D. 223. **Consd.** *Re* Thorne, [1914] 2 Ch. 438. **Refd.** Roxburghe *v.* Cox (1881), 17 Ch. D. 520; *Re* Gedney, Smith *v.* Grummitt, [1908] 1 Ch. 804. **Mentd.** *Re* Hankey, Cunliffe Smith *v.* Hankey, [1899] 1 Ch. 541; *Re* Sutherland, Michell *v.* Bubna, [1914] 2 Ch. 720.

2452. —— —— Mortgage to bank.]—A co. deposited title deeds with a bank "as collateral security for bills under discount." At the time the co. was wound up they were indebted to the bank in respect of other bills than those actually discounted for them, & the securities realised more than was sufficient to cover the latter bills:—*Held:* the co. could effect a mtge. by deposit of deeds without complying with the formalities required by their articles of association upon the execution of mtge. deeds; the bankers were not in the position of officers of the co., who were bound to see that the required formalities were complied with, & the bank was entitled to hold the balance of the proceeds upon the sale of the securities, to meet the whole amount due to them by the co.—*Re* GENERAL PROVIDENT ASSURANCE CO., *Ex p.* NATIONAL BANK (1872), L. R. 14 Eq. 507; 41 L. J. Ch. 823; 27 L. T. 433; 20 W. R. 939.

Annotations:—**Distd.** Pile *v.* Pile (1875), 23 W. R. 440. **Dbtd.** *Re* Gregson, Christison *v.* Bolam (1887), 36 Ch. D. 223. **Mentd.** *Re* General South American Co. (1876), 2 Ch. D. 337.

Mortgagee as executor of mortgagor.]—*See* EXECUTORS, Vol. XXIV., pp. 724, 725, Nos. 7524–7527.

Bankers.]—*See* BANKERS, Vol. III., pp. 287–290, Nos. 889–904.

(*c*) *Payment into Court.*

See Law of Property Act, 1925 (c. 20), s. 50, *&, generally,* TRUSTS & TRUSTEES.

2453. When payment in may be made—Absence of release by co-mortgagor—Interest transferred to other mortgagor—With power to give receipts.]—Trustees, who had, without sufficient reason, paid trust fund into ct. under Trustee Relief Act, were ordered to pay the costs of a petition for its payment to the party entitled. A. & B., being each entitled to one-fifth of a reversionary fund, mortgaged their shares with a power of sale. B. was a mere surety for A., & A. afterwards assigned his share to B. for his indemnity, with a power to sell & to give receipts for the share & the produce of the sale. The mtgees. sold the reversionary interest & refused to pay the surplus to B. without the concurrence & release of A. & they paid the fund into ct. under Trustee Relief Act:—*Held:* this was improper & they were ordered to pay the costs of a petition to get the money out of ct.—FOLIGNO'S MORTGAGE (1863), 32 Beav. 131; 55 E. R. 51.

exoneration of deft.'s bond.—COMMERCIAL BANK OF MIDLAND DISTRICT *v.* MUIRHEAD (1854), 4 C. P. 434.—**CAN.**

e. Mortgagee only chargeable with purchase-money actually received.]—BANK OF UPPER CANADA *v.* WALLACE (1869), 16 Gr. 280.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 10.—B. (e).

f. When payment in may be made.]—A mtge. sale under power yielded a surplus of $320.29, out of which the mtgee. applied to pay into ct. $246.89, being the amount of a judgment against the mtgor., which the judgment creditor sought by suit to have paid out of the surplus as against the owner of the equity of redemption in the mtge.:—*Held:* on the mtgee. paying into ct. the whole surplus, less the costs of his appearance & application, his name should be struck out of the suit.—BOYNE *v.* ROBINSON (1904), 25 C. L. T. 75; 3 N. B. Eq. Rep. 57.—**CAN.**

g. ——.]—*Semble:* if, after reasonable inquiry a mtgee. is unable to ascertain the amount due to the subsequent incumbrancers, or if some doubtful question arises, he is justified in paying the money into ct.—*Re* J. I. CASE THRESHING & MACHINE CO. MORTGAGE SALE (1911), 19 W. L. R. 701; 1

Sect. 2.—Sale: Sub-sect. 10, B. (c), C., D. & E.]

2454. When payment in may be ordered—Not when money not in hands of mortgagee—Though improperly paid away.]—Upon an interlocutory motion by pltfs., second mtgees., that defts., the first mtgee. & his solr., should be ordered to pay into ct. the balance of the proceeds of sale of the mtged. property, which the solr. admitted that he had received for his client, after deducting what was due in respect of the first mtge., the solr. claimed to retain also the amount of payments which he had made to the exors. of the mtgor. :—*Held :* though those payments were improper, yet, as the amount of them was not in the hands of defts., they could not be ordered to pay it into ct. upon an interlocutory motion, & they were ordered to pay only the balance of the sale moneys after deducting that amount & the amount due on the first mtge.—CROMPTON & EVANS' UNION BANK *v.* BURTON, [1895] 2 Ch. 711 ; 64 L. J. Ch. 811 ; 73 L. T. 181 ; 44 W. R. 60 ; 13 R. 792.

2455. Effect of improper payment in—Liability for costs of application for payment out.] — *Re* FOLIGNO'S MORTGAGE, No. 2453, *ante*.

2456. Right of mortgagee to payment out—Debt, interest & costs—Without order for account.] —A mtgee. sold under a power, & paid the money into ct. On a petition to have his debt, interest, & costs paid to him out of the fund :—*Held :* he was entitled to such an order without an account being directed.—BINGHAM *v.* KING (1866), 14 W. R. 414.

C. Rights of Mortgagor and Persons Claiming under him.

2457. Right to recover surplus.]—An account directed for all moneys received on the sale of stock pledged, notwithstanding the day of redemption was past ; it not appearing that deft. had sufficient stock at the day.—HARRISON *v.* HART (1726), 1 Com. 393 ; 2 Eq. Cas. Abr. 6 ; 92 E. R. 1126.

2458. —— Where absolute assignment—Subsequent acknowledgment by mortgagee.] — Pltf. assigned his ship to deft. as a security for the repayment of money ; but on the register it appeared to be an absolute assignment. Deft. sold the ship, & told pltf. that he had received the purchase-money, & would account with him for the balance of the proceeds of the sale. In an action upon the money counts :—*Held :* pltf. was entitled to recover this balance, the acknowledgment being sufficient to support the action.—PROUTING *v.* HAMMOND (1819), 8 Taunt. 688 ; 129 E. R. 552.

Annotations :—**Mentd.** Davenport *v.* Whitmore (1836), 2 My. & Cr. 177 ; Armstrong *v.* Armstrong (1855), 21 Beav. 78.

2459. ——— Effect of abandonment.]—Where a mtgor. had executed an agreement to deliver up possession of the mtged. property, & to release all his interest to the mtgee., & the agreement was not acted upon for twelve years, when the property was sold :—*Held :* under the circumstances the mtgor. was entitled to the surplus of the purchase-money. —RUSHBROOK *v.* LAWRENCE (1869), 5 Ch. App. 3 ; 39 L. J. Ch. 93 ; 21 L. T. 477 ; 18 W. R. 101, L. C.

2460. Who may recover surplus—Sale after death of mortgagor—Devisee of mortgaged premises.]—An action for money had & received will lie at the suit of the devisee of mtged. premises against the mtgee., to recover the overplus of the proceeds of a sale by the mtgee. under a power in the mtge. deed, such sale taking place after the death of the mtgor.—HARDEY *v.* FELTON (1850), 14 L. T. O. S. 346.

—— ——.]—*See* EQUITY, Vol. XX., p. 365, Nos. 1023–1026.

2461. —— Sale before death of mortgagor—Administrator—Amount paid into court but not claimed.]—A mtgee., in pursuance of the power in his mtge. deed, sold the real estate comprised therein, & paid the surplus moneys into ct. to the credit of the mtgor. The moneys were not claimed by the mtgor. during her lifetime :—*Held :* the administrator of the mtgor. was entitled to have the fund in ct. paid out, although the application was opposed by the heir-at-law, of the mtgor., upon the ground that the mtgor. at the time of executing the mtge., was not of sound mind & that an action of ejectment had been brought by the heir-at-law against the purchaser of the mtged. property.—*Re* SMITH'S MORTGAGE ACCOUNT (1861), 7 Jur. N. S. 903 ; 9 W. R. 799.

—— ——.]—*See* EQUITY, Vol. XX., pp. 364, 365, Nos. 1020–1022.

2462. —— Persons claiming under voluntary settlement.] — *Re* WALHAMPTON ESTATE, No. 1672, *ante*.

Mortgage of shares in company.]—*See* COMPANIES, Vol. IX., pp. 413, 414, Nos. 2665–2669.

Mortgage to building society.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 479, 480, Nos. 151, 152.

Whether interest in land within Real Property Limitation Act, 1833 (c. 27), s. 1.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 429, No. 1035.

Application of Statute of Limitations.] — *See* LIMITATION OF ACTIONS, Vol. XXXII., p. 477, No. 1400.

D. Rights of Puisne Mortgagees.

See Law of Property Act, 1925 (c. 20), s. 105.

2463. Right against first mortgagee only.]—A public co. was formed to erect certain works, & borrowed money for the purpose, giving mtges. to secure repayment, with interest. By several statutes the Exchequer Loan Comrs. were authorised to advance money to assist in completing public works, & to take mtges. on the works,

W. W. R. 129 ; 4 Sask. L. R. 374.—**CAN.**

h. ——.]—Where a mtgee. who has sold land under a power of sale has a surplus in his hands an order should not be made permitting the mtgee. to pay the money into ct. & discharging him from liability in respect thereto, the payment into ct. may be made without an order.—*Re* CUDMORE & LAW UNION & ROCK INSURANCE CO., [1918] 2 W. W. R. 862 ; 11 Sask. L. R. 221.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 10. —C.

k. *Who may recover surplus—Execution creditor.*]— HARVEY *v.* MCNEIL (1888), 12 P. R. 362.—**CAN.**

l. —— ——.]—*Re* BOKSTAL (1896), 17 P. R. 201.—**CAN.**

m. —— ——.]—EDMONTON MORTGAGE CO. *v.* GROSS (1911), 18 W. L. R. 385 ; 3 Alta. L. R. 500.—**CAN.**

n. —— ——.] — *Re* FERGUSON & HILL, PURSE *v.* FERGUSON (1913), 24 O. W. R. 634 ; 4 O. W. N. 1339 ; 10 D. L. R. 855.—**CAN.**

o. —— ——.]—*Re* TRUSTEE ACT & LAND TITLES ACT, *Re* LAW UNION & ROCK INSURANCE CO., LTD. & CUDMORE MORTGAGE (Sask.), [1919] 2 W. W. R. 400.—**CAN.**

p. —— *Wife.*]—SMITH *v.* WAMBOLT (1907), 2 E. L. R. 271.—**CAN.**

q. *Purchase-money paid in instalments.*]—Where the power of sale in a mtge. authorises a sale for cash or on terms, & the mtgee. sells on terms by which the payment of the purchase-money is spread over a number of years, the mtgee. is not bound to credit the mtgor. with the whole of the purchase-money as received on the day of the sale, but only with the instalments as they are received. — IRVING *v.* COMMERCIAL BANKING CO. OF SYDNEY (1898), 19 N. S. W. Eq. 54 ; 14 N. S. W. W. N. 182.—**AUS.**

r. *Claim against surplus — What court may entertain.*]—A division ct. has jurisdiction to entertain a claim for less than $100 made by a mtgor. upon the surplus proceeds of a mtge. sale which realised less than $400. Such a claim is an equitable cause of action for money had & received.—*Re* LEGARIE *v.* CANADA LOAN & BANKING CO. (1886), 11 P. R. 512.—**CAN.**

& on the tolls, profits, etc., of such works, & priority was given to mtges. given to the Comrs. over mtges. made to private individuals, except *bonâ fide* creditors who at the time of the advances by the Comrs. were entitled to repayment. 1 & 2 Will. 4, c. 26, gave the Comrs., in case of default of payment, power to enter & sell. 5 & 6 Vict. c. 9, enacted that the property sold by the Comrs. should be held freed & discharged from all claim & demand of the mtgors. or of persons claiming under them, in all respects, as if they were foreclosed, "provided that nothing herein contained shall prejudice the rights" of any creditors "in respect of any surplus" arising on the sale:—*Held:* under these statutes the Comrs. had a legal right to enter & sell; after their claim for interest had been satisfied, the surplus was liable for the interest due to the other creditors; but this liability could be enforced against the Comrs. only, & not against the purchasers.

When a mtgee. sells under a power, that sale defeats the rights of all subsequent incumbrancers, whose remedy then is only against the money in the hands of the vendors (LORD CRANWORTH, C.).—SOUTH EASTERN RY. CO. (DIRECTORS, ETC.) *v.* JORTIN (1857), 6 H. L. Cas. 425; 27 L. J. Ch. 145; 31 L. T. O. S. 44; 22 J. P. 306; 4 Jur. N. S. 467; 10 E. R. 1360, H. L.; *revg.* S. C. *sub nom.* JORTIN *v.* SOUTH-EASTERN RY. CO. (1854), 6 De G. M. & G. 270, L. JJ.

Annotations:—**Mentd.** *Re* Burdett, *Ex p.* Byrne (1888), 20 Q. B. D. 310; Davis *v.* Petrie (1905), 93 L. T. 511.

2464. —— When first mortgagee has notice—What constitutes notice—Knowledge of solicitor acting for all parties.]—THORNE *v.* HEARD & MARSH, No. 2060, *ante*.

2465. Right to surplus proceeds of sale.]—W., being entitled in reversion to one-eighth of a sum of £8,000 bequeathed to trustees, assigned it by way of mtge. to G., with power to give receipts in the name of W., or otherwise, with a proviso for redemption. On the death of the tenant for life of the fund, J., to whom the mtge. had been transferred, claimed to receive from the trustees £1,000, the whole amount of the share, the sum due on the mtge. being only about £400. The trustees of the will, who had received notice of subsequent incumbrances, expressed themselves willing to pay to J. what was due on his mtge., but declined to pay over to him the whole share. J. took out an originating summons to compel payment:—*Held:* the trustees were not bound to pay over the whole share to J. & the summons must be dismissed.—*Re* BELL, JEFFERY *v.* SAYLES, [1896] 1 Ch. 1; 65 L. J. Ch. 188; 73 L. T. 391; 44 W. R. 99; 40 Sol. Jo. 50, C. A.

Annotations:—**Folld.** Hockey *v.* Western, [1898] 1 Ch. 350. **Expld.** *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385.

2466. —— After allowance for value of improvements.]—The present value of improvements due to expenditure by a tenant in common in fee of one half, & tenant for life of the other half, of real estate, not exceeding the expenditure, allowed in distributing the surplus proceeds of sale by a paramount mtgee. among the persons entitled to the equity of redemption.—*Re* COOK'S MORTGAGE, LAWLEDGE *v.* TYNDALL, [1896] 1 Ch. 923; 65 L. J. Ch. 654; 74 L. T. 652; 44 W. R. 646.

Annotations:—**Consd.** *Re* Coulson's Trusts, Prichard *v.* Coulson (1907), 97 L. T. 754. **Refd.** Hill *v.* Hickin, [1897] 2 Ch. 579; Kenrick *v.* Mountsteven (1899), 48 W. R. 141. **Mentd.** Williams *v.* Williams (1899), 81 L. T. 163.

2467. ——.]—A member of a land society mortgaged his share in the society to pltf., another member of the same society, by a deed to which the powers conferred by the Conveyancing & Law of Property Act, 1881 (c. 41), Part IV., were incident. The mtgor. died intestate, & there was no legal personal representative of his estate. A sum of money having become due to the mtgor.'s estate from the society, pltf., relying upon his power to give a receipt under Conveyancing & Law of Property Act, 1881 (c. 41), s. 22 (1), claimed to have the whole amount paid to him as mtgee. The trustees, however, not being furnished with an account & having reason to believe it questionable how much was due on the mtge. offered to pay pltf. so much of the money as upon taking an account should be found due to him, but declined to pay him without such an account. In an action by pltf. to recover the money from the trustees:—*Held:* the trustees were entitled to act as they had done; &, upon their undertaking to pay the money into court under Trustee Act, 1893 (c. 53), the action was dismissed.—HOCKEY *v.* WESTERN, [1898] 1 Ch. 350; 67 L. J. Ch. 166; 78 L. T. 1; 46 W. R. 312; 14 T. L. R. 201; 42 Sol. Jo. 232, C. A.

See, also, No. 2320, *ante*, No. 2477, *post*.

2468. Right to costs—Subsequent incumbrancers—Petition for payment out of balance by second mortgagee—Fund in court not sufficient to satisfy second mortgagee.]—Real estate subject to several incumbrances was sold by the first incumbrancer under a power of sale in his mtge. deed, & the surplus purchase-money was paid into ct. under Trustees' Relief Act. The second incumbrancer, whose debt was greater than the fund in ct., presented a petition stating the other incumbrances & praying for payment of the fund to himself. This petition was served on the other incumbrancers, with a notice by the solr. of petitioner to each incumbrancer that, if he appeared on the petition the payment of his costs out of the fund would be resisted:—*Held:* the incumbrancers so served who appeared at the hearing of the petition were not entitled to their costs out of the fund.—ROBERTS *v.* BALL (1855), 3 Sm. & G. 168; 3 Eq. Rep. 632; 24 L. J. Ch. 471; 25 L. T. O. S. 139; 65 E. R. 610; *sub nom.* ROBERTS *v.* BALL, *Re* BALL'S MORTGAGE TRUSTS, 1 Jur. N. S. 585.

Sale by mortgagor with concurrence of first mortgagee.]—*See* Sub-sect. 11, *post*.

E. Rights of Judgment Creditors.

2469. Creditor of mortgagee—Right to priority.]—In a suit by a judgment creditor against his

PART XIII. SECT. 2, SUB-SECT. 10.—D.

2465 i. *Right to surplus proceeds of sale.*]—OCEAN ACCIDENT & GUARANTEE CORPN., LTD. & HEWITT *v.* COLLUM & ARCHDALL, [1913] 1 I. R. 328.—**IR.**

2465 ii. ——.]—A mtgee.'s action in Ireland for sale of the mtged. property & distribution of the proceeds enures like an administration action for the benefit of all incumbrances on the lands.—HARPUR *v.* BUCHANAN, [1919] 1 I. R. 1.—**IR.**

2465 iii. ——.]—In a suit to enforce payment of a mtge. security, if the mtgor. consents to a decree for an immediate sale, it is not necessary that subsequent incumbrancers should give their consent thereto; their right only being to be paid out of the surplus after satisfaction of the pltf.'s claim.—HAMILTON TOWNSHIP *v.* STEVENSON (1877), 25 Gr. 198.—**CAN.**

t. —— *& deposit paid to procure sale.*]—In a foreclosure suit the official assignee of an insolvent deft. paid $150 into ct. to procure a sale. The proceeds derived from the sale were much more than sufficient to pay pltf.'s claim in full, but were insufficient to pay the subsequent incumbrancers:—*Held:* the deposit should be applied in reduction of the second mtgee.'s claim.—GZOWSKI *v.* BEATY (1879), 8 P. R. 146.—**CAN.**

a. —— *Whether a money demand.*]—*Qu.:* whether the claim of a second mtgee. for the surplus proceeds of the sale after satisfaction of the prior mtge. is a purely money demand.—GREEN *v.* HAMILTON PROVIDENT LOAN CO. (1881), 31 C. P. 574.—**CAN.**

Sect. 2.—*Sale: Sub-sect.* 10, *E.; sub-sects.* 11, 12 & 13.]

debtor, to give effect to a charge, under 1 & 2 Vict. c. 110, on the interest of the debtor in an estate of which he was mtgee., which was vested in trustees for sale to satisfy incumbrances & pay the surplus to the mtgor., a sale of the estates was directed, &, the purchase-money proving insufficient to satisfy the charges thereon :—*Held :* pltf. was entitled to be paid his debt & costs in priority to the costs of the mtgor. or mtgee. of the estate, or any other of defts., except the trustees for sale.—CLARE *v.* WOOD (1844), 4 Hare, 81 ; 67 E. R. 569.

Annotations :—**Apld.** Macrae *v.* Ellerton (1858), 27 L. J. Ch. 777. **Reld.** Watts *v.* Porter (1854), 23 L. T. O. S. 228.

2470. Creditor of mortgagor—Right to surplus.]—H. had received from L. money advanced on the security of bills of exchange. In Oct. 1843, he wanted a further advance, which L., after inquiring into the value of his real estate, consented to make, on condition that three months' bills should be given for the amount, usurious interest included, & that a warrant of attorney to confess judgment, which L. should be at liberty to enter up immediately, should also be executed. All this was done, & judgment was entered up on the following day, & the judgment registered. The bills given in Oct. 1843 were not paid when they became due in Jan. 1844, & others were then substituted for them. These last were also dishonoured. A sale of H.'s estate took place, under a mtge., executed to a prior creditor, who received more than would satisfy his claim :—*Held :* L. was entitled to maintain a bill against him to pay over so much of the surplus in his hands as would satisfy L.'s judgment.—LANE *v.* HORLOCK (1856), 5 H. L. Cas. 580 ; 25 L. J. Ch. 253 ; 2 Jur. N. S. 289 ; 4 W. R. 408 ; 10 E. R. 1028, H. L. ; *revsg.* (1853), 1 Drew. 587.

Annotations :—**Mentd.** Bates *v.* Brothers (1854), 2 Sm. & G. 509 ; Fussell *v.* Daniel (1854), 10 Exch. 581 ; Hughes *v.* Lumley (1854), 4 E. & B. 274 ; James *v.* Rice (1854), Kay, 231 ; Thomas *v.* Cooper (1854), 2 Eq. Rep. 1185 ; Rew *v.* Lane (1856), 28 L. T. O. S. 184 ; Bond *v.* Bell (1857), 4 Drew. 157 ; Croft *v.* Lumley (1858), 6 H. L. Cas. 672 ; Shaw *v.* Neale (1858), 6 H. L. Cas. 581 ; Boughton *v.* Jervis (1861), 3 Giff. 144.

2471. —— —— Right to injunction against mortgagee.]—A judgment creditor, who had issued execution upon his judgment, which was entered up after the passing of Judgments Act, 1864 (c. 112), filed his bill against prior mtgees. with power of sale, & the mtgor., who was the judgment debtor, for redemption or foreclosure, & for an injunction to restrain the mtgees. from paying to the mtgor. the surplus of the proceeds of the mtged. estate which might remain after paying the mtge. money. The ct., upon an interlocutory application, granted an injunction to the above effect ; & upon the hearing of the cause made a decree for redemption against the mtgees., & for redemption or foreclosure against the mtgor.—THORNTON *v.* FINCH (1865), 4 Giff. 515 ; 34 L. J. Ch. 466 ; 66 E. R. 810.

Annotations :—**Consd.** Hatton *v.* Haywood (1874), 9 Ch. App. 229. **Reld.** Anglo-Italian Bank *v.* Davies (1878), 9 Ch. D. 275.

2472. —— ——.]—In Jan. 1894, a husband mortgaged his property to secure £225 & interest. In Mar. 1896 his wife mortgaged her property to the same mtgee. to secure £275 & interest. In Aug. 1896, the husband & wife joined in a mtge. to the same mtgee. to secure £500 & interest & entered into a joint & several covenant with the mtgee. for the repayment of that sum. By the same deed the husband as to his property & the wife as to the property mtged. by her in Mar. 1896, charged those properties with the repayment of the £500 ; & the wife mortgaged certain other property to secure the sum of £500 & also the sums of £225 & £275 owing on the prior mtges. In Jan. 1899 judgment creditors of the husband obtained equitable execution against him, & took from the mtgee. a transfer of all his mtges., having been informed that the wife joined in the mtge. of Aug. 1896 only as surety for her husband. The husband's property was sold for £375, which was paid to the judgment creditors as transferees of the mtge. of Jan. 1894 in repayment of the amount due thereon ; & they claimed to retain the balance amounting to £130 towards satisfaction of their judgment debt against the husband. The wife took out a summons for the determination of the question whether the balance ought not to be applied in reduction of the debt of £500 secured by the mtge. of Aug. 1896, which was prior in date to the judgment debt. It was proved that the wife joined in that mtge. only as surety for her husband :—*Held :* the balance must be applied in reduction of the £500 secured by the mtge. of Aug. 1896, for which the husband's property was primarily liable.—DIXON *v.* STEEL, [1901] 2 Ch. 602 ; 70 L. J. Ch. 794 ; 85 L. T. 404 ; 50 W. R. 132.

Under garnishee order.]—*See* EXECUTION, Vol. XXI., p. 623, No. 2097.

Bills of sale.]—*See* BILLS OF SALE, Vol. VII., p. 128, Nos. 729, 730.

SUB-SECT. 11.—SALE BY MORTGAGOR WITH CONCURRENCE OF MORTGAGEE.

2473. Sale in administration action—Right of mortgagee to principal, interest & costs.]—Creditor's bill was filed by a mtgee., who was also a simple contract creditor of testator in the cause, & in the course of the suit the mtged. estate was sold, with the concurrence of the mtgee., & the purchase-money paid into ct. :—*Held :* notwithstanding the nature of the suit, & that the mtgee. had proved his debt before the master, he was entitled to have the whole of the proceeds of the mtged. estate applied, in the first instance, in payment of his principal debt & interest, before the payment of the costs of the suit.—ALLEN *v.* ALDRIDGE (1842), 6 Jur. 159, 183.

—— ——.]—*See* EXECUTORS, Vol. XXIV., pp. 842, 843, No. 8764.

2474. Deposit paid to solicitor or agent of mortgagor—Loss by insolvency of agent—How loss borne as between mortgagee & purchaser.]—ROWE *v.* MAY, No. 2256, *ante*.

2475. —— —— How loss borne as between mortgagee & mortgagor.]—(1) A first mtgee. joining in a sale by a subsequent mtgee., executing conveyances & signing receipts for the purchase-money of lands in mtge. :—*Held :* not accountable, either to the mtgor. or to the subsequent mtgee. in respect of deposits, which, pursuant to the conditions of sale, the purchasers had paid to the solr., & with which the solr. had absconded.

PART XIII. SECT. 2, SUB-SECT. 10. —E.

2470 i. *Creditor of mortgagor—Right to surplus.*]—BOND *v.* HUTCHINSON (1878), R. E. D. 443.—**CAN.**

b. —— *Trustee - mortgagor.*] — D., who was trustee for his sister, M., invested money belonging to M. on mtge., taking & registering the mtge. in his own name. The property having been sold under order of foreclosure & sale, & the proceeds paid into ct. :—*Held :* pltf., the substituted trustee for M., was entitled to the proceeds as against the judgment creditors of D. —OXLEY *v.* CULTON (1899), 32 N. S. R. 256.—**CAN.**

(2) *Semble:* under such circumstances, it is immaterial whether the solr. acted in the transaction as agent also for the first mtgee.—BARROW *v.* WHITE (1862), 2 John & H. 580; 70 E. R. 1190.

2476. —— —— How loss borne as between mortgagee & subsequent incumbrancer.]—BARROW *v.* WHITE, No. 2475, *ante*.

2477. Right of second mortgagee to surplus purchase-money.]—A mtgor. of a leasehold house, with the concurrence of the first mtgees., who had a notice of a second equitable mtge., sold the property. Upon completion, the balance of the purchase-money, after payment of the first mtgees., was handed to the mtgor. In an action by the second mtgees. against the mtgor., who did not appear, & the first mtgees.:—*Held:* the first mtgees. were liable to make good to pltfs. the amount of their security to the extent of the balance of the purchase-money.

If he exercises his power of sale as mtgee., whether under the terms of the mtge. deed or by statute, he is answerable for the money he receives if he pays it to the wrong person, that is to say, if he passes over the second mtgee., & pays it to the mtgor. who has no right to receive it (COTTON, L.J.).—WEST LONDON COMMERCIAL BANK *v.* RELIANCE PERMANENT BUILDING SOCIETY (1885), 29 Ch. D. 954; 54 L. J. Ch. 1081; 53 L. T. 442; 33 W. R. 916; 1 T. L. R. 609, C. A.

Annotations:—**Apld.** Corbett *v.* National Provident Institution (1900), 17 T. L. R. 5. **Mentd.** Gordon *v.* Holland, Holland *v.* Gordon (1913), 82 L. J. P. C. 81.

SUB-SECT. 12.—EFFECT ON EQUITY OF REDEMPTION.

See Law of Property Act, 1925 (c. 20), s. 88 (1).

2478. Equity destroyed.]—RAJAH KISHENDATT RAM *v.* RAJAH MUMTAZ ALI KHAN, No. 2320, *ante*.

2479. ——.]—HENDERSON *v.* ASTWOOD, ASTWOOD *v.* COBBOLD, COBBOLD *v.* ASTWOOD, No. 2306, *ante*.

SUB-SECT. 13.—LIABILITY FOR INTEREST AFTER SALE.

2480. Liability of mortgagor—Leases on sale.]—Principal & interest secured by bill of sale were payable by equal monthly instalments. The borrower authorised the lender to sell, & out of the proceeds deduct the amount for which she was "liable":—*Held:* on sale interest ceased to run, & the lender was entitled to retain unpaid principal & interest to date only.

The sale was made by the authority of the mtgor. contained in a letter by which she authorised deft. to retain a third of the balance for his trouble. . . . In my view, I ought to apply exactly the same principle to a sale under that authority as I should apply in case of a sale by the mtgee. under a power. . . . I hold that from the moment the money was received interest ceased to run (COZENS-HARDY, J.).—WEST *v.* DIPROSE, [1900] 1 Ch. 337; 69 L. J. Ch. 169; 82 L. T. 20; 64 J. P. 281; 48 W. R. 389; 44 Sol. Jo. 175; 7 Mans. 152.

2481. Liability of mortgagee—For interest on balance of proceeds—To second mortgagee.]—(1) Where upon the realisation of mtged. property the first mtgee. receives & retains more money than is sufficient to satisfy his claim under his mtge., the ct. will order him to pay to the second mtgee. simple interest upon the surplus moneys so retained by him, unless there are circumstances in the particular case before the ct. which render such an order unjust.

(2) The fact that the second mtgee. has wilfully abstained for four years from taking proceedings to enforce his claim to the surplus moneys retained by the first mtgee. is not a circumstance upon which the ct. will deprive him of interest.—ELEY *v.* READ (1897), 76 L. T. 39, C. A.; *on appeal, sub nom.* READ *v.* ELEY (1899), 80 L. T. 369, H. L.

Annotation:—*As to* (1) **Apld.** Heath *v.* Chinn (1908), 98 L. T. 855.

2482. —— —— Rate of interest—4 per cent.]—BANNER *v.* BERRIDGE, No. 2444, *ante*.

2483. —— —— —— ——.]—A mtge. of real estate was made under the sanction of the ct. by the trustees of a will. The mtge. was transferred to deft., who sold under his power of sale & received the purchase-money. There being no existing trustees of the will, deft., after paying himself his debt & costs, retained the balance of purchase-money. An action by one of the beneficiaries under the will was brought against him for accounts, in the course of which he admitted a balance due from him of £600, which he paid into ct. On the taking of the accounts it appeared that there was a further sum due of £591. Upon further consideration, the question arose from what date deft. was chargeable with interest on this sum:—*Held:* the mtgee. must be charged with interest from the time of completion of the sale on the balance of purchase-money received, & could have no costs allowed him of taking the accounts.

Deft., Jones, is liable to pay interest at 4 per cent. upon the money remaining in his hands after he had paid himself his debt & costs. That amount is now known, & he must be charged with interest upon it from the date of the completion of the sale (KAY, J.).—CHARLES *v.* JONES (1887), Ch. D. 544; 56 L. J. Ch. 745; 56 L. T. 848; 35 W. R. 645.

Annotations:—**Consd.** Heath *v.* Chinn (1908), 98 L. T. 855; Williams *v.* Jones (1911), 55 Sol. Jo. 500; *Re* Thorne, [1914] 2 Ch. 438. **Reld.** Thorne *v.* Heard, [1894] 1 Ch. 599; Eley *v.* Read (1897), 76 L. T. 39.

2484. —— —— From what date payable—Date of sale.]—CHARLES *v.* JONES, No. 2483, *ante*.

2485. —— —— Effect of delay—Disputes between incumbrancers.]—A first mtgee. having sold the mtged. property under a power of sale, gave notice to the subsequent mtgees. that he was ready to pay over the balance, after satisfying his own mtge. The second mtgee. required that the money should not be parted with until certain disputes between the incumbrancers should have been settled. The money was thereupon paid by the first mtgee. into his bankers, & was allowed to remain unproductive for several years:—*Held:* the first mtgee. could not, under the circumstances, be charged with interest upon the money.—MATHISON *v.* CLARK (1855), 25 L. J. Ch. 29; 26 L. T. O. S. 68; 4 W. R. 30.

Annotation:—**Reld.** Thorne *v.* Heard, [1894] 1 Ch. 599.

2486. —— —— —— Forbearance of second mortgage to enforce claim.]—ELEY *v.* READ, No. 2481, *ante*.

PART XIII. SECT. 2, SUB-SECT. 12.

2478 i. *Equity destroyed.*]—CLUTE *v.* MACAULAY (1854), 4 Gr. 410.—**CAN.**

2478 ii. ——.]—After sale proceedings regularly taken by a mtgee. of land under Real Property Act, 1902, ss. 108–112, whereby the property is sold to a *bonâ fide* purchaser who makes the first payment called for by the terms of the sale & binds himself to complete the purchase, it is too late for the mtgor. to apply for redemption even if the purchaser has made default in strict compliance with his agreement.—SALTMAN *v.* MCCOLL (1910), 19 Man. L. R. 456.—**CAN.**

Sect. 2.—*Sale: Sub-sect.* 13. *Sect.* 3: *Sub-sect.* 1, *A., B. & C.* (*a*), (*b*), (*c*) & (*d*).]

Application of Statute of Limitations.] — *See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 422–424, Nos. 990, 993, 1006–1008.

SECT. 3.—APPOINTMENT OF RECEIVER.

SUB-SECT. 1.—BY THE COURT.

A. When Appointed.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 45 ; & *generally*, RECEIVERS.

2487. Security in jeopardy.] — First mtgee. having got possession by means of informal judgment, ct. will not restrain proceedings by mtgor. to restore possession, though mtgor. had disclaimed in foreclosure suit ; no receiver appointed, only appointed when the inheritance is in jeopardy.—STEVENS *v.* LORD (1838), 2 Jur. 92.

2488. ——.]—An agreement was entered into by A. for the sale of an estate to B., to be completed & the purchase-money paid on or before the expiration of five years, & in the meantime interest on the purchase-money was to be paid half yearly by the purchaser ; the vendor reserved a right of avoiding the contract in case the interest should be in arrear for twenty-one days.

To enable B. to pay the interest then in arrear, C. advanced a sum of money on mtge. of B.'s interest in the property, & the vendor afterwards verbally agreed with C. to extend the term for the payment of the half yearly interest. The interest became afterwards in arrear in such a way that A., by the original agreement, had a right to annul the contract, but he had no such right under the varied agreement : A. re-entered as for a forfeiture. The ct., on the application of C., appointed a receiver over the property.—DAWSON *v.* YATES (1838), 1 Beav. 301 ; 2 Jur. 960 ; 48 E. R. 956.

2489. —— **Danger of bankruptcy of mortgagor—Agreement to execute bill of sale.**]—Immediate appointment of *interim* receiver of chattels comprised in an agreement to execute a bill of sale in a case where there was imminent danger of the mtgor.'s bankruptcy. — TAYLOR *v.* ECKERSLEY (1876), 2 Ch. D. 302 ; 45 L. J. Ch. 527 ; 34 L. T. 637 ; 24 W. R. 450 ; 2 Char. Pr. Cas. 84, C. A.

Annotations :—**Reld.** Minter *v.* Kent, Sussex & General Land Soc. (1895), 72 L. T. 186 ; Shears *v.* Jones, [1922] 2 Ch. 802.

2490. —— **Wasting property.**]—REAL & PERSONAL ADVANCE CO. *v.* M'CARTHY & SMITH, No. 2497, *post*.

——.]—*See* COMPANIES, Vol. X., pp. 793, 794, Nos. 4990–4999.

2491. Interest in arrear.]—On Sept. 30 a creditor's petition to wind up a co. was presented, & on Oct. 10 the official receiver was appointed provisional liquidator. On Oct. 11 the debenture-holders of the co., whose charge extended over all the property of the co., & whose interest was in arrear, commenced an action to enforce their security ; & on Oct. 14 a receiver was appointed on their application, with power to manage the business until the winding-up petition was disposed of. On Oct. 25 a winding-up order was made, & the official receiver was continued as provisional liquidator. On Oct. 28 leave was given to pltfs. to go on with their action ; & on the same day the receiver was continued, with power to manage the business. On Nov. 24, on the application of pltfs., leave was given to discontinue the business. The liquidator thereupon applied to discharge the receiver, & the judge considering that, as the business was discontinued, the reason for his appointment had ceased, discharged him. It appeared that there was no uncalled capital, & that the assets of the co. were not enough to pay the debentures :—*Held :* the order discharging the receiver must be reversed, for the debenture-holders, whose interest was in arrear, had a right to a receiver, which right was not taken away by the winding up, & the receiver ought not to be displaced without some strong reason for doing so.—STRONG *v.* CARLYLE PRESS, [1893] 1 Ch. 268 ; 62 L. J. Ch. 541 ; 68 L. T. 396 ; 41 W. R. 404 ; 9 T. L. R. 135 ; 37 Sol. Jo. 116 ; 2 R. 283, C. A.

Annotation :—**Reld.** British Linen Co. *v.* South American & Mexican Co., [1894] 1 Ch. 108.

.]—*See* COMPANIES, Vol. X., p. 793, No. 4989.

2492. With view to sale.]—I think it has been settled that the ct. will never appoint a person receiver & manager except with a view to a sale (COZENS-HARDY, M.R.).—*Re* NEWDIGATE COLLIERY, LTD., NEWDEGATE *v.* THE CO., [1912] 1 Ch. 468 ; 81 L. J. Ch. 235 ; 106 L. T. 133 ; 28 T. L. R. 207 ; 19 Mans. 155, C. A.

Annotations :—**Consd.** *Re* Thames Ironworks Shipbuilding & Engineering Co., Farrer *v.* The Co. (1912), 106 L. T. 674. **Expld.** *Re* Great Cobar, Beeson *v.* The Co., [1915] 1 Ch. 682.

2493. Undertaking in suspended animation—Mortgage by limited company.]—In an action by mtgees. against mtgors., the latter being a limited co. which was in a state of suspended animation, the ct. held that in the circumstances a receiver must be appointed.—HIGGINSON *v.* GERMAN ATHENÆUM, LTD. (1916), 32 T. L. R. 277.

B. Who may be Appointed.

See, generally, RECEIVERS.

2494. Mortgagee—Colonial estate—Not without special provision in mortgage.]—COX *v.* CHAMPNEYS, No. 2560, *post*.

2495. Mortgagee in possession—Without salary or security.] — *Re* PRYTHERCH, PRYTHERCH *v.* WILLIAMS, No. 2508, *post*.

C. On Whose Application Appointed.

(*a*) *In General.*

See, generally, RECEIVERS.

2496. Legal & equitable mortgagee—Different parts of same property.]—Under the power given

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PART XIII. SECT. 3, SUB-SECT. 1.—A.

2491 i. *Interest in arrear.*]—HALEY *v.* HALIFAX STREET RY. CO. (1893), 25 N. S. R. (13 R. & G.) 140.—**CAN.**

2491 ii. ——.]—*Re* MARTINS ESTATE, *Ex p.* BEWLEY (1884), 13 L. R. Ir. 43.—**IR.**

c. *Whether within discretion of court.*]—It is proper, in the exercise of the ct.'s discretion, in an action by a mtgee. to enforce his mtge. & on the mtgee.'s application made before judgment, to appoint a receiver to take & receive all moneys payable under a sale of the land by the mtgor.—MANUFACTURERS LIFE INSURANCE CO. *v.* HANSON & FORTY MILE MUNICIPAL DISTRICT, [1924] 2 D. L. R. 692 ; [1924] 1 W. W. R. 809 ; 20 Alta. L. R. 260.—**CAN.**

d. *To keep down interest.*]—Advances made by a mtgee. for the preservation of the estate follow the nature of the mtge. security : & if the mtgee. is not entitled to foreclose the mtge. until after the decease of mtgor. neither is he entitled, during the life of the mtgor. to a sale of the estate for payment of such advances ; but if necessary, a receiver will be appointed to keep down the interest on the mtge. debt & advances.—BURROWES *v.* MOLLOY (1845), 2 Jo. & Lat. 521 ; 8 I. Eq. R. 482.—**IR.**

PART XIII. SECT. 3, SUB-SECT. 1.—B

e. *Sheriff.*]—The jurisdiction of the ct. was exercised on behalf of an execution creditor by way of equitable execution, to make the sheriff receiver of the moneys secured by a mtge. of land in his county, held by the execution debtor, who was resident out of the Province.—PARENT *v.* LORTIE, 7 C. L. T. Occ. N. 195.—**CAN.**

PART XIII. SECT. 3, SUB-SECT. 1.—C. (a).

f. *Whether judgment creditor of mortgagor.*] — A judgment creditor of a mtgor. upon covenants in the mtge. cannot obtain a receivership order to

by Jud. Act, 1873 (c. 66), s. 25 (8), to appoint a receiver in all cases in which it shall appear just & convenient, the order made on interlocutory application for the appointment of a receiver was extended to the whole property comprised in pltf.'s security, as to part of which he was legal & as to part equitable mtgee.—PEASE *v.* FLETCHER (1875), 1 Ch. D. 273; 45 L. J. Ch. 265; 33 L. T. 644; 24 W. R. 158; 1 Char. Pr. Cas. 35.

2497. Sub-mortgagee—Security insufficient for original mortgage — Wasting property.] — Deft. brought an action against B. for redemption. Pltfs. brought the present action against defts. for the recovery of the land, which was the subject-matter of the redemption action. Pltfs. in the present action were then added as defts. in the redemption action by pltfs. in that action, who obtained an order staying the present action until the redemption action should be ready for trial. The defence in the present action was that pltfs. were only sub-mtgees. Pltfs. in the present action moved for a receiver, & that defts., who were in occupation of the property, should attorn tenants to pltfs. The uncontradicted evidence in support of the motion showed that the property was wasting, & was an insufficient security for the mtge. under which B. was alleged to hold:—*Held:* it was "just & convenient" to appoint a receiver within such Act, 1873 (c. 66), s. 25 (8), such appointment must be made unless deft. within a certain time elected to pay into ct. an occupation rent, the amount of which was to be settled in chambers.—REAL & PERSONAL ADVANCE CO. *v.* M'CARTHY & SMITH (1879), 40 L. T. 878; 27 W. R. 706.

Appointment on behalf of puisne mortgagee & other equitable interests.]—*See* Sub-sect. 1, F., *post.*

Who may apply for appointment of receiver & manager.]—*See* Sect. 4, sub-sect. 2, *post.*

(b) Equitable Mortgagees.

See Sub-sect. 1, D., *post.*

(c) Legal Mortgagee.

2498. Whether entitled to receiver.]—BERNEY *v.* SEWELL, No. 2545, *post.*

2499. ——.]—The doctrine of this ct. is, that it will not appoint a receiver on the application of those who do not require it. The principle is the same with regard to a part mtgee. who has the legal estate; if he asks for a receiver the application will be refused, because he has power to help himself by entering upon the estate & giving notice to the tenants to pay the rent to him & thus to get into possession. A second mtgee., having no such remedy, can have a receiver appointed (MALINS, V.-C.).—SOLLORY *v.* LEAVER (1869), L. R. 9 Eq. 22; 39 L. J. Ch. 72; 21 L. T. 453; 18 W. R. 59.

Annotations:—**Consd.** Kelsey *v.* Kelsey (1874), L. R. 17 Eq. 495. **Mentd.** Roper *v.* Roper (1876), 3 Ch. D. 714.

2500. ——.] — *Re* PRYTHERCH, PRYTHERCH *v.* WILLIAMS, No. 2508, *post.*

2501. —— **Tenants numerous—Rents difficult to collect.**]—A mtgee. having the legal estate is not entitled to a receiver appointed by the ct., although the tenants may be numerous, & the rents difficult to collect.—STURCH *v.* YOUNG (1842), 5 Beav. 557; 12 L. J. Ch. 56; 49 E. R. 694.

2502. —— **Estate of surety—Principal's estate primarily liable.**]—Receiver granted under special circumstances, at the instance of a first mtgee. having the legal estate.

A., together with B. as his surety, mortgaged their respective estates for A.'s debt; but it was provided that recourse should not be had to B.'s estate unless A.'s estate should prove insufficient. In a suit for foreclosure, B. insisted that the insufficiency of A.'s estate had not been shown. The ct. granted a receiver over B.'s estate, although the legal estate was vested in the mtgee.—ACKLAND *v.* GRAVENER (1862), 31 Beav. 482; 54 E. R. 1225; *sub nom.* ACLAND *v.* GRAVENER, 1 New Rep. 119; 32 L. J. Ch. 474.

2503. —— **Equitable mortgagee as to part.**]—PEASE *v.* FLETCHER, No. 2496, *ante.*

Mortgage of tolls.]—*See* Sub-sect. 1, E. (*d*), *post.*

2504. —— **Effect of Judicature Act, 1873 (c. 66), s. 25 (8).**]—Under above sub-sect. the ct. may & does grant receivers when it never could have done so before. Thus, for instance, it has power to grant a receiver under that sect. when a pltf. has himself the power of obtaining possession at law (COTTON, L.J.).—ANGLO-ITALIAN BANK *v.* DAVIES (1878), 9 Ch. D. 275; 47 L. J. Ch. 833; 39 L. T. 244; 27 W. R. 3, C. A.

Annotations:—**Consd.** *Re* Watkins, *Ex p.* Evans (1879), 13 Ch. D. 252. **Apld.** *Re* Pope (1886), 17 Q. B. D. 743. **Reld.** Bryant *v.* Bull, Bull *v.* Bryant (1878), 10 Ch. D. 153; Oliver *v.* Lowther (1880), 42 L. T. 47; Smith *v.* Cowell (1880), 6 Q. B. D. 75; Westhead *v.* Riley (1883), 25 Ch. D. 413; *Re* Whiteley, Whiteley *v.* Learoyd (1887), 56 L. T. 846; Holmes *v.* Millage, [1893] 1 Q. B. 551; Cadogan *v.* Lyric Theatre, [1894] 3 Ch. 338; Harris *v.* Beauchamp, [1894] 1 Q. B. 801; *Re* Jones (1895), 39 Sol. Jo. 671; Tyrrell *v.* Painton, [1895] 1 Q. B. 202; Thompson *v.* Gill, [1903] 1 K. B. 760; R. *v.* Selfe, [1908] 2 K. B. 121; Ashburton *v.* Nocton, [1915] 1 Ch. 274. **Mentd.** *Re* Peace & Waller (1883), 24 Ch. D. 405; *Re* Pearce, Official Receiver *v.* Pearce (1918), 120 L. T. 334.

2505. —— ——.]—Since the passing of that Act [Jud. Act, 1873 (c. 66)], it has been a usual practice for the Ch. Div. to grant a receiver at the instance of the legal mtgee. just as it formerly did at the instance of an equitable mtgee. Because although a legal mtgee. has power to take possession, & can do so without the assistance of a Ct. of Equity yet there are obvious conveniences in granting a receiver so as to prevent a mtgee. from being in the very unpleasant position of a mtgee. in possession (COTTON, L.J.).—*Re* POPE (1886), 17 Q. B. D. 743; 55 L. J. Q. B. 522; 55 L. T. 369; 34 W. R. 693; 2 T. L. R. 826, C. A.

Annotations:—**Apld.** *Re* Whiteley, Whiteley *v.* Learoyd (1887), 56 L. T. 846. **Reld.** Blackman *v.* Fysh, [1892] 3 Ch. 209; Cadogan *v.* Lyric Theatre, [1894] 3 Ch. 338. **Mentd.** Ashburton *v.* Nocton, [1915] 1 Ch. 274.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 45.

(d) Mortgagee in Possession.

2506. Right to appointment.]—A legal mtgee. being in possession of the mtged. property, applied to the ct. for the appointment of a receiver:—*Held:* although the mtgee. might, under the Conveyancing Act, 1881 (c. 41), appoint a receiver without coming to the ct., it was more desirable, where an action was pending, that the appointment

enforce payment by the purchaser of the equity who, on purchasing, has agreed to assume & pay the mtge. though he sue & make the application on behalf of himself & all other creditors of the mtgor.—PALMER *v.* MCKNIGHT (1899), 31 O. R. 306.—**CAN.**

PART XIII. SECT. 3, SUB-SECT. 1.—C. (c).

2498 i. *Whether entitled to receiver.*]—A receiver of severed crops on mtged. land will not be appointed on the application of a legal mtgee.—ASSOCIATED MORTGAGE INVESTORS *v.* ROSEBURGH (Alta.), [1925] 3 W. W. R. 505—**CAN.**

2498 ii. ——.]—LEAHY *v.* ARTHUR (1824), 1 Hog. 92.—**IR.**

2498 iii. ——.]—PAGE *v.* WELLESLEY (MARQUIS) (1824), 1 Hog. 179.—**IR.**

Sect. 3.—*Appointment of receiver: Sub-sect.* 1, *C.* (*d*), *& D.* (*a*) *&* (*b*) *i. & ii.*]

should be made by the ct. under Jud. Act, 1873 (c. 66).—TILLETT *v.* NIXON (1883), 25 Ch. D. 238; 53 L. J. Ch. 199; 49 L. T. 598; 32 W. R. 226.

Annotation :—**Consd.** Anchor Trust Co. *v.* Bell, [1926] Ch. 805.

2507. ——.]—Under Jud. Act, 1873 (c. 66), s. 25 (8), mtgee. in possession is entitled to the appointment of a receiver, notwithstanding that he has been paid all his interest & costs out of rents received by him while in possession, & that he has surplus rents in his hands.—MASON *v.* WESTOBY (1886), 32 Ch. D. 206; 55 L. J. Ch. 507; 54 L. T. 526; 34 W. R. 498.

Annotation :—**Consd.** *Re* Prytherch, Prytherch *v.* Williams (1889), 42 Ch. D. 590.

2508. ——.]—(1) A receiver may be appointed at the instance of a legal mtgee. but he has no absolute right to a receiver.

(2) A mtgee. who has once taken possession of the mtged. property cannot relinquish possession at his pleasure; having once assumed the responsibilities attaching to a mtgee. in possession, he cannot at his own pleasure get rid of them & as a general rule the ct. will not by appointing a receiver assist him to so so.

I do not see how a man who is himself in possession can have a right to have a receiver appointed to assist him in the performance of his duty. . . . I can see no reason why a mtgee., who has voluntarily remained in possession so long, should say at the last moment that he will give up possession, & put the mtgors. to the expense of a receivership (NORTH, J.).—*Re* PRYTHERCH, PRYTHERCH *v.* WILLIAMS (1889), 42 Ch. D. 590; 59 L. J. Ch. 79; 61 L. T. 799; 38 W. R. 61.

Annotation :—*As to* (2) **Consd.** Anchor Trust Co. *v.* Bell, [1926] Ch. 805.

D. Appointment on behalf of Equitable Mortgagee.

(*a*) *In General.*

Appointment of receiver by way of equitable execution.—*See* EXECUTION, Vol. XXI., pp. 664 *et seq.*

2509. General rule.]—The grantor of an annuity, secured by an equitable charge on certain lands which are subject to a prior charge, goes to reside abroad, but, by his agent, continues in the receipt of the rents & profits: the ct., on the application of the annuitant, will appoint a receiver, though the grantor has not appeared to the suit.

Now it is the unquestioned rule of equity, that an equitable incumbrancer, who will take possession, may have a receiver; care being taken at the same time, that the order for the receiver shall not prevent any, who have a better title to the possession, from ousting him, if they please (LORD ELDON, C.).—TANFIELD *v.* IRVINE (1826), 2 Russ. 149; 38 E. R. 292, L. C.

Annotations :—**Consd.** Shaw *v.* Shore (1835), 5 L. J. Ch. 79. **Refd.** Lyde *v.* Hale (1835), 4 L. J. Ch. 180; Meaden *v.* Sealey (1849), 6 Hare, 620; Caddick *v.* Cook (1863), 1 New Rep. 463.

2510. ——.]—SOLLORY *v.* LEAVER, No. 2499, *ante*.

2511. Equitable charge & judgment—Execution impossible.]—Receiver, in default of payment into ct., on an equitable charge & a judgment, but execution prevented by the circumstances of the title. The right not affected by a subsequent variation of circumstances; & established over the whole estate, though of great value compared with the debt; as a reasonable part may be tendered as security, or the debt may be paid into ct.—CURLING *v.* TOWNSHEND (MARQUIS) (1816), 19 Ves. 628; 34 E. R. 649, L. C.

Annotations :—**Consd.** Free *v.* Hinde (1827), 2 Sim. 7. **Mentd.** Greenwood *v.* Atkinson (1830), 4 Sim. 54.

2512. Agreement for mortgage.]—SHAKEL *v.* MARLBOROUGH (DUKE) (1819), 4 Madd. 463; 56 E. R. 776.

2513. Mortgage by deposit of deeds.]—Receiver of rents of mtged. premises was appointed before answer, upon bill by equitable mtgee., the title deeds being deposited as a collateral security for the payment of an accommodation bill.—ABERDEEN *v.* CHITTY (1839), 3 Y. & C. Ex. 379; 8 L. J. Ex. Eq. 30; 160 E. R. 749.

2514. ——.]—In a suit to establish an alleged equitable mtge. by deposit of deeds, if the ct. is satisfied as to the deposit, it will for the purposes of a motion for a receiver by pltf. assume the probability that such deposit was made for an advance of money, & that pltf. may be entitled to some relief at the hearing, & make an order for a receiver.—BODGER *v.* BODGER (2) (1862), 11 W. R. 160.

2515. Prior incumbrancer with express power.]—The ct. will, on the hearing of an incumbrancer's suit, appoint a receiver, although the first incumbrancer has, by his deed, a power to appoint one.—BORD *v.* TOLLEMACHE (1862), 1 New Rep. 177; 7 L. T. 526.

2516. Substitution of new receiver—At reduced salary.]—STANLEY *v.* COULTHURST, [1868] W. N. 305.

2517. After bankruptcy of mortgagor.]—S. having created an equitable mtge. in favour of pltfs. of his share in the assets of a partnership, subsequently became bkpt. To a bill filed by pltfs. against the trustee in S.'s bkpcy., praying for the appointment of a receiver of the property, subject to the mtge. & that deft. might be restrained from obtaining possession thereof, demurrer for want of jurisdiction overruled.—COULTHURST *v.* SMITH (1873), 29 L. T. 714, L. C. & L. JJ.

Annotation :—**Refd.** Jenney *v.* Bell (1876), 2 Ch. D. 547.

2518. Wasting property—Insufficient security.]—REAL & PERSONAL ADVANCE CO. *v.* M'CARTHY & SMITH, No. 2497, *ante*.

Appointment on behalf of debenture-holders.]—*See* COMPANIES, Vol. X., pp. 793 *et seq.*

(*b*) *Prior Mortgagee Not in Possession.*

i. *Appointment subject to Prior Mortgage.*

2519. General rule.]—When a mtgee. is not in possession the ct. will, upon application of creditors, appoint a receiver of the mtged. premises, but without prejudice to the right of the mtgee. to obtain possession.—BRYAN *v.* CORMICK (1788), 1 Cox, Eq. Cas. 422; 29 E. R. 1231, L. C.

2520. ——.]—A. having charged his estates by mtges. & other incumbrances to a very large amount, appointed B. to be his steward or receiver of all his estates with verbal directions to pay the interest to the mtgees., & to pay over the surplus of the rents to himself. On the making a fifth

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PART XIII. SECT. 3, SUB-SECT. 1.—D. (a).

2509 i. *General rule.*]—An equitable mtgee. is entitled to the appointment of a receiver if (1) he makes out a *primâ facie* case of an equitable mtge., & (2) proves that a large sum of money is due thereon, & (3) brings action for, *inter alia*, the enforcement of the security.—UNION BANK OF CANADA *v.* ENGEN (Sask.), [1917] 2 W. W. R. 395.—**CAN.**

PART XIII. SECT. 3, SUB-SECT. 1.—D. (b) i.

g. Whether appointment made—If opposed by prior incumbrancers.]—RUNDELL *v.* WELLESLEY (MARQUIS) (1825), 3 Mol. 116.—**IR.**

mtge. A. by deed appointed B. receiver of the estates comprised in that mtge. in trust to keep down the interest of that mtge. & to pay over the residue of the rents to himself. A. afterwards granted several annuities, which he charged on all the mtged. premises, & demised the same to a trustee for securing the said annuties in manner therein mentioned & subject thereto to permit A. to receive the surplus for his own benefit. At the time of granting these annuities A. represented the estates to be free from all incumbrances. On a bill filed by the annuitants against A. & B., without making any of the prior incumbrancers parties, the ct. will restrain B. from paying over any part of the rents to A. & will appoint a receiver, without prejudice to the prior mtgees. taking possession.—DALMER *v.* DASHWOOD (1793), 2 Cox, Eq. Cas. 378; 30 E. R. 174.

2521. ——.]—The ct. will on motion appoint a receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior estates; in this sense without prejudice to persons having prior legal estates, that it will not prevent their proceeding to obtain possession, if they think proper; & with regard to persons having prior equitable estates, the ct. takes care in appointing a receiver not to disturb prior equities & for that purpose directs inquirers to determine priorities among equitable incumbrancers; permitting legal creditors to act against the estates at law, & settling the priorities of equitable creditors (LORD ELDON, C.).—DAVIS *v.* MARLBOROUGH (DUKE) (1819), 2 Swan. 108; 2 Wils. Ch. 130; 36 E. R. 555, L. C.

Annotations :—**Refd.** Paynter *v.* Carew (1854), Kay, App. XXXVI. **Mentd.** Cooper *v.* Reilly (1829), 2 Sim. 560; Portmore *v.* Taylor (1831), 4 Sim. 182; King *v.* Hamlet (1835), 9 Bli. N. S. 575; Pelly *v.* Wathen (1849), 7 Hare, 351; Mansfield *v.* Ogle (1855), 24 L. J. Ch. 450; Bromley *v.* Smith, Boustead *v.* Bromley, Smith *v.* Bromley (1859), 26 Beav. 644; Webster *v.* Cooke (1866), 36 L. J. Ch. 753; O'Rorke *v.* Bolingbroke (1877), 2 App. Cas. 814; Fry *v.* Lane, *Re* Fry, Whittet *v.* Bush (1888), 40 Ch. D. 312.

2522. ——.]—BERNEY *v.* SEWELL, No. 2545, *post*.

2523. ——.]—TANFIELD *v.* IRVINE, No. 2509, *ante*.

2524. ——.]—Where there are mtgees. in fee of estates, the mtges. being created by a tenant for life & in remainder in fee, & there are judgment creditors of the tenant for life, the ct. will appoint a receiver of the rents, but without prejudice to the rights of the mtgees. who were not in, & who refused to enter into possession of the estates.—RHODES *v.* MOSTYN (LORD) (1853), 1 Eq. Rep. 212; 22 L. T. O. S. 92; 21 L. T. O. S. 150; 17 Jur. 1007; 1 W. R. 366.

Annotation :—**Apld.** Cadogan *v.* Lyric Theatre, [1894] 3 Ch. 338.

2525. ——.]—What is the position of a second mtgee. of a ship with respect to the freight? He has no legal right to take actual possession, & cannot therefore by his own act give himself that which is equivalent to possession. But as between himself & the mtgor. the equitable right of the second mtgee. is the same as the legal right of the first mtgee., just as in the case of land, if the first mtgee. declines to take possession, the second mtgee. may obtain a receiver & so have the possession & the benefits of the possessory right (JAMES, L.J.).—LIVERPOOL MARINE CREDIT CO. *v.* WILSON (1872), 7 Ch. App. 507; 41 L. J. Ch. 798; 26 L. T. 717; 20 W. R. 665; 1 Asp. M. L. C. 323, C. A.

Annotations :—**Refd.** Keith *v.* Burrows (1876), 1 C. P. D. 722. **Mentd.** Anderson *v.* Butler's Wharf Co. (1879), 48 L. J. Ch. 824; The Benwell Tower (1895), 72 L. T. 664; Shillito *v.* Biggart, [1903] 1 K. B. 683.

2526. ——.]—When it came to the knowledge of the Ct. of Ch. that the property in respect of which a receiver was to be appointed was subject to a prior mtge. the Ct. reserved the rights of the mtgees. No case can be produced in which a person has ever been committed for enforcing such prior rights (FRY, L.J.).—UNDERHAY *v.* READ (1887), 20 Q. B. D. 209; 57 L. J. Q. B. 129; 58 L. T. 457; 36 W. R. 298; 4 T. L. R. 188, C. A.

Annotation :—**Mentd.** Towerson *v.* Jackson, [1891] 2 Q. B. 484.

2527. ——.]—A judgment for debt was recovered against a theatre co. The theatre was subject to a mtge. The co. had no land except the theatre, of which they were lessees & were in occupation, & they were using it for the ordinary purposes of a theatre :—*Held* : a receiver ought to be appointed of the rents & profits of the co.'s lands by way of equitable execution, without prejudice to the rights of any prior incumbrancers, & the co. should be ordered to deliver up possession of the lands to him.—CADOGAN *v.* LYRIC THEATRE, LTD., [1894], 3 Ch. 338; 63 L. J. Ch. 775; 71 L. T. 8; 10 T. L. R. 596; 7 R. 594, C. A.

Annotation :—**Refd.** *Re* Pearce, *Ex p.* Official Receiver, The Trustee, [1919] 1 K. B. 354.

ii. *Recovery of Possession by Prior Mortgagee.*

2528. Right to eject receiver.]—A second mtgee. cannot have a receiver, the mtgor. living, without the consent of the first mtgee. because the ct. cannot prevent the first mtgee. from bringing an ejectment against the receiver, as soon as he is appointed.—PHIPPS *v.* BATH & WELLS (BP.) (1783), 2 Dick. 608; 21 E. R. 408, L. C.

Annotation :—**Refd.** Berney *v.* Sewell (1820), 1 Jac. & W. 647.

2529. ——.]—BROOKS *v.* GREATHED, DAVIS *v.* GREATHED, No. 2538, *post*.

2530. Whether leave of court necessary—Reservation of rights of prior mortgagees.]—UNDERHAY *v.* READ, No. 2526, *ante*.

2531. —— ——.]—A co. issued debentures constituting a first charge on the whole of their undertaking & property, & empowering the holders, in the event of proceedings for the winding-up of the co., to appoint a receiver invested with very ample powers of carrying on the co.'s business, & managing & disposing of their undertaking & property.

An order was made for the winding-up of the co., & an official liquidator was appointed. The debenture-holders, under their powers, appointed a receiver & applied to the ct. that, notwithstanding the appointment of the liquidator, the receiver might be at liberty forthwith to take possession of all the co.'s undertaking & property :—*Held* : the ct. ought not to interfere with the right of the debenture-holders to a receiver under their deed; & leave was given to the receiver appointed by them to take possession, notwithstanding the appointment of an official liquidator, but without prejudice to any question as to the powers of the receiver, other than the power to take possession & to sell the property.

Where property is in possession of an officer of the ct. & there are legal or equitable rights in that property not vested in the parties to the action or the persons who are before the ct., which legal or equitable rights are not the subject of the administration then going on, then the ct. requires that the person who claims to enforce those rights shall apply for leave to enforce them. The right may be a right to take possession (FRY, L.J.).—*Re* HENRY POUND, SON & HUTCHINS (1889), 42

Sect. 3.—*Appointment of receiver: Sub-sect.* 1, *D.* (*b*) *ii., iii. & iv., &* (*c*) *i., ii., iii. & iv., & E.* (*a*), (*b*) *&* (*c*).]

Ch. D. 402; 58 L. J. Ch. 792; 62 L. T. 137; 38 W. R. 18; 5 T. L. R. 720; 1 Meg. 363, C. A.

Annotations:—**Expld. & Distd.** *Re* Stubbs, Barney *v.* Stubbs, [1891] 1 Ch. 475. **Folld.** Strong *v.* Carlyle Press, [1893] 1 Ch. 268. **Refd.** British Linen Co. *v.* South American & Mexican Co., [1894] 1 Ch. 108. **Mentd.** Davies *v.* Thomas, [1900] 2 Ch. 462.

2532. —— ——.]—ENGEL *v.* SOUTH METROPOLITAN BREWING & BOTTLING CO., [1891] W. N. 31.

2533. Discharge of receiver—Establishment of prior title.]—*Cestuis que trust* under a will instituted a suit to have the trusts carried into effect & to set aside a mtge. of a part of the trust estate made by the trustees. By the terms of the mtge. the mtgees. were not entitled to take possession except upon a prescribed notice. Before this notice had been given pltf. had obtained an order for a receiver, & also an order to take proceedings with respect to a claim adverse to the interests of all the parties to the suit. Afterwards a decree was made in the suit, establishing the validity of the mtge. & directing a sale in which all parties were ordered to join. The mtgees. neither consented to nor opposed the interlocutory orders being made, nor did they at the hearing ask for a dismissal of the bill as against themselves, or oppose the insertion of the direction for a sale. They afterwards applied to have the receiver discharged & to be let into possession, & gave the notice prescribed by the mtge. On their application being refused, they appealed from the refusal, & at the same time from so much of the decree as rendered it obligatory on them to concur in the sale:—*Held*: (1) they had not adopted the proceedings in the suit, but were entitled to priority over the costs of it & of the action, & also to have the receiver discharged & the decree varied so far as it bound them to join in the sale; (2) the ct. might direct possession to be delivered to the mtgees.—LANGTON *v.* LANGTON (1855), 7 De G. M. & G. 30; 3 Eq. Rep. 394; 24 L. J. Ch. 625; 24 L. T. O. S. 294; 1 Jur. N. S. 1078; 3 W. R. 222; 44 E. R. 12, L. JJ.

Annotation:—*As to* (1) **Refd.** *Re* Pound & Hutchins (1889), 42 Ch. D. 402.

iii. *Ascertainment of Priorities.*

2534. Ascertainment by court—Prior equitable estates.]—DAVIS *v.* MARLBOROUGH (DUKE), No. 2521, *ante*.

2535. —— ——.]—(1) A sequestrator of a living in the North Riding of Yorkshire, who had registered his security, postponed to a prior incumbrancer, by an unregistered deed, & which he had notice.

(2) A clergyman, whilst 13 Eliz. c. 20, was not in force, granted an annuity, which he charged upon his living in London, & covenanted that if he exchanged for any other benefice, he would charge it with the annuity. Prior to 57 Geo. 3, c. 99, he exchanged it for a living in Yorkshire, but did not execute any deed, charging the new living with the annuity until after the passing of 57 Geo. 3, c. 49.

The covenant was held to create a good equitable charge on the new living from the time of the exchange; & in a suit instituted by the annuitant against the clergyman, & subsequent sequestrators who had notice of the annuity, the ct., at the hearing, continued a receiver of the rents & profits of the living, who had been appointed by an interlocutory order.—METCALFE *v.* YORK (ARCHBP.) (1835), 6 Sim. 224; 4 L. J. Ch. 154; 58 E. R. 577; *affd.* (1836), 1 My. & Cr. 547; 6 L. J. Ch. 65, L. C.

Annotations:—*As to* (1) **Consd.** Holroyd *v.* Marshall (1862), 10 H. L. Cas. 191; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345. *As to* (2) **Refd.** Long *v.* Storie (1849), 3 De G. & Sm. 308. *Generally*, **Refd.** Tuckley *v.* Thompson (1860), 1 John. & H. 126; Montagu *v.* Sandwich (1886), 32 Ch. D. 525; Tailby *v.* Official Receiver (1888), 13 App. Cas. 523. **Mentd.** Wellesley *v.* Wellesley (1839), 4 My. & Cr. 561; Ludgate *v.* Channell (1851), 16 L. T. O. S. 337; Mornington *v.* Keane (1858), 2 De G. & J. 292; *Re* Mirams, [1891] 1 Q. B. 594; Western Wagon & Property Co. *v.* West, [1892] 1 Ch. 271.

2536. —— —— **Where not admitted.**]—HILES *v.* MOORE, No. 2555, *post*.

2537. —— **Prior charges — Before directing receiver to pay specific incumbrances.**]—A receiver will not be appointed with directions to pay certain incumbrances, till the ct. is satisfied that there are no prior charges on the premises.—— —— *v.* CARPENTER (1823), 1 L. J. O. S. Ch. 181.

2538. Loss of right by first mortgagee—Delay in pursuing action.]—A second incumbrancer having obtained the appointment of a receiver & a decree for a sale, without making the first incumbrancer a party, a petition by the latter for a reference to ascertain priorities, & for the receiver to keep down the interest, refused on the ground that petitioner had commenced a suit for the same purpose, & had delayed it; but leave was given to bring an ejectment.—BROOKS *v.* GREATHED, DAVIS *v.* GREATHED (1820), 1 Jac. & W. 176; 37 E. R. 342.

Annotations:—**Mentd.** Empringham *v.* Short (1844), 3 Hare, 461; Musadee Mahomed Cazum Sherazee *v.* Meerza Shoostry (1854), 8 Moo. P. C. C. 90.

iv. *Rent in Hands of Receiver.*

2539. Notice to tenants by prior mortgagee—Not followed by motion to discharge receiver—Prior mortgagee not entitled to rents.]—THOMAS *v.* BRIGSTOCKE, No. 1418, *ante*.

2540. From what date prior mortgagee entitled—Date of application for discharge of receiver.]—PRESTON *v.* TUNBRIDGE WELLS OPERA HOUSE, LTD., No. 1422, *ante*.

2541. —— —— **Or date of actual discharge.**]—THOMAS *v.* BRIGSTOCKE, No. 1418, *ante*.

2542. —— —— **Notwithstanding earlier notice to tenants.**]—*Re* METROPOLITAN AMALGAMATED ESTATES, LTD., FAIRWEATHER *v.* METROPOLITAN AMALGAMATED ESTATES, LTD., No. 1423, *ante*.

(*c*) *Prior Mortgagee in Possession.*

i. *In General.*

2543. Mortgagee in possession as tenant—Cannot set up title as mortgagee.]—ARCHDEACON *v.* BOWES (1796), 3 Anst. 752; 145 E. R. 1028.

ii. *Sum remaining due.*

2544. Receiver not appointed.]—QUARRELL *v.* BECKFORD, No. 2554, *post*.

2545. ——.]—(1) When a first mtgee. is in possession a receiver will not be appointed against him, except on his confession that he has been paid off, or his refusal to accept what is due to him.

(3) Mismanagement of the estates, & misapplication of the rents, & collusion with the mtgor. are not grounds for a motion before answer, to take the possession from him.

(3) When the first mtgee. is not in possession,

a receiver may be appointed at the suit of a subsequent incumbrancer, without prejudice to the first mtgee.'s taking possession.

(4) A mtgee. who has the legal estate cannot have a receiver.—BERNEY *v.* SEWELL (1820), 1 Jac. & W. 647; 37 E. R. 515.

Annotation :—Generally, **Refd.** Hele *v.* Bexley, Whitfield *v.* Bowyer, Whitfield *v.* Knight (1855), 20 Beav. 127.

iii. *Grounds for Appointment.*

2546. Mismanagement of property.]—BERNEY *v.* SEWELL, No. 2545, *ante.*

2547. ——.]—ROWE *v.* WOOD, No. 1438, *ante.*

2548. Admission that mortgage satisfied.]—BERNEY *v.* SEWELL, No. 2545, *ante.*

2549. ——.]—ROWE *v.* WOOD, No. 1438, *ante.*

2550. Refusal to accept amount due.]—BERNEY *v.* SEWELL, No. 2545, *ante.*

2551. Misapplication of rents.]—BERNEY *v.* SEWELL, No. 2545, *ante.*

2552. Collusion with mortgagor.]—BERNEY *v.* SEWELL, No. 2545, *ante.*

iv. *How Appointment Resisted.*

2553. Mortgagee in possession must show money owing.]—Receiver upon a mtgee. in possession; who cannot ascertain the debt, due to him.—CODRINGTON *v.* PARKER (1810), 16 Ves. 469; 33 E. R. 1062, L. C.

*Annotation :—***Consd.** Hiles *v.* Moore (1853), 15 Beav. 175.

2554. —— **Statement on oath.**]—Though a mtgee. shall not be deprived of possession, while anything remains due, where he refused to swear that anything was due, a consignee, the estate being in the West Indies, was appointed.

If the mtgee., though he cannot state with any great precision, what sum is due to him, can say upon his oath, he believes a sum of money is due, & his mtge. is not satisfied, the ct. will not take the possession from him (LORD ERSKINE, C.).—QUARRELL *v.* BECKFORD (1807), 13 Ves. 377; 33 E. R. 335, L. C.

*Annotations :—***Consd.** Berney *v.* Sewell (1820), 1 Jac. & W. 647; Rowe *v.* Wood (1822), 2 Jac. & W. 553.

2555. —— ——.]—Receiver against a mtgee. in possession granted after decree, on the application of another mtgee., a co-deft.

A., the third mtgee., took possession, & then bought up the first mtge. Having retained possession many years, & received a considerable sum, a receiver was appointed against him, on the application of the second mtgee., the affidavit of A. not satisfactorily showing that anything remained due on the first mtge.

Though I have had considerable difficulty in this case, I think that the proper mode of applying the rule of the ct. is to grant a receiver. The reason is this: in the first place it is to be observed, that in cases of this description, & to avoid complication, the ct., where the priorities are not admitted, sends a reference to the master, to ascertain the priorities, in order that it may make a decree, enabling the mtgees., according to their priorities, to redeem & foreclose each other in succession. That, therefore, is an answer to the observation, that though a receiver was asked, it was refused at the hearing (ROMILLY, M.R.).—HILES *v.* MOORE (1852), 15 Beav. 175; 51 E. R. 503.

2556. —— —— **Not examined by court.**]—ROWE *v.* WOOD, No. 1438, *ante.*

E. In respect of What Property.

(*a*) *In General.*

See, generally, RECEIVERS.

2557. Mortgage of undivided share.]—In a suit for foreclosure & partition by the mtgees. of an undivided share in certain property the ct. allowed a receiver to be appointed of the undivided share which belonged to pltfs.' mtgor.—FALL *v.* ELKINS (1861), 9 W. R. 861.

2558. —— **Receiver appointed over whole property.**]—Receiver may be appointed over the whole of a property at the instance of a mtgee. of an undivided share.—SUMSION *v.* CRUTWELL (1883), 31 W. R. 399.

See Law of Property Act, 1925 (c. 20), s. 102.

Market tolls.]—*See* MARKETS, Vol. XXXIII., p. 530, No. 78.

Appointment of receiver & manager.] — *See* Sect. 4, sub-sect. 4, *post.*

(*b*) *Property Abroad.*

See CONFLICT OF LAWS, Vol. XI., pp. 353, 354, Nos. 378–380; COMPANIES, Vol. X., p. 795, Nos. 5013–5017.

2559. Colonial estate.]—QUARRELL *v.* BECKFORD, No. 2554, *ante.*

2560. ——.]—Mtgee. of a West India estate not taking possession, will not be appointed consignee by the ct. unless the mtge. deed contains a covenant for that purpose.—COX *v.* CHAMPNEYS (1822), Jac. 576; 37 E. R. 967.

*Annotations :—***Mentd.** Henckell *v.* Daly (1828), 1 Moo. P. C. C. 51; Leith *v.* Irvine (1833), 1 My. & K. 277.

2561. Contract made in England.]—Motion for the appointment of a receiver by D. & co. a Brazilian firm, one of them at present residing in England, pltfs. in an action seeking for a declaration that by virtue of two deeds they were entitled to a charge upon the freehold hereditaments & other premises situate in Brazil comprised in a debenture trust deed, & upon the undertaking of defts. the B. C. S. F. Ltd. & all its assets, present & future, for securing moneys due; for an account of what was due; for enforcement of the charge by foreclosure or sale, & for a receiver. Defts., the A. T. K. were sued as trustees under the debenture trust deed, & defts. S. & C. as receivers duly appointed under the same deed. The B. C. S. F. Ltd., the remaining defts. were an English co. having property & business in Brazil: —*Held:* pltfs. were entitled to the appointment of a receiver as to so much of the property as was clearly within their deeds; & deft.'s motion must be dismissed.—DUDER *v.* AMSTERDAMSCH TRUSTEES KANTOOR, [1902] 2 Ch. 132; 71 L. J. Ch. 619; 87 L. T. 22; 50 W. R. 551.

*Annotation :—***Mentd.** Bank of Africa *v.* Cohen, [1909] 2 Ch. 129.

(*c*) *Rates.*

2562. Poor rate—To be assessed at future time.]—A. being entitled to a sum of £300 secured on the poor's rates of the parish of S. in the manner required by a private Act of Parliament, received the interest up to 1802, but did not make any claim or receive any payment from 1802 to 1812: in the meantime, in 1810, an Act had been passed, repealing the former Act, under which the money had been lent, but providing, that the debts & liabilities, contracted under the old Act, should be

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PART XIII. SECT. 3, SUB-SECT. 1.—E. (a).

k. *Railways.*]—GREY *v.* MANITOBA & NORTH WESTERN RY. CO. OF CANADA, [1897] A. C. 254, P. C.—**CAN.**

PART XIII. SECT. 3, SUB-SECT. 1.—E. (c).

l. *Rates for use of pier.*]—KERRY COUNTY COUNCIL *v.* TRALEE & FENIT PIER & HARBOUR COMRS., [1921] 1 I. R. 71.—**IR.**

Sect. 3.—Appointment of receiver: Sub-sect. 1, E. (c) & (d), F. (a), (b) & (c), G. & H. (a) & (b).]

paid by the comrs. appointed, & under the authorities given them by the new Act; & also providing, that the comrs. should sue & be sued by their clerk. A. filed a bill, praying an account of what is due to him for interest on the bond, payment of what shall be found due to him, & the appointment of a receiver.

A receiver will not be appointed of rates to be assessed by comrs. & collected at a future period. —DREWRY *v.* BARNES (1826), 3 Russ. 94; 5 L. J. O. S. Ch. 47; 38 E. R. 511.

Annotations:—**Refd.** Preston *v.* Great Yarmouth Corpn. (1872), 7 Ch. App. 657, n. **Mentd.** A.-G. *v.* Pearson (1846), 2 Coll. 581; Delarue *v.* Church (1851), 20 L. J. Ch. 183.

2563. Parish rate — Under special Act.]—GIBBONS *v.* FLETCHER (1852), cited in 11 Hare, at p. 251; 68 E. R. 1268, L. C.

2564. ——.]—The comrs. appointed under a local Act were by the Act empowered to raise money upon the security of the rates for the purposes of local improvement. Of the money so borrowed the sum of £100 at the least in every year was to be repaid to such of the mtgees. as should be selected by ballot. The interest upon the mtge. was duly paid, & annual instalments were paid in the prescribed manner, though not with complete regularity. Pltfs., as mtgees., gave notice to the comrs., requiring them to pay off their mtge., £800, in six months. The comrs. refused to do so, whereupon pltfs. filed their bill to establish their right to be paid off, & for a receiver of the rates:—*Held:* pltfs. had no right to have their mtge. debt paid off, except under the provisions of the Act, & the ct. had no jurisdiction to appoint a receiver of the rates.—PRESTON *v.* GREAT YARMOUTH CORPN. (1872), 7 Ch. App. 655; 41 L. J. Ch. 760; 27 L. T. 87; 20 W. R. 875, L. JJ.

(d) Tolls.

2565. Receiver appointed.]—It occurred to me, that it had been determined that a mtge. of turnpike-tolls is within the statute [9 Geo. 2, c. 36]. The mtgee. would have a right to come into this ct. to have an account & a receiver appointed (LORD LOUGHBOROUGH, C.).—KNAPP *v.* WILLIAMS (1798), 4 Ves. 430, n.; 31 E. R. 221, L. C.

Annotations:—**Refd.** Crewe *v.* Edleston (1857), 1 De G. & J. 93. **Mentd.** R. *v.* Bates (1816), 3 Price, 341; Myers *v.* Perigal (1852), 2 De G. M. & G. 599; Ion *v.* Ashton (1860), 28 Beav. 379; Chandler *v.* Howell (1876), 4 Ch. D. 651; Attree *v.* Hawe (1877), 47 L. J. Ch. 157; *Re* Mitchell's Estate, Mitchell *v.* Moberly (1877), 6 Ch. D. 655; Jervis *v.* Lawrence (1882), 22 Ch. D. 202; Cavendish *v.* Cavendish (1883), 24 Ch. D 685; *Re* Christmas, Martin *v.* Lacon (1885), 33 Ch. D. 332; *Re* David, Buckley *v.* Royal National Lifeboat Institution (1889), 43 Ch. D. 27; *Re* Pickard, Elmsley *v.* Mitchell, [1894] 3 Ch. 704.

2566. ——.]—DUMVILLE *v.* ASHBROOKE (1829), 3 Russ. 98, n.; 38 E. R. 516.

2567. ——.]—CREWE (LORD) *v.* EDLESTON, No. 1352, *ante*.

——.]—*See* COMPANIES, Vol. X., p. 1189, No. 8433; MARKETS, Vol. XXXIII., p. 530, No. 78.

F. Position of Tenants and Mortgagor in Possession.

(a) Attornment.

See, generally, RECEIVERS.

2568. Remedy in case of refusal—Motion for attornment—Party in possession not a party.]—Where a receiver is appointed & the person in possession refuses to attorn, or to deliver up possession, it is not appearing in what right the possession is held, the proper course is to move that the person may attorn. It is not necessary in the first instance, to make such person a party to the suit.—REID *v.* MIDDLETON (1823), Turn. & R. 455; 37 E. R. 1176, L. C.

2569. From what date directed—Service of notice of motion.]—MOORE *v.* MALYON (1889), 33 Sol. Jo. 699.

2570. —— **Date of order.**]—*Re* BURCHNALL, WALKER *v.* LACEY (1893), 38 Sol. Jo. 59.

Direction for attornment in order for possession.] —*See* No. 2579, *post*.

(b) Occupation Rent.

See, generally, RECEIVERS.

2571. From what date payable — Date of order appointing receiver—& fixing rent.]—*Re* BURCHNALL, WALKER *v.* LACEY (1893), 38 Sol. Jo. 59.

2572. —— **Date of demand—No express provision in order.**]—In a foreclosure action against a mtgor. who was himself in possession & occupation of part of the lands comprised in the mtge. a receivership order was made which contained a direction that the tenants should attorn & pay rents to the receiver, but did not expressly provide for the circumstance of the mtgor.'s possession & occupation. The receiver demanded an occupation rent:—*Held:* the occupation rent payable by the mtgor. ran, not from the date of the order appointing the receiver, but from that of the demand.—YORKSHIRE BANKING CO. *v.* MULLAN (1887), 35 Ch. D. 125; 56 L. J. Ch. 562; 56 L. T. 399; 35 W. R. 593.

2573. How fixed — Reference to master.]—REAL & PERSONAL ADVANCE CO. *v.* M'CARTHY & SMITH, No. 2497, *ante*.

2574. ——.]—MOORE *v.* MALYON (1889), 33 Sol. Jo. 699.

2575. ——.]—*Re* BURCHNALL, WALKER *v.* LACEY (1893), 38 Sol. Jo. 59.

2576. Payment of occupation rent as alternative to appointment of receiver.]—REAL & PERSONAL ADVANCE CO. *v.* M'CARTHY & SMITH, No. 2497, *ante*.

(c) Delivery of Possession.

See, generally, RECEIVERS.

2577. No direction in order appointing receiver—Right of person in possession to remain—On payment of occupation rent.]—Where an order appointing a receiver does not contain a direction that possession of the property shall be delivered up to the receiver, a party in possession is justified in refusing to deliver it up, & may retain it, paying an occupation rent.—RANDFIELD *v.* RANDFIELD (1859), 7 W. R. 651.

Annotation:—**Folld.** Yorkshire Banking Co. *v.* Mullan (1887), 35 Ch. D. 125.

2578. Order for possession directing attornment —Variation of order.]—HAWKES *v.* HOLLAND, [1881] W. N. 128, C. A.

Annotations:—**Apld.** Edgell *v.* Wilson (1893), 37 Sol. Jo. 715; Pratchett *v.* Drew, [1924] 1 Ch. 280.

2579. Right of mortgagee to order.]—HAWKES *v.* HOLLAND, [1881] W. N. 128, C. A.

Annotations:—**Folld.** Edgell *v.* Wilson (1893), 37 Sol. Jo. 715; Pratchett *v.* Drew, [1924] 1 Ch. 280.

2580. —— **Before judgment in foreclosure action.**]—This was an action brought by brewers for foreclosure of a mtge. of a public-house of which the mtgor. was in possession. A receiver & manager had been appointed by order on interlocutory motion in the form given in *Truman & Co.* v. *Redgrave*, No. 2617, *post*. The mtgor. continued in occupation of a part of the premises, & was alleged to have acted in a manner which interfered with the proper conduct of the business by

the receiver. Pltf. now moved for an order directing the mtgor. to give up possession to the receiver, & restraining him from remaining in occupation of any part of the premises:—*Held:* the mtgee. was not entitled to such an order before judgment.—TAYLOR *v.* SOPER (1890), 62 L. T. 828.

Annotations:—**Distd.** Pratchett *v.* Drew, [1924] 1 Ch. 280. **Reid.** Ind, Coope *v.* Mee, [1895] W. N. 8.

2581. —— —— Discretion of court.]—Where, upon an application in a mtgee.'s action for foreclosure or sale, an *interim* receiver is appointed of the rents & profits of the mtged. premises & the mtgor. is in possession of the premises, the mtgee. is entitled *primâ facie* to an order that the mtgor. do deliver up possession of the premises to the receiver, although the matter is within the discretion of the ct.—PRATCHETT *v.* DREW, [1924] 1 Ch. 280; 93 L. J. Ch. 137; 130 L. T. 660; 40 T. L. R. 167; 68 Sol. Jo. 276.

2582. ——.] — EDGELL *v.* WILSON (1893), 37 Sol. Jo. 715.

Annotation:—**Follid.** Pratchett *v.* Drew, [1924] 1 Ch. 280.

2583. Alternative to occupation rent.] — *Re* BURCHNALL, WALKER *v.* LACEY (1893), 38 Sol. Jo. 59.

2584. Time not specified in order—Application for writ of possession—R. S. C., Ord. 41, r. 5.]—Where an order was made directing delivery of certain premises into the possession of a receiver appointed by the order, but no time within which delivery of possession was to be made was specified in the order, it was held that a writ of possession could not issue because above rule had not been complied with.—SAVAGE *v.* BENTLEY (1904), 90 L. T. 641; 48 Sol. Jo. 507.

G. Position of Receiver.

See, generally, RECEIVERS.

2585. To whom liable for money received—Mortgagor liable for embezzlement or waste.]—RIGGE *v.* BOWATER (1791), 3 Bro. C. C. 365; 29 E. R. 585, L. C.

2586. —— Termination of appointment—Money in receiver's hands.]—PAYNTER *v.* CAREW, No. 2690, *post.*

2587. —— Money paid into court.]—A tenant for life having mortgaged his life interest to the full amount, a suit is instituted, & a receiver appointed, who pays certain moneys to which the tenant for life is entitled into ct., & the tenant for life petitions for payment of the money out to him, & gets the order, nothing being said about the mtge. The mtgees. then petition for payment of the fund out of ct. to them. Order made.

Until the money actually gets into the hands of the mtgor., it is my duty to order it to be paid to the mtgee. (MALINS, V.-C.).—PIDDOCK *v.* BOULTBEE (1867), 16 L. T. 837.

Interim receiver in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., p. 204, Nos. 1882-1885.

H. Practice.

(a) Stage of Proceedings at which Receiver Appointed.

See, generally, R. S. C., Ord. 50, r. 6; RECEIVERS.

2588. Application at hearing of suit for redemption—By defendant in action.]—At the hearing of a suit for redemption, the ct. will not, on the application of deft., grant a receiver against pltf., the mtgor. in possession, none being prayed by the bill.—BARLOW *v.* GAINS (1845), 8 Beav. 329; 50 E. R. 129; *subsequent proceedings*, 5 L. T. O. S. 283.

2589. Interlocutory application.] — PEASE *v.* FLETCHER, No. 2496, *ante.*

2590. Whether after judgment for foreclosure.]—WESTON *v.* LEVY, [1887] W. N. 76.

2591. —— Conveyance to plaintiff not settled.]—After judgment for foreclosure absolute, the action being at an end, pltf. cannot obtain an order for the appointment of a receiver of the mtged. property, even though the conveyance of the property to pltf. remains to be settled.—WILLS *v.* LUFF (1888), 38 Ch. D. 197; 57 L. J. Ch. 563; 36 W. R. 571.

Annotations:—**Reid.** Manchester & Liverpool Bank *v.* Parkinson (1889), 60 L. T. 258. **Mentd.** Holmes *v.* Millage, [1893] 1 Q. B. 551.

(b) Effect of Non-Appearance of Mortgagor.

See, generally, R. S. C., Ord. 50, r. 6; RECEIVERS.

2592. Whether receiver appointed—Mortgagor out of jurisdiction—In receipt of rents through agent.]—COWARD *v.* CHADWICK (1825), 2 Russ. 150, n.; 38 E. R. 293; *sub nom.* —— *v.* CHADWICK, 4 L. J. O. S. Ch. 67; *subsequent proceedings* (1827), 2 Russ. 634, L. C.

Annotations:—**Reid.** Lyde *v.* Hale (1835), 4 L. J. Ch. 180; Shaw *v.* Shore (1835), 5 L. J. Ch. 79.

2593. —— —— Rents received by co-owner.]—Two parties, who were entitled to property in equal moieties, made an equitable mtge. of it; one of the mtgors. was out of the jurisdiction, & the whole rents were received by the other. The ct. granted a receiver.—HOLMES *v.* BELL (1840), 2 Beav. 298; 9 L. J. Ch. 217; 48 E. R. 1195.

2594. —— Non-appearance after notice served personally.]—In a suit by an equitable mtgee. against the mtgor., to which deft. had not appeared, the ct. refused to appoint a receiver, upon a motion, notice of which had been served upon deft. personally, & also refused leave to serve deft. personally with such a notice, until the ct. was satisfied that pltf. had taken all proper steps to compel an appearance.—RAMSBOTTOM *v.* FREEMAN (1841), 4 Beav. 145; 10 L. J. Ch. 362; 49 E. R. 294.

2595. —— Affidavit disclosing case of injury.]—Where a case of injury was disclosed by the affidavits in support of a motion by an equitable mtgee. for a receiver, the ct. made the order, although deft. had not appeared, & no injunction was asked.—MEADEN *v.* SEALEY (1849), 6 Hare, 620; 18 L. J. Ch. 168; 13 Jur. 297; 67 E. R. 1310.

2596. —— Mortgagor absconding.] — Where deft. had made an equitable mtge. & had subsequently absconded after an unsuccessful attempt to effect an arrangement with his creditors in bkpcy., a bill was filed to realise the mtge., but no service could be effected. The ct., on an *ex p.* motion, appointed a receiver of the property comprised in the mtge.—LONDON & SOUTH WESTERN BANK, LTD. *v.* FACEY (1871), 24 L. T. 126; 19 W. R. 676.

2597. —— ——.]—BANK OF WHITEHAVEN *v.* THOMPSON, [1877] W. N. 45.

PART XIII. SECT. 3, SUB-SECT. 1.—G.

m. *Acts for benefit of party—On whose application he was appointed.*]—Possession of a receiver in a mtge. suit is *primâ facie* for the benefit of the party who has obtained the appointment.—RAMESHWAR SINGH *v.* CHUNI LAL SHAHA (1919), I. L. R. 47 Calc. 418.—**IND.**

PART XIII. SECT. 3, SUB-SECT. 1.—H. (a).

n. *Whether petition for receiver cause of action.*]—JONES *v.* COHN & CANARY (1924), 33 B. C. R. 321.—**CAN.**

Sect. 3.—*Appointment of receiver: Sub-sect.* 1, *I. & J.; sub-sect.* 2, *A. & B.* (*a*), (*b*) & (*c*).]

I. Equitable Execution.

See EXECUTION, Vol. XXI., pp. 664–674, Nos. 2448–2536.

J. As Remedy of Debenture-Holders.

See COMPANIES, Vol. X., pp. 791–810, 1188–1190, Nos. 4971–5178, 8429–8447.

SUB-SECT. 2.—OUT OF COURT

A. In General.

See, generally, RECEIVERS.

2598. Negotiation for mortgage — Securities to be approved by conveyancer—Right to require receiver.]—(1) In a negotiation, for the advance of a sum of money, by way of mtge., where the proposed mtgor. undertakes, in writing, to pay to mtgee., all "fair & reasonable expenses, in ascertaining the value of the property"; if the negotiation goes off, by the default of the mtgee., the mtgor. is not bound to pay such expenses.

(2) In such negotiation, agreement by mtgee., to advance a given sum, "subject to the approval of the title, & execution of such mtge. securities, as shall be recommended & approved by his conveyancer," does not entitle the mtgee. to insist upon the appointment of a receiver, as part of the "securities," although such appointment be recommended by the conveyancer.—ST. LEGER *v.* ROBSON (1831), 9 L. J. O. S. K. B. 184.

B. Under Express Powers.

(*a*) *In General.*

See, generally, RECEIVERS.

2599. Appointment by successive incumbrancers —Subsequent incumbrancer seeking account—Necessity for joining prior incumbrancers.]—Where A. & his incumbrancers, B., C. & D., joined in the appointment of a receiver, who covenanted to keep down the incumbrances according to their priorities, & pay the surplus to A.:—*Held:* a subsequent mtgee. from A. could not sustain a bill against the receiver & A. for an account of the rents & an injunction against paying the surplus to A. in the absence of B., C. & D.—FORD *v.* RACKHAM (1853), 17 Beav. 485; 23 L. J. Ch. 481; 22 L. T. O. S. 112; 2 W. R. 9; 51 E. R. 1122.

Annotation:—**Apld.** Jefferys *v.* Dickson (1866), 1 Ch. App. 183.

(*b*) *Position of Receiver.*

2600. Agent of mortgagor.]—K., being beneficially interested in the reversion, joined with the trustee, who was legally entitled, in mortgaging it to pltf. & K., by the mtge. deed, with the approbation of pltf., testified by pltfs. executing the deed, appointed G. to be receiver, agent & attorney of K., to demand & collect rents, to adjust accounts, to sue or distrain for rent, give notice to quit, & eject on refusal, & to do all that K. could have done if the deed had not been made. K., the trustees & pltf., executed the deed:—*Held:* G. was an agent lawfully authorised to give the notice required by 4 Geo. 2, c. 28, s. 1.—POOLE *v.* WARREN (1838), 8 Ad. & El. 582; 3 Nev. & P. K. B. 693; 1 Will. Woll. & H. 518; 3 Jur. 23; 112 E. R. 959.

2601. ——.]—There was the receivership deed & the receiver, I presume, collected the rents of some parts of the property comprised in the deed, but . . . it does not appear that he was ever in actual possession of that estate. Supposing him, however, to have been so, the possession of such receiver is wholly different from that of a mtgee. . . . The receiver is appointed merely to secure the interest upon the debt & when that interest has been paid the rents belong to the mtgor. (TURNER, L.J.).—KENSINGTON (LORD) *v.* BOUVERIE (1855), 7 De G. M. & G. 134; 3 Eq. Rep. 765; 24 L. J. Ch. 442; 25 L. T. 169; 1 Jur. N. S. 577; 3 W. R. 469; 44 E. R. 53, L. JJ.; *on appeal* (1859), 7 H. L. Cas. 557, H. L.

Annotations:—**Reld.** Mayer *v.* Murray (1878), 8 Ch. D. 424; Noyes *v.* Pollock (1886), 32 Ch. D. 53. **Mentd.** Howlin *v.* Sheppard (1870), 19 W. R. 253.

2602. ——.]—It was contended on behalf of defts., that the appointment of the receiver by the deed of even date with pltfs.'s first mtge. . . . did not constitute the receiver for all purposes the agent of the mtgor., & that in fact, the receiver must be deemed when in possession, to have received the rents as agent of pltfs., & that the only object & effect of the receivership deed was to prevent pltfs. from being charged in the accounts for wilful neglect or default. No direct authority was cited for this proposition, & if it were necessary now to decide it I should hold that it could not be maintained, & that the receiver must be treated as being for all purposes the agent of the mtgor. (ROLT, L.J.).—LAW *v.* GLENN (1867), 2 Ch. App. 634, L. JJ.

Annotation:—**Reld.** *Re* Hale, Lilley *v.* Foad, [1899] 2 Ch. 107.

2603. —— **Though appointed by mortgagee.**]—A mtgor., by deed to which his mtgees. were parties, conveyed the mtged. estates to trustees on trusts for better securing to the mtgees. payment of the interest on their incumbrances, & upon trusts to accumulate the surplus rents as a fund to satisfy the incumbrances, & subject thereto, in trust for the mtgor., with a proviso, that when the incumbrances should be satisfied, the trusts should cease:—*Held:* although a receiver, appointed by a mtgee. under the ordinary power, is the agent of the mtgor., who may file a bill against him for an account without making the mtgee. a party, in this case the trustees were not mere receivers, & therefore, the mtgees. were properly made parties to the suit.

A receiver who has been appointed by a mtgee. under the ordinary power for that purpose, is in possession as agent, not of the mtgee., but of the mtgor. (LORD CRANWORTH, C.).—JEFFERYS *v.* DICKSON (1866), 1 Ch. App. 183; 35 L. J. Ch. 376; 14 L. T. 208; 12 Jur. N. S. 281; 14 W. R. 322, L. C.

Annotations:—**Consd.** Gaskell *v.* Gosling, [1896] 1 Q. B. 669; Robinson Printing Co. *v.* Chic, [1905] 2 Ch. 123. **Reld.** Deyes *v.* Wood, [1911] 1 K. B. 806.

2604. —— ——.]—GASKELL *v.* GOSLING, No. 1370, *ante.*

2605. Agent of mortgagee—Death of mortgagee & mortgagor—Agency constituted by acts of representative of mortgagee.]—(1) The doctrine of constructive notice applies in two cases; first, where the party charged has notice that the property in dispute is incumbered, or in some way affected, in which case he is deemed to have notice of the facts & instruments, to a knowledge whereof he would have been led by due inquiry after the fact

o. Whether receiver may be appointed—When not expressly stipulated for in mortgage.]—NATIONAL TRUST CO. *v.* BRANTFORD ST. RY. CO., GRAND VALLEY RY. CO. & STOCKDALE (1912), 22 O. W. R. 839; 3 O. W. N. 1615.—CAN.

which he actually knew; &, secondly, where the conduct of the party charged evinces that he had a suspicion of the truth, & wilfully or fraudulently determined to avoid receiving actual notice of it.

A party before advancing money on a mtge., inquired of the mtgor. & his wife, whether any settlement had been made upon their marriage, & was informed that a settlement had been made of the wife's fortune only, & that it did not include the husband's estate which was proposed as the security, & he afterwards advanced the mtge. money without having seen the settlement or known its contents:—*Held:* the mtgee. was not, under the circumstances, affected with constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate.

(2) A mtgor. having only a life interest in the mtged. premises, & a mtgee. having a charge both on the life interest & on the interest in remainder, by a joint deed appoint a receiver, who is directed to pay certain debts, expenses & the charge on the life interest, & to keep down the interest on the residue. The mtgee. dies, & afterwards the mtgor. The receiver continues in receipt of the rents & profits after the death of the mtgor., & pays some part of the rents to the representative of the mtgee.:—*Held:* upon the construction of the deed, the possession of the receiver was not the possession of the mtgee.; but there was ground for an inquiry whether the representative of the mtgee. had by any acts constituted the receiver her agent exclusively.—JONES *v.* SMITH (1841), 1 Hare, 43; 11 L. J. Ch. 83; 6 Jur. 8; 66 E. R. 943; *affd.* (1843), 1 Ph. 244, L. C.

Annotations:—As to (1) **Consd.** West *v.* Reid (1843), 2 Hare, 249; Ware *v.* Egmont (1853), 23 L. J. Ch. 499. **Apld.** *Re* Bright's Trusts (1856), 21 Beav. 430; Dawson *v.* Prince (1857), 2 De G. & J. 41. **Consd.** Jones *v.* Williams (1857), 24 Beav. 47. **Apld.** Montefiore *v.* Browne (1858), 7 H. L. Cas. 241; Cox *v.* Coventon (1862), 31 Beav. 378; The Emilien Marie (1875), 44 L. J. Adm. 9. **Consd.** Patman *v.* Harland (1881), 17 Ch. D. 353; Williams *v.* Williams (1881), 17 Ch. D. 437. **Apld.** English & Scottish Mercantile Investment Co. *v.* Brunton, [1892] 2 Q. B. 700; Black *v.* Williams (1894), 2 Mans. 86. **Refd.** Macbryde *v.* Eykyn (1811), 24 L. T. 461; Steadman *v.* Poole (1847), 16 L. J. Ch. 348; Barnhart *v.* Greenshields (1853), 9 Moo. P. C. C. 18; Bird *v.* Fox (1853), 11 Hare, 40; Clack *v.* Holland (1854), 19 Beav. 262; Rooke *v.* Kensington (1856), 2 K. & J. 753; Knight *v.* Bowyer (1857), 23 Beav. 609; Welchman *v.* Coventry Union Bank (1860), 8 W. R. 729; Wilson *v.* Hart (1865), 2 Hem. & M. 551; *Re* Hop & Malt Exchange & Warehouse Co., *Ex p.* Briggs (1866), 35 L. J. Ch. 320; Lees *v.* Whiteley (1866), L. R. 2 Eq. 143; Brown *v.* Tanner (1868), 3 Ch. App. 597; Turton *v.* Meacham (1868), 19 L. T. 760; Shaw *v.* Foster (1872), L. R. 5 H. L. 321; Carroll *v.* Keays, Keays *v.* Carroll (1873), 22 W. R. 243; Agra Bank *v.* Barry (1874), L. R. 7 H. L. 135; Lee *v.* Clutton (1875), 45 L. J. Ch. 43; A.-G. *v.* Biphasphated Guano Co. (1878), 38 L. T. 941; Lloyds Banking Co. *v.* Jones (1885), 29 Ch. D. 221; *Re* Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 56 L. T. 622; Bailey *v.* Barnes, [1894] 1 Ch. 25; Oliver *v.* Hinton, [1899] 2 Ch. 264; *Re* Alms Corn Charity, Charity Comrs. *v.* Bode, [1901] 2 Ch. 750; Hooper *v.* Bromet (1903), 89 L. T. 37; *Re* Valletort Sanitary Steam Laundry Co., Ward *v.* Valletort Sanitary Steam Laundry Co., [1903] 2 Ch. 654; *Re* Companies Acts, 1862 to 1900, *Re* Standard Rotary Machine Co. (1906), 95 L. T. 829; Davis *v.* Hutchings, [1907] 1 Ch. 356; Reeves *v.* Pope (1914), 2 K. B. 284; *Re* Chafer & Randall's Contract, [1916] 2 Ch. 8; *Re* De Leeuw, Jakens *v.* Central Advance & Discount Corpn., [1922] 2 Ch. 540; Underwood *v.* Bank of Liverpool, Same *v.* Barclays Bank, [1924] 1 K. B. 775.

2606. ——.]—MADGE *v.* DEBENTURE CORPN. (1896), 12 T. L. R. 203, D. C.

Appointment under statutory powers.] — *See* Sub-sect. 2, C. (*b*), *post.*

(*c*) *Powers of Receiver.*

2607. Appointment by mortgagor & mortgagee—Provision for expenses & remuneration—Right to repay expenses before paying over proceeds.]—By a receivership deed, appointing A. to be receiver of rents & tithes forming the subject of an existing mtge., it is covenanted that A. shall, in the first place, pay all the costs, charges, & expenses which he shall bear, sustain, incur, or be liable to, in or about the collecting, receiving, & compelling payment of, the said rents & tithes, including therein all expenses of suit, action, process, distress, & all other charges of management whatsoever,; & that he shall, in the next place, pay all taxes, etc.; & in the next place pay the mtge. interest; & shall, lastly, pay the surplus of the rents & tithes to the mtgor., deducting & detaining out of such surplus, for his own use, so much as he shall reasonably deserve as a compensation for his care & pains, trouble & expenses, in collecting, receiving, & paying the said rents & tithes, not exceeding 1*s.* in the pound on the gross amount collected:—*Held:* A. is entitled to deduct & detain out of the rents & tithes received by him, such sums as are reasonably expended by him in collecting the rents & tithes, including salaries paid to collectors, before applying such rents & tithes in satisfaction or in reduction of the mtge. interest.—GILBERT *v.* DYNELEY (1841), 3 Man. & G. 12; 3 Scott, N. R. 365; 5 Jur. 843; 133 E. R. 1038.

2608. —— Trusts of ultimate surplus—Power to retain for payment of insurance premium.]—Testator, in his lifetime, was appointed by deed, by a mtgor. & mtgee., to receive the rents of the mtged. estates, & by the terms of the deed testator was, after allowing taxes & repairs, to hold the remaining rents in trust, first, to pay taxes; secondly, costs of collection; thirdly, commission; fourthly, premiums on policies of insurance; & fifthly, "in satisfaction, on Jan. 6, & July 6, of the accruing interest, due on the principal moneys secured, & to pay the ultimate surplus, if any, to pltf.," with a proviso, that if on those days, Jan. 6, & July 6, testator should have rents & profits in hand, it should be lawful for him to retain the whole or part, for the purpose of paying the premium in that year on the policies. Testator did not execute the deed. There was an admitted balance at testator's death, as appeared by an account rendered by the exor.:—*Held:* testator was not a mere receiver but a trustee, & was not bound by the terms of the deed to pay the surplus existing on each Jan. 6, & July 6, but had a discretion under the control of a ct. of equity, to keep the funds in his hands, if reasonably necessary; also the account being stated by the exor. was equivalent only to evidence that the payments therein mentioned were made by & to testator; therefore money had & received would not lie. *Qu.:* whether if testator had, by the terms of his contract, as contained in the deed, been bound to pay over the surplus existing on Jan. 6, & July 6, it could have been recovered in an action for money had & received.—BARTLETT *v.* DIMOND (1845), 14 M. & W. 49; 14 L. J. Ex. 372; 5 L. T. O. S. 56; 153 E. R. 385.

Annotation:—**Apld.** Pardoe *v.* Price (1847), 16 M. & W. 451.

2609. Mortgagee's power of sale—Trusts not declared subject to power—Power of sale paramount.]—KING *v.* HEENAN, No. 2252, *ante.*

Appointment under statutory powers.] — *See* Sub-sect. 2, C. (*c*), *post.*

Right to give notice or demand possession.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 452, 544, Nos. 5984, 6894.

Sect. 3.—*Appointment of receiver: Sub-sect.* 2, *C.* (*a*), (*b*) & (*c*). *Sect.* 4: *Sub-sects.* 1, 2, 3 & 4, *A. & B.*]

C. Under Statutory Powers.

(*a*) *In General.*

See, now, Law of Property Act, 1925 (c. 20), ss. 101 (1) (iii), (3), (4); 109 (1); &, *generally,* RECEIVERS.

2610. Bankruptcy of mortgagor—Failure of mortgagees to give notice to debtors.]—Mtgees. of book debts appointed, before the mtgor. had committed an act of bkpcy., a receiver under the powers conferred by Conveyancing & Law of Property Act, 1881 (c. 41), of the income of the property assigned. They subsequently obtained the appointment of the same person as receiver by the ct., without any notice of an act of bkpcy. which had been committed by their mtgor. a few days previously. A month later the mtgor. was adjudicated bkpt. The mtgees. never gave notice of the assignment to the debtors; but the receiver entered into possession of the premises assigned, & took moneys paid in respect of the book debts. The trustee in bkpcy. claimed these sums:—*Held:* inasmuch as the mtgees. had had ample time, between the appointment of the receiver & the adjudication, to give notice to the debtors, & had not done so, they had not determined their consent so as to take the debts out of the order & disposition of the bkpt. with the consent of the true owner, & the debts belonged to the trustee.—RUTTER *v.* EVERETT, [1895] 2 Ch. 872; 64 L. J. Ch. 845; 73 L. T. 82; 44 W. R. 104; 39 Sol. Jo. 689; 2 Mans. 371; 13 R. 719.

Annotations:—**Consd.** *Re* Neal, *Ex p.* Trustee, [1914] 2 K. B. 910; *Re* Collins, [1925] Ch. 556. **Mentd.** *Re* Crouch, *Ex p.* Smith (1901), 83 L. T. 746.

———.]—*See* BANKRUPTCY, Vol. V., p. 775, Nos. 6658, 6659.

2611. Death of mortgagor—No revocation of appointment.]—*Re* HALE, LILLEY *v.* FOAD, No. 2614, *post.*

Mortgagor's right to distrain.]—*See* DISTRESS. Vol. XVIII., pp. 286, 287, Nos. 219–222.

Priorities in execution.]—*See* EXECUTION, Vol. XXI., p. 645, Nos. 2240, 2241.

(*b*) *Position of Receiver.*

See, now, Law of Property Act, 1925 (c. 20), s. 109 (2).

2612. Agent of mortgagor—Agency modified by terms of mortgage deed.]—The fact that the covering deed goes much further than the Act [Conveyancing & Law of Property Act, 1881 (c. 41)] does not in any way affect its validity; but the result is that the sixth article of the deed which I have last read goes a great deal further than the provision in the Act, that the receiver shall be deemed to be the agent of the mtgor.; &, in my opinion, the provision in the Act that the receiver shall be deemed to be the agent of the mtgor. does not apply here, because there is an express provision as to the receiver taking possession from the co. in the deed itself (NORTH, J.).—RICHARDS *v.* KIDDERMINSTER OVERSEERS, RICHARDS *v.* KIDDERMINSTER CORPN., [1896] 2 Ch. 212; 65 L. J. Ch. 502; 74 L. T. 483; 44 W. R. 505; 12 T. L. R. 340; 4 Mans. 169.

Annotations:—**Mentd.** *Re* Marriage, Neave, North of England Trustee, Debenture & Assets Corpn. *v.* Marriage, Neave, [1896] 2 Ch. 663; National Provincial Bank of England *v.* United Electric Theatres (1915), 85 L. J. Ch. 106.

2613. —— Receiver subsequently appointed by court—Termination of agency.]—The agency of the receiver on behalf of the co. came to an end on Aug. 29, when he was appointed receiver & manager by an order in the action (ROMER, L.J.).—HAND *v.* BLOW, [1901] 2 Ch. 721; 70 L. J. Ch. 687; 85 L. T. 156; 50 W. R. 5; 17 T. L. R. 635; 45 Sol. Jo. 639; 9 Mans. 156, C. A.

Annotations:—**Mentd.** *Re* British Fullers' Earth Co., Gibbs *v.* Same Co. (1901), 17 T. L. R. 232; *Re* Griffiths Cycle Corpn., Dunlop Pneumatic Tyre Co. *v.* Griffiths Cycle Corpn. (1901), 85 L. T. 675; *Re* Abbott, Ltd., Abbott *v.* The Co. (1913), 30 T. L. R. 13; *Re* Westminster Motor Garage Co., Boyers *v.* The Co. (1914), 84 L. J. Ch. 753; *Re* Levi, [1919] 1 Ch. 416.

Appointment under express powers.]—*See* Sub-sect. 2, B. (*b*), *ante.*

(*c*) *Powers of Receiver.*

See, now, Law of Property Act, 1925 (c. 20), s. 109 (3), (4), (6), (7), (8).

2614. Application of income—Payment of unsecured debt—Extension of statutory powers by mortgage deed.]—H., the owner of a business, mortgaged it to S. to secure an annuity, the mtge. deed providing that S. might exercise the power of appointing a receiver under Conveyancing & Law of Property Act, 1881 (c. 41), s. 24, &, further, that the receiver might, if so directed in writing by S., "manage & carry on the business as he might think fit." H. continued to carry on the business from the date of the mtge., & in doing so became indebted to pltf. for work done in connection with the business. The debt was unsecured, but it was arranged between H. & pltf. that H. should pay it off by fixed instalments. In June, 1891, after having paid some of the instalments, H. died leaving an extrix., & then, S.'s annuity being in arrear, S. by writing under the power conferred by the mtge. deed appointed a receiver of the business "with full power to manage & carry on the same as he might think fit." In Aug. 1891, the receiver paid pltf. a further instalment in reduction of his debt. In a creditor's administration action commenced in July, 1897, by pltf. against H.'s extrix.:—*Held:* (1) the balance of pltf.'s debt was not statute barred, inasmuch as the receiver had, under the combined powers of Conveyancing & Law of Property Act, 1881 (c. 41), s. 24, & of the mtge. deed, & also as agent for H.'s extrix., as he had been for H. himself, authority to continue paying the debt by instalments, & there was, as incident to his authority, an implied promise that the balance should be paid out of H.'s assets:—*Qu.:* whether if the case had rested solely upon the power of appointing a receiver under Conveyancing & Law of Property Act, 1881 (c. 41), s. 24, the receiver would have been justified in making a payment on account of pltf.'s unsecured debt.

PART XIII. SECT. 3, SUB-SECT. 2.—C. (b).

p. *Liability to pay arrears of interest.*]—A receiver appointed by a mtgee. under the powers conferred by Conveyancing & Law of Property Act, 1881, s. 19, is bound under sect. 24 (8) of that Act to pay arrears of interest due to the mtgee. at the time of the appointment, & not merely interest accruing due after that date.—NATIONAL BANK *v.* KENNEY, [1898] 1 I. R. 197.—IR.

q. *Agent of mortgagor — Liability for paying statute barred debts.*]—A receiver appointed by a mtgee. pursuant to the powers of the Conveyancing Act, 1881, s. 24, being for all purposes the agent of the mtgor. commits a breach of duty if he pays arrears of interest on the mtge. which are statute-barred.—HIBERNIAN BANK *v.* YOURELL (No. 2), [1919] 1 I. R. 310.—IR.

PART XIII. SECT. 3, SUB-SECT. 2.—C. (c).

r. *Right to sue for rent.*]—A mtgor. died, having devised the mtged. lands to two trustees upon certain trusts. One of the trustees predeceased him, & the other disclaimed. The principal money & interest for over two months being due,

(2) [Mtgor.'s] death did not operate as a revocation of the mtgee.'s power to appoint a receiver (LINDLEY, M.R.).—*Re* HALE, LILLEY *v.* FOAD, [1899] 2 Ch. 107; 68 L. J. Ch. 517; 80 L. T. 827; 47 W. R. 579; 15 T. L. R. 389; 43 Sol. Jo. 528, C. A.

2615. —— Expenditure on repairs—Limited to necessary repairs—Directed in writing by mortgagee.]—A receiver appointed by a mtgee. under the powers of Conveyancing & Law of Property Act, 1881 (c. 41), cannot, on the account taken in a foreclosure action of what is due to the mtgee., be allowed any costs of repairs to the mtged. property, except costs of necessary or proper repairs directed in writing by the mtgee. as provided by Conveyancing & Law of Property Act, 1881 (c. 41), s. 24 (8), clause 3. It is immaterial in such a case that the receiver be the manager of a society which has guaranteed the mtgee. against loss in respect of his security, & that the costs of repairs in question have been paid out of moneys supplied by the society. Where the mtgee. by whom such money spent on repairs is to be taken to have been expended is a first mtgee., he has no right or authority to charge it against the second mtgee.—WHITE *v.* METCALF, [1903] 2 Ch. 567; 72 L. J. Ch. 712; 89 L. T. 164; 52 W. R. 280.

Appointed under express powers.]—*See* Sub-sect. 2, B. (*c*), *ante*.

SECT. 4.—APPOINTMENT OF RECEIVER AND MANAGER.

SUB-SECT. 1.—WHEN APPOINTED.

See COMPANIES, Vol. X., pp. 798, 799, Nos. 5045–5054.

Appointment of receiver.]—*See* Sect. 3, sub-sect. 1, A., *ante*.

SUB-SECT. 2.—WHO MAY BE APPOINTED.

2616. Mortgagee.]—DAVIS *v.* BARRETT, No. 2623, *post*.

—— **Appointment as receiver.**]—*See* Sect. 3, sub-sect. 1, B., *ante*.

SUB-SECT. 3.—ON WHOSE APPLICATION APPOINTED.

2617. Application of mortgagee.]—(1) A legal mtgee. of business premises, such as an hotel, who is prevented by the mtgor. from taking possession under the mtge., may obtain, upon an interlocutory application, an order for the appointment of a receiver & manager, & an injunction restraining the mtgor. from interfering with the management of the business & the possession of the premises.

(2) Form of order appointing a receiver & manager, with an injunction.—TRUMAN & CO. *v.* REDGRAVE (1881), 18 Ch. D. 547; 50 L. J. Ch. 830; 45 L. T. 605; 30 W. R. 421.

Annotations:—*As to* (1) **Refd.** Makins *v.* Ibotson (1890), 63 L. T. 515; Poole *v.* Downes (1897), 76 L. T. 110. *As to* (2) **Folld.** Grafton *v.* Taylor, Manvers *v.* Taylor (1891), 7 T. L. R. 588. **Refd.** Whitley *v.* Challis, [1892] 1 Ch. 64.

2618. ——.]—GRAFTON (DUKE) *v.* TAYLOR, MANVERS (EARL) *v.* TAYLOR (1891), 7 T. L. R. 588.

2619. ——.]—COUNTY OF GLOUCESTER BANK *v.* RUDRY MERTHYR STEAM & HOUSE COAL COLLIERY CO., No. 2631, *post*.

2620. ——.]—PORTER *v.* CORBETT (1899), 1 Seton's Judgments & Orders, 7th ed. p. 731.

—— **Mortgagee of colonial estate.**]—*See* No. 2621, *post*.

Appointment on behalf of puisne mortgagee & other equitable interests.]—*See* Sect. 3, sub-sect. 1, E., *ante*.

SUB-SECT. 4.—IN RESPECT OF WHAT PROPERTY.

A. Property Abroad.

See CONFLICT OF LAWS, Vol. XI., pp. 353, 354, Nos. 378–380, &, *generally*, RECEIVERS.

2621. Colonial estate—Right to crops shipped before appointment.]—At the instance of a mtgee. of a West India Estate, a receiver & manager had been appointed:—*Held*: he was not entitled to the produce of crops severed & shipped to the consignee of the mtgor. prior to the appointment, although there had been no conversion prior to that time.—CODRINGTON *v.* JOHNSTONE (1838), 1 Beav. 520; 8 L. J. Ch. 282; 48 E. R. 1042.

2622. —— Receiver, manager & consignee.]—The ct. has jurisdiction to appoint a receiver, manager, & consignee of estates in a colony.—WILLINK *v.* BENTINCK (1844), 2 L. T. O. S. 325, L. C.; *subsequent proceedings*, 2 L. T. O. S. 397, L. C.

2623. —— ——.]—Deft., a mtgee., in the absence of any direct authority to be found in the books, was appointed the consignee, manager, & receiver of the mtged. estates.—DAVIS *v.* BARRETT (1844), 13 L. J. Ch. 304.

Appointment of receiver.]—*See* Sect. 3, sub-sect. 1, E. (*b*), *ante*.

B. Mortgage of Business.

2624. Mortgagee prevented from taking possession.]—TRUMAN & CO. *v.* REDGRAVE, No. 2617, *ante*.

2625. Discretion of court.]—MOORE *v.* MALYON (1889), 33 Sol. Jo. 699.

2626. Liberty to appoint sub-manager.]—PORTER *v.* CORBETT (1899), 1 Seton's Judgments & Orders, 7th ed. p. 731.

2627. ——.]—TREBY *v.* TILLEY (1900), 1 Seton's Judgments & Orders, 7th ed. p. 731.

2628. With view to sale—Or winding up.]—Nothing is better settled than that this ct. does not assume the management of a business or undertaking except with a view to the winding up or sale of the business or undertaking (CAIRNS, L.J.).—GARDNER *v.* LONDON CHATHAM & DOVER RY. CO. (No. 1), DRAWBRIDGE *v.* SAME, GARDNER *v.* SAME (No. 2), IMPERIAL MERCANTILE CREDIT ASSOCN. *v.* SAME (1867), 2 Ch. App. 201; 36 L. J. Ch. 323; 15 L. T. 552; 31 J. P. 87; 15 W. R. 325, L. JJ.

Annotations:—**Apld.** *Re* Exmouth Docks Co. (1873), L. R. 17 Eq. 181. **Consd.** Attree *v.* Hawe (1878), 9 Ch. D. 337; *Re* Herne Bay Waterworks Co. (1878), 10 Ch. D. 42; *Re* Manchester & Milford Ry., *Ex p.* Cambrian Ry. (1880), 14 Ch. D. 645; Reid *v.* Explosives Co. (1886), 56 L. J. Q. B. 68. **Distd.** Bartlett *v.* West Metropolitan Tram. Co., [1893] 3 Ch. 437. **Apld.** Marshall *v.* South Staffordshire Tram. Co., [1895] 2 Ch. 36. **Consd.** Pegge *v.* Neath District Tram. Co., [1895] 2 Ch. 508; *Re* Knott End Railway Act, 1898, [1901] 2 Ch. 8. **Refd.** Griffin *v.* Bishop's Castle Ry. (1867), 15 W. R. 1058; Kingston *v.* Cowbridge Ry. (1871), 41 L. J. Ch. 152; Holdsworth *v.* Davenport (1876), 3 Ch. D. 185; Brocklehurst *v.* Railway Printing & Publishing Co., Eldridge & Pearson, Claimants,

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the mtgee. appointed a receiver, under Conveyancing & Law of Property Act, 1881:—*Held*: under sect. 24 (3) of the Act, the receiver was entitled to sue for rent in the name of the heir-at-law of the mtgor. upon giving him a sufficient indemnity.—FAIRHOLME & PALLISER *v.* KENNEDY (1890), 24 L. R. Ir. 498.—IR.

Sect. 4.—Appointment of receiver and manager: Sub-sect. 4, B. & C.; sub-sects. 5 & 6. Sect. 5: Sub-sect. 1, A. & B.]

[1884] W. N. 70; *Re* Watts, Cornford *v.* Elliott (1885), 33 W. R. 885; *Re* Barton-upon-Humber & District Water Co. (1889), 42 Ch. D. 585; *Re* Eastern & Midlands Ry. (1890), 45 Ch. D. 367; Makins *v.* Ibotson (1890), 60 L. J. Ch. 164; *Re* Parker, Wignall *v.* Park, [1891] 1 Ch. 682; De Grelle, Houdret *v.* Bull (1894), 1 Mans. 118; Central Ontario Ry. *v.* Trusts & Guarantee Co., [1905] A. C. 576; Boehm *v.* Goodall, [1911] 1 Ch. 155. **Mentd.** Bowen *v.* Brecon Ry., *Ex p.* Howell (1867), L. R. 3 Eq. 541; Cambrian Rys. Co.'s Scheme (1867), 3 Ch. App. 281, n.; *Re* New Clydach Sheet & Bar Iron Co. (1868), L. R. 6 Eq. 514; *Re* Panama, New Zealand & Australian Royal Mail Co. (1870), 5 Ch. App. 318; Chandler *v.* Howell (1876), 4 Ch. D. 651; *Re* Mitchell's Estate, Mitchell *v.* Moberly (1877), 6 Ch. D. 655; Bourgoin *v.* Compagnie du Chemin de Fer de Montréal, Ottawa et Occidental (1880), 5 App. Cas. 381; *Re* Cornwall Minerals Ry. (1882), 48 L. T. 41; *Re* Christmas, Martin *v.* Lacon (1885), 30 Ch. D. 544; *Re* Hatton, Robson *v.* Gibbs (1888), 4 T. L. R. 311; *Re* Hull, Barnsley & West Riding Junction Ry. (1888), 40 Ch. D. 119; Redfield *v.* Wickham Corpn. (1888), 13 App. Cas. 467; Blaker *v.* Herts & Essex Waterworks Co. (1889), 41 Ch. D. 399; *Re* David, Buckley *v.* Royal National Lifeboat Institution (1889), 43 Ch. D. 27; *Re* Hallett, Howarth *v.* Massey (1889), 5 T. L. R. 285; *Re* Yorbury's Estate, Ker *v.* Dent (1889), 62 L. T. 55; *Re* Thompson, Bedford *v.* Teal (1890), 45 Ch. D. 161; *Re* East & West India Dock Co. (1891), 7 T. L. R. 623; Proffitt *v.* Wye Valley Ry. (18), 64 L. T. 669; *Re* Portsmouth (Kingston, Fratton & Southsea) Borough Tram. Co., [1892] 2 Ch. 362; Driver *v.* Broad, [1893] 1 Q. B. 744; Whadcoat *v.* Shropshire Ry. (1893), 9 T. L. R. 589; *Re* Pickard, Elmsley *v.* Mitchell, [1894] 3 Ch. 704; Sadler *v.* Worley, [1894] 2 Ch. 170; *Re* Mersey Ry., Gibbs *v.* Mersey Ry. (1895), 11 T. L. R. 390; *Re* Crossley, Birrell *v.* Greenhough, [1897] 1 Ch. 928; Stagg *v.* Medway (Upper) Navigation Co., [1903] 1 Ch. 169; *Re* Crystal Palace Co., Fox *v.* Crystal Palace Co. (1911), 104 L. T. 898; *Re* Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300.

C. Mortgage including Business.

2629. Either expressly or impliedly.]—Where a mortgage security does not expressly or impliedly include business carried on upon the mtged. premises, the ct. cannot, in an action for foreclosure or sale, appoint a manager of the business.—WHITLEY *v.* CHALLIS, [1892] 1 Ch. 64; 61 L. J. Ch. 307; 65 L. T. 838; 40 W. R. 291; 36 Sol. Jo. 109, C. A.

Annotations:—**Distd.** County of Gloucester Bank *v.* Rudry Merthyr Steam & House Coal Colliery Co., [1895] 1 Ch. 629. **Expld.** *Re* Leas Hotel Co., Salter *v.* Leas Hotel Co., [1902] 1 Ch. 332. **Distd.** Leney *v.* Callingham & Thompson, [1908] 1 K. B. 79. **Reld.** Baglioni *v.* Cavalli (1900), 83 L. T. 500; Farmer *v.* Pitt, [1902] 1 Ch. 954.

2630. ——.]—The receiver could not receive except by working the collieries, & if he did not work them pltf.'s security was gone. If the case rested on principle alone he should have held that the ct. had power to appoint a manager as well as a receiver, notwithstanding that the colliery "business" had not been mortgaged in specific terms (CHITTY, J.).—CAMPBELL *v.* LLOYDS, BARNETT'S & BOSANQUET'S BANK, LTD. (1889), [1891] 1 Ch. 136, n.; 58 L. J. Ch. 424.

Annotations:—**Distd.** Whitley *v.* Challis, [1892] 1 Ch. 64. **Consd.** County of Gloucester Bank *v.* Rudry Merthyr Steam & House Coal Colliery Co., [1895] 1 Ch. 629. **Reld.** Makins *v.* Ibotson (1890), 63 L. T. 515; Stamford, Spalding & Boston Banking Co. *v.* Keeble (1913), 82 L. J. Ch. 388.

2631. ——.]—Where a colliery is mortgaged & the mtge. deed does not expressly include the undertaking & business of the colliery, they must nevertheless be taken to be included by implication; & on default being made in payment of the moneys secured by the mtge. the ct. has jurisdiction to appoint a receiver & manager at the instance of the mtgees.—COUNTY OF GLOUCESTER BANK *v.* RUDRY MERTHYR STEAM & HOUSE COAL COLLIERY CO., [1895] 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486; 39 Sol. Jo. 331; 2 Mans. 223; 12 R. 183, C. A.

Annotations:—**Reld.** Poole *v.* Downes (1897), 76 L. T. 110; Stamford, Spalding & Boston Banking Co. *v.* Keeble (1913), 82 L. J. Ch. 388. **Mentd.** *Re* Bank of Syria, Owen & Ashworth's Claim (1900), 83 L. T. 547; Duck *v.* Tower Galvanizing Co., [1901] 2 K. B. 314; Ruben *v.* Great Fingall Consolidated, [1904] 1 K. B. 650; Premier Industrial Bank *v.* Carlton Manufacturing Co. & Crabtree, [1909] 1 K. B. 106; *Re* Fireproof Doors, Ltd., Umney *v.* The Co., [1916] 2 Ch. 142; Dey *v.* Pullinger Engineering Co., [1921] 1 K. B. 77; Underwood *v.* Bank of Liverpool, Same *v.* Barclays Bank, [1924] 1 K. B. 775.

2632. ——.]—Debentures issued by a hotel co. charged all the co.'s "lands, buildings, property, stock-in-trade, furniture, chattels, & effects, whatsoever, both present & future":—*Held:* the word "property" was sufficient to include the goodwill or business of the co., & therefore, in a debenture holder's action, the ct. had jurisdiction to appoint a manager.—*Re* LEAS HOTEL, SALTER *v.* LEAS HOTEL CO., [1902] 1 Ch. 332; 71 L. J. Ch. 294; 86 L. T. 182; 50 W. R. 409; 18 T. L. R. 236; 46 Sol. Jo. 230; 9 Mans. 168.

SUB-SECT. 5.—DUTIES AND POWERS.

2633. Management of land—Proposals for repairs.]—The direction, in an order appointing a receiver, that he shall manage as well as set & let the estate, authorises him to propose to the master, from time to time, to make ordinary repairs to the buildings on the estate.—THORNHILL *v.* THORNHILL (1845), 14 Sim. 600; 60 E. R. 491.

2634. —— **Remedies for advances.**]—If a trustee is in possession of a plantation managing it on behalf of all parties, & employs a manager, such manager has the same remedies as the trustee who employed him, for the expenses & advances. When the Ct. of Ch. is in possession by a manager & receiver, it acts for all persons interested, & its officer has at least as extensive remedies against the estate as a trustee. Where the manager & attorney of a mtgor. is in possession, & the mtgees. have so recognised his possession that he may be considered as acting for their benefit, the same consequences follow, as regards their interest, as if he had been appointed under the Ct. of Ch.—FRASER *v.* BURGESS (1860), 13 Moo. P. C. C. 314; 2 L. T. 446; 6 Jur. N. S. 327; 8 W. R. 376; 15 E. R. 118, P. C.

Annotations:—**Consd.** Bertrand *v.* Davies (1862), 31 Beav. 429. **Reld.** *Re* Harriott, *Ex p.* Pengelley (1863), 8 L. T. 854.

2635. Licensed premises—Not entitled to possession of books & papers.]—Order on trustees to deliver up to receiver & manager possession of the premises "& all books, papers, & licenses relating to the business, & necessary for the purposes aforesaid":—*Held:* wrong in so far as it directed the trustees to deliver up the books & papers.—CAPITAL & COUNTIES BANK *v.* STEVENS' TRUSTEE (1901), 17 T. L. R. 260, C. A.

Reimbursement of advances to carry on business.]—*See* BANKRUPTCY, Vol. IV., p. 204, No. 1884.

SUB-SECT. 6.—PRACTICE.

2636. Form of order appointing receiver & manager.]—TRUMAN & CO. *v.* REDGRAVE, No. 2617, *ante*.

2637. —— **No order to deliver up possession of land.**]—NATIONAL PROVINCIAL BANK OF ENGLAND, LTD. *v.* UNITED ELECTRIC THEATRES, LTD., No. 3224, *post*.

2638. Bankruptcy of mortgagor—Continuance of receiver & manager.]—A receiver & manager had been appointed on an *ex parte* application by pltf. in a foreclosure action under a mtge. of brewery

premises. The mtgor., deft., afterwards became bkpt. on his own petition. The official receiver opposed a motion by pltf. for the continuance of the original receiver & manager, contending that he ought to be substituted :—*Held :* an order must be made confirming the previous appointment, & continuing the person then appointed as receiver of the rents & profits of the premises comprised in the mtge., & as manager of the business, he to be at liberty to use any of the vats, fixed motive machinery, & other property comprised in the mtge., but nothing else.—DEACON *v.* ARDEN (1884), 50 L. T. 584.

SECT. 5.—ACTION ON COVENANT FOR PAYMENT.

SUB-SECT. 1.—WHEN RIGHT OF ACTION ARISES.

A. Principal Payable on Demand.

2639. Necessity for demand—Present debt—Interest payable without demand.]—The declaration stated, that by an indenture of July 20, 1825, made between pltf. of the first part, E., deft.'s testator, of the second part, & W., of the third part, E. did, for himself, his exors., &c., covenant with the pltf. to pay to W. £1,200. Breach, non-payment by E., in his lifetime, or by deft. as his exor., to pltf., or W. Deft. pleaded, first, *non est factum*, & in the second plea set out the indenture declared on, not on oyer, but verbatim. In this indenture it was stated, that by an indenture of mtge., dated Apr. 12, 1825, W. had become mtgee. of the premises in question, to pltf., for £1,200, with a proviso, that if pltf. should within six months after demand of payment of the £1,200, such demand to be in writing, but not to be good or valid unless made after Apr. 12, 1828, to pay W. £1,200 & interest, W. would assign the premises to pltf. The indenture declared on then stated, that for the considerations therein mentioned, pltf. sold to E., his exors., etc., the premises in question, for the residue of the term, subject to the indenture of mtge., to W., of Apr. 12, 1825, & to the payment of the sum of £1,200 thereby secured, & interest. The plea then alleged, that after the breaches in the declaration, to wit, on Oct. 24, 1825, pltf. became a bkpt.; that his estate was conveyed to certain persons in trust for the creditors, not stating that such persons had been chosen assignees; that afterwards, to wit, on Oct. 24, 1826, pltf. obtained his certificate, & that the £1,200 became payable by pltf. to W., before the bkpcy. of pltf. The third plea stated, that the indenture declared on was the same as that set forth in the second plea; it then set out the proviso & covenant contained in the indenture of mtge., of Apr. 12, 1825, & alleged that no demand in writing of payment of the £1,200 had been given to pltf. These pleas having been demurred to :—*Held :* (1) the declaration was good; (2) the £1,200 was not due until after six months' demand, in writing, subsequent to Apr. 12, 1828; & the second special plea was a sufficient answer as to the principal sum of £1,200; (3) the interest on the sum of £1,200 being payable absolutely, & not on demand, the plea, which was pleaded to the interest as well as to the principal, being bad in part, was bad altogether, & the same objection applied to the first special plea.—TROTT *v.* SMITH (1844), 12 M. & W. 688; 13 L. J. Ex. 178; 2 L. T. O. S. 402; 152 E. R. 1375, Ex. Ch.

Annotations :—Generally, **Mentd.** Hyde *v.* Watts (1843) 12 M. & W. 254; North *v.* Wakefield (1849), 13 Q. B. 536.

2640. —— ——.]—Where there is a present debt & a covenant or promise to pay on demand, the demand is not considered a condition precedent to bringing the action; but where there is a covenant or promise to pay a collateral sum, on demand, *e.g.*, in a covenant by a surety for the principal debtor, then request must be made before action brought, or before the money can be considered as owing by the collateral debtor.

A mtge. of Sept. 1867, contained a joint & several covenant by a father & his son to pay the mtgee. £3,000 "on demand," & that they would, "in the meantime from the date hereof," pay interest on the same, at the rate therein mentioned. The father, who had joined as surety only, died in Nov. 1872, & his estate was being administered in an action commenced in Apr. 1880. No claim was made against the father's estate in respect of his liability on the covenant in the mtge., until July, 1889. The mtgee. now claimed to be let in as a creditor of the father's estate, in respect of the amount due on the mtge., which the son was unable to pay :—*Held :* the right of action did not accrue against the father's estate until July, 1889, when demand was first made, & consequently the mtgee. was entitled to come in & prove his claim against the father's estate, without disturbing any dividends already distributed.—*Re* BROWN'S ESTATE, BROWN *v.* BROWN, [1893] 2 Ch. 300; 62 L. J. Ch. 695; 69 L. T. 12; 41 W. R. 440; 37 Sol. Jo. 354; 3 R. 463.

*Annotations :—*Apld. Bradford Old Bank *v.* Sutcliffe, [1918] 2 K. B. 833. Refd. Edwards *v.* Walters, [1896] 2 Ch. 157.

2641. —— **Collateral covenant.**]—*Re* BROWN'S ESTATE, BROWN *v.* BROWN, No. 2640, *ante*.

2642. Sufficiency of demand—From person likely to inform mortgagor.]—WORTHINGTON & CO., LTD. *v.* ABBOTT, No. 2677, *post*.

Default "after notice" or "on demand"—Bill of sale.]—*See* BILLS OF SALE, Vol. VII., pp. 135–137, Nos. 765–771.

—— **Mortgage of shares.**] — *See* COMPANIES, Vol. IX., p. 415, No. 2085.

Demand for payment under bond.]—*See* BONDS, Vol. VII., pp. 197, 198, Nos. 366–379.

B. Principal Payable at Fixed Date.

2643. No right of action before day fixed.]—By a covenant in a mtge. deed, dated Sept. 4, 1857, the mtgor. covenanted & deft. covenanted as his surety for the payment of the mtge. debt of £450 to the mtgee. on Mar. 4, 1858. By a deed, dated Dec. 15, 1884, the above-mentioned mtge. & various other mtges., including other property, given by the mtgor. were consolidated, pltf. advancing the total sum of £3,200 for payment to the various mtgees. of the amounts of their respective debts, & taking assignments of such debts & the mtged. properties, "with the full benefit of the covenants" contained in the respective mtge. deeds; & the mtgor. covenanted with pltf. for the payment of £3,200 on Jan. 19, 1885. Deft. was not a party to such last-mentioned deed :—*Held :* the covenant in that deed necessarily implied that principal debtor could not be sued for the £450 due under the covenant in the deed of 1857 before Jan. 19, 1885, & consequently, there had been a giving of

PART XIII. SECT. 5, SUB-SECT. 1.—A.

t. *Sufficiency of demand — Where several mortgagor.*]— Defts. B. & S., with two others L. & H. mtged. to pltf. Pltf. sued defts. alone upon this mtge. for the principal & the interest making no mention of the other mtgors. A demand on defts. was proved, but not on the others :—*Held :* sufficient to prove a demand upon defts. only.—CASE *v.* BURTON & SADLEIR (1860), 19 U. C. R. 540.—**CAN.**

Sect. 5.—Action on covenant for payment: Sub-sect. 1, B. & C.; sub-sects. 2 & 3, A. & B.]

time to principal debtor by which deft. as surety was discharged from liability.

A covenant for payment of a loan on a certain day, though in the affirmative, necessarily contains a negative by implication, viz., that the lender of the money is not to sue for it before that day (LORD ESHER, M.R.).—BOLTON *v.* BUCKENHAM, [1891] 1 Q. B. 278; 60 L. J. Q. B. 261; 64 L. T. 278; 39 W. R. 293, C. A.

Annotation:—**Refd.** Bolton v. Salmon, [1891] 2 Ch. 48.

C. Agreement Not to Sue for Fixed Period.

2644. Whether implied—Agreement to advance by instalments over two years.]—Written agreements relating to the working of some quarries contained (*inter alia*) the following provisions—"That defts. should allow & pay to pltfs. for two years, from Dec. 7, 1870, the sum of £400 for each year, by equal quarterly sums of £100; that the sums of money which should be paid to pltfs. under that clause, should be added to a debt of £7,035 then due from pltfs. & that the whole amount of such debt should bear interest from time to time at the rate of 5 per cent. *per annum*; that the said sum of £ , meaning the £7,035 & all additions thereto, whether by means of the two sums of £400 above-mentioned, & all interest upon the said debt, should be a first charge upon the purchase-money which should become payable to pltfs. under the sixth clause of the last agreement." Defts. had advanced the above sum of £7,035 & other moneys to pltfs. on their personal account & also on the security of the working of the quarries which were managed by pltfs. Defts. considered the workings were not successful; & in June, 1872, they sued pltfs. at law for their debt. Pltfs. then filed their bill in this suit for the specific performance of the agreements, an account, & an injunction to restrain the action. A motion for the injunction was made on Aug. 1, but refused mainly on the grounds that there was no implied covenant by defts. not to sue for their debt before the expiration of the two years from the date of the agreements; & that a parol understanding to the contrary, relied on by pltfs., could not be allowed to control the written contract:—*Held:* there was an agreement not to sue during the two years, & the injunction was granted until the expiration of the two years.—CURTEIS *v.* FENNING (1872), 41 L. J. Ch. 791, L. C.

2645. Agreement conditional on observance of covenants—Waiver of breach by subsequent receipt of rent.]—Mtgee. agreed with a mtgor. that if mtgor. punctually performed the covenants contained in the mtge. deed he would not call in the mtge. money for five years. The mtgor. during the first year committed several breaches of covenant.

About one & a half years after the last of these breaches, & before the expiration of the five years, the mtgee. gave notice calling in the mtge. money, alleging the breaches aforesaid.

During this period of one & a half years the mtgee. had duly received the interest on the mtge. money on each quarter day as it accrued due:—*Held:* the receipt of interest was one of the facts receivable in evidence in determining whether pltf. had waived his right to call in the money before the expiration of the five years accruing to him on the commission of the breaches of covenant by the mtgor.—SEAL *v.* GIMSON (1914), 110 L. T. 583.

SUB-SECT. 2.—WHO MAY SUE.

2646. Joint mortgagees.] — Covenant, by one pltf., on a deed executed between pltf. & H. of the one part, & deft. of the other part:—*Held:* H. ought to have been joined as a pltf. by reason of her joint interest, disclosed by the deed, in the subject-matter of the covenant.—HOPKINSON *v.* LEE (1845), 6 Q. B. 964; 14 L. J. Q. B. 101; 4 L. T. O. S. 395; 9 Jur. 616; 115 E. R. 363.

Annotations:—**Refd.** Bradburne *v.* Botfield (1845), 14 M. & W. 559; Wakefield *v.* Brown (1846), 9 Q. B. 209; Keightley *v.* Watson (1849), 3 Exch. 716.

Assignee of chose in action by way of security.]—*See* CHOSES IN ACTION, Vol. VIII., pp. 443, 444, Nos. 194–200.

Debenture holder.]—*See* COMPANIES, Vol. X., pp. 830, 831, Nos. 5414–5418.

Personal representatives.]—*See* EXECUTORS, Vol. XXIII., p. 326, No. 3929; Part VIII, Sect. 3, sub-sect. 1, *ante*.

SUB-SECT. 3.—WHO MAY BE SUED.

A. Assignee.

2647. General rule — Assignee not liable.] — Though upon the purchase of an equity of redemption the incumbrance is not, as between the representatives of the purchaser, his personal debt, even by his covenant to pay, which is considered as only for indemnity of the vendor, it is; if, beyond that, he enters into a new contract with the mtgee., as for different times & modes of payment, etc.—OXFORD (EARL) *v.* RODNEY (LADY) (1808), 14 Ves. 417; 33 E. R. 581.

2648. —— ——.]—Mtgor. assigned his equity of redemption, & the estate of the two mtgees. was transferred, so that it vested in one alone. The assignee of the equity of redemption continued to pay interest on the mtge., & when sued for arrears suffered judgment by default. He afterwards was adjudged bkpt. & the transferee of the mtge. claimed to prove against his estate for further arrears of interest. The original mtgor. had absconded:—*Held:* there was no privity of contract between the assignee of the equity of redemption & the transferee of the mtge., & no personal liability on the part of the assignee of redemption to pay interest & the proof could not be allowed.—*Re* ERRINGTON, *Ex p.* MASON, [1894] 1 Q. B. 11; 10 Morr. 309; 10 R. 91; *sub nom. Re* ERRINGTON, *Ex p.* OFFICIAL RECEIVER, 96 L. T. 766.

PART XIII. SECT. 5, SUB-SECT. 2.

a. *Effect of assignment of mortgage.*]—MORSON *v.* HUNTER (1861), 11 C. P. 585.—**CAN.**

b. ——.]—Where an assignment of a mtge. on land is absolute in form, though as a matter of fact the assignor retains a right to part of the money, an action on the covenant in the mtge. must be brought in the name of the assignee.—WARD *v.* HUGHES (1884), 8 O. R. 138.—**CAN.**

c. ——.]—A conveyance of the equity of redemption to one of several joint mtgees., he covenanting to pay off the mtge., does not extinguish the mtgor.'s liability on his covenant for payment of the mtge. debt.—SCARLETT *v.* NATTRESS (1896), 23 A. R. 297.—**CAN.**

d. ——.]—NEVEREN *v.* WRIGHT (1917), 39 O. L. R. 397; 12 O. W. N. 151; 36 D. L. R. 734.—**CAN.**

e. *Joinder of prior mortgagee.*]—In an action brought for payment of a mtge. there must be an offer to redeem, either expressly or impliedly, in the pleadings in order to justify the joining of a prior mtgee. as a party to the action. — LUMBER MANUFACTURERS' YARDS, LTD., *v.* MOOSE JAW FLOUR MILLS, LTD. (1914), 30 W. L. R. 580; 7 W. W. R. 876; 20 D. L. R. 781.—**CAN.**

f. *Mortgagee a transferee under tax sale.*]—WESTERN CANADA MORTGAGE CO., LTD. *v.* O'FARRELL, [1921] 1 W. W. R. 121; 56 D. L. R. 10; [1921] 2 W. W. R. 626; 16 Alta. L. R. 429.—**CAN.**

2649. Effect of covenant with assignor—To indemnify.]—A mere covenant by the purchaser of a mtged. estate to indemnify the vendor, does not make it his personal debt.

Estate sold subject to a mtge. was exonerated in favour of the heir by the personal estate of the purchaser; his acts having clearly made it his personal debt.—WOODS *v.* HUNTINGFORD (1796), 3 Ves. 128; 30 E. R. 930.

Annotations:—**Consd.** Butler *v.* Butler (1800), 5 Ves. 534. **Apld.** Hedges *v.* Hedges (1852), 5 De G. & Sm. 330. **Refd.** Oxford *v.* Rodney (1808), 14 Ves. 417; Clarendon *v.* Barham (1842), 1 Y. & C. Ch. Cas. 688.

2650. —— To pay mortgage.]—Upon the purchase of an equity of redemption the agreement of the purchaser with the vendor to pay the mtge., without any communication with the mtgee., is not sufficient to make it the personal debt of the purchaser.—BUTLER *v.* BUTLER (1800), 5 Ves. 534; 31 E. R. 724.

Annotation:—**Consd.** Oxford *v.* Rodney (1808), 14 Ves. 417.

2651. —— ——.]—OXFORD (EARL) *v.* RODNEY (LADY), No. 2647, *ante*.

2652. —— ——.]—(1) A mtge. is made of the manor & lands of S. & other valuable estates, to secure a debt of £80,000 & interest. The mtgor. dies intestate, leaving the debt wholly unpaid; & his heir being pressed to pay off £30,000, part of the £80,000, procures a person to advance the sum required for the purpose, & the original mtgee. thereupon joins with the heir of the mtgor. in a deed conveying the manor & lands of S. to the person making the advance, subject to a proviso for redemption at the end of five years, being an equity of redemption altogether different from the prior equity of redemption, & the interest reserved being 5 per cent. instead of 4½ per cent., which was the rate reserved in the original mtge. This is in effect a new mtge. by the heir, & the £30,000 is thereby constituted his personal debt.

(2) The same mtgor. made another mtge. of gavelkind lands, which, upon his death intestate, descended to his two brothers as coparceners. The elder brother, who was the common law heir of the mtgor. purchased of the other brother his moiety of the gavelkind lands, & covenanted with him to pay the whole mtge. money. He did not thereby make the mtge. money his personal debt. —BARHAM *v.* THANET (EARL) (1834), 3 My. & K 607; 3 L. J. Ch. 228; 40 E. R. 231.

Annotations:—*As to* (1) **Distd.** Hedges *v.* Hedges (1852), De G. & Sm. 330. **Foll'd.** Bagot *v.* Bagot (1864), 34 Beav. 134. *Generally*, **Refd.** Clarendon *v.* Barham (1842), 1 Y. & C. Ch. Cas. 688.

2653. New contract with mortgagee—Different times & modes of payment—Assignee liable.]—OXFORD (EARL) *v.* RODNEY (LADY), No. 2647, *ante*.

2654. When liability implied—Not from payment of interest—& alteration of days of payment.]—*Re* ERRINGTON, *Ex p.* MASON, No. 2648, *ante*.

Right of assignor to indemnify by assignee.]—*See* Nos. 1018–1020, *ante*.

B. Personal Representatives and Beneficiaries.

See Administration of Estates Act, 1925 (c. 23), ss. 1, 2, 32–44.

Liability of personal representatives.] — *See* EXECUTORS, Vol. XXIV., pp. 618–620, 673, 674, Nos. 6487–6507, 6991–6995.

2655. Heir—Executing new covenant—Personal liability.]—Where heir inherits a mtge. estate, if he executes a new covenant & bond, with a new equity of redemption, he makes the debt his own, & his personal estate shall be primarily liable.—DONISTHORPE *v.* PORTER (1762), 2 Eden, 162; Amb. 600; 28 E. R. 858, L. C.

Annotations:—**Mentd.** Grice *v.* Shaw (1852), 10 Hare, 76; Byam *v.* Sutton (1854), 19 Beav. 556; Ingle *v.* Vaughan-Jenkins (1900), 83 L. T. 155.

2656. —— —— ——.]—If an estate descends subject to a mtge., & the heir creates a new mtge. for securing the old debt & also one contracted by himself, & fixes a new day of payment, he makes himself liable to both debts, notwithstanding he

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PART XIII. SECT. 5, SUB-SECT. 3.—A.

2649 i. *Effect of covenant with assignor—To indemnify.*]—The obligation of a purchaser of mtged. lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mtge. debt, & if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same.—MALONEY *v.* CAMPBELL (1897), 28 S. C. R. 228.—**CAN.**

2650 i. —— *To pay mortgage.*]—Although a purchaser from the mtgor. of the equity of redemption, covenants with him to pay off the mtge. debt, this, owing to the want of privity, affords no ground for the mtgee. proceeding against the purchaser, either at law or in equity, to compel him to perform his covenant.—CLARKSON *v.* SCOTT (1878), 25 Gr. 373.—**CAN.**

2650 ii. —— ——.]—Although the purchaser of the equity of redemption in a mtged. property covenants with the mtgor. to pay the mtge. money, as the expressed consideration for the conveyance, there is no privity of contract or any implied obligation created thereby, which will enable the mtgee. to sue the purchaser for the amount.—FRONTENAC LOAN & INVESTMENT SOCIETY *v.* HYSOP (1892), 21 O. R. 577.—**CAN.**

2650 iii. —— ——.]—The purchaser of land, subject to a mtge., does not *ipso facto* become personally liable to the mtgee. for the amount of the mtge. nor does he become liable to the mtgee. by entering into a covenant with his vendor to pay the mtge. In other words, the burden of a covenant to pay mtge. money does not run with the mtged. lands.—CANADA LANDED & NATIONAL INVESTMENT CO. *v.* SHAVER (1895), 22 A. R. 377.—**CAN.**

2650 iv. —— ——.]—The owner of land, after mortgaging it, assigned his equity of redemption to a third party, who covenanted to pay off the mtge. debt, & afterwards purchased the mtged. premises, under a decree at the suit of the mtgee. At the sale the amount realised was not sufficient to cover the amount due to the mtgee.: *Held:* under the circumstances he was not entitled to any lien on the estate for the deficiency.—FORBES *v.* ADAMSON, 1 Ch. Ch. 117.—**CAN.**

2651 i. *New contract with mortgagee—Different times & modes of payment—Assignee liable.*]—On the purchase of an estate subject to a mtge. the purchaser agreed to pay off the security, & subsequently agreed with the mtgee. for an extension of time for five years agreeing in consideration thereof to pay an increased rate of interest, & covenanted that he would pay to the mtgee. the said interest quarterly, so long as the said forbearance should continue, & until the principal money was fully paid. On a bill filed to enforce payment of the incumbrance: —*Held:* the purchaser was personally bound to pay only the interest on the debt.—MATHERS *v.* HELLIWELL (1863), 10 Gr. 172.—**CAN.**

g. Effect of release by mortgagee.]—A mtgor. conveyed part of the mtged. property to a purchaser, the mtgor. covenanting against incumbrances; & the mtgee. subsequently released the part so sold from his mtge.:—*Held:* as the release was in accordance with the mtgor.'s own obligation as to that part, it did not affect the mtgor.'s right to recover the mtge. debt.—CRAWFORD *v.* ARMOUR (1867), 13 Gr. 576.—**CAN.**

h. Implied covenant to pay mortgage—Under Land Titles Act.]—The effect of Sect. 63 of above Act, as amended 1909 statutes, c. 20, s. 5, is to give a mtgee. of lands the right to proceed against a purchaser from the mtgor., directly, thus avoiding the necessity of obtaining an assignment *from the mtgor.* of his right of indemnity.—MONTREAL TRUST CO. *v.* BOGGS & BERESFORD (1915), 31 W. L. R. 914; 25 D. L. R. 432.—**CAN.**

k. —— ——.]—COLONIAL INVESTMENT & LOAN CO. *v.* FOISIE (1911), 19 W. L. R. 748; 1 W. W. R. 397; 4 Sask. L. R. 392.—**CAN.**

l. —— ——.]—When mtged. land is transferred by one transfer to a number of transferees who each take a specified undivided interest therein & there is no arrangement, agreement or covenant negativing or restricting their liability to the mtgee. under the covenant implied by sect. 54 of above Act, each of the transferees is liable to the mtgee. for the whole amount payable on the mtge., even though certificates of title have been issued to the transferees for their specified interests.—TRUSTS & GUARANTEE CO., LTD. *v.* MONK, [1925] 1 D. L. R. 350; [1925] 1 W. W. R. 5; 21 Alta. L. R. 151; *affg.*, [1923] 3 W. W. R. 1217.—**CAN.**

PART XIII. SECT. 5, SUB-SECT. 3.—B.

m. Effect of joint covenant.]—A covenant by three mtgors. that "the mtgors.

Sect. 5.—Action on covenant for payment: Sub-sect. 3, B. & C.; sub-sects. 4 & 5, A., B. (a) & (b), & C.]

exempts, in the new security, his person & his property, except what is comprised in the new mtge. from liability in respect of the debts.—LUSHINGTON *v.* SEWELL (1827), 1 Sim. 435; 57 E. R. 641; *on appeal* (1830), 1 Russ. & M. 169, L. C.

Annotations:—**Mentd.** Turner *v.* Barclay (1854), 9 Moo. P. C. C. 264; Daniel *v.* Trotman (1863), 1 Moo. P. C. C. N. S. 123.

2657. —— —— ——.]—BARHAM *v.* THANET (EARL), No. 2652, *ante.*

2658. ——.]—In 1775, A. became owner in fee of estates W. & L. The W. estate was subject to mtges. amounting to £5,344 & the L. estate to a mtge. amounting to £2,200, all of which were created by A.'s ancestor. In 1787 A. mortgaged the L. estate for £8,000 reversing the equity of redemption to himself, & personally covenanting to pay the money out of this sum. He paid off the three mtges. on the W. estate; A. died in 1806: —*Held:* as between the representatives of A., the mtge. was primarily payable of A.'s personal estate.—BAGOT *v.* BAGOT (1864), 34 Beav. 134; 5 New Rep. 157; 11 L. T. 437; 10 Jur. N. S. 1169; 13 W. R. 169; 55 E. R. 585.

2659. Devisee—Devisees of mortgaged & unmortgaged estate—Joint liability.]—Payment of interest by the specific devisee of part of testator's real estate, which was subject to a mtge. created by testator, is sufficient to keep the mtgee.'s right of action alive against the specific devisees of other parts of the real estate which was not subject to the mtge., & thus entitle the mtgee. to an order for administration of the whole of testator's real estate.

The result is that for the purpose of this specialty debt all the devisees under the will, whether they are devisees of a mtged. or a free estate, stand on the same footing, & are jointly liable to the specialty creditor (FARWELL, J.).—*Re* LACEY, HOWARD *v.* LIGHTFOOT, [1907] 1 Ch. 330; 76 L. J. Ch. 316; 96 L. T. 306, C. A.

Annotations:—**Refd.** *Re* Atkinson, Proctor *v.* Atkinson, [1908] 2 Ch. 307. **Mentd.** Read *v.* Price, [1909] 2 K. B. 724.

2660. Right of mortgagee to follow assets—Deficiency of security.]—The mtgor. of a freehold house died shortly after assigning the equity of redemption. Six months later the mtgee. was informed of the assignment & death, but as he received his interest regularly from the assignee, he took no steps so realise his security or to enforce the mtgor.'s covenant. After thirteen years the assignee made default, & the security was found insufficient. The mtgors. estate had long since been distributed:—*Held:* the mtgee. was entitled to follow the mtgor.'s assets for any deficiency on the security.—*Re* EUSTACE, LEE *v.* MCMILLAN, [1912] 1 Ch. 561; 81 L. J. Ch. 529; 106 L. T. 789; 56 Sol. Jo. 468.

—.]—*See* Administration of Estates Act, 1925 (c. 23), s. 38.

See, also, EXECUTORS, Vol. XXIII., pp. 427-434, Nos. 4982-5050.

C. Statutory Companies for Public Purposes.

See COMPANIES, Vol. X., pp. 1187, 1188, Nos. 8421-8428.

covenant with the mtgee. that the mtgors. will pay the mtge. money & interest & observe the above proviso, & will pay all present & future taxes," is a joint covenant only, &, therefore, if default in performance occurs after the death of one of the mtgors. his estate is not liable.—LINDLEY *v.* VASSAR (B. C.), [1918] 1 W. W. R. 879.—**CAN.**

PART XIII. SECT. 5, SUB-SECT. 4.

n. *Restriction of liability in deed.*]—WILSON *v.* FLEMING (1893), 24 O. R. 388.—**CAN.**

o. *Mortgage in part payment of purchase-money—Contract of sale rescinded by vendor.*]—WALSH *v.* WILLAUGHAN (1918), 42 O. L. R. 455; 14 O. W. N. 53; 42 D. L. R. 581.—**CAN.**

p. *Agreement by mortgagees to pay off other mortgages.*]—ALBYN TRUST *v.* KING'S PARK CO., [1920] 3 W. W. R. 402.—**CAN.**

PART XIII. SECT. 5, SUB-SECT. 5.—B. (a).

2664 i. *General rule.*]—Where a mtgee. & mtgor. sold & conveyed part of the

SUB-SECT. 4.—AMOUNT RECOVERABLE.

Mortgage debt secured by bond—Whether interest recoverable beyond penalty.]—*See* BONDS, Vol. VII., p. 217, Nos. 592-594.

2661. Costs & expenses—Recoverable on redemption—Not recoverable in action.]—Costs & expenses properly incurred by a mtgee. in relation to the mtged. property, & which the mtgee. will be compelled to pay, as a condition of being allowed to redeem the property, do not constitute a debt in respect of which an action can be maintained by the mtgee. against the mtgor.—*Re* SNEYD, *Ex p.* FEWINGS (1883), 25 Ch. D. 338; 53 L. J. Ch. 545; 50 L. T. 109; 32 W. R. 352.

Annotations:—**Consd.** Wales *v.* Carr, [1902] 1 Ch. 860. **Refd.** Arbuthnot *v.* Bunsilall (1890), 62 L. T. 234; Economic Life Assce. Soc. *v.* Usborne, [1902] A. C. 147. **Mentd.** Faber *v.* Lathom (1897), 77 L. T. 168.

Interest on mortgage—Liability of surety.]—*See* GUARANTEE, Vol. XXVI., p. 86, No. 605.

Principal & interest.]—*See* Parts XVI. & XVII.

SUB-SECT. 5.—LOSS OF RIGHT.

A. Severance of Debt from Security.

2662. General rule—Right of mortgagor to reconveyance.]—The assignee of a mtge. cannot stand in any different character, or hold any different position from that of the mtgee. himself, although the mtgor. may not have been a party to the assignment. Every mtgor. has the right to have a reconveyance of the mtged. property upon payment of the money due upon the mtge., & the mtgee. is charged with the duty of making such reconveyance upon such payment being made. Where, therefore, a mtgee. having, besides the property mtged., certain promissory notes made by the mtgor. as collateral security for his debt, transferred the mtge. without assigning the collateral securities:—*Held:* he was not entitled so to sever the debt from the security, & an injunction granted against his proceeding at law to recover the amount of one of his notes pending a suit instituted by the mtgor., to redeem & to settle the equities of the parties, sustained.—WALKER *v.* JONES (1866), L. R. 1 P. C. 50; 3 Moo. P. C. C. N. S. 397; 35 L. J. P. C. 30; 14 L. T. 686; 12 Jur. N. S. 381; 14 W. R. 484; 16 E. R. 151, P. C.

Annotations:—**Consd.** Kinnaird *v.* Trollope (1888), 39 Ch. D. 636. **Apld.** Rourke *v.* Robinson, [1911] 1 Ch. 480. **Consd.** Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451. **Refd.** *Re* Oxford & Canterbury Hall Co. (1870), 5 Ch. App. 433; Rudge *v.* Richens (1873), L. R. 8 C. P. 358; Graham *v.* Seal (1918), 88 L. J. Ch. 31; Aman *v.* Southern Ry., [1926] 1 K. B. 59.

See, also, Part XIV., Sect. 2, *post.*

2663. Transfer of mortgage—Retention of collateral security—Assignee in no better position than mortgagee.]—WALKER *v.* JONES, No. 2662, *ante.*

B. Loss of Mortgaged Property.

(a) In General.

2664. General rule.]—If a creditor holding security say for his debt, he is under an obligation on payment of the debt to hand over the security; & if, having improperly made away with the security, he is unable to return it to his debtor,

he cannot have judgment for his debt (LORD CAVE, C.).—ELLIS & CO.'S TRUSTEE *v.* DIXON-JOHNSON, [1925] A. C. 489; 94 L. J. Ch. 221; 133 L. T. 60; 41 T. L. R. 336; 69 Sol. Jo. 395; [1925] B. & C. R. 54, H. L.

(b) Effect of Sale.

See, generally, Sect. 2, *ante*.

2665. Sale by transferee of equity of redemption—Concurrence by mortgagee—Vendor permitted to receive purchase-money—Loss of right against mortgagor.]—PALMER *v.* HENDRIE, No. 2189, *ante*.

2666. Sale under power—Action on covenant for balance.]—To a declaration by mtgee. against mtgor. for the balance due for principal & interest after sale under a power in the deed of the mtged. property, defts. pleaded, on equitable grounds, that, after default in payment of principal & interest, pltf., pursuant to the covenants in the deed, entered into & took possession of the mtged. premises, & sold the same, & so deprived deft. of his right to have them reconveyed to him on payment of the principal money & interest due. A judge at chambers having struck out the plea, on the ground that it was a bad & dishonest plea, the ct. refused to interfere.—RUDGE *v.* RICHENS (1873), L. R. 8 C. P. 358; 42 L. J. C. P. 127; 28 L. T. 537.

Annotations:—**Apprvd.** Grant *v.* Boos, [1926] A. C. 781. **Reld.** Kinnaird *v.* Trollope (1888), 39 Ch. D. 636.

2667. —— ——.]—By a memorandum of deposit, dated in 1882, of bonds to secure the repayment in 1883 of an advance, the borrower authorised the lender to sell the bonds for the purpose of repaying the advance, & undertook to pay the lender any difference between the proceeds of the bonds & the amount of the advance. In 1889 the lender sold the bonds, but the proceeds were not sufficient to repay the whole of the advance. In 1891 the borrower died without having given any acknowledgment of the debt:—*Held*: the cause of action in respect of the whole of the debt accrued in 1883 & not in 1889, & therefore a claim for the difference by the lender against the estate of the borrower was barred by Stat. Limitations.

It appears to me that that clause was not intended to alter the contract to pay, but to express the right of the creditor as to the mode of dealing with the securities. It gives him power to sell the securities, & directs him what to do with the proceeds, & says that the debtor will pay the deficiency. That does not affect the original promise or obligation to pay (LINDLEY, L.J.).—*Re* MCHENRY, MCDERMOTT *v.* BOYD, BARKER'S CLAIM, [1894] 3 Ch. 290; 63 L. J. Ch. 741; 71 L. T. 146; 43 W. R. 20; 10 T. L. R. 576; 38 Sol. Jo. 616; 7 R. 527, C. A.

2668. Sale under order of court—Purchase by mortgagee bidding with leave of court—Action on covenant for balance.]—Mtgee. who has obtained an order for sale, &, bidding with the leave of the ct., has purchased the mtged. property, is not precluded from suing the mtgor. upon his personal covenant in the mtge. for the difference between the sum due under the mtge. & that realised by the sale. It is not material that he has resold the property at a profit.—GRANT (GORDON) & CO. *v.* BOOS, [1926] A. C. 781; 95 L. J. P. C. 167; 135 L. T. 740; 42 T. L. R. 694, P. C.

C. Effect of Foreclosure Proceedings.

See, generally, Sect. 7, *post*.

2669. After foreclosure decree—Before sale.]—A mtgee. may sue at law on the bond, after a decree of foreclosure.—AYLET *v.* HILL (1779), 2 Dick. 551; 21 E. R. 384, L. C.

2670. —— ——.]—TOOK *v.* —— (1786), 2 Dick. 785; 21 E. R. 476; *sub nom.* TOOKE *v.* HARTLEY, 2 Bro. C. C. 125, L. C.

Annotations:—**Consd.** Perry *v.* Barker (1803), 8 Ves. 527. **Apld.** Smith *v.* Smith (1835), 1 Y. & C. Ex. 338. **Reld.** Lockhart *v.* Hardy (1846), 9 Beav. 349.

2671. After foreclosure & sale.]—TOOK *v.* ——

mtged. property, without the concurrence of a person to whom, subsequently to the mtge., the mtgor., had sold the remainder of the property, & whose interest was known to the mtgee.; & the mtgee. covenanted for freedom from incumbrances:—*Held*: the mtgee. having thereby put it out of his power to reconvey the whole of the mtged. property, he could not call on the owner of the remaining portion for payment of the balance of the mtge. money.—GOWLAND *v.* GARBUTT (1867), 13 Gr. 578.—**CAN.**

2664 ii. ——.]—A writ was in the hands of the sheriff at the suit of the pltfs. against I., at the time of the dismissal of a bill filed by I., to redeem pltfs., & at the time of the sale to M., which dismissal had the effect of a decree of foreclosure against I.:—*Held*: pltfs. might proceed to recover their debt against I., they being in a position to reconvey the mtged. premises.—BANK OF TORONTO *v.* IRWIN (1881), 28 Gr. 397.—**CAN.**

2664 iii. ——.]—*Held*: the mtgee. having debarred herself from restoring the estate covered by the mtge., unaltered in character & quantity, in a manner unauthorised by the terms of the mtge., an assignee of the mtge. could not claim under the covenant therein in an administration of the mtgor.'s estate.—*Re* THURESSON, MCKENZIE *v.* THURESSON (1902), 22 C. L. T. 51; 3 O. L. R. 271; 1 O. W. R. 4.—**CAN.**

2664 iv. ——.]—**The mtgee., having so dealt with the property as to render it impossible to restore it, on payment** of the moneys secured by the mtge. given by deft., cannot recover on the covenant.—NATIONAL TRUST CO. *v.* BOUSFIELD (Man.) (1906), 4 W. L. R. 575.—**CAN.**

PART XIII. SECT. 5, SUB-SECT. 5.—B. (b).

2666 i. *Sale under power—Action on covenant for balance.*]—Where, after the mtgor. had assigned his equity of redemption, the mtgee., with the concurrence of the assignee, by sale & transfer of the mtged. premises, put it out of his power to reconvey on redemption by the mtgor.:—*Held*: he could not call on the mtgor. for payment of any deficiency resulting upon such sale of the estate.—BURNHAM *v.* GALT (1869), 16 Gr. 417.—**CAN.**

2666 ii. —— ——.]—In an action on the covenant for payment in a mtge. for the amount of the deficiency after the exercise of a power of sale, deft. set up the sale under the power to one W., & a re-transfer by W. on the same day to pltf., by which pltf. became the owner of the land:—*Held*: no defence.—PEGG *v.* HOBSON (1887), 14 O. R. 272.—**CAN.**

2666 iii. —— ——.] Defts., having put it out of their power to reconvey to pltfs., upon payment of the mtge.-money, & having done this by an exercise of a power of sale, which was not *bonâ fide*, but intended to cut out the equity of redemption, while still enforcing payment of the debt, were restrained from enforcing a judgment which they had previously recovered on the covenant in the mtge.—CROTTY *v.* TAYLOR (1892), 8 Man. L. R. 188.—**CAN.**

q. *Action by second mortgagee—After sale by first mortgagee—Second mortgagee compelled to concur in sale.*]—*Held*: as the land charged was not of sufficient value to satisfy even the first chargee, the release given by the second chargee was given under compulsion to save expense, & his inability to reconvey could not be invoked when it arose from the chargor's own default.—BEATT *v.* BAILEY (1912), 21 O. W. R. 818; 3 O. W. N. 990; 26 O. L. R. 145; 3 D. L. R. 831.—**CAN.**

PART XIII. SECT. 5, SUB-SECT. 5.—C.

r. *After foreclosure decree—& mortgage by mortgagee.*]—If after a mtgee. has obtained a final order of foreclosure he has mortgaged the estate, that fact alone will not deprive him of the right to sue for the mtge. money, if, at the time of bringing the action, he has paid off the mtge. created by himself, & is in a position to reconvey the estate.—MUNSEN *v.* HAUSS (1875), 22 Gr. 279.—**CAN.**

t. —— *Foreclosure by prior mortgagee.*]—The fact that pltf. cannot, upon payment of the amount of his mtge. debt, reconvey the estate, is no answer to an action on the covenant, where the inability to reconvey is due to the equity of redemption having been foreclosed by a prior mtgee., & therefore to no fault of pltf.—BROWN *v.* WEIL, [1923] 4 D. L. R. 1164; 53 O. L. R. 183; *affg.*, [1923] 3 D. L. R. 892; 53 O. L. R. 27.—**CAN.**

2671 i. *After foreclosure & sale.*]—CHISHOLM *v.* KENNY (1886), 19 N. S. R. (7 R. & G.) 497; 8 C. L. T. 62.—**CAN.**

Sect. 5.—Action on covenant for payment: Sub-sect. 5, C., D. & E.; sub-sect. 6.]

(1786), 2 Dick. 785; 21 E. R. 476; *sub nom.* TOOKE *v.* HARTLEY, 2 Bro. C. C. 125, L. C.

Annotations:—**Consd.** Perry *v.* Barker (1803), 8 Ves. 527; Smith *v.* Smith (1835), 1 Y. & C. Ex. 338. **Refd.** Perry *v.* Barker (1806), 13 Ves. 198; Lockhart *v.* Hardy (1846), 9 Beav. 349.

2672. —— Action for balance — Foreclosure opened.]—After foreclosure & sale, action by the mtgee. for the balance opens the foreclosure. Therefore the mtgee. should have time to get back the estate & tender a reconveyance, & the mtgor. to redeem. But the mtgee. having taken possession a considerable time ago, & the balance being inconsiderable, a perpetual injunction was decreed.—PERRY *v.* BARKER (1806), 13 Ves. 198; 33 E. R. 269, L. C.

Annotations:—**Consd.** Grant *v.* Boos, [1926] A. C. 781. **Refd.** Dyson *v.* Morris (1842), 1 Hare, 413; Lockhart *v.* Hardy (1846), 9 Beav. 349. **Mentd.** Rome *v.* Young, Mounsey *v.* Young (1840), 9 L. J. Ex. Eq. 41.

2673. —— —— ——.]—LOCKHART *v.* HARDY, No. 2186, *ante*.

2674. Foreclosure absolute against second sub-mortgagee—By first sub-mortgagee—Right of first sub-mortgagee against mortgagor.]—B., the owner of a lease of a house, assigned it to D. for the residue of the term by way of mtge., to secure £3,000 & interest. D. sub-mortgaged the debt, & assigned the house for the residue of the term, less three days, to E., to secure £1,200 & interest. B. died, & in the administration suit against his exors., D. & E. brought in a claim for £3,000. B.'s exors. assigned their equity of redemption to D. D. further sub-mortgaged the debt, & assigned the house for the residue of the term, less three days, to L., to secure £1,000 & interest. D., by registered deed, assigned all his estate to trustees for the benefit of creditors. E. filed a bill against B.'s trustees & L. for foreclosure; B.'s exors. not being parties. D.'s trustees disclaimed by answer, & L. was foreclosed. E., who had been paying the ground rent for some years, at length ceased, & the original lessors entered:—*Held:* (1) E. was entitled to prove against B.'s estate, which was insufficient, for the whole sum of £3,000; but he was not to receive more than the amount due to him for principal, interest, & costs on the £1,200 mortgage debt; (2) the disclaimer by D.'s trustees extended only to matters in issue in the suit, & did not operate so as to enlarge the estate of pltf.

It is said that he is not in a position to restore the estate if the mtge. claim be satisfied; & that consequently, he has lost his right to enforce payment of the debt. He is not in a position to restore the estate, simply because the freeholder, by title paramount, has evicted him & everybody else. . . . There has been no default on his part; he has not received payment; he has not released the debt; & I think he is entitled to prove for the whole, & receive in respect of it as much as the estate can pay (JAMES, V.-C.).—*Re* BURRELL, BURRELL *v.* SMITH (1869), L. R. 7 Eq. 399; 38 L. J. Ch. 382; 17 W. R. 516.

2675. Foreclosure action pending—Order for personal payment—Second action unnecessary.]—Mtgees. commenced in May, 1891, an action claiming payment of the principal & interest, an account of what was due, foreclosure, & a receiver. In June the equitable tenant for life of the mtge. money was appointed in the action to be receiver of the rents of the mtged. property, with directions authorising him to retain the arrears of interest & the current interest out of the rents. The rents were insufficient to pay the current interest. The action had not been tried. In Sept. 1892, pltfs. commenced a second action against the mtgor., indorsing the writ for a definite sum, being the amount of two years' interest from Aug. 1890, less the amounts of rents received, & they applied for immediate judgment under R. S. C., Ord. 14:—*Held:* (1) as, according to the form of order settled in *Farrer* v. *Lacy, Hartland & Co.*, No. 2200, *ante*, a mtgee. in a foreclosure action obtains a personal order for payment of the principal with interest down to the date of the certificate, the money to be recovered in the second action could be recovered in the first, & the second action, therefore, was improperly brought; (2) the case did not come within R. S. C., Ord. 14; for as the receiver was receiving the rents with liberty to retain the interest out of them, there was no liquidated sum for which the writ could be indorsed under R. S. C., Ord. 3, r. 6. The order for payment was, therefore, discharged.—POULETT (EARL) *v.* HILL (VISCOUNT), [1893] 1 Ch. 277; 62 L. J. Ch. 466; 68 L. T. 476; 41 W. R. 503; 2 R. 288, C. A.

Annotations:—*As to* (1) **Foll.** Williams *v.* Hunt, [1905] 1 K. B. 512. *As to* (2) **Expld.** Lynde *v.* Walthman, [1895] 2 Q. B. 180.

2676. —— —— —— Principal & interest.]—As a mtgee. who brings an action in the Ch. Div. for an account of principal & interest due under the mtge. has a complete remedy by claiming in that action a personal order for payment, a second action brought in the K. B. Div., while the Ch. action is pending, to recover principal & interest, is improper, & should be stayed.—WILLIAMS *v.* HUNT, [1905] 1 K. B. 512; 74 L. J. K. B. 364; 92 L. T. 192, C. A.

2677. Puisne incumbrancer submitting to foreclosure—Without insisting on right to redeem—Right of action on covenant not lost.]—Where various parties to an action agree an order purporting to be a consent order, the agreement must be treated as embodying terms to which all assent, & by which all are bound.

A puisne incumbrancer who voluntarily submits to a foreclosure order absolute being made upon an originating summons, without insisting upon his right to have a time allowed within which to redeem a prior incumbrancer, does not thereby preclude himself from suing on the covenant for

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2672 i. —— *Action for balance—Foreclosure opened.*]—MILLER *v.* MCCUAIG (1890), 6 Man. L. R. 539.—**CAN.**

2672 ii. —— —— ——.]—In a foreclosure action where the order *nisi* gives the mtgee. personal judgment against the mtgor. as well as foreclosure, the taking of the final order & vesting of the mtged. property in the mtgee. does not prevent the mtgee. from proceeding to realise the debt under his personal judgment, so long as he is in a position to reconvey the mtged. property. If, however, he proceeds on his judgment, the foreclosure will be reopened.—ORSER *v.* COLONIAL INVESTMENT & LOAN CO., [1917] 3 W. W. R. 513; 10 Sask. L. R. 349; 37 D. L. R. 47.—**CAN.**

a. —— ——.]—RYAN *v.* CALDWELL (1900), 32 N. S. R. 458.—**CAN.**

b. —— ——.] — MCNEILL *v.* O'CONNOR (1907), 2 E. L. R. 288.—**CAN.**

c. —— ——.]—Mtge. transactions under Real Property Act are to be dealt with in accordance with the principles of equity jurisprudence; & foreclosure under the statute does not, as between the parties, any more than a decree absolute would have done, prevent cts. of equity from regarding the intent rather than the form; & the mtgee. may, notwithstanding the foreclosure, recover on the covenants, unless he has parted with the property.—NOBLE *v.* CAMPBELL (1911), 18 W. L. R. 591; 20 Man. L. R. 232.—**CAN.**

d. —— ——.]—Where a mtgee. has foreclosed the equity of redemption or acquired it by other means he cannot sue for the debt or any part of it secured by the mtge. unless he is in position to restore the mtged. property.—ROYAL BANK OF CANADA *v.* MCLEOD (B. C.), [1919] 3 W. W. R. 544; 48 D. L. R. 500.—**CAN.**

e. —— ——.]—Under the law of Saskatchewan, if a mtgee. of a first

payment in the mtge. deed & recovering his debt from the residuary legatees & devisees of deceased mtgor.

A mtge. of a leasehold public-house by testatrix contained a covenant that she, or those deriving title under her, would, upon demand in writing left at the public-house, repay the principal sum advanced with interest. No demand in writing was ever made on the premises:—*Held:* effect was given to the true intention of the parties to the deed if it was brought home to the mtgor., or those claiming under her, that the mtgees. were demanding their money & were about to take proceedings to recover it.—WORTHINGTON & Co., LTD. *v.* ABBOTT, [1910] 1 Ch. 588; 79 L. J. Ch. 252; 101 L. T. 895; 54 Sol. Jo. 83.

D. By Lapse of Time.

See LIMITATION OF ACTIONS, Vol. XXXII., pp. 317, 324, 333, 406, 407, 421, 422, 471–482, Nos. 29–36, 103, 183, 848–860, 984–993, 1350–1454.

E. Other Cases.

2678. Contract to buy other property from mortgagor—Debt to be deducted from purchase price.]—It is no ground for restraining a mtgee. from enforcing his security at law, that he has contracted to buy from the mtgor. another estate from the purchase-money for which the mtge. debt is to be deducted.

If an injunction be granted on such a ground as is here stated, is not this the consequence, that the mtgee. of any estate, by agreeing to become the purchaser, abandons his right to sue at law upon the specialty, until an account can be taken between him & the mtgor. as vendor? (LORD BROUGHAM, C.).—PELL *v.* STEPHENS (1833), 2 My. & K. 334; Coop. *temp.* Brough. 266; 47 E. R. 94, L. C.

2679. Sub-mortgage of leasehold—Forfeiture by lessor.]—*Re* BURRELL, BURRELL *v.* SMITH, No. 2674, *ante.*

2680. —— Disclaimer by trustees of mortgagee.]—*Re* BURRELL, BURRELL *v.* SMITH, No. 2674, *ante.*

2681. —— Release by mortgagee to mortgagor.]—*Re* BURRELL, BURRELL *v.* SMITH, No. 2674, *ante.*

SUB-SECT. 6.—PRACTICE.

2682. Specially indorsed writ—Action by assignee of mortgage debt.]—The indorsement upon a writ of summons stated that pltf.'s claim was for a certain sum for principal & interest due to him as the assignee of a mtge. debt due from deft., but did not state that express notice in writing of the assignment was given to deft.:—*Held:* the writ was specially indorsed within R. S. C., Ord. 3, r. 6, &, therefore, leave could be given to enter final judgment under R. S. C., Ord. 14, r. 1.—SATCHWELL *v.* CLARKE (1892), 66 L. T. 641; 8 T. L. R. 592; 36 Sol. Jo. 521, C. A.

Annotation:—**Apld.** Bradley *v.* Chamberlyn, [1893] 1 Q. B. 439.

2683. —— Receiver in possession.]—POULETT (EARL) *v.* HILL (VISCOUNT), No. 2675, *ante.*

2684. —— —— Amount due in dispute.]—Where a mtgee. appointed a receiver, who received rents, & afterwards the mtgee. brought an action specially indorsing the writ with a claim for the mtge. debt & interest, & applied for judgment under R. S. C., Ord. 14:—*Held:* the mere fact of a receiver having been appointed did not prevent the application of Ord. 14, but, as there appeared

& of a third mtge. obtains foreclosure under the first mtge. & alienates the land, he can still recover under the covenant for payment in the third mtge.—ISMAN *v.* SINNOTT, [1920] 3 W. W. R. 481.—**CAN.**

f. Foreclosure action pending—Payment by assignee of equity of redemption—Release by mortgagee.]—RYAN *v.* WILSON (1872), 32 U. C. R. 553.—**CAN.**

PART XIII. SECT. 5, SUB-SECT. 5.—E.

g. Mortgage for unpaid purchase-money—Land subject to mortgage in fraud of purchaser.]—MCDERMOTT *v.* WORKMAN (1865), 24 U. C. R. 467.—**CAN.**

h. ——.]—BARTON *v.* BALDWIN (1879), R. E. D. 366.—**CAN.**

k. —— *Land sold for taxes.*]—*Re* KENNEDY, WIGLE *v.* KENNEDY (1878), 26 Gr. 33.—**CAN.**

l. Mining lease—Mortgage to secure advances—Variation between lay agreement & mortgage—Illiterate mortgagors not liable on covenant.]—LETOURNEAU *v.* CARBONNEAU (1904), 35 S. C. R. 110.—**CAN.**

m. Extension of time given by mortgagee—To assignee of mortgagor.]—In order for a mtgor. to be released from his covenants by an extension of time given by the mtgee. to persons who have purchased the land subject to the mtge., the mtgor. must establish some impairment of his rights to proceed against such purchasers in the event that he is called upon to pay off the mtge.—CANADA LIFE ASSURANCE CO. *v.* YOUNG (Alta.), [1921] 1 W. W. R. 915; 65 D. L. R. 776.—**CAN.**

n. Mortgagee unable to give up title-deeds.]—Mtgee. having got possession of mtgor.'s title deeds, lodged them with an attorney, who claimed a lien on them for business done for mtgee. On the application of mtgor., mtgee. was restrained from proceeding at law upon his collateral security.—SCHOOLE *v.* SALL (1803), 1 Sch. & Lef. 176.—**IR.**

PART XIII. SECT. 5, SUB-SECT. 6.

o. Stay of proceedings.]—The ct. refused to interfere in a summary manner to stay proceedings in an action of covenant on a mtge. to secure money, brought for the benefit of an assignee, though it was shown that the mtgee. had signed a writing, not under seal, by which he acknowledged that the instalments mentioned in the mtge. were for a larger sum than was really due.—BABY *v.* MILNE (1836), 5 O. S. 76.—**CAN.**

p. Order for payment out of money.]—An order for the payment of money out of ct. will not be made *ex p.* the party who has paid it in must be served with notice.—BULLEN *v.* IRENWICK (1864), 1 Ch. Ch. 213.—**CAN.**

q. Defence.]—Declaration on a covenant contained in a mtge. Deft. pleaded that pltfs. gave their bond, binding themselves to execute a bond to deft. of the premises comprised in the mtge., & alleged that pltfs. had not done so: & averred that pltfs. had not a good title to the land:—*Held:* plea, bad, as it did not show what defect there was in pltfs.' title.—DAUPHIN *v.* LESPERANCE (1864), 14 C. P. 133.—**CAN.**

r. Declaration.]—*Held:* looking at the form of the mtge. in this case, & the declaration, pltf. was not entitled to a verdict for the whole principal, for the declaration did not clearly show that he was claiming it by reason of non-payment of the interest, & he was not bound to sue for the whole amount.—NORTHEY *v.* TRUMENHISER (1870), 30 U. C. R. 426.—**CAN.**

t. Jurisdiction of court.]—The writ was issued, specially endorsed for money payable on a mtge. of lands in Manitoba, executed by deft. in Ontario, & payable to the mtgee. or his assigns, but not at any particular place. Pltf., who was the mtgee., resided in Manitoba:—*Held:* the non-payment of the money, which gave pltf. his cause of complaint, occurred within the province, & the ct. had jurisdiction.—BRADLEY *v.* MCLEISH (1883), 1 Man. L. R. 103.—**CAN.**

a. ——.]—The district ct. has jurisdiction over an action by a mtgee. on the personal covenant in a mtge. where the amount claimed is within the competence of that ct.—COAD *v.* WINDSOR, [1924] 4 D. L. R. 892; [1924] 3 W. W. R. 430; 19 Sask. L. R. 50.—**CAN.**

b. Joinder of pleas.]—To an action upon a covenant in a mtge., a plea of payment into ct. may be joined with a plea of *non est factum.*—PRATT *v.* WARK (1885), 2 Man. L. R. 213.—**CAN.**

c. Dispute as to amount due.]—Where a deft. in a mtge. action desires only to dispute the amount claimed, but, instead of giving the notice referred to in r. 718, enters an appearance in which he disputes the amount, judgment cannot be entered on *praecipe*; a motion to the ct. becomes necessary.—RICE *v.* KINGHORN (1895), 17 P. R. 1.—**CAN.**

d. Amendment of claim.]—In, an action upon mtge. where it is found that deft. did not execute the mtge., but that moneys of pltf. were paid for, & to deft. through an agent whom he had authorised to obtain a loan for him, pltf. should be allowed to amend his claim so as to make it one for repayment of money lent.—

Sect. 5.—Action on covenant for payment: Sub-sect. 6. Sects. 6 & 7: Sub-sects. 1 & 2, A. (a).]

to be a question as to what on the true state of the account as between the mtgor. & mtgee. was due to the latter, leave to defend must be granted. LYNDE *v.* WAITHMAN, [1895] 2 Q. B. 180; 64 L. J. Q. B. 762; 72 L. T. 857; 14 R. 489, C. A.

2685. Right to begin—Plaintiff.]—There is a question as to the amount of the claim pltf. is to begin (WILLIAMS, J.).—OVERBURY *v.* MUGGRIDGE (1858), 1 F. & F. 137, n.

2686. —— Defendant—Amount of claim admitted.]—In covenant for repayment of money, the only plea being that the deed was a mtge. deed, given to secure money lost by gaming; if deft. admits the amount of the claim, he is entitled to begin, even although the claim, in a technical view, is partly for unliquidated damages.—HILL *v.* FOX (1858), 1 F. & F. 136, N. P.; *on appeal* (1859), 4 H. & N. 359, Ex. Ch.

Annotations:—**Mentd.** Howkins *v.* Bennet (1860), 7 C. B. N. S. 507; Higginson *v.* Simpson (1877), 2 C. P. D. 76; Read *v.* Anderson (1882), 10 Q. B. D. 100; Carlill *v.* Carbolic Smoke Ball Co. (1892), 67 L. T. 837.

SECT. 6.—RECOVERY OF DEBT WHEN NO COVENANT TO REPAY.

2687. Action for money lent.]—Deft. borrowed money of B., & conveyed land in trust for him, with a power of sale, in trust to pay him principal & interest, & pay over the residue to deft.; deft. afterwards borrowed other money of B., & charged that also on the land, but without any power of sale. Afterwards, pltf. paying both sums to B. & advancing an additional sum to deft., by deed between pltf., deft., B., & B.'s trustee, the former securities were assigned to pltf., B. giving pltf. a power of attorney to sue in his name as to the first sum borrowed, & the lands were conveyed to pltf., to hold them to the same trusts, but for his own benefit, as were mentioned in the other deeds with respect to B. None of the deeds contained a covenant to pay. Pltf. sued deft. in debt, payable on demand, for money paid, money lent, interest, & on an account stated:—*Held:* he was entitled to recover the whole sum, on proof that he had paid it as above: & he was not bound to declare on the deed.—YATES *v.* ASTON (1843), 4 Q. B. 182; 3 Gal. & Dav. 351; 12 L. J. Q. B. 160; 7 Jur. 83; 114 E. R. 866.

Annotations:—**Distd.** Mathew *v.* Blackmore (1857), 1 H. & N. 762. **Reld.** Barber *v.* Butcher (1846), 8 Q. B. 863; Price *v.* Moulton (1851), 10 C. B. 561; Painter *v.* Abel (1863), 2 New Rep. 83.

2688. ——.]—L. devised certain lands to deft. on trust to sell the same & apply the proceeds in payment of debts, etc. Deft. mortgaged the lands to pltf. as a security for money lent to him. The mtge. deed contained a covenant by deft. that he would, out of the moneys which should come to his hands as such trustee, from the lands comprised in the mtged. security & the personal estate, if any, of L., pay to pltf. the principal & interest:—*Held:* as there was an express covenant by deft. to pay in a qualified manner, no contract by parol could be implied for the repayment, & consequently an action for money lent would not lie.—MATHEW *v.* BLACKMORE (1857), 1 H. & N. 762; 26 L. J. Ex. 150; 28 L. T. O. S. 325; 156 E. R. 1409; *sub nom.* MATTHEW *v* BLACKMORE, 5 W. R. 363.

See, also, MONEY & MONEY-LENDING, pp. 210, 211, *ante.*

SECT. 7.—FORECLOSURE OR SALE.

SUB-SECT. 1.—NATURE OF RIGHT TO FORECLOSE.

See, generally, Law of Property Act, 1925 (c. 20), ss. 87–92, 101–107, 110.

2689. Whether mortgagee must take possession.]—(1) Mtgee., having permitted the tenant for life to run in arrear for the interest, purchases the estate for life, & takes possession under that purchase: he is bound to apply the surplus rents & profits beyond the current interest in discharge of the arrear; & in the account under a bill of foreclosure was charged accordingly.

(2) Mtgee. cannot be compelled to take possession, for he would subject himself to the account; which this ct. will never force upon a mtgee. Therefore he may file a bill for foreclosure without taking possession (ARDEN, M.R.).—PENRHYN (LORD) *v.* HUGHES (1799), 5 Ves. 99; 31 E. R. 492.

Annotations:—*As to* (1) **Dbtd.** Sharshaw *v.* Gibbs (1854), Kay, 333. **Mentd.** Burges *v.* Mawley (1823), Turn. & R. 167.

2690. Stay of proceedings for foreclosure—On payment—On future day.]—(1) In a foreclosure suit, the ct. will not stay proceedings on the application of a deft., except upon the terms of his paying down or having previously paid or tendered to pltf. his principal & interest & all the costs of the suit. Other incumbrancers, who are parties to the suit, have not such an interest in it as to enable them successfully to oppose a motion to stay proceedings, because the pltf. might at

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NORTHERN TRUST CO. *v.* WASYLKOVSKY & NORTHERN LUMBER CO., LTD. (Sask.), [1918] 3 W. W. R. 204. —**CAN.**

e. Personal judgment.]—Applt., being indebted to pltf., transferred to him a mtge. containing a covenant by the mtgor. for payment, & in the transfer the applt. covenanted that in case the mtgor. made default in payment he would pay or cause to be paid the sums in default. Default having arisen under the mtge., pltf. brought action against the mtgor. which was a co. then bkpt., the trustee in bkpcy., & applt.:—*Held:* as to applt. the action was one "brought upon a mtge. of land" within Judicature Act, 1922, s. 37, & the enforcement of personal judgment was precluded until after sale.—MACDONALD *v.* CLARKSON (Alta.), [1923] 4 D. L. R. 898; [1923] 3 W. W. R. 690.—**CAN.**

f. ——.]—A statute of the Province of Alberta dealing only with the remedy in an "action brought upon a mtge. of land," & settling the form of judgment for the realisation of the debt out of the mtged. property, does not apply to an action brought on the covenant for payment contained in a mtge. deed of Alberta land, in which the judgment must be limited to a personal order on the deft. to pay the amount.—NORTHERN TRUSTS CO. *v.* MCLEAN, [1926] 3 D. L. R. 93; 58 O. L. R. 683.—**CAN.**

PART XIII. SECT. 6.

2687 i. *Action for money lent.*]—Where the mtge. contains only a proviso for making it void on payment of the mtge. money, & a proviso to sell & eject on default, but no covenant to pay, no liability to pay is created by mere proof of the mtge.; there must be evidence given of a loan or debt.—JACKSON *v.* YEOMANS (1869), 28 U. C. R. 307.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 1.

g. General rule.]—A bill of foreclosure is not a suit in equity for the recovery of the money charged upon the land, although it may lead to that; but it is, in effect, a suit to obtain the equity of redemption, which is, in the view of equity, an actual estate.—WRIXON *v.* VIZE (1842), 3 Dr. & War. 104.—**IR.**

h. Dismissal of bill—Upon which redemption decree issued.]—Although a bill does not pray redemption, but a decree for redemption is issued upon it, it would seem that a subsequent dismissal of the bill operates as a foreclosure. — CORNWALL *v.* HENRIOD (1866), 12 Gr. 338.—**CAN.**

k. Co-extensive with right to redeem.]—The rights of mtgor. & mtgee. are reciprocal, in so far as the right to redeem being shown the right to foreclose is thereby established, although the identical conditions attached to

any time dismiss the bill against them upon payment of their costs.

(2) The ct. will not make an order to stay proceedings upon payment of principal, interest & costs on a future specified day, however near, because the right of a mtgee. is to pursue any or all of his remedies without hindrance, until he actually obtains payment of his demand.

(3) When a suit is brought to a conclusion upon a motion of this kind, moneys in the hands of a receiver appointed in the suit belong to the person who was in possession of the estate when the receiver was appointed.—PAYNTER *v.* CAREW (1854), Kay, App. XXXVI.; 2 Eq. Rep. 496; 23 L. J. Ch. 596; 23 L. T. O. S. 21; 18 Jur. 417; 2 W. R. 345; 69 E. R. 331.

Annotation:—As to (1) **Distd.** Paine *v.* Edwards (1862), 6 L. T. 600.

2691. Effect of dispute as to priorities—Day fixed for redemption.]—BARTLETT *v.* REES, No. 3122, *post.*

See, now, Law of Property Act, 1925 (c. 20), s. 88 (2).

SUB-SECT. 2.—RIGHT TO FORECLOSURE OR SALE.

A. Jurisdiction of Court to order Foreclosure or Sale.

(a) In General.

See, now, Law of Property Act, 1925 (c. 20), s. 91.

2692. What court may order—Sale of equitable mortgage—Commissioner.]—*Qu.:* whether a mtge. of an equity of redemption can be sold under the order of the comr., or an application to the ct. is necessary.—*Re* FAWCETT, *Ex p.* ROBINSON (1832), 2 Deac. & Ch. 110; 1 L. J. Bcy. 114, C. of R.

2693. —— —— High Court.]—*Re* FAWCETT, *Ex p.* ROBINSON, No. 2692, *ante.*

2694. Reference to commissioner—To inquire into propriety of sale.]—Where the assignees declined, upon the petition of the mtgee., to assent to a sale of the mtged. property, but asked that the ct. should exercise a discretion as to the propriety of the sale, a reference for that purpose was directed to the comr.—*Re* LETT, *Ex p.* HURST (1844), 4 L. T. O. S. 214; 8 Jur. 1106, C. of R.

2695. Resale—Grounds for ordering—Purchaser son of mortgagor—Son without property or known resources.]—CAUTY *v.* HOULDITCH (1844), 3 L. T. O. S. 409.

2696. Negotiation for private sale abandoned—Acceptance by court of price offered—Consent of incumbrancers.]—ANON. (1837), 1 Jur. 525.

2697. On whose application ordered—First & second mortgagees & mortgagor—Though opposed by third mortgagee—Value of property not proved.]—Decree for sale ordered, at the request of the first & second mtgees. & the mtgor., notwithstanding the third incumbrancer insisted on a decree for foreclosure & redemption, the value of the property not being proved.—WICKHAM *v.* NICHOLSON (1854), 19 Beav. 38; 52 E. R. 262.

*Annotation:—***Mentd.** Langstaff *v.* Nicholson (1858), 25 Beav. 160.

2698. —— First mortgagee—Inquiry directed as to priorities—Chancery Procedure Amendment Act, 1852 (c. 86), s. 48.]—In a foreclosure suit by a first mtgee. against the mtgor. & subsequent incumbrancers, the second mtgee. moved that, on payment by himself to pltf. of what should be due to him for principal, interest & costs, the estate, of which pltf. was in possession, might be conveyed to him, the moving deft. & that all further proceedings might be stayed. It appeared that in a former suit by the same second mtgee. against the mtgor. & subsequent incumbrancers, to which the present pltf. was not a party, praying for a foreclosure or a sale, an order had been made

the one right may not be attached to the other.—PARKER *v.* VINEGROWERS' ASSOCN. (1875), 23 Gr. 179.—**CAN.**

l. ——.]—Unless there is an agreement to the contrary, the right of foreclosure & the right of redemption must be deemed co-extensive.—PURNA CHANDRA SARMA *v.* PEARY MOHAN PAL DAS (1912), 1. L. R. 39 Calc. 828.—**IND.**

m. *Does not include right to recover possession.*]—Under Judicature Act (Ont.) an action for foreclosure is not to be regarded as including a right to recover possession of the mtged. premises as in ejectment.—CLARK *v.* HAGAR (1893), 22 S. C. R. 510.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 2.—A. (a).

n. *What court may order—Whether sale—In absence of interested parties.*]—Where a bill prays a foreclosure, & some of the parties interested are not before the ct., a sale cannot be decreed.—BETHUNE *v.* CAULCUTT (1849), 1 Gr. 81.—**CAN.**

o. —— —— ——.]—Where a party interested in the equity of redemption is dead, & his heirs are out of the jurisdiction & unknown, the ct. has jurisdiction in a suit by the first mtgee. against a subsequent mtgee. & the A.-G., to direct a sale of the property; & the proceedings cannot afterwards be set aside by the heirs except for error or fraud.—SMITH *v.* GOOD (1868), 14 Gr. 444.—**CAN.**

p. —— —— *After foreclosure.*]—The granting of an order of sale of mtged. premises after foreclosure, where the interest of the mtgor. is only contingent, is discretionary with the ct. of equity.—HUTCHINSON *v.* WITHAM (1865), 1 Old. 640.—**CAN.**

q. —— —— —— *Although foreclosure sought.*]—EXCELSIOR LIFE INSURANCE CO. *v.* PRESTNIAK (1908), 8 W. L. R. 780; 1 Sask. L. R. 215.—**CAN.**

r. —— *Foreclosure—On failure of sale.*]—Where at the hearing a sale instead of foreclosure had been asked for, & was directed by the decree, which omitted however to provide that in the event of the sale failing the deft. stand foreclosed, the ct., upon petition setting forth the facts, & that the attempted sale which had been made had proved abortive, ordered deft. to pay the amount which had been found due, within one month, or, in default, foreclosure.—GOODALL *v.* BURROWS, HENDERSON *v.* RICHMOND (1859), 7 Gr. 449.—**CAN.**

t. —— *Sale of mortgaged property in portions.*]—MURDOCH *v.* BELLONI (1875), 9 N. S. R. 532.—**CAN.**

a. —— *Purchase at named price—Leave to issue execution for balance.*]—SECURITY TRUST CO., LTD. *v.* SAYRE & GILFOY, [1920] 3 W. W. R. 469.—**CAN.**

b. —— *Postponement.*]—SHEATH *v.* HUME (1903), 23 N. Z. L. R. 221.—**N.Z.**

Court will not order investigation of title.]—A.-G. *v.* CAMPBELL (1845), Res. & Eq. Jud. (Eq.) 16.—**AUS.**

d. *Option of parties.*]—A mtgee. is entitled to a decree for a sale or foreclosure, at his option, as against the mtgor.—MEYERS *v.* HARRISON (1850), 1 Gr. 449.—**CAN.**

e. ——.]—The orders of June, 1861, do not entitle deft. to insist upon a sale instead of a foreclosure against the consent of the mtgee., without making the usual deposit upon his undertaking the conduct of the sale.—TAYLOR *v.* WALKER (1861), 8 Gr. 506.—**CAN.**

f. ——.]—In a suit on a mtge. covering lands in the Province of Ontario, & also in Quebec, deft., mtgor., waived his right to claim a sale of the property & elected to have a decree of foreclosure pronounced.—BRYSON *v.* HUNTINGTON (1877), 25 Gr. 265.—**CAN.**

g. *Presumption of jurisdiction.*]—A bill for foreclosure need not state the property or the parties to be within the jurisdiction of the ct. If necessary that will be presumed in favour of the bill till the contrary appears.—DUNCAN *v.* GEARY (1863), 10 Gr. 34.—**CAN.**

h. *Effect of Insolvent Act, 1869.*]—Under above Act, the jurisdiction of the ct. of Ch. to decree foreclosure upon a mtge. is not taken away, & a mtgee. must still proceed in that ct. to obtain such relief against the official assignee of the mtgor.—HENDERSON *v.* KERR (1875), 22 Gr. 91.—**CAN.**

k. *Action brought at common law—Waiver of objection to jurisdiction.*]—LYNDS *v.* HOAR (1881), 14 N. S. R. (2 R. & G.) 237; 1 C. L. T. 710.—**CAN.**

aa. *Absence of consideration.*]—MCLELLAN *v.* FULMORE (*circa* 1883), R. E. D. 453.—**CAN.**

bb. ——.]—In an action for the foreclosure of a mtge. tried before a jury, the jury found (*inter alia*) that the mtgors. did not receive from the mtgee. the amount for which the mtge. purported to be given, or any other consideration therefor:—*Held:*

Sect. 7.—Foreclosure or sale: Sub-sect. 2, A. (a), (b) & (c).]

directing an inquiry as to priorities. The present motion was resisted by the mtgor., & by the subsequent incumbrancers, one of whom denied altogether the first mtgee.'s right to redeem:—*Held:* as the order now prayed not only would interfere with the former order of the ct., but would injure the position of the subsequent incumbrancers, the motion must be refused.

At the hearing of the motion in the cause, on the application of the pltf., the first mtgee., under above section of the Act, although the second mtgee. now opposed, a sale was ordered, with an inquiry as to priorities, having regard to the direction in the former suit.—PAINE *v.* EDWARDS (1862), 6 L. T. 600; 8 Jur. N. S. 1200; 10 W. R. 709.

2699. —— Mortgagee by deposit of deeds—Conveyancing Act, 1881 (c. 41).]—An equitable mtgee. by deposit of deeds applied under Conveyancing Act, 1881 (c. 41), s. 25 (2), for an order for sale instead of foreclosure. There was no memorandum of the charge, & no agreement by the mtgor. to execute a legal mtge. The order asked for was made.—OLDHAM *v.* STRINGER (1884), 51 L. T. 895; 33 W. R. 251.

Annotation:—**N.F.** Green *v.* Biggs (1885), 52 L. T. 680.

—— **Creditors of bankrupt.**]—*See* BANKRUPTCY, Vol. IV., pp. 374–377, Nos. 3444–3479.

2700. Mortgage deed containing express power of sale—Notice given thereunder.]—By indenture, dated Oct. 27, 1851, J. conveyed freeholds to & to the use of W. & C., their heirs & assigns for ever, by way of mtge., for securing the repayment of £3,000 & interest, & the said indenture contained a power to the mtgees., after six months' notice, to sell the mtged. premises, & to hold the moneys arising thereby upon the trusts therein mentioned for better securing the repayment of the mtge. moneys. J. died on Apr. 1, 1856, having devised & bequeathed all his real & personal property for the benefit, as to the real estate, of his wife for life; &, after her decease, upon trust, as to both the real & personal estate, for the benefit of his twelve nephews & nieces. The mtgees., on Oct. 18, 1856, in conformity with the terms of the power, gave notice of their intention to exercise the power of sale at the expiration of six months, if their debt were not previously paid. On Dec. 10, 1857, the mtgees., instead of selling under the power pursuant to their notice, filed their bill against the widow of the mtgor., & his devisees in trust, praying an account of the mtge. debt, & that the mtged. premises might be sold under the direction of the ct., & the sum found due to pltfs. in respect of their mtge. debt paid out of the proceeds of sale, together with the costs of suit; & it was decreed accordingly.—HUTTON *v.* SEALY (1858), 27 L. J. Ch. 263; 4 Jur. N. S. 450; 6 W. R. 350.

Annotation:—**Distd.** Macrae *v.* Ellerton (1858), 27 L. J. Ch. 777.

Foreclosure of foreign immovables.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 349, 350, Nos. 352–354.

(b) At What Stage of Proceedings.

2701. On interlocutory motion—15 & 16 Vict. c. 86, s. 55.]—The ct. will not deprive a creditor of his right to an immediate sale, except under very special circumstances.

A creditor in respect of a debt secured upon the real estate of a co. in liquidation brought an action for an account & sale. Upon an interlocutory application, under above sect., the ct. ordered an immediate sale, without waiting until the hearing of the action.—DAVIS *v.* ASHWIN (1877), 47 L. J. Ch. 70; *sub nom. Re* BRYNMAWR COAL & IRON CO., LTD., DAVIS *v.* ASHWIN, 26 W. R. 139.

Annotation:—**Dbtd.** London & County Banking Co. *v.* Dover (1879), 11 Ch. D. 204.

2702. —— ——.]—15 & 16 Vict. c. 86, s. 55, does not authorise the ct. in an ordinary foreclosure action to direct a sale on an interlocutory application.—LONDON & COUNTY BANKING CO. *v.* DOVER (1879), 11 Ch. D. 204; 48 L. J. Ch. 336; 27 W. R. 749.

Annotation:—**Reld.** Woolley *v.* Colman (1882), 21 Ch. D. 169.

2703. At any time before foreclosure absolute—After decree nisi.]—A decree for successive redemptions & foreclosures having been obtained in an action by a second mtgee. against the first mtgee. & several successive incumbrancers, the second mtgee. redeemed the first, & then applied for a sale of the mtged. property:—*Held:* under Conveyancing & Law of Property Act, 1881 (c. 41), s. 25, the ct. has jurisdiction to order a sale of mtged. property in a foreclosure or redemption action at any time before the suit is concluded by foreclosure absolute, & a sale was ordered.—UNION BANK OF LONDON *v.* INGRAM (1882), 20 Ch. D. 463; 51 L. J. Ch. 508; 46 L. T. 507; 30 W. R. 375, C. A.

Annotations:—**Folld.** Woolley *v.* Colman (1882), 21 Ch. D. 169. **Reld.** Western District Bank *v.* Turner (1882), 47 L. T. 433.

2704. At any stage of redemption action.]—WOOLLEY *v.* COLMAN, No. 2746, *post.*

2705. On motion for judgment claiming foreclosure only—Mortgagor not appearing—Necessity for notice.]—Upon motion for judgment in an action where foreclosure alone is claimed by the

pltf. could not, in such case, obtain a decree of foreclosure & sale.—MCPHEE *v.* MCDONALD (1889), 26 N. S. R. 519. —**CAN.**

—.]—PATTERSON *v.* MCLEAN (1891), 21 O. R. 221.—**CAN.**

o. *Territorial jurisdiction.*] — Although in an action on a mtge. of lands situate out of the province judgment of foreclosure will be granted against a deft. residing therein, such judgment merely operating *in personam* as an extinguishment of a personal right, yet the ct. will not extend the doctrine by ordering a sale of land over which it has no territorial jurisdiction.—STRANGE *v.* RADFORD (1887), 15 O. R. 145.—**CAN.**

p. *After foreclosure—No power to order sale.*]—The ct. has no power to direct a sale of a mtged. property after foreclosure has been ordered, without the consent of deft., although it be shown that the mtged. premises are not worth the amount due under the mtge.—CRÉDIT FONCIER FRANCO-CANADIEN *v.* SCHULTZ (1894), 10 Man. L. R. 158.—**CAN.**

q. *Mortgagor without interest.*] — Mtgor. will be foreclosed though he may have had no interest in the premises to mtge., but, in such an instance, a sale will not be ordered.—DOHERTY *v.* HOGAN (1895), 1 N. B. Eq. Rep. 113. —**CAN.**

r. *Appeal to Supreme Court—Amount less than* $1,000.]—JERMYN *v.* TEW (1898), 28 S. C. R. 497.—**CAN.**

t. *Jurisdiction of district court.*] — An action for sale or foreclosure, where pltf.'s claim is less than $600, though the land exceeds in value $600, or though the claims of subsequent incumbrancers raise the amount of the charges against the land to a sum exceeding $600, is properly brought & continued in a district ct. —OLIVER *v.* LAURENT (1913), 25 W. L. R. 625; 5 W. W. R. 237; 13 D. L. R. 245; 7 Alta. L. R. 30.—**CAN.**

a. *Where mortgagor absent.*]—GOWAN *v.* TYGHE (1827), 3 Mol. 113.—**IR.**

b. ——.]—The ct. held itself bound even in a case of hardship to refuse to give any effect to a proceeding under the Mortgage Act against an absent mortgagor.—WOLFE *v.* JACKSON (1830), 1 Mol. 250.—**IR.**

PART XIII. SECT. 7, SUB-SECT. 2.—A. (b).

c. *At any time before foreclosure absolute.*]—Apart from statute, the ct. can order a sale, in lieu of foreclosure, under a mtge. which contains a power of sale; the sale may be directed at any time before order absolute.—MCLEAN *v.* BADGER, [1925] 4 D. L. R. 1021; [1925] 3 W. W. R. 575.—**CAN.**

d. *Not on ex parte motion.*]—

mtgee., & the mtgor. does not appear, the ct. will not exercise its discretion under Conveyancing & Law of Property Act, 1881 (c. 41), s. 25 (2), unless the mtgor. has had notice of the mtgee.'s intention to ask for a sale instead of foreclosure of the mtged. premises.—SOUTH WESTERN DISTRICT BANK *v.* TURNER (1882), 31 W. R. 113.

2706. On motion for foreclosure absolute—enlarge [1882]

(c) *Terms on Which Sale Ordered.*

2707. Mortgagor given time to redeem.]—In a claim filed by a mtgee., praying payment, a sale, or foreclosure, the ct., under 15 & 16 Vict. c. 86, s. 48, will not in the first instance, & in the absence of the owners of the equity of redemption, decree an immediate sale, but will fix a time for payment, &, in default thereof, direct a sale.—SMITH *v.* ROBINSON (1853), 1 Sm. & G. 140; 22 L. J. Ch. 482; 20 L. T. O. S. 205; 1 W. R. 123; 65 E. R. 61.

Annotation:—**Apld.** Woof *v.* Barron, [1873] W. N. 71.

2708. —— Six months after decree.]—MEUX *v.* FERNE (1818), cited in 2 My. & K. at p. 422; 39 E. R. 1005.

Annotation:—**Apld.** Parker *v.* Housefield (1834), 2 My. & K. 419.

2709. —— ——.]—SPRING *v.* ALLEN (1830), cited in 2 My. & K. at p. 422; 39 E. R. 1005.

Annotation:—**Apld.** Parker *v.* Housefield (1834), 2 My. & K. 419.

2710. —— Three months after chief clerk's certificate.]—Where an equitable mtgee. by deposit of deeds applied, under Conveyancing & Law of Property Act, 1881 (c. 41), s. 25 (2), for an order for sale instead of foreclosure, there being a memorandum of the charge, & an agreement by the mtgor. to execute a legal mtge., the ct. made an order for sale of the property, such sale not to take place until three months after the chief clerk's certificate, as to the amount due to pltf., should be filed; but refused to order an immediate sale after such certificate.—GREEN *v.* BIGGS (1885), 52 L. T. 680.

2711. —— ——.]—In a foreclosure action against a mtgor. & subsequent mtgee. the mtgor. made default of appearance, & remaining defts. appeared but made default in pleading. Upon motion for judgment under R. S. C., Ord. 27, r. 11, pltfs. filed an affidavit in support of their claim:—*Held:* (1) the costs of the affidavit must be disallowed against all defts; (2) three months allowed for redemption after the date of the certificate.—JONES *v.* HARRIS (1887), 55 L. T. 884.

2712. —— Mortgage of leaseholds by deposit.]—Where a deposit of a lease was made to secure a debt, & from the nature of the transaction no interest was to be paid on the principal sum secured, the equitable mtgor., on a bill filed by the equitable mtgee. to have the lease sold, is entitled to the usual time to redeem.—MELLER *v.* WOODS (1836), 1 Keen, 16; 5 L. J. Ch. 109; 48 E. R. 212; *sub nom.* MILLER *v.* WOODS, Donnelly, 8.

Annotation:—**Reld.** Tuckley *v.* Thompson (1860), 1 John. & H. 126.

2713. Estate expressed to be free from incumbrances—Consent of incumbrancer to such condition—Concurrence in sale ordered.]—Deft., who is an incumbrancer on an estate sold under the decree of the ct., & who has concurred in settling conditions of sale, describing such estate as to be sold free from incumbrances will be ordered to concur in carrying the sale into effect, & to execute the of the estate to the purchaser free from his incumbrance.—TOMLIN *v.* HATFIELD (1839), 9 L. J. Ch. 119.

2714. When immediate sale may be ordered—Discretion of court.]—The ct., in a foreclosure suit, is not bound to give the mtgor. six months to redeem, nor is his consent necessary to enable it to make an immediate order for sale.—NEWMAN *v.* SELFE (1864), 33 Beav. 522; 33 L. J. Ch. 527; 10 L. T. 152; 10 Jur. N. S. 251; 12 W. R. 564; 55 E. R. 471.

2715. —— Mortgage on infant's estate—Whether benefit to infant must be shown.]—Direction for sale of an infant's estate in a foreclosure suit, under circumstances showing it to be clearly for the benefit of the infant, without giving time to redeem.—MEARS *v.* BEST (1853), 10 Hare, App. II., 51; 68 E. R. 1144.

2716. —— ——.]—In a foreclosure suit under 15 & 16 Vict. c. 86, s. 48, an immediate sale will be ordered, notwithstanding that infants are interested in the equity of redemption, without inquiring whether such sale is for their benefit.—WIGHAM *v.* MEASOR (1857), 5 W. R. 394.

2717. —— Mortgagor not appearing.]—When at the trial of a foreclosure action pltf. asks for a sale of the property, & the mtgor. does not appear, the ct. will order an account of what is due to pltf. to be first taken, & then that so much of the property be sold as will be sufficient to satisfy what is found due to pltf.—WADE *v.* WILSON (1882), 22 Ch. D. 235; 52 L. J. Ch. 399; 47 L. T. 696; 31 W. R. 237.

Annotation: **Reld.** Green *v.* Biggs (1885), 52 L. T. 680.

—— —— Deficient security.]—*See* Nos. 2834, 2835, *post.*

Mortgage or unproductive leaseholds.]—*See* No. 2842, *post.*

2718. —— Company in liquidation.]—DAVIS *v.* ASHWIN, No. 2701, *ante.*

2719. Necessity for payment of prior mortgage—Application by puisne incumbrancer.]—SMITHSON *v.* THOMPSON, No. 1762, *ante.*

2720. ——.]—A. being entitled to an annuity out of an estate, it was afterwards conveyed to a trustee in trust, out of the rents, or by a sale, to raise a sum due to A. The owner of the estate afterwards mortgaged it to B., who filed his bill, praying the execution of the trusts of the first deed, & a sale of the estate, but the bill did not offer to redeem:—*Held:* it was demurrable.—CAVE *v.* FOULKES (1836), Donnelly, 54; 5 L. J. Ch. 206; 47 E. R. 222.

2721. Mortgagee's right to have estate sold as it was at date of order.]—A legal mtgee. obtained the usual order for sale of the property previous to

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Where the decree is for sale, the ct. will not on default grant an order of foreclosure, *ex p.*—GARRATT *v.* MCDONALD, 1 Ch. Ch. 335.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 2.—A. (c).

2707 i. *Mortgagor given time to redeem.*]—Where a foreclosure is asked after an abortive sale, the mtgor. must first be allowed three months to redeem.—GIRDLESTONE *v.* GUNN (1864), 1 Ch. Ch. 212.—**CAN.**

2707 ii. ——.]—TRUST & LOAN CO. *v.* REYNOLDS (1866), 2 Ch. Ch. 41.—**CAN.**

2707 iii. ——.]—CHURCH SOCIETY *v.* MCQUEEN (1868), 15 Gr. 281.—**CAN.**

2707 iv. ——.]—ELLIS *v.* DEANE (1827), Beat. 5.—**IR.**

a. Discretion of court.]—MERRITT *v.* STEPHENSON (1858), 7 Gr. 22.—**CAN.**

f. Increase of deposit.]—Where a deft. by bill in a foreclosure suit demanded a sale & paid $80 into ct. as a deposit:—*Held:* although the costs of the sale would exceed that amount, deft. could not be ordered to increase it.—CRUSO *v.* CLOSE (1879), 8 P. R. 33.—**CAN.**

g. —— Sale by subsequent incumbrancer.]—Where a subsequent incumbrancer has obtained a sale under G. O. 456, an application to increase the deposit must be made before the order for sale is acted upon.—LONDON

Sect. 7.—Foreclosure or sale: Sub-sect. 2, A. (c) & (d).]

which it was arranged between himself & the assignees, that he should be placed in the same situation as if he had given notice to the tenants :—*Held :* the mtgee. was under these circumstances entitled to the crops growing on the estate at the time of the order of sale.—*Re* MEDLEY, *Ex p.* BARNES (1838), 3 Deac. 223 ; 3 Mont. & A. 497 ; 7 L. J. Bcy. 37 ; 2 Jur. 329.

2722. Consents required—Sale by equitable mortgagee from vendee who has not paid purchase-money.]—An equitable mtgee. from a vendee who has not paid the purchase-money can sell the bkpt.'s interest only, unless the vendor consents, & the ct. will not act till he is served.—*Re* WATTS, *Ex p.* WRIGHT (1837), 3 Mont. & A. 49.

2723. —— Sale by second puisne incumbrancer—Sum payable into court as security in default of consent.]—In a suit instituted for redemption of prior, & foreclosure of subsequent incumbrances, creditors by judgment & by deposit of title deeds, who had parted with their interest in the securities before they were made parties to the suit, put in their respective answers disclaiming all interest in the estates mtged. :—*Held :* they were entitled not only to the general costs of the suit, but also to the costs of the evidence which one of them had gone into in support of the statements in his answer, which had been replied to.

The power given to the ct., as I read it, is, at the instance of the first mtgee., to direct a sale if it should think fit, or at the instance of a second or any puisne incumbrancer, with the consent of the prior incumbrancer ; or if they do not consent, then upon ordering such sum of money to be paid into ct. as the ct. may think necessary to protect them (ROMILLY, M.R.).—HURST *v.* HURST (1852), 16 Beav. 372 ; 22 L. J. Ch. 538 ; 1 W. R. 105 ; 51 E. R. 822.

Annotation :—**Refd.** *Re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332.

2724. —— Application by puisne incumbrancer—Consent of prior mortgagees.]—A decree for the foreclosure of an estate, subject to a first & second mtge., was made in the usual terms. Afterwards a second decree was taken by consent, by which the time for redemption was enlarged for fifteen months, until June, 1854, in default of which it was ordered that the equity of redemption should be absolutely foreclosed, "without any further or other order, & without any further extension of time." A motion was now made by deft.. the second mtgee., for the further enlargement of the time, & to have a sale instead of a foreclosure, which was opposed by pltf., the first mtgee. :—*Held :* (1) it would be very difficult to maintain such an application as the present without the consent of the first mtgee. ; (2) this application was a violation of the agreement, which led to the second decree, & motion refused, with costs.—CAMPBELL *v.* MOXHAY (1854), 23 L. T. O. S. 227 ; 18 Jur. 641 ; 2 W. R. 610.

2725. —— —— —— Absence of mortgagor.]—After a decree for foreclosure, but before it was drawn up, a sale was directed on the application of one of defts., a puisne mtgee., with the consent of the prior mtgees., in the absence of the mtgor., against whom the bill had been taken *pro confesso*.—WOODFORD *v.* BROOKING (1874), L. R. 17 Eq. 425 ; 22 W. R. 683.

2726. —— Consent of mortgagor—As condition precedent to immediate sale.]—NEWMAN *v.* SELFE, No. 2714, *ante*.

2727. Payment into court of indemnity—Sale opposed by third incumbrancer.]—In an ordinary foreclosure suit, a decree was made with the consent of all parties except the mtgor., for a foreclosure, on the usual terms. After the filing of the bill, but before the decree, the mtgor. took the benefit of Insolvent Act. Pltf. in the suit represented the rights of the first & second incumbrancers ; a third incumbrancer had bought up all the subsequent charges, including the rights of the mtgor. himself, vested in the assignee in insolvency, & had contracted to sell the estate. Upon a petition by the mtgor. & two of his creditors, opposed by the third incumbrancer, for a sale, instead of a foreclosure notwithstanding the decree :—*Held :* the ct. has power, by 15 & 16 Vict. c. 86, s. 48, under the above circumstances, & notwithstanding the former decree, to which the mtgor. was not a consenting party, to order a sale, upon the terms of a sufficient sum being paid into ct. to indemnify the third incumbrancer for the sums actually paid by him.—LASLETT *v.* CLIFFE (1854), 2 Sm. & G. 278 ; 23 L. T. O. S. 167 ; 2 W. R. 536 ; 65 E. R. 400.

Annotations :—**Distd.** Campbell *v.* Moxhay (1854), 23 L. T. O. S. 227. **Consd.** Union Bank of London *v.* Ingram (1882), 20 Ch. D. 463.

2728. Necessity for deposit to cover abortive attempt to sell.]—The deposit to be made by a mtgor., requesting a sale instead of a foreclosure, should be sufficient to cover the expenses of an abortive attempt to sell.—BELLAMY *v.* COCKLE (1854), 2 Eq. Rep. 435 ; 23 L. J. Ch. 456 ; 23 L. T. O. S. 20 ; 18 Jur. 465 ; 2 W. R. 326.

Annotation :—**Refd.** Whitbread *v.* Roberts (1859), 33 L. T. O. S. 24.

(*d*) *Conduct of Sale.*

Conduct of proceedings, *see* Sub-sect. 5, E., *post*.

2729. To whom given—Discretion of court.]—When an equitable mtgee. applies to the ct. to realise his security, the conduct of the sale is in the discretion of the ct. As a general rule where the security is sufficient the conduct of the sale will be given to the trustee, but where the security is insufficient the conduct of the sale will be given to the mtgee. In either case the costs, charges, & expenses of the trustee, properly incurred, will be a first charge upon the proceeds of sale.—*Re* JORDAN, *Ex p.* HARRISON (1884), 13 Q. B. D. 228 ; 53 L. J. Q. B. 554 ; 33 W. R. 153 ; *sub nom. Re* JORDAN, *Ex p.* LLOYD'S BANKING CO., 50 L. T. 594 ; 1 Morr. 41.

2730. —— General practice—To mortgagor.]—Although the assignees delay selling under an order obtained by a mtgee. for sale of the mtged. property, with liberty for him to bid, the ct. will not depart from the rule of not giving to the mtgee the conduct of the sale.—*Re* LAIRD, *Ex p.* M'GREGOR (1851), 4 De G. & Sm. 603 ; 64 E. R. 976.

2731. —— —— ——.]—First mtgee. of real estate on Nov. 19, 1891, gave notice to the mtgors.

& CANADIAN LOAN & AGENCY CO. *v.* MORRISON (1879), 7 P. R. 450.—**CAN.**

h. Mortgagee's title must be perfected before sale.]—A mtgee., whose title has not been perfected by foreclosure or otherwise, is not entitled to an order for partition or sale upon summary application, under r. 989.—MULLIGAN *v.* HENDERSHOTT (1896), 17 P. R. 227.—**CAN.**

k. Arrangement between parties.]—McGREGOR *v.* HEMSTREET (Man.) (1912), 20 W. L. R. 642 ; 2 W. W. R. 284 ; 5 D. L. R. 301.—**CAN.**

l. Purpose of Drought Area Relief Act, 1922 (c. 43).]—NORTHERN TRUSTS CO. *v.* JONES (Alta.), [1922] 3 W. W. R. 541 ; 70 D. L. R. 72.—**CAN.**

m. Mortgagor must have opportunity to redeem.]—KAULBACH *v.* KEDY, [1924] 2 D. L. R. 913 ; 57 N. S. R. 181.—**CAN.**

to pay off the mtge. debt within three months, & that if it was not so paid they would proceed to sell under their power of sale. On Feb. 17, 1892, the mtgors. commenced a redemption action, & moved under Conveyancing Act, 1881 (c. 41), s. 25, that the property should be sold out of ct. & the conduct of the sale given to the mtgors. The first mtgees. opposed this application, but certain second mtgees. of the property consented to it:—*Held:* there was jurisdiction to allow a sale by the mtgors. out of ct. & they should be given liberty to sell within three months, subject to a reserve price being fixed sufficient to cover the mtge. debt, interest, & costs, & to payment into ct. by the mtgors. of £100 as security for the costs of the mtgees.—BREWER *v.* SQUARE, [1892] 2 Ch. 111; 61 L. J. Ch. 516; 66 L. T. 486; 40 W. R. 378; 36 Sol. Jo. 328.

2732. —— —— —— As being party interested in obtaining best price.]—MANCHESTER & SALFORD BANK *v.* SCOWCROFT (1883), 27 Sol. Jo. 517.

2733. —— —— —— ——.]—An action having been brought to foreclose an equitable mtge., pltf. at the hearing asked for a sale. Defts. did not oppose this, but they wished to have the conduct of the sale. The parties left it to the judge to decide who should have the conduct:—*Held:* (1) defts. ought to have the conduct, because it was most to their interest to obtain the best possible price for the property; (2) inasmuch as defts. alone would be liable for the costs of the sale, there was no reason for requiring them to give security for the costs.

Ordered, that the sale should take place out of ct., & that the proceeds of sale should be paid into ct.—DAVIES *v.* WRIGHT (1886), 32 Ch. D. 220.

Annotation:—As to (2) **Distd.** Brewer *v.* Square, [1892] 2 Ch. 111.

2734. —— Departure from practice—First mortgagee in preference to later mortgagees—With view to saving expense.]—A second mtgee. is entitled under 15 & 16 Vict. c. 86, to apply in a foreclosure suit for the conduct of the sale of the estate; but the ct. will exercise a discretion, & will refuse such application, upon being satisfied that expense will be saved by giving the conduct of the sale to the first mtgee.—HEWITT *v.* NANSON (1858), 28 L. J. Ch. 49; 32 L. T. O. S. 100; 7 W. R. 5.

2735. —— —— —— Value of property sufficient to pay first & subsequent mortgagees.]—CHRISTY *v.* VAN TROMP, [1886] W. N. 111.

2736. —— —— To second mortgagee—Reserve price fixed by court.]—A first mtgee. filed a bill of foreclosure, & asked for a decree. Subsequent incumbrancers asked, under 15 & 16 Vict. c. 86, s. 48, for a sale of the mtged. estates. Pltf. not consenting, the ct. directed the subsequent incumbrancers to deposit a sum of £200 to cover the expense of any ineffectual attempt to sell, & also directed a reserved bidding to be fixed sufficient to cover the amount due to pltf., & made an order for sale of the estates within a given time, & foreclosure in default.—WHITBREAD *v.* ROBERTS (1859), 28 L. J. Ch. 431; 33 L. T. O. S. 24; 5 Jur. N. S. 113; 7 W. R. 216.

Annotation:—**Reld.** Bartlett *v.* Rees (1871), 40 L. J. Ch. 599.

2737. —— —— To sole mortgagee—Sale out of court.]—In a foreclosure action, where an order is made for the sale of the mtged. property by pltfs. out of ct., but the reserved biddings & the remuneration of the auctioneer are to be fixed by the judge, & the proceeds of sale are to be paid into ct. by pltfs.—such order must be prefaced with the declaration required when the proceedings are altogether out of ct. that the judge is satisfied by the evidence that all persons interested in the estate to be sold are before the ct.—CUMBERLAND UNION BANKING CO. *v.* MARYPORT HEMATITE IRON & STEEL CO., [1892] 1 Ch. 92; 61 L. J. Ch. 335; 66 L. T. 103; 36 Sol. Jo. 78.

2738. —— —— ——.]—Mtgor. filed a bill for the redemption of a legal mtge. The mtgee., by his answer, alleged that he had advanced another sum of money on the deposit of the title deeds of another estate, & he claimed to hold both estates till both debts were paid. Pltf. amended his bill by stating the allegations made by deft., but before the bill came to a hearing he obtained an order, *ex p.*, dismissing the bill with costs. The mtgee. afterwards contracted to sell both the estates, & then filed a bill for the administration of the estate of the mtgor., who was dead, praying for permission to carry out the sale, & for payment of his whole debt out of the mtgor.'s estate:—*Held:* the equitable mtge. was not foreclosed, & pltf. was entitled to the relief prayed for.

When an equitable mtgee. files a bill to enforce his security . . . he is entitled to have a declaration that his deposit operated as a mtge.—(JAMES, L.J.).—MARSHALL *v.* SHREWSBURY (1875), 10 Ch. App. 250; 44 L. J. Ch. 302; 32 L. T. 418; 23 W. R. 803, L. JJ.

2739. —— —— —— Security insufficient.]—*Re* JORDAN, *Ex p.* HARRISON, No. 2729, *ante.*

2740. When court will require security—For ineffectual attempt to sell.] — WHITBREAD *v.* ROBERTS, No. 2736, *ante.*

2741. —— For costs.]—DAVIES *v.* WRIGHT, No. 2733, *ante.*

2742. —— ——.]—BREWER *v.* SQUARE, No. 2731, *ante.*

PART XIII. SECT. 7, SUB-SECT. 2.—A. (d).

2732 i. *To whom given—General practice—To mortgagor—As being party interested in obtaining best price.*]—NORTHERN TRUSTS CO. *v.* WEART (Alta.), [1923] 1 W. W. R. 1018.—**CAN.**

n. —— *Assignee in bankruptcy.*]—Where original & puisne mtgees. file their charge in bkpcy. & pray for a sale under Lord Loughborough's order, if the puisne mtgees. object, the ct. will not give the carriage of the sale to the solr. of the original mtgee., but will give it to the solr. of the assignees, directing that the puisne mtgee. shall join in the order.—*Re* DONNELLY (1859), 34 L. T. O. S. 16—**IR.**

o. *Power to permit sale out of court.*]—*Re* CLAIRE'S ESTATE, *Ex p.* FROSTE (1889), 23 L. R. Ir. 281.—**IR.**

p. *Who may bid—Mortgagee.*]—It is not in itself an improper practice to allow pltf. to become a purchaser if proper precautions are taken. In such case he must have nothing to do with conducting the sale.—GUNN *v.* JOHNSON & MCDOUGAL & FOASTER, LTD. (Alta.), [1919] 1 W. W. R. 699. —**CAN.**

q. —— ——.]—TRUSTS & GUARANTEE CO., LTD. *v.* OLIVER (Alta.), [1923] 3 W. W. R. 386.—**CAN.**

r. —— ——.]—The ct. expressed the view that pltf. should not be allowed to bid in the first instance either in mtge. or agreement of sale proceedings, no matter who has conduct of the sale, that there should be an upset price fixed & advertised, & if, after such procedure, the sale is abortive, then, as a rule, pltf. be allowed to make proposals to the master to take the property at a certain price, & deft., before acceptance, be given a fixed time to bring in a better offer from a satisfactory purchaser.—TRUSTS & GUARANTEE CO., LTD. *v.* RICE, [1924] 3 D. L. R. 352; [1924] 2 W. W. R. 691; 20 Alta. L. R. 444. —**CAN.**

t. —— ——.]—Permission to a mtgee. to bid should be very cautiously granted, & only when it is found after proceeding with a sale that no purchaser at an adequate price can be found, & even then only after some inquiry as to whether the sale proclamation has been duly published.—SHEONATH DOSS *v.* JANKI PROSAD SINGH (1888), I. L. R. 16 Calc. 132.—**IND.**

s. —— *Party conducting sale.*]—HALSTED *v.* CONKLIN (1885), 3 Man. L. R. 8.—**CAN.**

b. —— ——.]—It is contrary to our practice to give leave to bid to the person having conduct of the sale.—

Sect. 7.—Foreclosure or sale: Sub-sect. 2, A. (d), & B. (a), (b), (c), (d) & (e).]

2743. Power to permit sale out of court—Reserve price to be fixed by judge.]—WHITBREAD *v.* ROBERTS, No. 2736, *ante*.

2744. —— ——.]—CUMBERLAND UNION BANKING CO. *v.* MARYPORT HEMATITE IRON & STEEL CO., No. 2737, *ante*.

2745. —— ——.] — BREWER *v.* SQUARE, No. 2731, *ante*.

2746. —— **Proceeds to be paid into court.**]—(1) The power of the ct. to order a sale in a redemption action under Conveyancing Act, 1881 (c. 41), s. 25 (2), may be exercised at any stage of the action.

(2) It was ordered that the sale should take place out of ct., & that the proceeds of sale should be paid into ct.—WOOLLEY *v.* COLMAN (1882), 21 Ch. D. 169; 51 L. J. Ch. 854; 46 L. T. 737; 30 W. R. 769.

Annotations:—As to (1) **Consd.** Manchester & Salford Bank *v.* Scowcroft (1883), 27 Sol. Jo. 517. **Distd.** Davies *v.* Wright (1886), 32 Ch. D. 220. **Consd.** Brewer *v.* Square, [1892] 2 Ch. 111. *Generally*, **Mentd.** Sadler *v.* Worley, [1894] 2 Ch. 170.

2747. —— ——.]—DAVIES *v.* WRIGHT, No. 2733, *ante*.

2748. —— ——.]—CUMBERLAND UNION BANKING CO. *v.* MARYPORT HEMATITE IRON & STEEL CO., No. 2737, *ante*.

2749. Who may bid—Mortgagee—Third mortgagee.]—*Re* FAWCETT, *Ex p.* ROBINSON (1832), 2 Deac. & Ch. 110; 1 L. J. Bcy. 114, Ct. of R.

2750. —— —— **Solicitor to commission in bankruptcy.**]—One of a firm, solrs. to the commission, who was also mtgee., allowed to bid at the sale of the premises.—ANON. (1832), 2 L. J. Bcy. 3.

2751. —— —— **Equitable mortgagee.**]—Where an equitable mtgee., with a power of sale, had executed the power by putting up the estate to sale, when it was sold to him for £300 & he applied afterwards for the usual order:—*Held:* the estate must be put up at that sum.—*Re* BROWN, *Ex p.* FRANCIS (1832), 1 Deac. & Ch. 274, Ct. of R.

2752. —— —— **On payment of deposit money.**]—ANON. (1834), 4 L. J. Bcy. 4.

2753. —— —— **Costs.**]—The costs of an application of a mtgee., for leave to bid at the sale, will not be allowed out of the proceeds, unless the assignees consent.—*Ex p.* —— (1843), 3 Mont. D. & De G. 339, Ct. of R.

2754. —— —— ——.]—On a petition by a legal mtgee. for leave to bid, no order is made as to costs.—*Ex p.* SMITH *v.* FIELD (1849), 13 L. T. O. S. 263.

B. When Right to Foreclosure or Sale arises.

(a) In General.

See, now, Law of Property Act, 1925 (c. 20), s. 103.

2755. On forfeiture by default in payment.]—BONHAM *v.* NEWCOMB (1684), as reported in 1 Vern. 232; 2 Vent. 364; 23 E. R. 435; *on appeal* (1689), 1 Vern. 233, n., H. L.

Annotations:—**Refd.** Croft *v.* Powel (1738), 2 Com. 603; Mellor *v.* Lees (1742), 2 Atk. 494; *Re* Carshalton Park Estate, Graham *v.* The Co., Turnell *v.* The Co., [1908] 2 Ch. 62; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. **Mentd.** Fisher *v.* Wigg (1700), 1 P. Wms. 14; Trulock *v.* Robey (1847), 2 Ph. 395.

(b) Where Day fixed for Redemption.

2756. On default in payment on that day—Sufficiency of allegation of date agreed.]—The declaration stated, that by a mtge. deed the mtged.

CUMMINGS *v.* SEMERAD (1908), 2 Alta. L. R. 82.—**CAN.**

c. —— *Solicitor of party conducting sale.*]—GREAT WEST LIFE ASSURANCE CO. *v.* LIEB (Sask.) (1909), 11 W. L. R. 632.—**CAN.**

d. *Sale by auction—Errors in advertisement—Delay in making objection.*]—An application for an order confirming a judicial sale by auction of mtged. property was allowed, notwithstanding errors & ambiguous description of the property in the advertisements of sale, where deft. made no objection until service of notice of the application to confirm, being about nine months after the sale, although he had had ample opportunity to object before the sale & had attended thereat.—TRUSTS & GUARANTEE CO., LTD. *v.* DOW, [1921] 2 W. W. R. 577.—**CAN.**

e. *Sale by registrar.*]—Under Conveyancing Ordinance Amendment Act, 1880, it is the registrar's duty to conduct the sale of a mtged. estate.—MCGARRIGLE *v.* HEPBURN (1867), 1 C. A. 20.—**N.Z.**

PART XIII. SECT. 7, SUB-SECT. 2.—B. (a).

2755 i. *On forfeiture by default in payment.*]—EVANS *v.* PARKER (1851), 2 Gr. 556.—**CAN.**

2755 ii. ——.]—Upon default in payment by a mtgor. of any instalment of, or of interest upon, mtge. money, the mtgor. has a right to a decree directing payment, or to foreclose on default the whole amount secured by the mtge.—CAMERON *v.* MCREA, SPARKS *v.* REDHEAD (1852), 3 Gr. 311.—**CAN.**

2755 iii. ——.]—WHITE *v.* COURTNEY 1858), 1 Ch. Ch. 66.—**CAN.**

2755 iv. ——.]—Where judgment is registered against the vendee prior to the conveyance being executed, the vendor is not entitled to a rescission of the contract in default of payment, but to a decree of foreclosure or sale.—GALT *v.* BUSH (1860), 8 Gr. 360.—**CAN.**

2755 v. ——.]—CORNWALL *v.* HENRIOD (1866), 12 Gr. 338.—**CAN.**

2755 vi. ——.]—BECK *v.* MOFFATT (1870), 17 Gr. 601.—**CAN.**

2755 vii. ——.]—ROSS *v.* VADER (1871), 3 Ch. Ch. 236.—**CAN.**

2755 viii. ——.]—In the case of a mtge. where there has been default in payment, foreclosure is the appropriate remedy.—CREDIT FONCIER FRANCO-CANADIEN *v.* ANDREW (1893), 9 Man. L. R. 65.—**CAN.**

f. —— *Payment of instalments.*]—After payment of what is due upon a mtge. payable by instalments, pursuant to the orders of 1853, it is irregular to take any further proceeding in the cause until another instalment falls due.—CARROLL *v.* HOPKINS (1854), 4 Gr. 431.—**CAN.**

g. — *Of interest.*]—In a mtge. under Transfer of Land Statute, upon default in payment of interest, although the time for payment of the principal has not arrived, the mtgee. can only be stayed from selling, by payment or tender of the whole amount of principal & interest.—HERVEY *v.* INGLIS (1868), 5 W. W. & A'B. 125.—**AUS.**

h. —— —— *Where no proviso.*]—Upon default in payment by a mtgor. of any instalment of interest the mtgee. has a right, independently of any express proviso in the mtge., to that effect, to call in the whole principal & interest, & foreclosure.—CANADA SETTLERS' LOAN CO. *v.* NICHOLLES (1896), 5 B. C. R. 41.—**CAN.**

k. *Against subsequent mortgagee & mortgagor—Ability to reconvey.*]—It seems that pltf. will not be entitled to the absolute order of foreclosure against a subsequent mtgee. & the mtgor., unless he be in a situation to reconvey the legal estate in the mtged. premises.—ROSS *v.* THOMPSON (1851), 2 Gr. 624.—**CAN.**

l. *Necessity for notice.*]—A mtgee. with power of sale, covenanted that no sale or notice of sale should be made or given, or any means taken to obtain possession of the mtged. premises without three months' notice to the mtgor., commanding payment:—*Held:* such notice was unnecessary before filing a bill to foreclose.—LAMB *v.* MCCORMACK (1857), 6 Gr. 240.—**CAN.**

m. *Omission of mortgage from registrar's abstract — Subsequent purchase by registrar—Registrar's right to foreclose.*]—A registrar of deeds gave an intending purchaser an abstract of title, which by mistake omitted an outstanding mtge.:—*Held:* a purchaser who had notice of the omitted mtge. could not make any claim against the registrar in respect of payments made by the purchaser after such notice; & the registrar, who, on finding his mistake, had bought up the outstanding mtge., was entitled to foreclose same.—BREGA *v.* DICKEY (1869), 16 Gr. 494.—**CAN.**

n. *Before mortgagor's title complete.*]—LAWSON *v.* TOBIN (*circa* 1873), R. E. D. 111.—**CAN.**

o. *On forfeiture by breach of covenant.*]—GRAHAM *v.* ROSS (1883), 6 O. R. 154.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 2.—B. (b).

p. *On default in payment on that day.*]—After the day appointed for payment pltf. entered into possession of the mtged. premises:—*Held:* pltf. was entitled to a final decree of foreclosure without a new account being

premises were to be reconveyed, provided the mtgee. paid £1,400 on Mar. 19, 1833, & that the mtgee. covenanted to pay the £1,400 in manner & at the time thereinbefore appointed for the payment thereof: Breach, that the mtgee. did not pay at the time & in the manner in the indenture appointed for the same:—*Held:* a sufficient allegation of the time when the money was to be paid.—TILDASLEY *v.* STEPHENSON (1834), 10 Bing. 545; 4 Moo. & S. 442; 3 L. J. C. P. 204; 131 E. R. 1006.

2757. —— Floating charge.]—RANSOM *v.* BIRD (1908), cited in, [1908] 2 Ch. at p. 67.

Annotation:—**Refd.** *Re* Carshalton Park Estate, Graham *v.* The Co., Turnell *v.* The Co., [1908] 2 Ch. 62.

(c) Proviso for Redemption on Payment on Demand.

2758. Mortgagee to enter & enjoy till demand—Welsh mortgage.]—A demise, by way of mtge., of the interest of a reversioner in fee for a term of five hundred years, subject to a proviso for redemption on payment of principal & interest, without limitation as to the time of payment, & containing covenants for payment of principal & interest on demand, & until payment thereof for the mtgee. to enter into, & hold & enjoy the premises, is in the nature of a Welsh mtge.; & the mtgee. cannot sustain a bill for foreclosure against the party to whom the reversionary interest has been conveyed.—TEULON *v.* CURTIS (1832), You. 610; 2 L. J. Ex. Eq. 17; 159 E. R. 1135.

(d) Proviso Conditional on Payment of Interest.

2759. Foreclosure on default.]—In a mtge. of leaseholds there was a proviso for redemption in case the principal should be paid at the expiration of five years, with interest half-yearly in the meantime at 5 per cent. Default having been made in payment of the interest a bill of foreclosure was filed, although the period for payment of the principal had not arrived:—*Held:* the condition having been broken, the mtgee. was entitled to a decree of foreclosure, notwithstanding he had taken possession of the property, & had realised by sale of a portion of it more than enough to cover the interest due.—EDWARDS *v.* MARTIN (1856), 25 L. J. Ch. 284; 27 L. T. O. S. 164; 4 W. R. 219.

Annotations:—**Apld.** Seaton *v.* Twyford (1870), L. R. 11 Eq. 591. **Distd.** Williams *v.* Morgan, [1906] 1 Ch. 804.

2760. Proviso for redemption on payment of principal at distinct date—No foreclosure before date fixed—Notwithstanding breach of covenant for periodical payment of interest—Proviso apart & distinct from covenant.]—A mtge. of a reversionary share in the proceeds of realty & in personalty in ct. contained a proviso for redemption upon payment, on or before the death of the life tenant, of the principal sum, "with interest for the same in the meantime" at the specified rate. Then followed distinct covenants for payment of principal on the life tenant's death, & of interest in the meantime half-yearly respectively; but the proviso did not refer to these covenants. When the life tenant died some thirteen years' interest was unpaid:—*Held:* the proviso for redemption was a distinct contract & the covenant for payment of interest ought not to be imported into it; &, therefore, the mtgee.'s right to all the interest unpaid, which was expressly given by the proviso, was unaffected by any stat. limitations or principle of equity.—*Re* TURNER, TURNER *v.* SPENCER (1894), 43 W. R. 153; 39 Sol. Jo. 59; 13 R. 132.

Annotation:—**Apld.** Williams *v.* Morgan, [1906] 1 Ch. 804.

2761. —— —— —— ——.]—A mtge. of Jan. 30, 1900, contained the following provisions: (*a*) A covenant to pay the principal on Jan. 1, 1914, "with interest that may be then due" at a specified rate; (*b*) A covenant to pay interim interest half-yearly on specified days; (*c*) A conveyance of the property "subject to the proviso for redemption hereinafter contained"; (*d*) A proviso that the mtgee. would not call in the principal before Jan. 1, 1914, if the half-yearly interest were paid on the specified days or within twenty-one days thereof; (*e*) A proviso that the mtgor. should not pay off the principal before Jan. 1, 1914; (*f*) A proviso that if the mtgor. should on Jan. 1, 1914, pay the principal, "with interest for the same in the meantime at the rate aforesaid that may be due & unpaid," the mtgee. would reconvey. The mtgor. having paid an instalment of interest twenty-seven days after the specified day, the mtgee. sued for foreclosure:—*Held:* on the construction of the deed, the proviso for redemption did not import a condition that interest was to be paid half-yearly on the specified days or within twenty-one days thereof, &, consequently, as there was no condition broken, the mtgee.'s estate was not absolute at law, & there could be no foreclosure.—WILLIAMS *v.* MORGAN, [1906] 1 Ch. 804; 75 L. J. Ch. 480; 94 L. T. 473; 50 Sol. Jo. 420.

(e) Loan for Term Conditional on Payment of interim Interest.

2762. Default in payment or breach of mortgagor's covenants—Effect of.]—A mtge. made for £450 payable at the end of five years, with interest at 5 per cent. in the mean time. About two months before the end of the five years, the mtgee. assigned over the mtge. for £560, being the principal & interest then due. The £560 shall carry interest, though the five years were not elapsed; the mtge.

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taken.—GREENSHIELDS *v.* BLACKWOOD (1858), 1 Ch. Ch. 60.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 2.—B. (c).

2758 i. *Mortgagee to enter & enjoy till demand—Welsh mortgage.*]—O'CONNELL *v.* CUMMINS (1840), 2 I. Eq. R. 251.—**IR.**

PART XIII. SECT. 7, SUB-SECT. 2.—B. (d).

2759 i. *Foreclosure on default.*]—In an action for foreclosure upon a mtge. which contains a clause by which the principal falls due upon default made in payment of any instalment of interest, if pltf. claims the benefit of the clause, & calls in the whole mtge. debt, he is bound by his election & must accept principal, interest, & costs, whenever tendered, although he does not pray for a personal order for immediate payment.—CRUSO *v.* BOND (1882), 1 O. R. 384.—**CAN.**

2759 ii. ——.]—FARMERS LOAN & TRUST CO. *v.* NOVA SCOTIA CENTRAL RY. (1892), 24 N. S. R. (12 R. & G.) 542.—**CAN.**

2759 iii. ——.]—MCDOUGALL & SECORD *v.* YORK (1908), 1 Alta. L. R. 59.—**CAN.**

2759 iv. ——.]—WILLSON *v.* THOMPSON (1914), 30 O. L. R. 502; 31 O. L. R. 471; 19 D. L. R. 593; 6 O. W. N. 506.—**CAN.**

2759 v. ——.]—LITTLE *v.* HALL (1917), 23 B. C. R. 321.—**CAN.**

2759 vi. ——.]—SCOTTISH TEMPERANCE LIFE ASSURANCE CO. *v.* JOHNSTON (B. C.), [1918] 1 W. W. R. 402.—**CAN.**

2759 vii. ——.]—RODDY *v.* WILLIAMS (1845), 3 Jo. & Lat. 1.—**IR.**

2759 viii. ——.]—*Re* PRENDERGAST (1850), 2 Ir. Jur. 145.—**IR.**

PART XIII. SECT. 7, SUB-SECT. 2.—B. (e).

2762 i. *Default in payment or breach of mortgagor's covenants—Effect of.*]—A mtge. deed dated Oct. 16, 1866, provided for payment of the principal in three years, & interest meanwhile at twelve per cent. half yearly, on Apr. 16, & Oct. 16, in every year; & declared that to secure prompt payment of said interest the mtgee. would take at the rate of ten per cent. if the interest was paid on the said Apr. 17, & Oct. 16, respectively:—*Held:* the first reference to the day being unequivocal must govern; the interest was due on the 16th; & not having been paid then, a bill on the 17th to foreclose was not irregular.—BENNETT *v.* FOREMAN (1868), 15 Gr. 117.—**CAN.**

Sect. 7.—Foreclosure or sale: Sub-sect. 2, B. (e), (f), (g), (h) & (j), & C. (a).]

being forfeited by the non-payment of the interest. —GLADWYN *v.* HITCHMAN (1690), 2 Vern. 135; 1 Eq. Cas. Abr. 287; 23 E. R. 695.

2763. —— ——.]—Deed of mtge. at 5 per cent. contained a proviso that as often as the interest should be paid half-yearly on the days appointed, or within three months next after each, so much should be deducted as would make the interest 3½ per cent. By a separate agreement, mtgee. covenanted not to call in the money within five years, unless the interest should be in arrear. The first half year's interest not having been tendered till after the three months, but the second half year's interest before:—*Held:* (1) mtgee. was only entitled to interest at 5 per cent. for the half year which had been tendered after the time; (2) in consequence of the default, he was entitled to call in his money.—STANHOPE *v.* MANNERS (1763), 2 Eden, 197; 28 E. R. 873, L. C.

Annotation:—As to (2) **Distd.** Williams *v.* Morgan, [1906] 1 Ch. 804.

2764. —— ——.]—Where an agreement for a mtge. contains a stipulation that the principal money shall not be called in for a certain time, the ct., in settling the form of the deed, will, although the agreement be silent on the subject, insert a proviso that the postponement shall be conditional on punctual payment of interest, &, if the property be leasehold, on observance of the covenants; so that, if the mtgor. should make default in either of these respects, the mtgee.'s remedies by sale or foreclosure will immediately arise.—SEATON *v.* TWYFORD (1870), L. R. 11 Eq. 591; 40 L. J. Ch. 122; 23 L. T. 648; 19 W. R. 200.

2765. —— **What constitutes.**]—A policy subject to a charge in favour of the insurance co. was mortgaged, the mtgor. covenanting to do & suffer nothing whereby the policy might become voidable or void. Under the terms of the mtgor.'s agreement with the co., the co. took over the policy at its surrender value upon the mtgor.'s default in payment of interest to the co. Upon the mtgee.'s seeking to foreclose on an alleged breach of the mtgor.'s covenant:—*Held:* the mtgee. was not entitled to foreclose, inasmuch as the mtgor. had done nothing in breach of the covenant.—SAPIO *v.* HACKNEY (1907), 51 Sol. Jo. 428.

2766. —— **Waiver.**]—STANHOPE *v.* MANNERS, No. 2763, *ante.*

2767. —— ——.]—Agreement in writing not to call in a mtge. for two years, the mtgor. fulfilling his covenants. On one occasion within the two years interest was not paid on the day, & the mtgee. shortly afterwards, after giving notice that he was no longer bound by the agreement, demanded & received payment of the interest & incidental costs:—*Held:* this was a waiver of the default; & injunction granted to restrain an ejectment brought within the two years.—LANGRIDGE *v.* PAYNE (1862), 2 John. & H. 423; 7 L. T. 23; 10 W. R. 726; 70 E. R. 1124.

Annotation:—**Consd.** Keene *v.* Biscoe (1878), 8 Ch. D. 201.

2768. —— ——.]—A mtgee. agreed with the mtgor. that if the interest was duly & punctually paid the principal should remain for two years. Six months' interest became due & was demanded but was not paid; & the mtgee. then demanded payment of principal & interest. Three days afterwards the mtgor. paid the six months' interest, which was received by the mtgee.:—*Held:* the mtgee. had not thereby, nor by a subsequent unaccepted offer to receive an instalment, waived his right to call in the principal.—KEENE *v.* BISCOE (1878), 8 Ch. D. 201; 47 L. J. Ch. 644; 38 L. T. 286; 26 W. R. 552.

Annotation:—**Reld.** Williams *v.* Morgan (1906), 94 L. T. 473.

2769. Effect of giving further charge—Agreement that further charge should not be redeemable until payment of whole amount.]—Pltf. was transferee of a mtge. on defts.' property, the original mtge. deed containing a personal covenant by the mtgee. not to proceed for the recovery of the mtge. money until the expiration of a notice. After the transfer pltf. made a further advance to defts. on the security of a deed further charging the same property, defts. agreeing that it should not be redeemable until the payment of the whole amount due to pltf. On a bill by pltf., who had not given the notice, praying for an account of what was due on his securities, & for payment or foreclosure:—*Held:* (1) assuming the covenant as to notice to affect the right to foreclose the original mtge., it did not affect pltf.'s rights under the subsequent mtge.; & (2) as defts. had precluded themselves by their agreement from being admitted to redeem the subsequent without also redeeming the prior mtge., pltf. was entitled to the relief which he asked for.—HAYWOOD *v.* GREGG (1875), 24 W. R. 157.

(f) Equitable Mortgagees and Charges.

2770. Effect of default in paying insurance premiums.]—Where A. & B. jointly interested in a policy of assurance agreed to keep it up for their mutual benefit, paying the premium in certain proportions, & B. ceasing to pay his portion of the premium, the whole was paid by A.:—*Held:* A. was entitled to a foreclosure decree against B.—PARKER *v.* ANGLESEA (MARQUESS) (1871), 25 L. T. 482; 20 W. R. 162.

2770a. ——.]—FORD *v.* TYNTE, No. 1593, *ante.*

(g) Effect of pending Action of puisne Incumbrancer.

2771. Prior incumbrancer's rights untrammelled.]—A mtgee. of a devisee filed a bill to enforce his security, & obtained a decree containing an inquiry as to the incumbrances on the estate. Immediately afterwards a legatee, whose legacy was charged on the estate & had priority over the mtge., filed his bill to have the legacy raised:—*Held:* the decree in the other suit was no bar to his proceeding with his suit, for a prior incumbrancer is not bound to go in under a decree obtained by a puisne incumbrancer, but is at liberty to institute a suit of his own.—ARNOLD *v.* BAINBRIGGE (1860), 2 De G. F. & J. 92; 45 E. R. 557, L. JJ.

(h) Effect of Notice by Mortgagor to pay off Mortgage.

2772. Actual payment essential to preclude foreclosure.]—GRUGEON *v.* GERRARD, No. 1611, *ante.*

(j) Bankruptcy of Mortgagor.

2773. Whether mortgagor's rights interfered with — Mortgage fraudulent in character.] — A father purchased a piece of land, & took an agreement that the vendors would convey it to him. He afterwards built a granary, & allowed his sons to occupy the premises for their business. They supplied goods to their father to the amount expended by him in building the granary, & they

erected other buildings on the land of greater value. The father, pending these transactions, became surety for his sons to certain bankers for £10,000. The sons afterwards surreptitiously obtained possession of the agreement; & one of them, representing that his father had given the land to them, signed his father's name on the blank leaf of the agreement, & deposited it with pltfs., who were bankers, to secure their cash credit. The sons afterwards became bkpt.; the son depositing the agreement was, upon several indictments, convicted of forgery; & the father was required to pay the £10,000 for which he was surety. Upon a bill, by pltfs., to obtain the benefit of the deposit made with them:—*Held:* the sons had a lien on the land to the value of the goods supplied to the father & the money expended by them in building; the deposit of the agreement, though made under false representations, was good to the extent of that lien; pltfs. had no notice of the father's interest; the father, as against pltfs., was not entitled to any set-off in respect of his subsequent liability as surety; & a decree was made to foreclose the security in favour of pltfs. as against the sons, with costs, & as against the father, without costs.—UNITY JOINT STOCK MUTUAL BANKING ASSOCN. *v.* KING (1858), 25 Beav. 72; 27 L. J. Ch. 585; 31 L. T. O. S. 128; 4 Jur. N. S. 470; 6 W. R. 264; 53 E. R. 563.

Annotations:—**Mentd.** Millard *v.* Harvey (1864), 11 L. T. 360; Plimmer *v.* Wellington Corpn. (1884), 9 App. Cas. 699.

2774. ——.]—Where a trustee has been appointed under a liquidation of the affairs of an equitable mtgor., the mtgee. may, instead of applying in bkpcy., proceed in Ch. against the trustee for the purpose of having the security realised, the jurisdiction in Ch. not being taken away by Bkpcy. Act, 1869 (c. 71).—WHITE *v.* SIMMONS (1871), 6 Ch. App. 555; 40 L. J. Ch. 689; 19 W. R. 939, L. C.

Annotations:—**Apld.** Coulthurst *v.* Smith (1873), 29 L. T. 243. **Reld.** Jenney *v.* Bell (1876), 2 Ch. D. 547; *Re* Hart, *Ex p.* Fletcher (1878), 9 Ch. D. 381.

C. Who May institute Proceedings.

(*a*) *Legal Mortgagee.*

2775. Trustee of mortgagee—Must be made party.]—On a bill to foreclose, by W. it appeared, that the mtge. was made to H. who was a trustee for W. by whom the mtge. money was advanced:—*Held:* H. must be a party to the suit.—WOOD *v.* WILLIAMS (1819), 4 Madd. 186; 56 E. R. 676.

Annotations:—**Apld.** Scott *v.* Nicoll, Hampson *v.* Nicoll (1827), 3 Russ. 476; Hichens *v.* Kelly (1854), 2 Sm. & G. 264.

2776. Assignee — Bankrupt mortgagee — Indemnity by equitable mortgagee.]—The ct. will order assignees of a bkpt. mtgee., who has pledged the mtge., to take measures for foreclosure, on the equitable mtgee. indemnifying them, & undertaking for a proper application of the proceeds.—*Re* RUCKER, *Ex p.* COLES (1832), 1 Deac. & Ch. 100; 1 L. J. Bcy. 18.

Annotation:—**Reld.** *Re* Rucker, *Ex p.* Rucker (1834), 3 L. J. Bcy. 104.

2777. —— Right to benefit of foreclosure suit instituted.]—(1) A. mortgaged to B., who filed a bill of foreclosure, & B., pending the suit, assigned to C., who mortgaged to D., & became insolvent. D. filed a supplemental bill to have the benefit of the suit for foreclosure:—*Held:* he was entitled to such relief.

(2) A mtgee. filed a bill of foreclosure, & pending the suit, transfered the mtge. to A., who transfered it to C.:—*Held:* the extra costs thus occasioned were not to be charged against the mtgor.

(3) Pending a suit, by a first mtgee. to foreclose, pltf. obtained a transfer from the second mtgee.:—*Held:* the costs occasioned were chargeable against the estate.

(4) A. mortgaged a leasehold property, & afterwards specifically bequeathed it to F. & B., on certain trusts for C., D. & E.:—*Held:* C., D. & E. were proper parties to a bill to foreclose.

(5) A mtgee. had been in possession. She transfered the whole of her interest, & afterwards became insolvent. Her assignees were made defts. to a bill of foreclosure:—*Held:* their costs ought not to be charged on the mtged. estate, but on pltf.—COLES *v.* FORREST, WARD *v.* FORREST (1847), 10 Beav. 552; 50 E. R. 694.

2778. —— Transfer without notice.]—A., & B., mtgees., transferred their mtge. to pltf., who gave no notice to the mtgors. Subsequently the mtgors., intending to redeem, paid the amount secured by the mtge. to the solrs. of A. & B., without ascertaining that they were authorised to receive it. The solrs. misappropriated the money. A. & B. executed a deed prepared by their solrs., but without perusing the same or knowing its contents, which contained a recital acknowledging the receipt of the money, & which purported to convey the property by the direction of the mtgors. to their nominees. There was no proper receipt indorsed on the deed. Pltf. having filed his bill for foreclosure against the mtgors.:—*Held:* the transferee of the mtge. was entitled to a decree; the payment to the solrs. had been made by the mtgors. in their own wrong.—WITHINGTON *v.* TATE (1869), 4 Ch. App. 288; 20 L. T. 637, L. C.

Annotation:—**Expld.** *Re* Southampton's Estate, Allen *v.* Southampton, Banfather's Claim (1880), 16 Ch. D. 178.

2779. —— —— Transferee's right subject to equities.]—In 1886, a mtge. debt for £1,500 was duly transferred & the mtged. property was conveyed, by way of security, to F., pltf., the mtgor., being a party. Several subsequent transfers, to which the pltf. was not a party, were made, & in Feb. 1896, the mtge. debt & the security were vested in one A. In 1892 the pltf. gave H., her solr., the money to pay off the mtge., which he did not do, though he continued to pay interest on the mtge. as it became due to the transferee for the time being. Pltf. made no inquiry in 1892 for the reconveyance nor for the title deeds, but left the whole matter in the hands of her solr. In Oct. 1897, A. transferred the mtge. debt & the property to H., & the next day H. transferred the same to defts., to whom the deeds were handed. The cheque for £1,500 from deft. was paid by H. into his private account, & the cheque to A. was drawn by H. on his firm's account, which was then in funds, at another bank. In Dec. 1899, application was made by deft. to pltf. for arrears of interest, & the fraud was discovered. On an action by pltf. to establish her priority over deft., & for a reconveyance of the mtged. property:—*Held:* on the transfer to H. the mtge. debt became discharged, & he held the property as trustee for pltf.; deft., having taken the transfer from H. without the privity of the mtgor., could only hold it against the mtgor. subject to the state

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PART XIII. SECT. 7, SUB-SECT. 2.—C. (a).

q. *Assignee.*]—HINDSON *v.* YEOMANS (1845), Res. & Eq. Jud. App. 68.—**AUS.**

r. ——.]—MCLEAN *v.* CHISHOLM (1895), 27 N. S. R. 492.—**CAN.**

t. *Puisne mortgagee.*]—MATA DIN KASODHAN *v.* KAZIM HUSAIN (1891), I. L. R. 13 All. 432.—**IND.**

s. ——.]—ROTHERAM *v.* WEBB (1841), 4 I. Eq. R. 52.—**IR.**

Sect. 7.—Foreclosure or sale: Sub-sect. 2, C. (a), (b) & (c), & D. (a) & (b).]

of account between H. & the mtgor., & as between them the debt was non-existent; pltf. had never lost the right to redeem, & directly the agent, who had received the amount to pay off the mtge., became himself the transferee, the debt was extinguished, & no transferee from him could treat the debt as a subsisting charge upon the property, & pltf. was therefore entitled to priority & to have a reconveyance from deft.—TURNER *v.* SMITH, [1901] 1 Ch. 213; 70 L. J. Ch. 144; 83 L. T. 704; 49 W. R. 186; 17 T. L. R. 143; 45 Sol. Jo. 118.

Annotations:—**Refd.** Powell *v.* Browne (1907), 97 L. T. 854; De Lisle *v.* Union Bank of Scotland, [1914] 1 Ch. 22.

2780. Solicitor mortgagee—Mortgage to secure costs—Order for taxation immaterial.]—The client of a solr., gave him a mtge. to secure previous advances & costs. Having subsequently discharged him from being his solr., he obtained an order at the Rolls for delivery & taxation of his bill of costs, whereby the solr. was prohibited from commencing any suit in respect of the bill pending the reference; but he did not serve it properly on the solr., & took no steps to enforce it. Upwards of six months after the order was obtained, the solr. filed a bill to enforce his security:—*Held:* the order was no bar to the suit.—THOMAS *v.* CROSS (1864), 5 New Rep. 148; 11 L. T. 430; 29 J. P. 4; 10 Jur. N. S. 1163; 13 W. R. 166, L. C.

2781. Trustee mortgagee.]—TENNANT *v.* TRENCHARD, No. 2309, *ante.*

2782. After winding up order directing inquiry as to priorities—Made in presence of mortgagees.]—An order in a winding up directing inquiries to ascertain the priorities of the incumbrancers of the co.'s property raises no equity to prevent an action for foreclosure being brought by persons claiming to be first mtgees., in whose presence the order had been made, & who had obtained an order to attend the proceedings & to have their costs made costs in the winding up; but leave to bring the action was given on the terms that, notwithstanding the latter order the costs of attending the proceedings should be in the discretion of the ct.—*Re* HAMILTON'S WINDSOR IRONWORKS CO., LTD. (1879), 40 L. T. 569; *sub nom. Re* HAMILTON'S WINDSOR IRONWORKS CO., *Ex p.* GENERAL CREDIT & DISCOUNT CO. (NO. 2), 27 W. R. 827, C. A.

Annotation:—**Refd.** *Re* Brown, Bayley & Dixon, *Ex p.* Roberts & Wright (1881), 30 W. R. 5.

(b) *Co-Mortgagees.*

2783. Right of one mortgagee to sue alone—For his proportion of mortgage debt.]—LOWE *v.* MORGAN (1784), 1 Bro. C. C. 368; 28 E. R. 1183.

Annotation:—**Refd.** *Re* Continental Oxygen Co., Elias *v.* Continental Oxygen Co., [1897] 1 Ch. 511.

2784. —— ——.]—(1) A person entitled to part only of a sum of money due on mtge., cannot ille a bill for a foreclosure of the same part of the mtged. estate.

(2) There can be no redemption or foreclosure unless the parties entitled to the whole of the mtge. money are before the ct.—PALMER *v.* CARLISLE (EARL) (1823), 1 Sim. & St. 423; 57 E. R. 169.

Annotation:—*Generally*, **Refd.** *Re* Continental Oxygen Co., Elias *v.* Continental Oxygen Co., [1897] 1 Ch. 511.

2785. —— **Mortgagees tenants in common of mortgage money—Representatives of deceased mortgagees to be joined.**]—Where a mtge. is made to several persons jointly, they are, in equity, tenants in common of the mtge. money, & the representatives of such of them as may be dead are necessary parties with the survivor to a bill for foreclosure or redemption.—VICKERS *v.* COWELL (1839), 1 Beav. 529; 8 L. J. Ch. 371; 3 Jur. 864; 48 E. R. 1046.

2786. —— **Mortgage of tolls.**]—The trustees of a turnpike road borrowed a sum of money from A. on the security of the tolls, & they assigned to him such proportion of the tolls as the sum advanced bore to the whole principal money advanced on the credit of the tolls:—*Held:* the other mtgees. of the tolls were necessary parties to a suit, by A. against the trustees, to obtain payment of arrears of interest out of the tolls to be received.—MELLISH *v.* BROOKS (1840), 3 Beav. 22; 9 L. J. Ch. 362; 4 Jur. 739; 49 E. R. 9.

2787. —— ——.]—Under a local turnpike Act, a mtgee. of the tolls, who took possession, was bound to pay the interest on all the mtges. *pari passu*, but the principal was only to be paid by means of a sinking fund. Under the general Turnpike Act, a mtgee. in possession was authorised to pay the principal as well as the interest. Some mtgees. took possession, & one of the trustees of the road filed a bill against them for an account:—*Held:* the other mtgees., being interested in the question as to the payment of the principal moneys, were necessary parties to the suit.—WATTS *v.* EGLINTON (LORD) (1846), 1 Coop. *temp.* Cott. 25; 15 L. J. Ch. 412; 7 L. T. O. S. 405; 47 E. R. 726, L. C.

2788. —— **Mortgagees unwilling to sue being made defendants.**]—Where a mtge. is made to two for a sum of money, of which each had lent a portion, one of the mtgees. may file a bill of foreclosure, making the other mtgee. deft., & pltf. in such a suit is entitled to the usual decree of foreclosure, on default of payment of the whole mtge. debt, in the proportions due to pltf. & deft. respectively, together with their respective costs.—DAVENPORT *v.* JAMES (1847), 7 Hare, 249; 12 Jur. 827; 68 E. R. 102.

Annotation:—**Refd.** *Re* Continental Oxygen Co., Elias *v.* Continental Oxygen Co., [1897] 1 Ch. 511.

2789. —— ——.]—A. mortgaged to B. in fee; B. died, having devised the mtged. estate to C. & D. D. subsequently advanced money to A. on the same security:—*Held:* C. was alone entitled to file a bill for foreclosure, & D. was properly made a party deft.—REMER *v.* STOKES (1856), 4 W. R. 730.

2790. —— ——.]—One of several mtgees. can bring an action to foreclose the mtge., making his co-mtgees. defts., if they are unwilling to be joined as co-pltfs. or have by their acts precluded themselves from being made co-pltfs., &, *semble:* even if they are opposed to the foreclosure.—LUKE *v.* SOUTH KENSINGTON HOTEL CO. (1879), 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W. R. 514, C. A.

Annotations:—**Refd.** Palmer *v.* Mallett (1887), 36 Ch. D. 411; Webb *v.* Jonas (1888), 39 Ch. D. 660; *Re* Continental Oxygen Co., Elias *v.* Continental Oxygen Co., [1897] 1 Ch. 511.

(c) *Equitable Mortgagee.*

2791. Second mortgagee—Right to foreclose mortgagor — & third mortgagee — Necessity for

PART XIII. SECT. 7, SUB-SECT. 2.—C. (c).

b. *Second mortgagee.*]—A subsequent incumbrancer is entitled to a sale upon the usual terms, where pltf. is an equitable mtgee. by deposit of title deeds, as well as when the mtge. is by deed.—KERR *v.* BEBEE (1866), 12 Gr. 204.—CAN.

c. ——.]—KANTI RAM *v.* KUTU-

joinder of first mortgagee.]—A second mtgee. may file a bill of foreclosure against the mtgor. & third mtgee. without making the first mtgee. a party. —ROSE *v.* PAGE (1829), 2 Sim. 471 ; 57 E. R. 864.
Annotation :—**Refd.** Briscoe *v.* Kenrick (1831), 1 L. J. Ch. 116.

2792. —— —— **Without redeeming first mortgage.**]—SLADE *v.* RIGG, No. 2250, *ante*.

2793. —— —— **Right to account against first mortgagee—Mortgage of rates & tolls in shipping company.**]—T., a mtgee. of rates & tolls of a navigation co., having a power to enter & receive tolls in default of payment, but no covenant from the co. to pay the money borrowed, has notice of a prior mtge. to the manager of the co., & files a bill for foreclosure, & for an account against prior mtgee. Demurrer to the bill for want of equity overruled, with costs.—THORNTON *v.* PORTSMOUTH & ARUNDEL NAVIGATION CO. (1845), 1 Holt, Eq. 56 ; 71 E. R. 669.

2794. Equitable mortgagee with agreement for legal mortgage.]—An equitable mtgee., who has an agreement that, if called upon, the mtgor. will execute a valid legal mtge. of the property, is entitled to a decree to foreclose or to sue for a sale.—AUSTIN *v.* CHASE (1850), 16 L. T. O. S. 279.

D. Whether Foreclosure or Sale the Appropriate Remedy.

(a) Devolution of Mortgagor's Estate on Crown.

2795. Forfeiture owing to felony—Former practice—Mortgagee ordered to hold till redemption by Crown.]—LUTWICH'S CASE (*circa* 1729), cited in 2 Atk. 223 ; 26 E. R. 538.

2796. —— —— ——.]—The title deeds of a leasehold estate were deposited with bankers, by way of equitable mtge., for securing the balance of a running account. The party making the deposit was subsequently convicted of felony. A bill was filed by the bankers, claiming to be equitable mtgees. by virtue of the deposit, against the A.-G., for a sale of the property :—*Held :* the ct. had no jurisdiction, the legal estate being in the Crown, to decree a sale of the estate, nor any power to compel a conveyance by the Crown of the legal estate ; but only to declare pltfs., as equitable mtgees., entitled to hold possession of the property, until the Crown should think fit to redeem.—HODGE *v.* A.-G. (1839), 3 Y. & C. Ex. 342 ; 8 L. J. Ex. Eq. 28 ; 160 E. R. 734.
Annotations :—**Mentd.** Burghes *v.* A.-G., [1911] 2 Ch. 139 ; Dyson *v.* A.-G., [1911] 1 K. B. 410.

2797. —— **Foreclosure as against subsequent mortgagees—Sale against Crown.**]—Mtgor. having been outlawed, the first mtgee. obtained a decree to foreclose subsequent mtgees., & if they should not redeem, to sell against the Crown.—SCOTT *v.* ROBARTS (1856), 4 W. R. 499.

2798. —— **Order for account & sale—No jurisdiction to order Crown to convey.**]—Where a mtgor. of leaseholds had been convicted of a felony, the ct., at the instance of an equitable mtgee., made a decree for an account & for a sale of the mtged. premises, & directed the purchase-money to be brought into ct., with liberty to the A.-G. to apply for payment out of the balance thereof, after satisfaction of the mtge. debt & costs ; but considered it had no jurisdiction to direct a conveyance by the Crown.—HANCOCK *v.* A.-G. (1864), 33 L. J. Ch. 661 ; 10 L. T. 222 ; 10 Jur. N. S. 557 ; 12 W. R. 569.
Annotation :—**Folld.** Bartlett *v.* Rees (1871), L. R. 12 Eq. 395.

——.]—*See, now*, Forfeiture Act, 1872 (c. 23), *& generally*, CRIMINAL LAW, Vol. IX., pp. 494 *et seq.*

2799. Mortgagor dying intestate & without heirs — Mortgage by deposit of deeds.] — Equitable mtgee. may sell against Crown. *Semble :* no escheat of an equitable interest.—PRESCOTT *v.* TYLER (1837), 1 Jur. 470.
Annotations :—**Distd.** Hodges *v.* A.-G. (1839), 8 L. J. Ex. Eq. 28. **Mentd.** Masulipatam, Collector *v.* Cavaly Venkata Narrainapah (1861), 8 Moo. Ind. App. 529.

2800. Mortgagor dying intestate, unmarried & illegitimate—Order for sale—With liberty to apply to Crown for conveyance.]—A. died intestate, unmarried & illegitimate, having mortgaged his real estates to B. for five hundred years, & having subsequently mortgaged them to B. for an additional sum, by deposit of the title deeds. The fee simple was not worth the mtge. money :—*Held :* nevertheless, the mtgor. could not be deemed a bare trustee for the mtgee., within 4 & 5 Will. 4, c. 23, s. 2, so as to deprive the Crown of the equity of redemption ; but it was ordered that the estate should be sold in the administration of assets, & B. declared a purchaser, with liberty to apply to the Crown for a grant of the fee simple.—ROGERS *v.* MAULE (1841), 1 Y. & C. Ch. Cas. 4 ; 62 E. R. 765.

(b) In Cases of Mere Charge.

2801. General rule.]—TENNANT *v.* TRENCHARD, No. 2309, *ante*.

2802. Charge with power of sale.]—A conveyance of an estate to A., in trust that the same should stand chargeable with a sum of money & interest, & subject thereto in trust for B., with a power of sale by A., upon non-payment after notice, is not a mtge. entitling A. to bring his bill for foreclosure, but it entitles him to the aid of the ct. in effecting a sale.—SAMPSON *v.* PATTISON (1842), 1 Hare, 533 ; 66 E. R. 1143.
Annotations :—**Distd.** Stamford, Spalding & Boston Banking Co. *v.* Ball (1862), 8 Jur. N. S. 420. **Consd.** *Re* Owen, [1894] 3 Ch. 220. **Refd.** *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385.

2803. —— **Importance of court being able to decree foreclosure.**]—An implied power of sale in the exor. of a mtgor., arising from a direction in the will to pay debts, will not enable the ct. to direct the sale of the mtged. estate if it cannot make a decree for foreclosure.—BOLTON *v.* STANNARD (1858), 27 L. J. Ch. 845 ; 31 L. T. O. S. 310 ; 4 Jur. N. S. 576 ; 6 W. R. 570.

2804. Judgment creditor's charge—Judgments Act, 1838 (c. 110), s. 14.]—A judgment creditor having registered his judgment under above Act, is not entitled to a decree for foreclosure, but only to one for sale.—FOOTNER *v.* STURGIS (1852), 5 De G. & Sm. 736 ; 21 L. J. Ch. 741 ; 19 L. T. O. S. 324 ; 64 E. R. 1322.
Annotation :—**Consd.** Tuckley *v.* Thompson (1860), 1 John. & H. 126.

2805. —— ——.]—D'AUVERGNE *v.* COOPER, [1899] W. N. 256.
Annotation :—**Consd.** Hosack *v.* Robins, [1917] 1 Ch. 332.

2806. —— —— **Charge equivalent to agreement to execute mortgage.**]—The relief to which a

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BUDDIN MAHOMED (1894), I. L. R. 22 Calc. 33.—**IND.**

d. ——.]—BENI MADHUB MOHAPATRA *v.* SOURENDRA MOHUN TAGORE (1896), I. L. R. 23 Calc. 795.—**IND.**

e. *Mortgagee of reversionary interest.*] —*Re* MALLETT, COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD. *v.* MALLET, [1907] V. L. R. 655.—**AUS.**

f. *Bank as equitable mortgagee.*]—The chartered banks of this province have a right to a decree of foreclosure upon a mtge. held by them as security. —BANK OF UPPER CANADA *v.* SCOTT (1858), 6 Gr. 451.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 2.—D. (b).

2801 f. *General rule.*] — SHEA *v.* MOORE, [1894] 1 I. R. 158.—**IR.**

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judgment creditor is entitled, under above Act. is a foreclosure, & not a sale.

Pltf. has that which is equivalent to an agreement to execute a legal mtge. (ROMILLY, M.R.). —JONES *v.* BAILEY (1853), 17 Beav. 582; 51 E. R. 1161.

Annotation :—**Consd.** Tuckley *v.* Thompson (1860), 1 John. & H. 126.

2807. —— —— Creditor ranking after first mortgagee—Prior in date to further charge & other judgments.]—A judgment creditor, ranking after a first mtgee., but prior in date to a further charge & to other judgments, held entitled to a foreclosure, although all the other parties insisted on a sale.—MESSER *v.* BOYLE (1856), 21 Beav. 559; 52 E. R. 976.

Annotation :—**Folld.** Thornton *v.* Finch (1865), 4 Giff. 518, n.

2808. —— —— Discretion of court.]—In Feb. 1916, defts. bought shares subject to a charging order obtained by pltf. before the war. On June 27, 1916, pltf., without obtaining leave under the Courts (Emergency Powers) Acts, 1914 to 1916, issued a summons to enforce the charging order against defts. by sale of the shares :—*Held :* pltf. being in the position of a mtgee. under the charging order was really applying for his proper remedy of " sale in lieu of foreclosure," & as his charging order was before the war, leave was necessary under Courts (Emergency Powers) Act, 1914 (c. 78), s. 1 (1) (*b*), as amended by Courts (Emergency Powers) Act, 1916 (c. 13), s. 1, (1) (*b*), although defts. had only acquired the shares after the war.

I regard the view taken by NORTH, J., long ago in the case of *D'Auvergne* v. *Cooper*, No. 2835, *ante*, that sale & not foreclosure was the proper remedy of a person having a charge under above sect., as merely a rule of practice, & not a question of jurisdiction. As a matter of convenience the ct. says that the charge shall be enforced not by foreclosure but by sale. I guard myself from saying there is any real prohibition which could prevent the ct., if it thought fit, from granting either foreclosure or a sale in lieu of foreclosure (COZENS-HARDY, M.R.).—HOSACK *v.* ROBINS, [1917] 1 Ch. 332; 86 L. J. Ch. 282; 115 L. T. 879; 61 Sol. Jo. 267, C. A.

2809. Charge under will—On real estate.]—Testator, subject & charged with the payment of his annuities, devised his real estate to trustees, as to part for his wife for life, & then, in the first place, out of the rents, to pay the annuities, & subject to the life estate of his wife & the annuities to A. for life, etc. :—*Held :* the real estates were liable to be sold for payment of the arrears of the annuities.—PICARD *v.* MITCHELL (1851), 14 Beav. 103; 51 E. R. 225.

Annotation :—**Consd.** *Re* Tucker, Tucker *v.* Tucker, [1893] 2 Ch. 323.

2810. —— Upon reversionary interest.] — A person entitled to the benefit of an equitable charge created by will upon a reversionary interest in land has no remedy by way of foreclosure, but only by way of sale or mtge. of such interest.—*Re* OWEN, [1894] 3 Ch. 220; 63 L. J. Ch. 749; 71 L. T. 181; 43 W. R. 55; 38 Sol. Jo. 617; 8 R. 566.

Annotations :—**Refd.** *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385; *Re* Witham, Chadburn *v.* Winfield, [1922] 2 Ch. 413.

2811. Charge of chief rent.]—Land, on which an improved chief rent, which was purchased by pltf.'s testator in 1853, had been reserved by a former vendor of the land, was ordered to be sold to pay the arrears of the chief rent which had accrued due since that date.—HORTON *v.* HALL (1874), L. R. 17 Eq. 437; 22 W. R. 391.

Annotations :—**Consd.** Hambro *v.* Hambro (1894), 63 L. J. Ch. 627. **Refd.** Kelsey *v.* Kelsey (1874), 22 W. R. 433; *Re* Tucker, Tucker *v.* Tucker, [1893] 2 Ch. 323; *Re* Young, Brown *v.* Hodgson, [1912] 2 Ch. 479.

(c) *Mortgage by Way of Sale.*

2812. Sale.]—A. assigned to B. certain leaseholds for a consideration of £200 upon trust to sell, & out of the proceeds to defray the costs incurred, & then to retain the said principal sum of £200 & interest, & to pay the residue to A. The indenture contained covenants by A. with B. for payment, on or before a day named, of the said principal sum of £200 & interest; that the term was subsisting; that B., at any time after default in payment of the money, might enter & peaceably enjoy the premises; & an agreement that B. should not proceed to sell until after six months' previous notice had been given to A., demanding payment of the said £200 & interest. Upon a claim by B. for foreclosure :—*Held :* it was a case for sale, not a foreclosure, & an order for a sale might be made, though not asked by the claim.—JENKIN *v.* ROW (1851), 5 De G. & Sm. 107; 18 L. T. O. S. 204; 16 Jur. 1131; 64 E. R. 1039.

Annotations :—**Distd.** Stamford, Spalding & Boston Banking Co. *v.* Ball (1862), 8 Jur. N. S. 420. **Apld.** Kirkwood *v.* Thompson (1865), 34 L. J. Ch. 305. **Refd.** *Re* Owen, [1894] 3 Ch. 220; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385.

2813. ——.]—KIRKWOOD *v.* THOMPSON, No. 2322, *ante*.

2814. ——.]—A security in the form of a trust for sale is a mtge. within Real Property Limitation Act, 1833 (c. 27), s. 28.

Before 1829 L. had demised two estates to P. for long terms of years by way of mtge. On Feb. 11, 1829, P. made to L. a further advance, & L., by a deed to which P. was a party, but not a conveying party, conveyed the fee in those estates & another estate to C., upon trust for P., his heirs, exors., administrators, & assigns, nevertheless upon the further trusts thereinafter declared; which were, to permit L. to continue in possession & receipt of rents till Aug. 11, & if L. should then repay the further advance with interest, & the other mtges. charged on the property & thereinafter specified, to reconvey to L., his heirs or assigns; but in default of payment, then that C., his heirs or assigns, should immediately, or at their or his discretion, enter into possession, & sell the estates, & stand possessed of the proceeds in trust, in the first place, to pay costs, then the sums due to P. with interest, & a sum due on mtge. to another person with interest, & to pay the surplus to L., his exors., administrators or assigns. L. at the same time attorned tenant to P. Default having been made in payment, P. entered into possession in 1832, & thenceforth received the rents & let the property. Sales were subsequently made of parts of the property, the last being in 1848, & C. conveyed to the purchasers, P. being a party, & it was agreed that all terms should be assigned in trust to attend. In

1871 L.'s heir-at-law filed a bill to have the trusts of the deed of 1829 carried into execution:—*Held:* (1) the deed of 1829 did not create a trust of the estate for the benefit of the mtgor. which he could enforce, so as to bring the case within Real Property Limitation Act, 1833 (c. 27), s. 25, but was a mtge. within sect. 28 of the same statute; (2) although the deed created an express trust in favour of L. of the surplus proceeds of sale after paying incumbrances, no relief could be given to pltf. on this ground, as it was not alleged, nor was there anything to lead to the supposition, that there had ever been any such surplus; therefore that the bill must be dismissed with costs.—LOCKING *v.* PARKER (1872), 8 Ch. App. 30; 42 L. J. Ch. 257; 27 L. T. 635; 21 W. R. 113, L. JJ.

Annotations:—*As to* (1) **Apld.** *Re* Alison, Johnson v. Mounsey (1879), 11 Ch. D. 284; Banner *v.* Berridge (1881), 18 Ch. D. 254. **Consd.** Warner *v.* Jacob (1882), 20 Ch. D. 220. **Expld.** Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196. **Refd.** Chapman *v.* Corpe (1879), 41 L. T. 22. *As to* (2) **Distd.** *Re* Alison, Johnson *v.* Mounsey (1879), 11 Ch. D. 284. *Generally*, **Consd.** Liquidation Estates Purchase Co. *v.* Willoughby, [1898] A. C. 321. **Mentd.** Sanders *v.* Sanders (1881), 30 W. R. 280.

2815. ——.]—A security for money lent was made in the form of a conveyance to the lender on trust to sell. He entered into possession & remained in possession for more than twenty years. His devisees in trust agreed to sell the mtged. estate for a sum exceeding the amount then due for principal, interest, & costs, & conveyed it to the purchaser by a deed in which the trust for sale was recited:—*Held:* the devisees in trust could only convey as owners in fee, & the mtgors. had no right to the surplus of the purchase-money.—*Re* ALISON, JOHNSON *v.* MOUNSEY (1879), 11 Ch. D. 284; 40 L. T. 234; 27 W. R. 537, C. A.

Annotations:—**Apld.** Warner *v.* Jacob (1882), 20 Ch. D. 220. **Refd.** Chapman *v.* Corpe (1879), 41 L. T. 22; Banner *v.* Berridge (1881), 29 W. R. 844; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196; *Re* Loveridge, Drayton *v.* Loveridge, [1902] 2 Ch. 859; *Re* Metropolis & Counties Permanent Investment Bldg. Soc., Gatfield's Case, [1911] 1 Ch. 698. **Mentd.** Sanders *v.* Sanders (1881), 19 Ch. D. 373; Nicholson *v.* England, [1926] 2 K. B. 93.

2816. ——.]—Property was conveyed by a member of a building society to the trustees, on trust for sale, to secure the moneys due to the society:—*Held:* the trustees were not entitled to a foreclosure, but to a decree for sale.—SCWEITZER *v.* MAYHEW (1862), 31 Beav. 37; 54 E. R. 1051.

(d) Deposit of Title Deeds.

2817. Mortgage by deposit of deeds.]—PAIN *v.* SMITH, No. 2260, *ante*.

2818. ——.]—*Re* MOORE, *Ex p.* EDWARDS (1836), 1 Deac. 611, Ct. of R.

Annotation:—**Refd.** *Re* Carter & Justins, *Ex p.* Sheffield Union Banking Co. (1865), 13 L. T. 477.

2819. —— **Mortgagor deceased — Claim by Crown.**]—PRESCOTT *v.* TYLER, No. 2799, *ante*.

2820. —— **Immediately before bankruptcy—Presumed fraud on creditors—Application of proceeds of sale.**]—Where the petition of an equitable mtgee. states that the deposit took place only nine days before the issuing of the fiat, & there is nothing to rebut the presumption of fraudulent preference, the ct. will not make the usual order.—*Re* WALKER, *Ex p.* AINSWORTH (1838), 2 Deac. 563; 7 L. J. Bcy. 33; *sub nom. Re* GOREN, *Ex p.* AINSWORTH, 3 Mont & R. 451, Ct. of R.

Annotation:—**Refd.** *Re* Lindon, *Ex p.* Clouter (1843), 7 Jur. 135.

2821. —— **Accompanied by memorandum for securing running balance.**]—On a claim by an equitable mtgee. under a deposit of title deeds, with a memorandum for securing a running balance, limited to a certain amount, the ct. will direct a sale.—LLOYD *v.* WHITTEY (1853), 22 L. J. Ch. 1038; 17 Jur. 754.

2822. —— **Accompanied by memorandum of agreement to execute legal mortgage.**]—Where, on a deposit of title deeds to secure the repayment of money, a memorandum was executed, by which the depositor charged the land with payment of the money, & also agreed to execute a legal mtge.:—*Held:* the person who advanced the money had a right to a decree for a sale, & not to a legal mtge. only.—MATTHEWS *v.* GOODDAY (1861), 31 L. J. Ch. 282; 5 L. T. 572; 8 Jur. N. S. 90; 10 W. R. 148.

2823. ——.]—Where there is a mtge. by deposit of deeds, & the memorandum states an agreement to execute a legal mtge., a decree on a bill to enforce the security will not direct a sale, but foreclosure; but if there is no memorandum a sale will be directed.—LONDON MONETARY ADVANCE CO. *v.* BROWN (1865), 12 L. T. 199; 13 W. R. 490; *subsequent proceedings* (1868), 16 W. R. 782.

Annotation:—**Apld.** Yeatman *v.* Reed (1866), 36 L. J. Ch. 136.

2824. ——.]—Where a bill is filed for foreclosure or sale by an equitable mtgee. by deposit, accompanied by a memorandum of agreement to execute a legal mtge., the ct. will not decree a sale but will order the execution of a legal mtge. with due provision for foreclosure of such legal mtge. when executed.—YEATMAN *v.* REED (1866), 36 L. J. Ch. 136; 15 L. T. 349; 15 W. R. 168.

2825. ——.]—An equitable mtgee. by deposit of deeds accompanied by an agreement to execute a legal mtge., is entitled to either sale or foreclosure.—YORK UNION BANKING CO. *v.* ARTLEY (1879), 11 Ch. D. 205; 27 W. R. 704.

2826. —— **With power of sale.**]—An equitable mtge. by deposit of title deeds, with an agreement in writing by the party making the deposit, to execute a formal mtge. of the property to the mtgee. for the balance which might be due to him, constitutes the equitable mtgee. a purchaser for good consideration within 27 Eliz. c. 4, in respect of such balance; & it being a term of the agreement that the mtge. to be executed should contain a power of sale, the ct., on a bill to set aside a prior voluntary conveyance by the mtgor., as fraudulent & void, under 27 Eliz. c. 4, decreed, that, on default of payment, the mtged. property should be sold.

The next question is, as to the form of the remedy to which pltf. is entitled, whether the decree is to give pltf. the benefit of a legal mtge. or to direct a sale. The decisions with regard to the right of an equitable mtgee. are not uniform; but, in this case, the express terms of the contract are, that S. shall convey the premises by way of legal mtge., & that such mtge. shall contain a full & absolute power of sale; & to make the suit available for its objects, it is necessary that there should be a decree for sale. There is no reason, therefore, why such a decree should not be made (WIGRAM, V.-C.).—LISTER *v.* TURNER (1846), 5 Hare, 281; 15 L. J. Ch. 336; 7 L. T. O. S. 3; 10 Jur. 751; 67 E. R. 919.

2827. —— ——.]—WOOF *v.* BARRON, [1873] W. N. 71.

Sect. 7.—Foreclosure or sale: Sub-sect. 2, D. (e), (f) & (g).]

(e) Unproductiveness or Deficiency of Security.

2828. Security defective.]—A bill of foreclosure being heard on a sequestration, & the security being defective, the ct. decreed a sale, instead of a foreclosure, because if pltf. sued deft. on his bond, that would open a decree of foreclosure, & it is usual in such cases to refer it to a master to set a value on the estate, & decree that pltf. should take it *pro tanto*.—DASHWOOD *v.* BITHAZEY (1729), Mos. 196; 25 E. R. 347.

2829. ——.]—Where one exor. is indebted to testator by mtge., if the co-exors. are apprehensive he is insolvent, they should bring a bill against him for sale of the estate; to pray a foreclosure would be improper.—LUCAS *v.* SEALE (1740), 2 Atk. 56; 26 E. R. 431, L. C.

Annotation:—**N.F.** Remer *v.* Stokes (1856), 4 W. R. 730.

2830. ——.] — Mtgee., when personalty deficient, may pray a sale of the mtged. premises in the first instance, where the heir & personal representative are the same person.—DANIEL *v.* SKIPWITH (1787), 2 Bro. C. C. 155; 29 E. R. 89, L. C.

2831. —— At suit of tenant for life.]—As to the prayer of a sale, that is certainly improper: the tenant for life of an estate subject to a mtge. is not entitled to pray such relief, though the mtgee. himself might be, if he thought it a scanty security (LORD HARDWICKE, C.).—KINNOUL (EARL) *v.* MONEY (1767), 3 Swan. 202, n.; 36 E. R. 830, L. C.

Annotations:—**Mentd.** Clinton *v.* Hooper (1791), 3 Bro. C. C. 201; Hudson *v.* Carmichael (1854), Kay, 613; Paget *v.* Paget, [1898] 1 Ch. 470; Hall *v.* Hall, [1911] 1 Ch. 487.

2832. —— Mortgagor lunatic.]—On a claim for foreclosure against a mtgor. who was of unsound mind, but not found so by inquisition, it appearing that the value of the property was much below the amount of the mtge. debt & interest, the ct., upon pltf.'s undertaking to pay deft.'s guardian his costs, declared that it was for the benefit of deft. that an absolute decree of foreclosure should be made immediately.—BACKHURST *v.* KING (1851), 17 L. T. O. S. 175.

2833. —— Defendant refusing to give security against plaintiff's loss.] — (1) In an action by second mtgees., against subsequent incumbrancers & the mtgor.'s trustee in liquidation, there being evidence that the sale of the property would leave a very small margin for the subsequent incumbrancers, only one of whom appeared, one time certain was fixed for all defts. to redeem or be foreclosed.

(2) There is jurisdiction under Conveyancing Act, 1881 (c. 41), s. 25, (2), to direct a sale in an action for foreclosure without pltf.'s consent, although the mtged. property in question may be only an equity of redemption, there being prior mtgees. not parties to the action. The ct., however, declined so to direct a sale at the request of a deft. who would not give security.—CRIPPS *v.* WOOD (1882), 51 L. J. Ch. 584.

Annotation:—*As to* (1) **Distd.** Platt *v.* Mendel, Gurney *v.* Canterbury (1884), 54 L. J. Ch. 1145.

2834. —— Mortgagor not appearing.]—Where, at the trial of a foreclosure action, pltf. asks for a sale of the property & the mtgor. does not appear, the ct. will dispense with an account of what is due, if it appear by the pleadings that the security is insufficient.—WILLIAMS *v.* OWEN (1883), 48 L. T. 388; 27 Sol. Jo. 256.

2835. —— ——.]—CHARLEWOOD *v.* HAMMER (1884), 28 Sol. Jo. 710.

2836. —— Mortgage by deposit—Unaccompanied by agreement to execute legal mortgage.] — OLDHAM *v.* STRINGER, No. 2699, *ante*.

2837. —— Application based on speculative rise in value.]—In an action for foreclosure by first mtgees. of a building estate at Manchester, the second mtgees. & mtgor. requested a sale, & offered to pay into ct. a sum sufficient to meet the costs of sale. The value of the estate was insufficient to cover what was due on the first mtge.; but appcts. produced evidence stating that since the date of the action such value had, in consequence of the subsequent passing of Manchester Ship Canal Act, increased, & was likely continuously to increase:—*Held*: the ct. had no power to grant the application, notwithstanding the discretion conferred by Conveyancing & Law of Property Act, 1881 (c. 41), s. 25 (2).—MERCHANT BANKING CO. OF LONDON *v.* LONDON & HANSEATIC BANK (1886), 55 L. J. Ch. 479; 2 T. L. R. 245.

Annotation:—**Apld.** Provident Clerks' Mutual, etc. Assocn. *v.* Lewis (1892), 62 L. J. Ch. 89.

2838. —— Dispute as to insufficiency of security—Plaintiff to be guaranteed against loss.]—NORMAN *v.* BEAUMONT, [1893] W. N. 45.

2839. —— Sale of no benefit to either party.]—In an action for foreclosure in which the mtgor. did not appear the master certified that a certain sum was due to pltf. under the memorandum of charge, & the usual order *nisi* was made fixing a day for payment by the mtgor., & in default for sale of the mtged. property & application of the proceeds of sale in payment of what was due to pltf. Default was made in payment of what was due on the day appointed. Pltf. adduced evidence that the property was of less value than the amount certified to be due to him on the security of the mtge., & asked for foreclosure instead of sale. Deft. had not appeared to the action nor did he appear on this application:—*Held*: it not being for the benefit of either party that the costs of a sale or attempted sale should be incurred, foreclosure would be ordered instead of sale.—LLOYDS BANK, LTD. *v.* COLSTON (1912), 106 L. T. 420.

2840. Security unproductive — Reversion.] — HOW *v.* VIGURES (1628), 1 Rep. Ch. 32; 21 E. R. 499.

2841. —— Advowson.]—MACKENSIE *v.* ROBINSON, No. 2878, *post*.

2842. —— Mortgage of property held on lease—Mortgagee in possession.]—Pltf. was first mtgee., & in possession as such of a distillery held upon a lease of which about twenty five years were unexpired, but which was wholly unproductive. He filed his bill for a foreclosure:—*Held*: he was entitled to an immediate sale before deciding upon the questions between the subsequent mtgees.—FOSTER *v.* HARVEY (1863), 4 De G. J. & Sm. 59; 3 New Rep. 98; 9 L. T. 404; 12 W. R. 92; 46 E. R. 837, L. JJ.

Annotations:—**Mentd.** *Re* Gregg, *Re* Prance (1869), L. R. 9 Eq. 137; Northumberland *v.* Todd (1878), 26 W. R. 350.

(f) Infancy of Owner of Equity of Redemption.

2843. Grounds for ordering sale—Benefit of infant.]—Where a decree had been made in two

PART XIII. SECT. 7, SUB-SECT. 2.—D. (e).

2828 i. *Security defective.*]—Where the prayer of the bill is for either sale or foreclosure, the ct. will, at the instance of pltf., make a decree for sale, &, in the event of a sale failing to cover the claim of pltf., order foreclosure.—BLACHFORD *v.* OLIVER (1860), 8 Gr. 391.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 2.—D. (f).

2843 i. *Grounds for ordering sale—Benefit of infant.*]—The ct., where it is considered beneficial to the interests

suits, framed for the purpose of administering testator's personal estate only, & the devisee of the real estate was an infant, a suit by mtgees., for the purpose of realising their security by a sale of the mtged. premises, was properly instituted. In a suit for realising a mtge. security, where the devisee or heir of the mtgor. is an infant, the ct. usually directs a reference to the master to inquire whether a sale of the mtged. premises will be for the benefit of the infant; but, where it is clear that such sale will be for the infant's benefit, the ct. will direct a sale in the first instance.—DAVIS *v.* DOWDING (1838), 2 Keen, 245; 7 L. J. Ch. 169; 48 E. R. 622.

2844. —— ——.]—A decree for an immediate sale of property subject to an equitable mtge., where the heir of the mtgor. is an infant, may be made, if the ct. is of opinion that such sale would be for the benefit of the infant.—REDSHAW *v.* NEWBOLD (1848), 11 L. T. O. S. 372; 12 Jur. 833.

Annotation :—**Folld.** Cockburn *v.* Aukett (1855), 3 W. R. 641.

2845. —— ——.]—Trustees of a will whereby property is devised subject to mtges. sufficiently represent the devisees; & although there are infants interested in the equity of redemption the ct. will direct an immediate sale where it appears to be for the benefit of the infants.—COCKBURN *v.* AUKETT (1855), 3 W. R. 641.

2846. Grounds for ordering foreclosure—Infants doing no more than submitting rights & interests to court.]—The ct. will not make an immediate decree of foreclosure, under 7 Geo. 2, c. 20, where any of defts. do not admit, though they may not absolutely deny pltf.'s title. *Qu.:* whether the ct. will not make such a decree against an infant, unless he do more than merely submit his rights & interests to the ct.—ROE *v.* WARDLE (1838), 3 Y. & C. Ex. 70; 2 Jur. 640; 160 E. R. 618.

2847. —— **Admission of debt by some co-owners—As against infant co-owners.**]—A., seised in fee, mortgaged for a term of years, & afterwards devised the mtged. premises, & died. Mtgee. brought his bill against the devisees, some of whom were infants, for foreclosure:—*Held:* pltfs. during the infancy of the devisees, were not entitled to a decretal order on motion, under 7 Geo. 2, c. 20, s. 2, or under the general jurisdiction of the ct. to take an account of what was due.

The question was, whether the ct., in absence of all proof, on the admission only, as against infants, should place pltf.'s in a position to foreclose the infants' estate. He thought this should not be done (WIGRAM, V.-C.).—TAYLOR *v.* COATES (1843), 3 Hare, 263; 67 E. R. 381.

(g) Other Cases.

2848. Mortgage of contingent reversionary interest in stock.]—POUTEN *v.* PAGE (1816), 1 Maddock's Chancery Practice 3rd ed. p. 664.

2849. Equitable mortgage—Mortgagor deceased.]—*Semble:* an equitable mtgee., if the mtgor. is dead, is entitled to have the estate sold, & the proceeds applied in payment of his debt, & to stand as a creditor, for the balance, if any, on the general assets of the mtgor.—BROCKLEHURST *v.* JESSOP (1835), 7 Sim. 438; 58 E. R. 906.

Annotations :—**Reld.** Tipping *v.* Power (1842), 1 Hare, 405; Tuckley *v.* Thompson (1860), 1 John. & H. 126. **Mentd.** Connell *v.* Hardie (1839), 3 Y. & C. Ex. 582; Fordham *v.* Wallis (1853), 10 Hare, 217; Cockburn *v.* Edwards (1881), 18 Ch. D. 449; Barnes *v.* Glenton, [1899] 1 Q. B. 885; London & Midland Bank *v.* Mitchell, [1899] 2 Ch. 161; Wrigley *v.* Gill, [1906] 1 Ch. 165.

2850. Effect of not admitting plaintiff's title.]—ROE *v.* WARDLE, No. 2846, *ante*.

2851. Effect of objection that title to property defective.]—BROWN *v.* VERNON (1852), 1 W. R. 104.

2852. Whether sale will be decreed after foreclosure—By variation of foreclosure decree.]—The ct. refused, on the application of the mtgee., after a decree of foreclosure had been made, to vary the decree by directing a sale under 15 & 16 Vict. (c. 86), s. 48.—GIRDLESTONE *v.* LAVENDER (1852), 9 Hare, App. LIII.; 20 L. T. O. S. 176; 16 Jur. 1081; 68 E. R. 788.

Annotations :—**Consd.** Campbell *v.* Moxhay (1854), 23 L. T. O. S. 227. **Distd.** Laslett *v.* Cliffe (1854), 2 Sm. & G. 278; Union Bank of London *v.* Ingram (1882), 20 Ch. D. 463.

2853. Application by tenant in common for sale—Of whole property.]—Tenant in common who has mortgaged his share to another tenant in common cannot enforce a partition or sale of the whole property against the will of the mtgee., except upon the terms of paying off the mtge.—GIBBS *v.* HAYDON (1882), 47 L. T. 184; 30 W. R. 726.

Annotation :—**Reld.** Sinclair *v.* James, [1894] 3 Ch. 554.

2854. Case must be made out for sale—15 & 16 Vict. (c. 86), s. 48.]—Although 15 & 16 Vict. (c. 86), s. 48, gives the ct. power to direct a sale or foreclosure, it will not depart from the ordinary practice & direct a sale instead of a foreclosure, unless a case is made out for such a course.—ROBERTS *v.* PRICE (1853), 21 L. T. O. S. 209; 1 W. R. 303.

2855. In absence of evidence as to value of property.]—SMITHETT *v.* HESKETH, No. 3133, *post*.

2856. —— **Where ample evidence of solvency of mortgagor.**]—HOPKINSON *v.* MIERS (1889), 34 Sol. Jo. 128.

2857. —— **Scattered properties—Not likely to sell in one lot.**]—In an action for foreclosure by first mtgees. of a residential estate & plots of freehold & leasehold lands in different places, the second mtgees. & an alleged incumbrancer asked for a sale. The first mtgees. & the owner of the equity of redemption asked for foreclosure, the latter anticipating that the property might increase in value, & allow of redemption. The ct. was not satisfied as to the sufficiency or insufficiency of the security; but, considering that the property was in various places, & not likely to sell, except as a speculation, in one lot, declined to exercise its discretion by ordering a sale.—PROVIDENT CLERKS' MUTUAL, ETC. ASSOCN. *v.* LEWIS (1892), 62 L. J. Ch. 89; 67 L. T. 644.

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of an infant deft., will direct a sale instead of a foreclosure, without requiring any deposit to cover the expenses of such sale.—BANK OF UPPER CANADA *v.* SCOTT (1858), 6 Gr. 451.—**CAN.**

2843 ii. —— ——.]—In a mtge. suit the master after hearing evidence ordered a sale instead of a foreclosure, as being more beneficial for infant heirs. Upon appeal:—*Held:* the evidence showed that a sale would not realise pltf.'s claim, & foreclosure was directed.—LANDED BANKING & LOAN CO. *v.* ANDERSON (1886), 3 Man. L. R. 270.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 2.—D. (g).

h. *Whether foreclosure will be decreed instead of sale.*] — Where a decree is sought to be changed from a sale to a foreclosure, the cause must be set down to be reheard, & notice served on deft., although the bill has been taken *pro confesso*.—MCCLELAN *v.* JACOBS (1862), 9 Gr. 50.—**CAN.**

k. ——.]—Where an order for sale has been taken out *ex p.* by mistake, in lieu of an order for foreclosure, the ct. will vacate the order for sale & grant an order for foreclosure *ex p.*—MCGILLIVRAY *v.* CAMERON (1862), 1 Ch. Ch. 197.—**CAN.**

l. *Mortgage to corporation.*]—After the passing of 27 Vict. c. 17, a municipal corpn. invested on mtge. part of the surplus clergy reserve moneys in their hands, & the mtgors. made default in payment, whereupon the municipality filed a bill to foreclose the security:—*Held:* the municipality were entitled to a decree of foreclosure, & were not restricted to a sale of the property only.—MUNICIPALITY OF OXFORD *v.* BAILEY (1866), 12 Gr. 276.—**CAN.**

Sect. 7.—Foreclosure or sale: Sub-sect. 2, E. & F.; sub-sect. 3.]

E. Foreclosure by Equitable Mortgagee.

2858. Whether entitled to foreclosure—General rule.]—An equitable mtgee. is entitled, at his option, either to a foreclosure or sale.—PERRY *v.* KEANE, PERRY *v.* PARTRIDGE (1836), 6 L. J. Ch. 67.

2859. —— ——.]—PRYCE *v.* BURY (1854), as reported in L. R. 16 Eq. 153, n., L. C. & L. JJ.

Annotations :—**Folld.** James *v.* James (1873), L. R. 16 Eq. 153. **Refd.** Backhouse *v.* Charlton (1878), 8 Ch. D. 444.

2860. —— ——.]—An equitable mtgee., as of right, is entitled to a foreclosure, & not to a sale.—COX *v.* TOOLE (1855), 20 Beav. 145; 52 E. R. 558.

2861. —— **Mortgagees by deposit.**]—An equitable mtgor., by deposit of title deeds, is entitled to have six months to redeem, to be computed from the time when the master makes his report of the amount due, & in the same way as if there had been a legal mtge.

Qu.: whether a mtgee. in the case of an equitable mtge., is entitled to have a sale of the mtged. premises.—PARKER *v.* HOUSEFIELD (1834), 2 My. & K. 419; 4 L. J. Ch. 57; 39 E. R. 1004.

Annotations :—**Folld.** Meller *v.* Woods (1836), 1 Keen, 16; Thorpe *v.* Gartside (1837), 7 L. J. Ex. Eq. 30. **Refd.** Ashworth *v.* Mounsey (1853), 9 Exch. 175; McKay *v.* McNally (1879), 41 L. T. 230; *Re* Owen, [1894] 3 Ch. 220.

2862. —— ——.]—In a suit by an equitable mtgee. of leaseholds to enforce his security, a decree was made for sale in default of payment, & the premises were sold under the decree.—KING *v.* LEACH (1842), 2 Hare, 57; 7 Jur. 845; 67 E. R. 24.

Annotations :—**Mentd.** Jackson *v.* Milfield (1847), 5 Hare, 538; Rowley *v.* Adams (1851), 14 Beav. 130.

2863. —— ——.]—LISTER *v.* TURNER, No. 2826, *ante*.

2864. —— ——.]—An equitable mtgee., by deposit of title deeds, coming to a ct. of equity to realise his security, is entitled to a sale, & not a foreclosure only.—TUCKLEY *v.* THOMPSON (1860), 29 L. J. Ch. 548; 3 L. T. 257, L. JJ.

Annotation :—**Mentd.** *Re* Oriental Hotels Co., Perry *v.* Oriental Hotels Co. (1871), L. R. 12 Eq. 126.

2865. —— ——.]—The right of an equitable mtgee. by deposit without memorandum is foreclosure, not sale.—SAMBLE *v.* WILSON (1865), 5 New Rep. 395.

Annotation :—**Folld.** Backhouse *v.* Charlton (1878), 8 Ch. D. 444.

2866. —— ——.]—The relief to which an equitable mtgee. by deposit is entitled is foreclosure, not sale.—JAMES *v.* JAMES (1873), L. R. 16 Eq. 153; 42 L. J. Ch. 386; 21 W. R. 522.

Annotations :—**Folld.** Backhouse *v.* Charlton (1878), 8 Ch. D. 444. **Refd.** *Re* Owen, [1894] 3 Ch. 220; Sadler *v.* Worley, [1894] 2 Ch. 170.

2867. —— ——.]—The right of an equitable mtgee. by deposit of deeds without a written memorandum is a decree of foreclosure, not sale.—BACKHOUSE *v.* CHARLTON (1878), 8 Ch. D. 444; 26 W. R. 504.

Annotation :—**Mentd.** Morison *v.* London County & Westminster Bank (1913), 108 L. T. 379.

2868. —— —— **Pledge of personal chattels.**]—The doctrine that an equitable mtgee. by deposit of title deeds is entitled to foreclosure, does not extend to a pledgee of personal chattels. A. deposited with B. certain Canada railway bonds as security for a debt. On bill filed by B. for foreclosure or sale :—*Held :* B. was entitled to an order for sale only.—CARTER *v.* WAKE (1877), 4 Ch. D. 605; 46 L. J. Ch. 841.

Annotations :—**Expld.** Sadler *v.* Worley, [1894] 2 Ch. 170. **Apld.** Fraser *v.* Byas (1895), 11 T. L. R. 481. **Distd.** Harrold *v.* Plenty, [1901] 2 Ch. 314. **Refd.** *Re* Owen, [1894] 3 Ch. 220; London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515.

2869. —— —— **Deposit of certificate of shares.**]—The deposit of a certificate of shares to secure the repayment of money amounts to an agreement to transfer the shares by way of mtge., & the depositee is entitled to a decree for foreclosure, & is not restricted to a remedy by sale.—HARROLD *v.* PLENTY, [1901] 2 Ch. 314; 70 L. J. Ch. 562; 85 L. T. 45; 49 W. R. 646; 17 T. L. R. 545; 8 Mans. 304.

Annotations :—**Refd.** Stubbs *v.* Slater, [1910] 1 Ch. 632; London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515; Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451.

2870. —— **Trustee under charge in own favour—Lien on deeds.**]—The rebuilding of a dissenting chapel was entrusted to three of the several trustees in whom the estate was vested. There being a deficiency of money, they borrowed, on a deposit of the title deeds of the chapel, £500, which they personally engaged to pay. Interest was, for a long time, paid out of the chapel funds, but ultimately, the representatives of the trustees were compelled to pay the money. The legal estate was vested in new trustees :—*Held :* the representatives of the persons who had paid the £500 had a lien on the deeds, but they were not entitled to a decree for foreclosure or sale, as by granting such relief, the trust would be altogether destroyed.—DARKE *v.* WILLIAMSON (1858), 25 Beav. 622; 32 L. T. O. S. 99; 22 J. P. 705; 4 Jur. N. S. 1009; 6 W. R. 824; 53 E. R. 774.

Annotation :—**Mentd.** Grissell *v.* Money (1869), 38 L. J. Ch. 312.

2871. —— —— **Trustee in control of estate—Cestui que trust without means of paying off charge.**]—TENNANT *v.* TRENCHARD, No. 2309, *ante*.

2872. ——.] — **Mortgagor requiring sale — & making proper deposit.**]—An equitable mtgee. is entitled to a conveyance & foreclosure, unless the mtgor. requires a sale, & will make the proper deposit.—UNDERWOOD *v.* JOYCE (1861), 7 Jur. N. S. 566.

2873. —— **Second mortgagee—First mortgage redeemed.**]—An equitable second mtgee. commenced an action against the liquidation trustee of the mtgor., & the first mtgees., claiming an equitable charge on the property, redemption against the second mtgees., &, if necessary, foreclosure :—*Held :* the equitable mtgee. had a right to redeem the first mtgee. & if necessary to foreclose the mtgor.—*Re* WHERLY, *Ex p.* HIRST (1879), 11 Ch. D. 278; 27 W. R. 788.

Annotation :—**Mentd.** Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747.

2874. —— —— **As alternative to order for sale—Sale not effected.**]—An order was made at request of a second mtgee. for sale of the property, & for foreclosure in case a sale should not be effected.—SAUL *v.* PATTINSON (1880), 55 L. J. Ch. 831; 54 L. T. 670; 34 W. R. 561.

Annotation :—**Mentd.** *Re* Somes, Smith *v.* Somes, [1896] 1 Ch. 250.

2875. —— **Registered holder of debenture.**]—A debenture of a limited co., in the usual form of a floating security charging all the property of the co., both present & future, including its uncalled

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PART XIII. SECT. 7, SUB-SECT. 2.—E.

2858 1. ***Whether entitled to foreclosure—General rule.***]—The proper remedy in equity of an equitable mtgee. is a sale & not foreclosure.—BANK OF VICTORIA *v.* COZENS (1864), 1 W. W. & A'B. 93.—AUS.

capital, confers upon the registered holder, in the event of the debenture becoming immediately payable in consequence of a winding up, the ordinary mtgee.'s remedy by foreclosure against the uncalled capital as well as the other property comprised in the security.—SADLER *v.* WORLEY, [1894] 2 Ch. 170; 63 L. J. Ch. 551; 70 L. T. 494; 42 W. R. 476; 10 T. L. R. 364; 8 R. 194.

Annotations :—**Apld.** Halifax & Huddersfield Union Banking Co. *v.* Radcliffe, [1895] W. N. 63. **Consd.** *Re* Continental Oxygen Co., Elias *v.* Continental Oxygen Co., [1897] 1 Ch. 511. **Mentd.** Oldrey *v.* Union Works (1895), 72 L. T. 627.

2876. —— Mortgage of personal estate.]—Where a bank had an equitable charge on shares in a limited co. to secure a simple contract debt & after the debt was barred brought an action to enforce their security by foreclosure or sale :—*Held :* the bank were not deprived of their remedy against the property by the fact that the personal remedy for the debt was barred, &, there being no Statute Limitations applicable to foreclosure of a mtge. of personal property, the security was enforceable.—LONDON & MIDLAND BANK *v.* MITCHELL, [1899] 2 Ch. 161; 68 L. J. Ch. 568; 81 L. T. 263; 47 W. R. 602; 15 T. L. R. 420; 43 Sol. Jo. 586.

Annotation :—**Apld.** Stubbs *v.* Slater, [1910] 1 Ch. 632.

F. In respect of What Kinds of Property.

2877. Advowsons.]—One mortgages a manor with an advowson appendant, & the church becomes void, mtgee., though in possession, shall not present to the church till the mtge. is foreclosed.—GARDINER *v.* GRIFFITH (1726), 2 P. Wms. 404; Mos. 16; 24 E. R. 787, L. C.; *affd.* (1729), 2 P. Wms. 405, n., H. L.

Annotations :—**Consd.** Mackensie *v.* Robinson (1747), 3 Atk. 559. **Mentd.** Botcler *v.* Allington (1746), 3 Atk. 453; Mutter *v.* Chaurel (1816), 1 Mer. 475.

2878. ——.]—A mtgee. must accept of a mtgor.'s nominee, to an avoidance of an advowson; for, instead of bringing a bill of foreclosure, he should have prayed a sale of the advowson.—MACKENSIE *v.* ROBINSON (1747), 3 Atk. 559; 26 E. R. 1122, L. C.

Annotation :—**Mentd.** Drinkwater *v.* Falconer (1755), 2 Ves. Sen. 623.

——.]—*See, generally,* ECCLESIASTICAL LAW, Vol. XIX., pp. 370 *et seq.*

2879. Copyhold.]—Person mortgaged a copyhold estate for the payment of debts, & after devised his estate for payment of debts, interest was paid after his decease; foreclosure decreed.—ROBINSON *v* SAVILE (1726), Cas. *temp.* King, 61; 25 E. R. 223, L. C.

——.]—*See, generally,* COPYHOLDS, Vol. XIII., pp. 9 *et seq.*

2880. Reversionary interests.]—SLADE *v.* RIGG, No. 2250, *ante.*

2881. ——.]—WAYNE *v.* HANHAM, No. 3048, *post.*

—— Assignment by way of guarantee—Liability in terms only of bond.]—*See* GUARANTEE, Vol. XXVI., p. 79, No. 566.

2882. Personalty—Stocks & shares.]—BOOKING *v.* RENDELL (1852), 3 Seton's Judgments & Orders, 7th ed. 1923.

2883. —— ——.]—(1) Foreclosure ordered with one term of redemption for all the puisne mtgees., as in *Bartlett* v. *Rees*, No. 3122, *post.*

(2) On a security upon railway shares with power of sale, under which the shares were transferred to the lender :—*Held :* the lender was entitled to foreclosure, & *Carter* v. *Wake*, No. 2868, *ante*, did not apply.—GENERAL CREDIT & DISCOUNT CO. *v.* GLEGG (1883), 22 Ch. D. 549; 52 L. J. Ch. 297; 48 L. T. 182; 31 W. R. 421.

Annotations :—*As to* (2) **Consd.** Sadler *v.* Worley, [1894] 2 Ch. 170. *Generally,* **Mentd.** Mainland *v.* Upjohn (1889), 41 Ch. D. 126; The Benwell Tower (1895), 72 L. T. 664.

2884. —— Share in colliery partnership.]—(1) Where a partnership deed gave to the several partners a right of pre-emption of any shares which might be sold, the ct., on bill filed by the mtgee. of certain shares, made the usual foreclosure decree against one of the partners, but in the event of his being absolutely foreclosed, gave leave to any of the other partners to redeem pltf. before a given day.

(2) Mtgee. of a share in a colliery partnership is entitled to a decree for foreclosure, but he is not entitled to any account of the property paid or distributed to shareholders or partners before he filed his bill, nor is he entitled to contest or call the shareholders to account for their previous management of the colliery, but he is entitled to say, that no extra burden shall be thrown on his shares which is not in accordance with some contract or agreement in force at the date of the mtge.—REDMAYNE *v.* FORSTER (1866), L. R. 2 Eq. 467; 35 Beav. 529; 35 L. J. Ch. 847; 14 W. R. 825; 55 E. R. 1002.

Annotations :—*As to* (2) **Reld.** Whetham *v.* Davey (1885), 30 Ch. D. 574. *Generally,* **Mentd.** Cavender *v.* Bulteel (1873), 28 L. T. 620.

2885. —— Pension.]—JAMES *v.* ELLIS, No. 3100, *post.*

2886. —— Chattel.]—FRASER *v.* BYAS (1895), 11 T. L. R. 481; 13 R. 452.

2887. All property of company—Past & future.]—SADLER *v.* WORLEY, No. 2875, *ante.*

——.]—*See* COMPANIES, Vol. X., pp. 804 *et seq.*

SUB-SECT. 3.—EFFECT OF FORECLOSURE.

2888. Beneficial ownership of real estate vested in mortgagee.]—Construction of a will, as passing an estate, originally on mtge., but foreclosed; testator's intention appearing to dispose of all his interest, though inaccurately mentioned, both as land mtged., & as money due on mtge.

The mtge. which testator had originally upon the estate being foreclosed became absolutely his (GRANT, M.R.).—SILBERSCHILDT *v.* SCHIOTT (1814), 3 Ves. & B. 45; 35 E. R. 396.

Annotations :—**Apld.** Heath *v.* Pugh (1881), 6 Q. B. D. 345. **Mentd.** *Re* King's Mortgage (1852), 5 De G. & Sm. 644.

2889. ——.]—Testator having a foreclosed mtge. in fee. of certain farms in Lancashire, gave, amongst other things, to his wife, for life "the interest or proceeds of certain farms in the county

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PART XIII. SECT. 7, SUB-SECT. 2.—F.

m. *Railway.*]—CENTRAL ONTARIO RY. CO. *v.* TRUSTS & GUARANTEE CO., [1905] A. C. 576.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 3.

n. *Foreclosure under Land Transfer Act—Operates as transfer of land to mortgagee.*]—FINK *v.* ROBERTSON (1907), 4 C. L. R. 804.—**AUS.**

o. *Right to mesne profits.*]—Where a mtgee. brought ejectment after foreclosure, & defts. appeared to be mere trespassers having no privity with the mtgor., pltf. was held clearly entitled to mesne profits from the date of the foreclosure.—MAIR *v.* CULLY & YOUNG (1854), 11 U. C. R. 308.—**CAN.**

p. *Purchase of mortgagor's interest—Purchaser judgment creditor of mortgagee—Foreclosure subsequently set aside—Execution by purchaser restrained.*]—GOODWIN *v.* WILLIAMS (1855), 5 Gr. 178.—**CAN.**

q. *Dispute as to title.*]—After foreclosure, a stranger to a mtge. may dispute the title with the mtgor.—DOE d. DE VEBER *v.* BROWN (1857), 8 N. B. R. (3 All.) 433.—**CAN.**

r. *Termination of tenancy.*]—HIGGINS *v.* LANGFORD (1871), 21 C. P. 254.—**CAN.**

t. *On right to redeem.*]—There is this distinction between the Nova Scotia decree & the English final order, that under the former the right of

Sect. 7.—Foreclosure or sale: Sub-sects. 3 & 4, A.]

of Lancaster, mtged. to me for £2,500 " ; & after her decease, " one third part of the sum of £2,500 principal money disposed of in mtge. of the farms aforesaid " to his daughter Harriet ; & he declared that, after his wife's decease, his daughter Elizabeth should inherit & enjoy the bequests aforesaid in the same proportion as her sister Harriet ; & that his son should in like manner inherit & enjoy one third part of the aforesaid bequests, upon the same conditions as his daughters :—*Held :* the farms passed, as real estate, to testator's wife, for life, with remainder to his son & daughters, as tenants in common in fee.—LE GROS *v.* COCKERELL (1832), 5 Sim. 384 ; 58 E. R. 380.

Annotation :—**Apld.** Heath *v.* Pugh (1881), 6 Q. B. D. 345.

2890. ——.]—A legal mtge. of freehold land in 1856 ; no possession by the mtgee. & no payment of principal or interest to him, nor any acknowledgment of his title. In 1870 a bill by the mtgee. for redemption or foreclosure ; in 1874 a decree *nisi* for redemption or foreclosure ; & in 1877 an order absolute for foreclosure. In 1878 an action by the mtgee. to recover possession of the land :—*Held :* although brought more than twenty years after the date of the mtge. deed the action was not barred by Real Property Limitation Acts, 1833 (c. 27) & 1837 (c. 28).—PUGH *v.* HEATH (1882), 7 App. Cas. 235 ; 51 L. J. Q. B. 367 ; 46 L. T. 321 ; 30 W. R. 553, H. L. ; *affg.* S. C. *sub nom.* HEATH *v.* PUGH (1881), 6 Q. B. D. 345, C. A.

Annotations :—**Apld.** Harlock *v.* Ashberry (1882), 19 Ch. D. 539. **Consd.** Thornton *v.* France, [1897] 2 Q. B. 143 ; Copestake *v.* Hoper, [1907] 1 Ch. 366. **Reid.** Wood *v.* Wheater (1882), 22 Ch. D. 281 ; Badeley *v.* Consolidated Bank (1888), 57 L. J. Ch. 468 ; *Re* Lake's Trusts (1890), 63 L. T. 416 ; *Re* Owen, [1894] 3 Ch. 220 ; Huntington *v.* I. R. Comrs., [1896] 1 Q. B. 422 ; London & Midland Bank *v.* Mitchell, [1899] 2 Ch. 161 ; Matthews *v.* Usher (1899), 68 L. J. Q. B. 988 ; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385 ; *Re* Lovell & Collard's Contract, [1907] 1 Ch. 249 ; Copestake *v.* Hoper, [1908] 2 Ch. 10 ; Turner *v.* Walsh, [1909] 2 K. B. 484 ; *Re* Witham, Chadburn *v.* Winfield, [1922] 2 Ch. 413. **Mentd.** Fowke *v.* Draycott (1885), 29 Ch. D. 996 ; United Realization Co. *v.* I. R. Comrs., [1899] 1 Q. B. 361 ; Williams *v.* Thomas (1909), 100 L. T. 630.

See, also, No. 3162, *post.*

2891. —— Mortgagor restrained from committing waste.]—After decree in a foreclosure suit, a mtgor. in possession began to commit waste ; he was restrained by injunction, though no injunction was prayed by the bill.—GOODMAN *v.* KINE (1845), 8 Beav. 379 ; 50 E. R. 149.

2892. Right to disclaim lease.]—Testator devised a leasehold house to M. R. for life, she paying the rent & performing the covenants of the lease ; he also left her the dividends of certain stocks for life. By the lease testator had covenanted to keep the house in repair. M. R. accepted the legacies & mortgaged her interests under the will to deft. society in one mtge. The society obtained an order for foreclosure but did not take possession of the house. M. R. was now a pauper lunatic. The trustees paid the fire insurance premiums on the house & the rent out of the dividends on the stock & handed over the balance to the society. The lessor claimed possession of the house on the ground of breach of covenants to repair it. The society disclaimed all interest in the house & declined to do the repairs although they claimed to be entitled to the dividends on the stocks. On a summons to determine whether they were liable to do the repairs :—*Held :* on accepting the legacies M. R. became personally liable to perform the covenants of the lease ; the society had done nothing to make themselves liable to do the repairs ; the gifts in the will were independent ; & the society were entitled to retain the dividends on the stocks without being liable under the lease.—*Re* LOOM, FULFORD *v.* REVERSIONARY INTEREST SOCIETY, LTD., [1910] 2 Ch. 230 ; 79 L. J. Ch. 704 ; 102 L. T. 907 ; 54 Sol. Jo. 583.

2893. Foreclosure by trustee-mortgagees—Mortgage under power in will.]—*Re* HORN'S ESTATE, PUBLIC TRUSTEE *v.* GARNETT, No. 1416, *ante.*

See, now, Law of Property Act, 1925 (c. 20), s. 88 (2).

SUB-SECT. 4.—PARTIES TO PROCEEDINGS.

A. In General.

See R. S. C., Ord. 16, r. 8.

2894. All persons interested in equity of redemption—Necessary parties.]—The bill alleged that pltf. A. had sold Blackacre to B., upon an agreement that B. should execute to him a mtge. both of Blackacre & Whiteacre ; that the mtge. was accordingly made, & that B. afterwards mortgaged Blackacre to C. The bill then, after alleging that B. had conveyed Whiteacre to a purchaser for valuable consideration without notice of the mtge., prayed a foreclosure of Blackacre :—*Held :* the purchaser of Whiteacre was a necessary party to the suit.

I must look at it in the same way as if a party had a mtge. upon two estates which became separated in different hands. Pltf. has filed a bill to foreclose on one estate only. It would be very hard if the purchaser of that one estate were compelled to pay the whole mtge. ; the party must

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redemption exists absolutely pending the sale & final confirmation thereof, while under the latter no such absolute right exists.—STUBBINGS *v.* UMLAH (1900), 20 C. L. T. 357.—**CAN.**

a. *Foreclosure by holder of first mortgage on land & first mortgage on chattels—Whether chattel mortgage discharged thereby.*]—WESTERN CANADA SAWMILL YARDS, LTD. *v.* MCCANN, [1921] 23 W. W. R. 170.—**CAN.**

b. *Foreclosure against owner of equity of redemption—Personal judgment against mortgagor.*]—When a mtge. is in default, & the principal is due only by virtue of an acceleration clause, & the mtgee. has sued & obtained judgment for foreclosure & possession as against the owner of the equity of redemption, & also a judgment & execution, for principal, interest & costs, against the mtgor. upon his covenant, the payment by the owner of the equity of redemption of the interest in arrear & the costs does not operate to supersede the execution of the mtgor.—CLEMMER *v.* PANTON (1922), 52 O. L. R. 211.—**CAN.**

c. *On liability for rates.*] — Although on a sale under or foreclosure of a first mtge. on land subject to Irrigation Districts Act, 1922, c. 114, the land is freed from any charge with respect to rates already imposed under said Act, yet it remains subject to liability for rates which may be imposed in the future whether with respect to " the water service charge " or " the water right payment."—SUPREME COURT OF ONTARIO (ACCOUNTANT) *v.* CONNELLY & LETHBRIDGE NORTHERN IRRIGATION DISTRICT (Alta.), [1926] 2 D. L. R. 593 ; [1926] 1 W. W. R. 625.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 4.—A.

2894 i. *All persons interested in equity of redemption — Necessary parties.*] WHAN *v.* LUCAS (1858), 1 Ch. Ch. 58.—**CAN.**

2894 ii. —— ——.]—ELLIOTT *v.* HUNTER (1862), 1 Ch. Ch. 158.—**CAN.**

2894 iii. —— ——.]—SIBLEY *v.* CHISHOLM (1875), R. E. D. 167.—**CAN.**

2894 iv. —— ——.]—A person who, after the institution of the foreclosure action, acquires an interest in or claim against the mtged. premises, may, on his application, be added as a party.—GIBSON *v.* NELSON (1901), 21 C. L. T. 555 ; 2 O. L. R. 500.—**CAN.**

2894 v. —— ——.]—MOURRAY *v.* STENTIFORD (1914), 29 W. L. R. 180 ; 6 W. W. R. 1407.—**CAN.**

2894 vi. —— ——.]—CANADA LAND & RANCH CO., LTD. *v.* REDCLIFFE REALTY CO., LTD. (Alta.) (1922), 67 D. L. R. 401 ; [1922] 2 W. W. R. 1320.—**CAN.**

2894 vii. —— ——.]—An order for foreclosure cannot be made unless the parties entitled to redeem are made

go to the purchaser of the other estate & make him pay a portion (*per* CUR.).—PAYNE *v.* COMPTON, COMPTON *v.* PAYNE (1837), 2 Y. & C. Ex. 457; 160 E. R. 476.

2895. ——— ———.]—A decretal order in a foreclosure suit under 7 Geo. 2, c. 20, s. 2, cannot be made unless all defts. who are interested in the equity of redemption join in the application & admit pltf.'s title; &, consequently, the order cannot be made where one of those defts. is an infant.—LUSHINGTON *v.* PRICE (1839), 9 Sim. 651; 8 L. J. Ch. 254; 59 E. R. 510.

2896. ——— ———.]—In 1829 A. was admitted to a copyhold, & in 1832 he deposited the copy of his admission with B. as a security. In 1837 A.'s heir, after admission, attempted to sell the property without effect. C. acted therein as his attorney, & D. as the clerk of C. On July 20, 1837, A.'s heir mortgaged the property to C., by deposit of his own admission. In this transaction D. acted as the agent & clerk of C., & as the agent of the heir. It appeared that in Nov. 1835, D. had notice of B.'s incumbrance, & that on July 19, 1837, D. knew that the produce of the sale was to be applied in discharge of B.'s demand:—*Held:* (1) the knowledge which D. possessed in Nov. 1835, could not be imputed to C. in 1837. (2) D.'s knowledge in July, 1837, that the proceeds of the sale were to be applied in discharge of B.'s demand, did not clearly show, that even he, at that time, recollected or knew that which he had known in Nov. 1835; (3) *semble:* C., who knew that the party from whom he took it had been admitted only as heir & that the ancestor had been admitted under copy of ct. roll, dated in 1829, must be deemed that the ancestor, having the copy of ct. roll, might have created an equitable mtge. by deposit, & consequently C. ought to have required its production before he advanced his money.

It has been objected that pltfs. have unnecessarily made some of defts. parties to the cause; but considering this as a bill of foreclosure, I think that every one of defts. was a necessary party, because each of them had a right to redeem (LANGDALE, M.R.).—TYLEE *v.* WEBB (1843), as reported in 6 Beav. 552; 49 E. R. 939.

Annotation:—**Mentd.** Hewitt *v.* Loosemore (1851), 9 Hare, 449.

2897. ——— ———.]—A husband & wife assigned leasehold premises, of which the husband was possessed in her right, to a mtgee. for securing money then lent & interest, by a deed containing a proviso for redemption by the husband & wife, or either of them, or the representatives of either. The husband subsequently became insolvent, & the mtgee. filed a claim seeking a foreclosure against the assignee in insolvency, & the insolvent & his wife. The married woman proved that her husband had been without employment, & that she & her child were destitute, & claimed an equity to a settlement out of the mtged. property:—*Held:* the married woman had no equity to a settlement; but the proviso for redemption being on repayment of the sum advanced by the insolvent & his wife, the power to redeem must be given to the married woman as well as to the insolvent's assignee.

If it had not been for the leaseholds, Mrs. B. [the wife] ought not to have been made a party to the claim; but she, having a right to redeem the leaseholds, is necessarily brought before the ct. on a claim to foreclose (PARKER, V.-C.).—HILL *v.* EDMONDS (1852), 5 De G. & Sm. 603; 16 Jur. 1133; 64 E. R. 1262.

2898. ——— ———.]—In a foreclosure suit, the parties to the mtge. deed & those claiming under them ought alone to be made parties.—AUDSLEY *v.* HORN (1858), 26 Beav. 195; 1 F. & F. 135; 28 L. J. Ch. 293; 32 L. T. O. S. 203; 4 Jur. N. S. 1267; 7 W. R. 125; 53 E. R. 872; *affd.* on other grounds (1859), 1 De G. F. & J. 226, L. C.

Annotations:—**Mentd.** Newill *v.* Newill (1871), L. R. 12 Eq. 432; *Re* Adam's Policy Trusts (1883), 23 Ch. D. 525; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415.

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parties.—ALLISON *v.* RENT, [1926] 1 D. L. R. 885; 58 N. S. R. 404.—**CAN.**

d. ——— ——— *Wife in respect of dower.*]—SAUNDERSON *v.* CASTON (1850), 1 Gr. 349.—**CAN.**

e. ——— ——— ———.]—MOFFATT *v.* THOMPSON (1851), 3 Gr. 111.—**CAN.**

f. ——— ——— ———.]—DAVIDSON *v.* BOYES (1873), 5 P. R. 27.—**CAN.**

g. ——— ——— ———.]—BUILDING & LOAN ASSOCN. *v.* CARSWELL (1879), 8 P. R. 73.—**CAN.**

h. ——— ——— ———.]—The wife of a mtgor. who has joined in the mtge. only for the purpose of barring her dower, is properly made a deft. to an action of foreclosure, in order that she may either redeem or protect her interest by asking for a sale.—AYERST *v.* MCCLEAN (1890), 14 P. R. 15.—**CAN.**

k. ——— ——— ———.]—NORTHERN TRUSTS CO. *v.* NAISMITH (Alta.), [1926] 3 D. L. R. 37; [1926] 2 W. W. R. 127.—**CAN.**

l. ——— ——— *Assignee of mortgagee.*]—VANKLEEK *v.* TYRRELL (1860), 8 Gr. 321.—**CAN.**

m. ——— ——— ———.]—On a bill filed by the exors. of the mtgee., to foreclose:—*Held:* the heirs of the deceased mtgee., or the persons beneficially interested under his will, were not necessary parties.—LAWRENCE *v.* HUMPHRIES (1865), 11 Gr. 209.—**CAN.**

n. ——— ——— ———.]—STREET *v.* DOLAN (1871), 3 Ch. Ch. 227.—**CAN.**

o. ——— ——— ———.]—KENNEDY *v.* FOXWELL (1906), 11 O. L. R. 389; 7 O. W. R. 26.—**CAN.**

p. ——— ——— ———.]—HOLLOWAY *v.* MINER (1916), 34 W. L. R. 837.—**CAN.**

q. ——— ——— *Assignee of mortgagor.*]—PORTMAN *v.* PAUL (1864), 10 Gr. 458.—**CAN.**

r. ——— ——— ———.]—To a bill upon a mtge. for relief by sale or foreclosure a tenant of the mtgor. is a proper party, in order that he may redeem if he desires to do so, or in case of default of payment be ordered to deliver up possession.—CANADA PERMANENT LOAN & SAVINGS SOCIETY *v.* MACDONNELL (1875), 22 Gr. 461.—**CAN.**

t. ——— ——— ———.]—COLLINS *v.* CUNNINGHAM (1891), 23 N. S. R. 350; 21 S. C. R. 139.—**CAN.**

a. ——— ——— ———.]—MCLAUGHLIN *v.* STEWART (1901), 21 C. L. T. 185; 1 O. L. R. 295.—**CAN.**

b. ——— ——— ———.]—MUNICIPALITY OF ORFORD *v.* BAYLEY, 1 Ch. Ch. 272.—**CAN.**

c. ——— ——— *Principal & surety.*]—Where there is only one principal & one surety, both must be made parties to a bill for foreclosure or sale.—SEIDLER *v.* SHEPPARD (1866), 12 Gr. 456.—**CAN.**

aa. ——— ——— ———.]—REAL ESTATE LOAN CO. *v.* MOLESWORTH (1886), 3 Man. L. R. 116.—**CAN.**

bb. ——— ——— *Judgment creditors of mortgagor.*]—In suits to foreclose the equity of redemption in mtge. property, the judgment creditors of the mtgee. are necessary parties.—SANDERSON *v.* INCE (1859), 7 Gr. 383.—**CAN.**

cc. ——— ——— ———.]—CROSBIE *v.* FENN (1879), 26 Gr. 283.—**CAN.**

dd. ——— ——— *Wife of purchaser of equity of redemption.*]—The wife of the purchaser of an equity of redemption is not a proper party to be joined in a suit to foreclose the mtge.—PARKER *v.* WILLETT (1889), 22 N. S. R. 83.—**CAN.**

ee. ——— ——— ———.]—MONK *v.* BENJAMIN (1890), 13 P. R. 356.—**CAN.**

ff. ——— ——— *Infant children of deceased owner of equity of redemption.*]—In a mtge. action for foreclosure the infant children of the deceased owner of the equity of redemption are proper parties.—KEEN *v.* CODD (1891), 14 P. R. 182.—**CAN.**

gg. ——— ——— *Creditors on the equity of redemption.*]—LELAND *v.* HUNT (1826), 1 Hog. 364.—**IR.**

hh. *Mortgagees trustees for mortgagor's creditors — Whether creditors necessary parties.*]—To a bill of foreclosure brought by mtgees., being trustees for the benefit of certain creditors of the mtgor., such creditors are not necessary parties.—FRASER *v.* SUTHERLAND (1851), 2 Gr. 442.—**CAN.**

kk. *Lease executed by mortgagor — Mortgage executed by lessee—Foreclosure by original mortgagee—Whether lessee's mortgagee necessary party.*]—MCMASTER *v.* DEMMERY (1866), 12 Gr. 193.—**CAN.**

ll. *Mortgage by devisee of land subject to charge—Realisation of charge—Whether mortgagees necessary parties.*]—Where a devisee of land subject to a charge mortgaged the devised property,

Sect. 7.—Foreclosure or sale: Sub-sect. 4, A., B., C., D. (a) i. & ii., (b), & E.]

2899. ——— ———.]—A decree for foreclosure or for sale cannot be made in the absence abroad of a party entitled to one-third of the equity of redemption. The objection is not removed by 15 & 16 Vict. c. 86.—CADDICK *v.* COOK (1863), 32 Beav. 70; 1 New Rep. 463; 32 L. J. Ch. 769; 7 L. T. 844; 9 Jur. N. S. 454; 11 W. R. 395; 55 E. R. 27.

2900. ——— ———.]—GRIFFITH *v.* POUND, No. 1629, *ante*.

2901. ——— ———.]—CUMBERLAND UNION BANKING CO. *v.* MARYPORT HEMATITE IRON & STEEL CO., No. 2737, *ante*.

B. Mortgagor.

2902. Mortgagor necessary party—Bill by second mortgagee.]—THOMSON *v.* BASKERVILL (1688), 3 Rep. Ch. 215; 21 E. R. 770.

2903. ——— Agreement entered into by wife when femme sole—Executed by husband & wife.]—An indenture of mtge. of the wife's reversionary property in ct. was executed by A. & B. after their marriage, & after the mtgee. had knowledge of the marriage, the agreement having been entered into, & a small part of the mtge. money paid to B., before her marriage. The ct. made the common decree of foreclosure against the husband & wife. —LEWIS *v.* POOLE (1862), 3 Giff. 636; 6 L. T. 709; 8 Jur. N. S. 536; 66 E. R. 562.

2904. ——— Action against subsequent incumbrancers.]—SWEET *v.* COMBLEY (1882), 25 Ch. D. 463, n.

Annotation :—**Mentd.** Platt *v.* Mendel (1884), 51 L. T. 424.

2905. ——— ———.]—MOORE *v.* MORTON, [1886] W. N. 196.

Bankruptcy of mortgagor.]—*See* Sub-sect. 4, C., *post*.

2906. Action by sub-mortgagee—Original mortgagee necessary party.]—An old mtge. is made to B. for £350, who in 1705, makes an under mtge. to C. for £300. C. brings a bill to foreclose; B. the original mtgee., or in case of his death his representative, ought to be made a party.—HOBART *v.* ABBOT (1731), 2 P. Wms. 643; 2 Eq. Cas. Abr. 109, pl. 24; 24 E. R. 897, L. C.

C. Trustee in Bankruptcy.

See Bankruptcy Act, 1914 (c. 54), ss. 53, 56, 76.

2907. Liability to be sued instead of mortgagor.]—In a foreclosure suit, where the mtgor. is bkpt., he need not be made a party.—KERRICK *v.* SAFFERY (1835), 7 Sim. 317; 4 L. J. Ch. 162; 58 E. R. 859.

2908. ———]—A bill of foreclosure against the assignees of a bkpt. mtgor. before the execution of the bargain & sale by the comrs. will not be dismissed on the ground that the assignees have not any interest that can be the subject of a foreclosure.—BAINBRIDGE *v.* PINHORN (1817), Buck, 135.

2909. ———]—Mtge. of a copyhold. Mtgor. became a bkpt., but no bargain & sale was made to his assignee. Mtgee. files a bill against the bkpt. & his assignee to redeem. Bkpt. demurs, & demurrer allowed, he not being a necessary party to the bill.—LLOYD *v.* LANDER (1821), 5 Madd. 282; 56 E. R. 903.

Annotations :—**Refd.** Gilbert *v.* Lewis (1862), 2 John. & H. 452; Weise *v.* Wardle (1874), L. R. 19 Eq. 171.

2910. ——— Effect of disclaimer by trustee.]—An insolvent mtgor., even where his assignees disclaim all interest in the equity of redemption, ought not to be made a party to a suit for foreclosing the mtge.—COLLINS *v.* SHIRLEY (1830), 1 Russ. & M. 638; 39 E. R. 245.

Annotations :—**Consd.** Rochfort *v.* Battersby (1849), 2 H. L. Cas. 388; Melbourne Banking Corpn. *v.* Brougham (1879), 4 App. Cas. 156. **Refd.** Thompson *v.* Kendall (1840), 9 Sim. 397; Appleby *v.* Duke (1842), 11 L. J. Ch. 194.

2911. ——— ———.]—*Semble :* the disclaimer by the assignees of a bkpt. of the equity of redemption of a term of years, vested in the bkpt. by the devise to him of the fee simple of the same estate, renders the bkpt. a necessary party to a bill of foreclosure. —SINGLETON *v.* COX (1845), 4 Hare, 326; 67 E. R. 673.

2912. ——— Bankruptcy previous to mortgage—Discovery of bankruptcy after issue joined.]—After issue joined in a foreclosure suit, pltf. discovered that, prior to the creation of his mtge. security, deft., the mtgor., had become bkpt.; whereupon the ct. gave pltf. leave to amend his bill by making the assignees defts., bkpt. still being retained as a deft. on the record.—HANSON *v.* PRESTON (1838), 3 Y. & C. Ex. 229; 160 E. R. 686.

2913. ——— Bankruptcy after settling property on marriage.]—Mtgor. upon his marriage settled the mtged. estate upon his intended wife & the issue of the marriage, & afterwards became insolvent :—*Held :* his assignee was not a necessary party to a bill to foreclose the estate.—STEELE *v.* MAUNDER (1844), 1 Coll. 535; 4 L. T. O. S. 212; 8 Jur. 1134; 63 E. R. 532.

D. Persons Interested on Mortgagor's Death.

(a) Death before 1st January, 1898.

i. Mortgage of Real Estate.

2914. Heir or devisee party.]—ADAMS *v.* GOULD (1771), 2 Dick. 443; 21 E. R. 342, L. C.

2915. ———.]—The heir of the mtgee., to whom the legal estate in the mtged. premises has descended, is a necessary party to a bill of foreclosure filed by the exor. of mtgee.—SCOTT *v.* NICOLL, HAMPSON *v.* NICOLL (1827), 3 Russ. 476; 38 E. R. 654; *sub nom.* HAMPSON *v.* NICOLL, NICOLL *v.* HAMPSON, 6 L. J. O. S. Ch. 22.

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the mtgees. were held to be proper parties to a suit for the realisation of the charge.—GOLDSMITH *v.* GOLDSMITH (1870), 17 Gr. 213.—**CAN.**

p. *Debt secured belonging to one party—Legal estate vested in another—Whether both parties necessary.*]—Where a debt secured by mtge. on land belongs to one person, & the legal estate in the land is vested in another, both must be joined in suit for foreclosure.—COTTON *v.* STACK (1876), 3 Pug. 424.—**CAN.**

q. *Intermediate purchasers of equity of redemption—Joinder as original defendants.*]—It is not proper in an action for foreclosure to join as original defts. the intermediate purchasers of the equity of redemption.—WALKER *v.* DICKSON (1892), 20 A. R. 96.—**CAN.**

r. *Mortgagee desiring to impeach lease—Whether tenant necessary party.*] —If the mtgee. desire to impeach the lease, he must make the tenant a party to the foreclosure suit.—MURTIN *v.* WALKER (1837), Sau. & Sc. 139.—**IR.**

t. *Suit by prior mortgagee—Whether heir of mortgagee of equity of redemption necessary party.*]—In a suit by a prior mtgee. for a foreclosure & sale, the heir of the mtgee. of the equity of redemption is not a necessary party.—WHITLA *v.* HALLIDAY (1843), 4 Dr. & War. 267.—**IR.**

PART XIII. SECT. 7, SUB-SECT. 4.—B.

a. *Action by sub-mortgagee—Whether sub-mortgagor necessary party.*]—JONES *v.* BANK OF UPPER CANADA (1866), 12 Gr. 429.—**CAN.**

b. *Whether mortgagor necessary party —After assignment of equity of redemption.*]—An assignment by the mtgor. of his equity of redemption under Insolvent Debtor's Act, makes his assignee a trustee for him, & leaves in him a remaining interest in the nature of an equity of redemption sufficient to entitle him to be made a party to a foreclosure of the mtged. premises.—MAYHEW *v.* FEN (1853), 2 N. S. R. (James) 108.—**CAN.**

c. ——— ———.]—SILVERTHORN *v.* GLAZEBROOK (1899), 30 O. R. 408.—**CAN.**

d. ———.]—SPURR *v.* ELDERKIN (1859), Coch. 47.—**CAN.**

2916. Parties beneficially interested.]—Equitable mtgee. having taken from the administratrix of the mtgor. a legal mtge. containing a power of sale, & having filed his bill to enforce specific performance of a contract for sale under the power, the ct. declined to entertain the suit in the absence of the administratrix & the parties beneficially interested under the mtgor.—SANDERS *v.* RICHARDS (1846), 2 Coll. 568 ; 63 E. R. 864.

Annotation :—**Mentd.** Cruikshank *v.* Duffin (1872), L. R. 13 Eq. 555.

2917. ——.]—In a suit for foreclosure against the infant heir-at-law of the mtgor. the ct. refused to act on 15 & 16 Vict. c. 86, s. 42, r. 9, dispensing with the parties beneficially interested in the equity of redemption of the mtged. premises, where the devisees in trust under the will of the mtgor. had disclaimed, & there were not before the ct. any adult parties who could be in possession of funds to redeem the estate.—YOUNG *v.* WARD (1853), 10 Hare, App. II, lviii ; 68 E. R. 1149.

2918. —— **Cestuis qui trust—Not sufficiently represented by trustee.**]—In a foreclosure action by a first mtgee. against the second, third, & fourth mtgees., & the exors. & trustees of the will of the mtgor., pltf. was also joined as a deft., one of the second mtgees. The persons interested under the will of the mtgor. were not made parties to the action :—*Held :* (1) the *cestuis que trust* under the will were not sufficiently represented by the trustees, & judgment for foreclosure could not be given in their absence ; (2) the *cestuis que trust* were sufficiently represented by the trustees for the purpose of taking the accounts as against the mtgees.—WAVELL *v.* MITCHELL (1891), 64 L. T. 560 ; *subsequent proceedings, sub nom. Re* MITCHELL, WAVELL *v.* MITCHELL (1892), 65 L. T. 851.

ii. *Mortgage of Personal Estate.*

2919. Personal representative party.]—WILTON *v.* JONES (1843), 2 Y. & C. Ch. Cas. 244 ; BRUITON *v.* BIRCH (1853), 1 Eq. Rep. 136 ; *In the Goods of* BRADSHAW (1887), 13 P. D. 18 ; AYLWARD *v.* LEWIS, [1891] 2 Ch. 81 ; SCOTT *v.* STREATHAM & GENERAL ESTATES CO., LTD., [1891] W. N. 153.

(*b*) *Death on or after 1st January*, 1898.

See Land Transfer Act, 1897 (c. 65), ss. 1, 2, 24 ; Law of Property Act, 1922 (c. 16), s. 156 (11) ; Land Registration Act, 1925 (c. 21), s. 147 ; Administration of Estates Act, 1925 (c. 23), ss. 1-3, 33, 39.

2920. Personal representative party—When beneficiaries must be joined.]—Testator, after making certain bequests, gave to his wife an estate for life determinable on certain events in the residue of his estate, with remainder over to the rector & churchwardens of W. C. church. The estate of testator was however mortgaged to the extent of £30,000. In a foreclosure action by the mtgee. against the wife the sole legal representative of testator, the wife entered an appearance but delivered no defence. On a motion for judgment it was ordered that the rector & churchwardens of W. C. church be made parties to the action.—WATTS *v.* LANE (1901), 84 L. T. 144.

2921. —— ——.]—*Re* DE LEEUW, JAKENS *v.* CENTRAL ADVANCE & DISCOUNT CORPN., No. 2009, *ante*.

——.]—*See, also*, Sub-sect. 4, E., *post*.

E. Trustees, Executors and Administrators.

See R. S. C., Ord. 7, r. 8.

2922. Power of court to add parties.]—*Re* HARROWBY & PAINE'S CONTRACT, [1902] W. N. 137.

2923. Personal representative.]—MEEKER *v.* TANTON (1680), 2 Cas. in Ch. 29 ; 22 E. R. 831.

2924. ——.]—Mtge. by tenant in fee by creating a term. The personal representative ought not to be a party to a bill of foreclosure.—BRADSHAW *v.* OUTRAM (1806), 13 Ves. 234 ; 33 E. R. 282.

2925. ——.]—A. & B. borrowed money from a banking house, in which A. was a partner, & deposited with the house, as a security, the title deeds of some property bought by A. & B. jointly on a building speculation. A. died, leaving an infant heir-at-law :—*Held :* to a suit by the surviving partners of A. in the banking house against B. & the heir-at-law of A., to have the mtged. property sold, & their debt paid out of the proceeds, the personal representative of A. was a necessary party.—SCHOLEFIELD *v.* HEAFIELD (1837), 7 Sim. 667 ; 5 L. J. Ch. 218 ; 58 E. R. 993.

2926. ——.]—Although exors. would be sufficient parties to a suit for forclosing chattel leaseholds, yet to a bill for forclosing freeholds held in trust, the *cestuis que trust* as well as the trustees had hitherto been considered necessary parties (KNIGHT BRUCE, V.-C.).—WILTON *v.* JONES (1843), 2 Y. & C. Ch. Cas. 244 ; 63 E. R. 107.

2927. ——.]—SANDERS *v.* RICHARDS, No. 2916, *ante*.

2928. —— **Executrix also tenant for life—Remaindermen added as parties.**]—WATTS *v.* LANE, No. 2920, *ante*.

2929. —— **Representing third parties.**]—BOLTON *v.* STANNARD, No. 2803, *ante*.

2930. Trustee.]—WILTON *v.* JONES, No. 2926, *ante*.

2931. —— ——.]—In a foreclosure suit, a trustee, in whom was vested the legal estate in the mtged. property, & who had agreed to convey it to pltf., when required, is a necessary party.—HICHENS *v*

PART XIII. SECT. 7, SUB-SECT. 4.—E.

e. Devise to trustees till cestuis que trust attain majority—Foreclosure against cestuis que trust after majority—Whether trustees necessary parties.]—A mtgor. having devised his equity of redemption to trustees for his children in fee on their attaining twenty-one :—*Held :* to a bill to foreclose against the *cestui que trust* after they attain twenty-one, the trustees were not necessary parties.—FORSYTH *v.* DRAKE (1850), 1 Gr. 223.—**CAN.**

f. Personal representatives of deceased partner.]—BAXTER *v.* TURNBULL (1851), 2 Gr. 521.—**CAN.**

g ——.]—Where the mtge. debt is taken in the name of one partner to secure a partnership debt, & a bill is filed to enforce the security, the representatives real or personal of a deceased partner are not necessary parties.—STEPHENS *v.* SIMPSON (1866), 12 Gr. 493.—**CAN.**

h. Real representatives of deceased mesne incumbrancer.]—Where a mtgee. proceeds to foreclose against the mtgor., & the estate of a deceased mesne incumbrancer, the real representatives of such incumbrancer are not necessary parties.—TAYLOR *v.* STEAD (1859), 1 Ch. Ch. 74.—**CAN.**

k. Personal representatives of deceased mortgagor.]—To a bill by a mtgee. for a sale after the mtgor.'s death, the personal representative of the mtgor. is a necessary party ; but not to a bill for foreclosure.—WHITE *v.* HAIGHT (1865), 11 Gr. 420.—**CAN.**

l. ——.]—RAMUS *v.* DOW (1893), 15 P. R. 219.—**CAN.**

m. ——.]—BARNABY *v.* MUNROE (1895), 1 N. B. Eq. Rep. 94.—**CAN.**

n. Personal representatives of deceased mortgagee.]—On a bill for foreclosure filed by the survivor of three trustees, who were mtgees., but had no beneficial interest in the mtge. moneys :—*Held :* the representatives of the deceased joint mtgees. were not necessary parties to the suit.—LANDALE *v.* MCLAREN (1892), 8 Man. L. R.

o. Personal representatives of assignees of mortgagee.]—PLENDERLEITH *v.* SMITH (1905), 5 O. W. R. 753 ; 6 O. W. R. 389 ; 10 O. L. R. 188.—**CAN.**

p. Administrator of deceased assignee of equity of redemption.]—Subsequently to the making of a mtge. the original mtgor. had assigned the equity of redemption in the mtged. premises to F. in trust to pay the creditors of the mtgor., who had become insolvent. In an action by the

Sect. 7.—Foreclosure or sale: Sub-sect. 4, I. & J. (a) & (b).]

2961. —— Trustees of creditor's deed.]—Mtgor. had executed a creditors' deed, but the judgment creditors had not acceded to it:—*Held:* the trustees of the deed did not represent them under 15 & 16 Vict. c. 86, s. 42, r. 9.—KNIGHT *v.* POCOCK (1857), 24 Beav. 436; 27 L. J. Ch. 297; 30 L. T. O. S. 126; 4 Jur. N. S. 197; 53 E. R. 426.

2962. —— Necessity for registration.]—Where a party enters into a covenant to pay a sum of money, & agrees in writing that it shall be a charge upon his real estate, the covenantee has an estate or interest in the real estate of the covenantor; & therefore, if the covenantee mtges. the agreement, & then has a judgment entered up against him, the judgment creditor is a necessary party to a suit for foreclosure.—RUSSELL *v.* M'CULLOCH (1855), 1 K. & J. 313; 24 L. T. O. S. 308; 1 Jur. N. S. 157; 3 W. R. 280; 69 E. R. 477.

2963. —— ——.]—Pltf. was the mtgee. of premises, the equity of redemption in which belonged to G., against whom in May, 1857, an adjudication in bkpcy. was made, & assignees of the estate & effects duly appointed. B. in Dec. 1856, & L. in Feb. 1857, entered up judgments duly recovered against G. On a bill filed by pltf. for foreclosure, B., by answer, disclaimed all right & interest in the mtged. premises. L., by answer, after stating that his judgment remained unsatisfied, stated that he did not claim to be entitled to any charge on the mtged. premises, being advised that under Judgments Act, 1837 (c. 110), such judgment was unavailable by reason of the bkpcy. of G., & that he was an unnecessary party to the suit. He did not, however, disclaim all right & interest in the premises:—*Held:* though by Judgments Act, 1837 (c. 110), judgment creditor is not entitled to proceed in equity to obtain the benefit of his charge until after the expiration of one year from the time of entering up his judgment, yet it seems that there is nothing to prevent him from taking proceedings to make his charge available at the end of one year.

Where a judgment is not entered up one year before the bkpcy. of the person against whom judgment is entered up, it will not operate to give the judgment creditor any preference; & therefore, although L. was deprived of his right to a preference, he was not deprived of his right to a charge, of which he would at the end of one year be entitled to claim the benefit, & consequently he was properly made a party to the suit; but as he had not sufficiently disclaimed by his answer, he was entitled to his costs.—HARRISON *v.* PENNELL (1858), 32 L. T. O. S. 15; 4 Jur. N. S. 682; 6 W. R. 712.

2964. —— —— In register county.]—Subsequent judgment creditors, whose judgments are registered under Judgments Act, 1839 (c. 11), but not in the county register, are not necessary parties to a suit for the foreclosure of lands in a register county.—JOHNSON *v.* HOLDSWORTH (1850), 1 Sim. N. S. 106; 20 L. J. Ch. 63; 15 Jur. 31; 61 E. R. 41.

Annotations:—**Reld.** Watts *v.* Porter (1854), 3 E. & B. 743; Boughton *v.* Jervis (1861), 4 L. T. 486. **Mentd.** Benham *v.* Keane (1861), 3 De G. F. & J. 318.

2965. —— Actual execution not necessary.]—S., a registered judgment creditor, who had issued execution & registered, but never executed the same, was held to be a proper party to a foreclosure suit instituted more than three months after registration of execution, & having appeared after having disclaimed, & received notice not to appear, was disallowed his costs of appearance.

The Act [Law of Property Amendment Act, 1860 (c. 38)] is for the benefit of *bonâ fide* purchasers & mtgees. & although a judgment cannot affect any land as to them unless execution shall have been put in force within three calendar months from the time when it was registered yet, the judgment creditor is not deprived of all interest in the land. Deft. is therefore a proper party in the first instance. He has received notice not to appear. He therefore cannot have his costs (STUART, V.-C.).—APPLETON *v.* STURGIS (1862), 10 W. R. 312.

2966. —— Whether issue of execution necessary.]—Certain judgment creditors of a mtgor., who had not issued execution, were made defts. to a suit for foreclosure:—*Held:* if the judgment creditors should issue execution, & the returns to the writs should be made before the expiration of the six months allowed for redemption, they would be entitled to redeem, but not otherwise.—MILDRED *v.* AUSTIN (1869), L. R. 8 Eq. 220; 20 L. T. 939; 17 W. R. 638.

Annotation:—**N.F.** Cork *v.* Russell (1871), L. R. 13 Eq. 210.

2967. —— ——.]—In a foreclosure suit by mtgees., judgment creditors, who had not issued execution, were made defts.:—*Held:* they were unnecessary parties, & having disclaimed all interest upon being served with copy of the bill, they were dismissed with costs.

My opinion is that a judgment creditor who has not issued execution has no interest in land; & the object in a foreclosure suit being to bring before the ct. those only who have an interest, it is evidently improper to make these judgment creditors parties (MALINS, V.-C.).—CORK (EARL) *v.* RUSSELL (1871), L. R. 13 Eq. 210; 41 L. J. Ch. 226; 26 L. T. 230; 20 W. R. 164.

Annotation:—**Reld.** Hatton *v.* Haywood (1874), 43 L. J. Ch. 372.

2968. —— Appointment of receiver after order nisi—Judgment creditor must be added as defendant.]—*Re* PARBOLA, LTD., BLACKBURN *v.* PARBOLA, LTD., No. 2973, *post.*

See, now, Law of Property Act, 1925 (c. 20), s. 195 (2).

2969. Partners—Right of pre-emption over each other's shares.]—REDMAYNE *v.* FORSTER, No. 2884, *ante.*

Debenture-holders.]—*See* COMPANIES, Vol. X., pp. 806, 807, Nos. 5114–5128.

Sureties.]—*See* GUARANTEE, Vol. XXVI., p. 119, Nos. 842–845.

J. Alienation or Charge pendente lite.

(a) Involuntary Alienation.

2970. Assignee—Of bankrupt equitable mortgagee.]—(1) Entries in the books of the deceased attorney of deft. admitted as evidence for pltf. in a bill of foreclosure, to prove that the whole mtge. money had been paid to deft., & that there was no usury; such entries, though not against the interest of the attorney, being found in an account in which there were entries against his interest.

(2) Bkpt. mtgor. is a competent witness for a party claiming an incumbrance prior to the mtge., to show that the mtgee. had notice of such incumbrance, but he is not a competent witness to show that the mtge. was usurious; as the effect

of his evidence in the latter case would be to discharge his estate from a possible liability to the costs of the suit.—CLARK *v.* WILMOT (1841), 1 Y. & C. Ch. Cas. 53; 62 E. R. 787; *on appeal* (1843), 1 Ph. 276.

Annotations:—Generally, **Mentd.** Gabriel *v.* Sturgis (1846), 15 L. J. Ch. 201; Staffurth *v.* Pott (1848), 2 De G. & Sm. 571.

2971. —— Of bankrupt mortgagor.]—One of several *cestui que trusts* having taken the benefit of the insolvent Act, joins as a co-pltf. with two others of the *cestui que trusts* in a bill to carry the trust deed into execution; the assignee of the insolvent being a deft., & the bill alleging that there is a surplus coming to the insolvent after payment of all his debts. This is not a misjoinder of which advantage can be taken at the hearing; &, *semble*, it is no ground of demurrer.—EADES *v.* HARRIS (1842), 1 Y. & C. Ch. Cas. 230; 62 E. R. 867.

*Annotation:—***Distd.** Solomon *v.* Solomon (1843), 13 Sim. 516.

2972. —— ——.]—Pltf. in redemption suit became insolvent after decree, but before default in payment. The bill was dismissed after default, without bringing the assignee before the ct.:—*Held:* the foreclosure was good against a purchaser under a second mtge. made before the insolvency, but pending the suit, of which the purchaser & his vendor had notice, though they were not parties thereto.—WOOD *v.* SURR (1854), 19 Beav. 551; 2 W. R. 683; 52 E. R. 465.

2973. Receiver by way of equitable execution—Judgment creditor to be joined.]—Where in a foreclosure action a mtgee. had obtained a foreclosure order *nisi*, & subsequently a judgment creditor in another action, who had obtained the appointment of a receiver by way of equitable execution of the property of the mtgor., applied to be added as deft. to the foreclosure action, & that the period for redemption might be extended, the ct. made an order adding appct. as deft., but refused to extend the period for redemption.—*Re* PARBOLA, LTD., BLACKBURN *v.* PARBOLA, LTD., [1909] 2 Ch. 437; 78 L. J. Ch. 782; 101 L. T. 382; 53 Sol. Jo. 697.

(b) Voluntary Alienation.

2974. Whether assignee must be joined—Assignment by mortgagor.]—CRISP *v.* HEATH (1714), 2 Eq. Cas. Abr. 597; 22 E. R. 502, L. C.

2975. —— ——.]—If, during a suit to redeem, the mtgor. assigns the equity of redemption, & there is a decree against him, the assignee is bound by it.—GARTH *v.* WARD (1741), 2 Atk. 174; 26 E. R. 509; *sub nom.* GARTH *v.* CRAWFORD, Barn. Ch. 450, L. C.

*Annotations:—***Apld.** Winchester (Bp.) *v.* Paine (1805), 11 Ves. 194. **Reld.** Metcalfe *v.* Pulvertoft (1813), 2 Ves. & B. 200; Bellamy *v.* Sabine (1857), 1 De G. & J. 566.

2976. —— ——.]—Effect of *lis pendens:* subsequent mtgees., of an equity of redemption bound by a decree of foreclosure; though not made parties. An exception by a purchaser on that ground was disallowed; & a specific performance decreed with costs.

The objection is that two mtgees. of the equity of redemption are not brought before the ct. & therefore are not bound by the decree of foreclosure. The answer is that they became mtgees. after the bill of foreclosure filed, & one even after the decree *nisi*. . . . Ordinarily, it is true, the decree of the ct. binds only the parties to the suit. But he who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title (GRANT, M.R.).—WINCHESTER (BP.) *v.* PAINE (1805), 11 Ves. 194; 32 E. R. 1062.

*Annotations:—***Expld.** Anundoo Moyee Dossee *v.* Dhonendro Chunder Mookerjee (1871), 14 Moo. Ind. App. 101. **Reld.** Metcalfe *v.* Pulvertoft (1813), 2 Ves. & B. 200; Landon *v.* Morris (1832), 5 Sim. 247. **Mentd.** A.-G. *v.* Foster (1842), 2 Hare, 81; Irby *v.* Irby (No. 3) (1858), 25 Beav. 632; Wigram *v.* Buckley, [1894] 3 Ch. 483.

2977. —— —— Costs of application.]—The assignee of the mtgor.'s interest, *pendente lite*, may be allowed to attend the master under a reference in a foreclosure suit, upon payment of the costs of the application, & of all costs occasioned by such attendance.—WHITEHURST *v.* BONEST (1840), 9 L. J. Ex. Eq. 43.

2978. —— —— Assignee not bound to inform court of assignment.]—To set aside on the ground of fraud a decree signed & enrolled, actual positive fraud ought to be shown. Mere constructive fraud is not sufficient, at all events after long delay.

W., as solr. of V., a second mtgee., received the rents of the mtged. property. The first mtgees. obtained a decree for foreclosure, & a first report was made finding what was due to them. W. paid them off with his own money, in V.'s name, & also paid off V. The proceedings went on without W.'s interest being disclosed, & shortly afterwards a second report was made finding what was due to V. in respect of his own security, & of what he had paid to the first mtgees., after allowing for the rents received by him. P., the mtgor., not paying this, an order absolute for foreclosure was made, V. making the usual affidavit that he had received nothing towards payment of the sum found due. Between the second report & the making this affidavit W. had gone on receiving rents. He was entitled to an undisputed third mtge., given him by P., on the same property. P., twelve years afterwards, filed a bill to impeach the order for foreclosure absolute as having been obtained by fraud:—*Held:* (1) it was not the duty of W., when he became owner of the mtges., to disclose his interest, & make himself a party to the proceedings, & although the affidavit made by V. was in the circumstances irregular, the irregularity did not prove any fraudulent design on the part of W., as it was a doubtful question whether he was not entitled to retain the rents towards satisfaction of this third mtge., which he claimed to do; & if he was so entitled V.'s affidavit was substantially correct; therefore the decree for foreclosure absolute could not be set aside.

There is no rule of the ct., that I am aware of, which requires a person acquiring an interest in that way to state to the ct. that such change of interest has taken place; though of course he frequently, perhaps generally, does so, because the transferee in most cases is anxious to become a party to the litigation in order to maintain his own rights (CAIRNS, L.J.).

(2) Slight circumstances will induce the ct. to enlarge the time before the day arrives, but after the order for foreclosure has been made absolute, it must be shown that the person who seeks to set it aside or to have it disregarded fully intended & was prepared to pay the money on the day, but was estopped by some accident from complying with the exigencies of the order (ROLT, L.J.).—PATCH *v.* WARD (1867), 3 Ch. App. 203; 18 L. T. 134; 16 W. R. 441, L. JJ.

Annotation:—As to (2) **Reld.** Campbell *v.* Holyland (1877), 47 L. J. Ch. 145.

m. *Whether assignee must be joined—Before judgment.*]—ABELL *v.* PARR (1883), 9 P. R. 564.—**CAN.**

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2979. —— —— Assignment after decree absolute.]—(1) If a party to a foreclosure action has assigned his interest after decree, the assignee may be made a party to the action even after the order for foreclosure absolute.

(2) Where, after decree in a foreclosure action the mtgor.'s interest had been purchased by A., & the mtgee.'s interest by B., & an order was afterwards made for foreclosure absolute on an *ex p.* application by pltf., the mtgee., A. & B. were, on motion by A., ordered to be made co-defts., & a subsequent motion by B. to discharge that order as irregular on the ground that the action was, in fact, at an end, was refused.

(3) In a foreclosure action the mtgor. can redeem after the order for foreclosure absolute & notwithstanding that, after the order, the mtgee. may have disposed of his interest to a purchaser; but whether or not he shall be allowed so to redeem lies in the discretion of the ct., & depends on the circumstances of each particular case.—CAMPBELL *v.* HOLYLAND (1877), 7 Ch. D. 166; 47 L. J. Ch. 145; 38 L. T. 128; 26 W. R. 160.

Annotations:—As to (1) **Folld.** *Re* Parbola, Blackburn *v.* Parbola, [1909] 2 Ch. 437. *As to* (3) **Distd.** Ingham *v.* Sutherland (1890), 63 L. T. 614. **Apld.** Beaton *v.* Boulton, [1891] W. N. 30. **Refd.** Platt *v.* Mendel (1884), 27 Ch. D. 246; Gaze *v.* London Drapery Stores (1900), 44 Sol. Jo. 722. *Generally*, **Mentd.** Graham *v.* Campbell (1878), 38 L. T. 195.

2980. —— Assignment by mortgagee—After decree nisi.]—Where, upon a bill of redemption & foreclosure, the mtgee. assigns his mtge. after a decree for the usual accounts, the mtgor. is not to pay the costs of the supplemental bill, which is necessary to bring the assignee of the mtgee. before the ct.—BARRY *v.* WREY (1827), 3 Russ. 465; 38 E. R. 650.

*Annotations:—***Distd.** Bartle *v.* Wilkin (1836), 8 Sim. 238. **Mentd.** Massey *v.* Moss (1842), 1 Hare, 319.

2981. —— —— ——.]—Pltf. in a foreclosure suit having after decree assigned his interest, the assignee must pay the costs of an order to revive under 15 & 16 Vict. c. 86, s. 52.—JAMES *v.* HARDING (1855), 3 Eq. Rep. 757; 24 L. J. Ch. 749; 25 L. T. O. S. 174; 3 W. R. 474.

2982. —— —— After decree absolute.]—CAMPBELL *v.* HOLYLAND, No. 2979, *ante*.

2983. —— ——.]—COLES *v.* FORREST, WARD *v.* FORREST, No. 2777, *ante*.

SUB-SECT. 5.—PROCEEDINGS FOR FORECLOSURE OR SALE.

A. Nature of Action.

See R. S. C., Ord. 18, r. 2.

2984. Not an action for recovery of land.]—A foreclosure action is not an action for the recovery of land within R. S. C., Ord. 18, r. 2.—TAWELL *v.* SLATE CO. (1876), 3 Ch. D. 629; 3 Char. Pr. Cas. 39.

B. Parties.

See Sub-sect. 4, *ante*.

C. Form of Proceedings.

See R. S. C., Ord. 55, r. 5A.

2985. By originating summons—Subsequent application for receiver.]—WESTON *v.* LEVY, [1887] W. N. 76.

2986. —— Though receiver asked for.]—Where a deft. does not appear pltf. cannot obtain any relief asked by his statement of claim which was not asked by the indorsement on the writ. *Semble*: the mere fact that a receiver is asked for is not sufficient reason for proceeding to obtain foreclosure by action instead of summons.—GEE *v.* BELL (1887), 35 Ch. D. 160; 56 L. J. Ch. 718; 56 L. T. 305; 35 W. R. 805.

*Annotations:—***Mentd.** Kingdon *v.* Kirk (1887), 37 Ch. D. 141; Jamaica Ry. *v.* Colonial Bank, [1905] 1 Ch. 677.

2987. —— ——.]—O'KELLY *v.* CULVERHOUSE, [1887] W. N. 36.

2988. —— —— Unless claim for payment joined.]—Mtgee. issued a writ asking for the usual order for foreclosure, & moved for the appointment of a receiver, & on the motion being heard, a receiver was appointed. A statement of claim was delivered, but the mtgor. having become bkpt., pltf. withdrew his claim for payment:—*Held*: pltf. should have proceeded by originating summons.—BARR *v.* HARDING (1887), 58 L. T. 74; 36 W. R. 216.

2989. —— —— ——.]—On a motion for judgment in default of defence in a foreclosure action, a mtgee. asked for an order for an account to be taken, & for payment, & the usual foreclosure judgment; the mtgee., however, being in possession, & having therefore to account on the footing of wilful default, did not show what he might have received but for his wilful default. The ct. therefore gave him the order for an account to be taken, & the usual foreclosure judgment, but made no order for payment. Deft. then said that pltf. had abandoned his claim for payment, & therefore ought to have proceeded by summons, & not by action, & was entitled under the foreclosure order to no more costs than if he had applied by summons:—*Held*: as pltf. had not abandoned his claim for personal payment, but had pressed it, he was entitled to his costs. The ct. refused to allow the case to go into the general paper for argument as to the question of costs.—BROOKING *v.* SKEWIS (1887), 58 L. T. 73; 36 W. R. 215.

D. Before What Tribunal.

See R. S. C., Ord. 55, r. 5A; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 56.

2990. Jurisdiction of Chancery Division—Concurrent with that of county court—Mortgage of fifty pounds—Parties living more than twenty miles apart.]—In a suit to foreclose a mtge. for £50, where pltf. & deft. lived more than twenty miles apart:—*Held*: the jurisdiction of the ct. was concurrent with that of the county cts., & that pltf. was entitled to a decree of foreclosure, with the ordinary costs.—SCOTTO *v.* HERITAGE (1866), L. R. 3 Eq. 212; 36 L. J. Ch. 123; 15 L. T. 349; 15 W. R. 168.

See, now, County Courts Act, 1888 (c. 43), s. 67.

2991. —— Subject-matter below ten pounds in value.]—An action in the High Ct., claiming relief which, before Jud. Act, 1873 (c. 66), could have been given only by the Ct. of Ch., cannot now be maintained if the subject-matter is below £10 in value. The old rule of the Ct. of Ch. in this respect still remains in force.—WESTBURY-ON-SEVERN RURAL SANITARY AUTHORITY *v.* MEREDITH

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n. Not an action for ejectment.]—An action by a mtgee. for foreclosure, payment, & possession of the mtged. premises is not an action of ejectment within the exception in O. J. Act, r. 254, & the venue need not therefore in such an action be laid in the county where the lands lie.—SEYMOUR *v.* DE MARSH (1886), 11 P. R. 472.—CAN.

PART XIII. SECT. 7, SUB-SECT. 5.—D.

o. Jurisdiction of Chancery Division.]—The Ch. Div. has jurisdiction to decree foreclosure & not a sale in a mtgee.'s suit, but will only

(1885), 30 Ch. D. 387; 55 L. J. Ch. 744; 52 L. T. 839; 34 W. R. 217; 1 T. L. R. 641, C. A.

Annotation:—**Mentd.** Guaranty Trust Co. of New York *v.* Hannay, [1915] 2 K. B. 536.

—— **Lands out of jurisdiction.**]—*See* CONFLICT OF LAWS, Vol. XI., pp. 349, 350, Nos. 352–355.

2992. Transfer of proceedings to Chancery Division—Action commenced in Chancery Division—Set down for trial at assizes.]—*Semble*: the fact that an action has been commenced in the Ch. Div. & is one of the matters specially assigned to that division by Jud. Act, 1873 (c. 66), s. 34, is not of itself a sufficient ground for changing the venue to London from the assize town named by pltf. as the place of trial, in his statement of claim. The writ in a foreclosure action was issued out of the Liverpool District Registry, the action being in the Ch. Div., & assigned to Bacon, V.-C. Both pltf. & deft. resided in London, but some of the witnesses were in Liverpool. Pltf. in her statement of claim named Liverpool as the place of trial & gave notice of trial at the Liverpool assizes without a jury. After the action had been set down deft. applied to have the venue changed to London:—*Held*: the venue ought not to be changed.—PHILIPS *v.* BEALE (1884), 26 Ch. D. 621; 54 L. J. Ch. 80; 50 L. T. 433; 32 W. R. 665, C. A.

Annotations:—**Mentd.** Fairburn *v.* Household (1885), 53 L. T. 513; Gardner *v.* Jay (1885), 54 L. J. Ch. 529; Powell *v.* Cobb (1885), 29 Ch. D. 486.

2993. —— Allegation of fraud not sufficient reason.]—VICTORIA MUTUAL ASSURANCE SOCIETY *v.* SMITH (1889), 5 T. L. R. 182, D. C.

2994. Application to extend time for redemption—After order nisi by Court of Appeal—To court of first instance.]—An application to extend time for redeeming property which was the subject of a foreclosure order *nisi* made by the Ct. of Appeal, where on a question of priorities the order of the ct. of first instance had been discharged, was held to be properly made to the ct. of first instance & not to the Ct. of Appeal, because such an application was in reality only a working out of the details in chambers of the order made by the Ct. of Appeal.—MANKS *v.* WHITELEY, [1913] 1 Ch. 581; 82 L. J. Ch. 267; 108 L. T. 450; 57 Sol. Jo. 391.

Transfer of proceedings to Bankruptcy Court.]—*See* BANKRUPTCY, Vol. V., p. 1018, No. 8308.

E. Conduct of Proceedings.

2995. Consolidation of proceedings by two mortgagees—Difference as to conduct of action—Conduct refused to party taking first steps to severance—Though larger claimant.]—Where two actions had been commenced on the same day by different pltfs. & had been consolidated, upon a difference of opinion arising between the joint pltfs. as to the conduct of the action, pltfs. who first took a step towards severance by making an application for a change of solrs. were made defts., & the conduct of the action given to the other pltfs., although the claim of the latter was smaller in amount than that of the former.—HOLDEN *v.* SILKSTONE & DODWORTH COAL & IRON CO., LTD. (1881), 45 L. T. 531; 30 W. R. 98.

Conduct of sale.]—*See* Sub-sect. 2, A. (*d*), *ante*.

F. Claims in Foreclosure.

(*a*) *In General.*

2996. Bill by equitable mortgagee—Declaration that deposit operates as mortgage.]—MARSHALL *v.* SHREWSBURY, No. 2738, *ante*.

2997. Mortgagee overlooking one charge—Order extending relief to that charge refused—Fresh action on all charges necessary.]—Deft., charged her property with repayment of £100 & interest to pltf. & subsequently gave him four supplementary charges to secure further advances. She then gave him another supplementary charge to secure a further advance & his professional costs. Pltf. brought an action on the first five charges, omitting the sixth which was mislaid, & obtained an order for foreclosure *nisi*. He afterwards found the sixth charge & applied for an order extending the relief to that charge, but his application was dismissed with costs. He then brought a fresh action

exercise such jurisdiction in exceptional circumstances.—BRUCE *v.* BROPHY, [1906] 1 I. R. 611.—**IR.**

p. *Order for sale—Whether made in court or chambers.*]—BUELL *v.* FISHER (1873), 6 P. R. 51.—**CAN.**

q. *Venue—Whether where defendant resides.*]—Under King's Bench Act, 1920 (c. 39), s. 35, a mtge. foreclosure action may be brought within the judicial district where one of defts. resides, though deft. be only an execution creditor of the mtgor., & though the land be situate & the mtgor. reside in another judicial district.—HOLLAND CANADA MORTGAGE CO., LTD. *v.* DULMADGE, [1921] 2 W. W. R. 322.—**CAN.**

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r. *When notice of motion necessary—For order of foreclosure.*]—After a lengthy period has elapsed since the day appointed for payment, it is necessary to give notice of the motion for an order of foreclosure.—KIRCHOFFER *v.* STAFFORD, 2 Ch. Ch. 52.—**CAN.**

t. *Whether necessary to entitle petition & affidavits—In the cause.*]—On an application by the exor. of a mtgee., for the infant heir of a mtgor. to convey after the exor. has obtained a final order for foreclosure, the petition & affidavits should be entitled, not in the cause but in the matter of the infant.—*Re* HODGES (1850), 1 Gr. 285.—**CAN.**

a. *Regularity of proceedings—Duty of plaintiff.*]—It is for pltf. in foreclosure to see that the proceedings are regular, at his own risk of having them set aside, if irregular.—BOUTILIER *v.* HARSHMAN (1854), 2 N. S. R. (James) 338.—**CAN.**

b. *Married woman defendant—Whether immediate reference refused.*]—Where a mtge. was created by husband & wife upon lands of the wife, & the mtgee., together with the husband, joined in a conveyance of all their interests to a purchaser, the ct. in a foreclosure suit refused an immediate reference under the orders of 1853, & directed the cause to be brought to a hearing in the regular way.—WALLIS *v.* BURTON (1855), 5 Gr. 352.—**CAN.**

c. *When default in appearance.*]—After default marked for non-appearance in a foreclosure suit, pltf., on filing a statement of claim, may obtain an *ex p.* order for foreclosure & sale at once, & need not wait ten days for deft. to appear.—BOARDMAN *v.* LAIDLAW (1890), 22 N. S. R. 220.—**CAN.**

d. ——.]—An offer to suffer judgment by default, under 53 Vict. c. 4, s. 130, is not applicable to a suit for the foreclosure of a mtge. & sale of the mtged. premises.—JEFFRIES *v.* BLAIR (1897), 1 N. B. Eq. Rep. 420.—**CAN.**

e. ——.]—On an application for an order *nisi* for foreclosure of a mtge. in an action wherein no appearance has been entered it is not necessary to produce an affidavit of default, *i.e.* an affidavit showing the state of the mtge. account & verifying the allegations in the statement of claim, unless there is something in the nature of the proceedings or relating to the pleading itself which would justify the requiring of such proof.—CANADA LIFE ASSURANCE CO. *v.* LIMA (Sask.), [1926] 4 D. L. R. 48; [1926] 3 W. W. R. 127.—**CAN.**

f. *Procedure where non-appearance of some defendants.*]—By analogy to rule 393, where in a mtge. action for foreclosure or sale, some of the defts. do not appear to the writ of summons, & others do appear, against whom judgment cannot then be obtained, the officer may note the pleadings closed as against the former, & the action may be brought on for judgment against them without further notice to them.—MORSE *v.* LAMBE (1892), 15 P. R. 9.—**CAN.**

g. *Motion to take bill pro confesso—Proper practice in cases of damages.*]—Where deft. appears to a foreclosure suit, pltf. cannot have the damages assessed on motion to have the bill taken *pro confesso*. The proper practice in such a case is to have the damages assessed upon a subsequent motion with notice.—HANFORD *v.* HOWARD (1896), 1 N. B. Eq. Rep. 241.—**CAN.**

h. *Disputed questions of fact—Whether decided on summons.*]—BEAMISH *v.* WHITENEY, [1908] 1 I. R. 38.—**IR.**

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for foreclosure on all the six charges. Deft., took out a summons asking that the proceedings might be stayed on the ground that pltf. was estopped by the foreclosure order:—*Held:* the subject-matter of the fresh action was not the same as that in the first action, & in the circumstances pltf., was not estopped from setting up his present case, & deft.'s application must be dismissed with costs. —BAKE *v.* FRENCH, [1907] 1 Ch. 428; 76 L. J. Ch. 299; 97 L. T. 131; 51 Sol. Jo. 326.

Annotations:—**Mentd.** Reid *v.* Cupper, [1915] 2 K. B. 147; Puddephatt *v.* Leith (No. 2), [1916] 2 Ch. 168.

(b) *Account.*

See R. S. C., Ord. 15, r. 1.

2998. Whether order for foreclosure made—R. S. C., Ord. 15, r. 1.]—A pltf. in a foreclosure action, where there is no preliminary question to be tried, may obtain by summons in chambers, under R. S. C., Ord. 15, rr. 1, 2, an order for an account & foreclosure—that is to say, the usual foreclosure judgment.—SMITH *v.* DAVIES (1884), 28 Ch. D. 650; 54 L. J. Ch. 278; 52 L. T. 19; *sub nom.* DAVIES *v.* SMITH, 33 W. R. 211.

Annotations:—**N.F.** Bissett *v.* Jones (1886), 32 Ch. D. 635. **Folld.** Horton *v.* Bosson (1899), 80 L. T. 435. (*See* 80 L. T. 437.) **Refd.** Blake *v.* Harvey (1885), 29 Ch. D. 827.

2999. —— ——.]—Pltfs. in a foreclosure action applied by summons under R. S. C., Ord. 15, r. 1, for an account. The chief clerk pronounced the usual order for an account & foreclosure. Defts. objected to the direction for foreclosure, & pltfs. assenting, the order was drawn up for an account only, & was passed & entered in that form. When the parties came before the chief clerk to proceed with the account he objected to the order as not being the one he had pronounced, & refused to proceed with the account. Subsequently the registrar, at the instance of the chief clerk, without any motion or summons, altered the order by adding the usual directions for foreclosure. Defts. moved to strike out the additions. The judge declined to do so, as he considered that the parties were not at liberty to have an order drawn up, different from the order pronounced, without applying to the ct. for the purpose; but, being of opinion that the addition had been irregularly made, he stayed proceedings under the existing order, giving pltfs. liberty to apply for a fresh order for accounts & foreclosure. Defts. appealed:—*Held:* assuming the order as passed & entered to contain an error arising from an accidental slip or omission, an alteration made in it without any motion or summons for the purpose was irregular, & must be discharged, & pltfs. must pay the costs, as they ought to have applied to the judge when the chief clerk refused to proceed with the accounts. *Qu.:* whether a foreclosure order can be made under R. S. C., Ord. 15, r. 1, as in *Smith* v. *Davies*, No. 2998, *ante*.—BLAKE *v.* HARVEY (1885), 29 Ch. D. 827; 53 L. T. 541; 33 W. R. 602, C. A.

Annotations:—**Refd.** Bissett *v.* Jones (1886), 32 Ch. D. 635; Salt *v.* Edgar (1886), 54 L. T. 374; Horton *v.* Bosson (1899), 80 L. T. 435. **Mentd.** *Re* Swire, Mellor *v.* Swire (1885), 30 Ch. D. 239.

3000. —— ——.]—A writ was indorsed with a claim for an account of principal, interest, & costs on a mtge., security, & for foreclosure or sale, & also with a claim for a specific sum for principal & interest due under a covenant in the mtge. deed. Deft. did not appear, & no statement of claim was delivered. Pltf. moved, under R. S. C., Ord. 13, r. 3, for liberty to forthwith sign final judgment for the amount indorsed on the writ, & under R. S. C., Ord. 15, for the usual foreclosure judgment *nisi*:—*Held:* under R. S. C., Ord. 13, r. 3, pltf. was entitled to sign judgment for the liquidated demand notwithstanding that the writ was also indorsed with a claim for an account & foreclosure, but he was not entitled under R. S. C., Ord. 15, to a foreclosure judgment.—BISSETT *v.* JONES (1886), 32 Ch. D. 635; 55 L. J. Ch. 648; 54 L. T. 603; 34 W. R. 591.

Annotations:—**Distd.** Imbert-Terry *v.* Carver (1887), 34 Ch. D. 506. **Consd.** Horton *v.* Bosson (1899), 80 L. T. 435

3001. —— ——.]—DYOTT *v.* NEVILE, [1887] W. N. 35, C. A.

Annotation:—**Folld.** Horton *v.* Bosson (1899), 80 L. T. 435.

3002. —— ——.]—The ct. has jurisdiction to make an order for foreclosure in chambers on a summons under R. S. C., Ord. 15.—HORTON *v.* BOSSON (1899), 80 L. T. 435; 43 Sol. Jo. 379, C. A.

Annotation:—**Mentd.** Pepperell *v.* Hird, [1902] 1 Ch. 477.

(c) *Possession.*

See R. S. C., Ord. 18, r. 2.

3003. Jurisdiction of court to order—Possession not claimed by writ or summons.]—Under R. S. C., Ord. 18, r. 2, the ct. has jurisdiction in a foreclosure action to order delivery of possession where possession is asked, not against a third party, but against the mtgor., notwithstanding that pltf. has not asked for possession either in the writ or statement of claim.—SALT *v.* EDGAR (1886), 54 L. T. 374; 2 T. L. R. 396.

Annotations:—**Folld.** Best *v.* Applegate (1887), 37 Ch. D. 42; Keith *v.* Day (1888), 39 Ch. D. 452.

3004. —— —— **Defendant not appearing.**]—Upon a motion by mtgees. for judgment for foreclosure absolute, & possession of the property, to which the mtgor. did not appear, & the mtgees. had received rents since the date of the certificate, the ct. enlarged the time for redemption by one month, & directed pltfs. to file & deliver to the registrar an affidavit showing what would be the balance due to them up to that date for principal, interest, & costs, & ordered that, if the amount should not be paid, deft. should be absolutely foreclosed, & pltfs. should have possession of the property.—LACON *v.* TYRRELL (1887), 22 L. J. N. C. 51; 56 L. T. 483.

Annotation:—**Folld.** Best *v.* Applegate (1887), 37 Ch. D. 42.

3005. —— ——.]—After an order absolute for foreclosure made on an originating summons the ct. will grant an order for possession, although possession was not asked for by the summons; & will also, on motion, grant an injunction to restrain removal of chattels comprised in the security, & an order for restitution of chattels wrongfully removed.—MANCHESTER & LIVERPOOL BANK *v.* PARKINSON (1889), 60 L. T. 258.

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k. *General rule.*]—When the court is asked to foreclose the rights of the mtgors. the parties cannot avoid an inquiry into the amount due for principal & interest, even if that involves the examination of an antecedent transaction out of which the mtge. arose & to which it is collateral; nor is the ct. bound by the form of the mtgc. or the agreement, or the expressions used by the parties; it is the substance of the combined transaction that is important.—LASTER *v.* POUCHER, [1926] 2 D. L. R. 993; 58 O. L. R. 589.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 5.—F. (c).

l. *Whether ordered—Without consent of defendants.*]—Where on a motion for speedy judgment in an action for foreclosure it was shown that the mtge. debt was in excess of the value of the land, immediate possession & foreclosure were ordered without the consent of defts.—GIBSON *v.* MCCRIMMON, 9 C. L. T. Occ. N. 40.—**CAN.**

m. —— *No opposition to motion.*]—Pltfs. foreclosed a mortgage made to them, &, having purchased at the sale held under the foreclosure order,

3006. —— —— On ex parte application—After order absolute.]—Pltf. in a foreclosure action commenced by originating summons, which did not ask for delivery of possession, moved *ex p.*, after an order for foreclosure absolute, for delivery of possession. Deft. had not appeared:—*Held:* the ct. had jurisdiction to make the order.—JENKINS *v.* RIDGLEY (1893), 68 L. T. 671; 41 W. R. 585; 37 Sol. Jo. 509; 3 R. 628.

3007. —— —— —— On application to make order absolute.]—Where a summons for foreclosure does not ask for delivery of possession, the subsequent order for foreclosure absolute & delivery of possession will not be made *ex p.*—LE BAS *v.* GRANT (1895), 64 L. J. Ch. 368.

3008. Order not including delivery of possession—Order for possession made on subsequent application.]—A summons for foreclosure asked for delivery of possession in the event of foreclosure. The usual foreclosure order was made without any direction as to delivery of possession. Default in payment having been made, the order for foreclosure was made absolute. Pltf. then moved in the action for an order on deft. to deliver up possession of the mtged. property:—*Held:* such an order ought to be made, & pltf. ought not to be put to bring a new action for the purpose of recovering possession.—KEITH *v.* DAY (1888), 39 Ch. D. 452; 58 L. J. Ch. 118; 60 L. T. 126; 37 W. R. 242, C. A.

Annotations:—**Apld.** Manchester & Liverpool Bank *v.* Parkinson (1889), 60 L. T. 258; Jenkins *v.* Ridgley (1893), 41 W. R. 585.

3009. Mortgage of copyholds—Order for ejectment after decree.]—Before admittance, a mtgee., [of copyholds] may bring a bill of foreclosure, & after a decree, an ejectment for the possession of the premises.—SUTTON *v.* STONE (1740), 2 Atk. 101; 26 E. R. 463.

Annotations:—**Refd.** Pryce *v.* Bury (1853), 2 W. R. 87. **Mentd.** Williams *v.* Williams (1810), 12 East, 209.

(d) Payment on Personal Covenant.

See R. S. C., Ord. 3, r. 6; Ord. 14, r. 1 (*a*).

3010. Claim specially indorsed—With claim for foreclosure — Right to summary judgment.] — Where the writ in an action for foreclosure was also specially indorsed under R. S. C., Ord. 3, r. 6, with a claim for the amount due on the covenant to pay in the mtge. deed, an application to enter judgment against the mtgor. under R. S. C., Ord. 14, r. 1 (*a*), for the amount claimed, before the action was heard, was refused.—HILL *v.* SIDEBOTTOM (1882), 47 L. T. 224.

Annotations:—**Folld.** Imbert-Terry *v.* Carver (1887), 34 Ch. D. 506. **Refd.** Clarke *v.* Berger (1899), 36 W. R. 809.

3011. —— —— ——.]—A writ which claims foreclosure or sale & a receiver, besides payment of the debt & interest, is not specially indorsed so as to entitle pltf. to summary judgment on the claim for debt & interest.—IMBERT-TERRY *v.* CARVER (1887), 34 Ch. D. 506; 56 L. J. Ch. 716; 56 L. T. 91; 35 W. R. 328.

Annotation:—**Refd.** Clarke *v.* Berger (1899), 36 W. R. 809.

3012. —— —— —— Defendant not appearing.] —BISSETT *v.* JONES, No. 3000, *ante*.

3013. Must be claimed by writ.]—Where no appearance has been entered by deft. in an action, pltf. cannot, by his statement of claim, enlarge the scope of the claim indorsed on his writ. Where, therefore, a deft. did not enter an appearance to the writ issued in a foreclosure action, & the writ was not indorsed for payment, the ct. held that pltf. was only entitled to the usual order for foreclosure, although, on his statement of claim, he was also entitled to an order for payment against deft.—LAW *v.* PHILBY (No. 2) (1887), 56 L. T. 522; 35 W. R. 450.

Right to pursue remedies concurrently.]—*See* Sect. 1, *ante*.

G. Pleading.

(a) Statement of Claim.

3014. What must be alleged—Not matters part of defence.]—In 1848 deft. executed a mtge. to pltf. Under a commission of lunacy, issued against the mtgor. in 1852, he was found upon inquisition to have been of unsound mind since 1825. The mtgee. filed his claim of foreclosure against the mtgor. & his committee, but did not state the date of the inquisition taken on the finding of the jury. He proved the execution of the mtge. deed in the usual way. Defts. did not cross examine the attesting witnesses to the deed, but produced evidence to show that the mtgor. was actually insane at the date of the execution of the deed:—*Held:* the suit was properly commenced by claim, & it was not defective in not stating matter which was properly part of the defence of deft.—JACOBS *v.* RICHARDS, JACOBS *v.* PORTER (1854), 18 Beav. 300; 23 L. J. Ch. 557;

applied under Ord. 48, r. 1, for an order for possession:—*Held:* pltfs. were entitled to the order applied for, but, no one having appeared to oppose the motion, without costs.—EASTERN CANADA SAVINGS & LOAN CO. *v.* MCKINNON (1892), 26 N. S. R. 523.—**CAN.**

n. *Whether action bars claim—To immediate possession.*]—Where a mtgee. elects to proceed by way of an action under Land Titles Act, 1920 (c. 27), s. 107, for foreclosure of a mtge. & the mtge. contains a covenant entitling him to possession on default & notice of intention to take possession he may give the notice &, on the mtgor.'s non-compliance therewith, apply, in the action, for an order for immediate possession; but the bringing of the action under said sect. 107 bars him from pursuing under sect. 108 his claim for immediate possession.—MCCUSKER *v.* YOVICKIN & HILLCREST ACRES, LTD., [1925] 3 D. L. R. 893; [1925] 2 W. W. R. 625.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 5.—F. (d).

o. *Consolidation with foreclosure action—Whether allowed.*]—Ord. 18, r. 2, of our Judicature Rules is similar to R. S. C., Ord. 17, r. 2, of the English Rules for 1875, under which it has been decided that a claim on a covenant in a mtge. can be joined with an action of foreclosure.—THOMSON *v.* PITTS (1893), 26 N. S. R. (14 R. & G.) 108.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 5.—G. (a).

p. *What must be alleged—Whether possession.*]—On an application for a final order for the sale of mtged. property it is not sufficient for pltf. in his affidavit of non-payment to swear merely that he has not been in possession or in receipt of rents & profits; he must also negative possession & the receipt of rents & profits by any one on his behalf.—FORD *v.* JONES, 1 Ch. Ch. 291.—**CAN.**

q. —— *In whom legal estate vested.*]—In a suit for foreclosure of a mtge. in fee, after the death of the mtgee., the bill must show in whom the legal estate is vested. Alleging that pltf. is exor. & trustee of the mtgee. is not sufficient.—WIGGINS *v.* FLOYD (1867), 12 N. B. R. (1 Han.) 229.—**CAN.**

r. —— *Interest of parties.*]—A bill for foreclosure of a mtge. against three defts. stated that one of them was mtgor., & that the others claimed a lien on the property; but omitted to state what interest they had, or anything to show that they were necessary parties; a decree of foreclosure was refused.—CHIPMAN *v.* TUCK (1868), N. B. Dig. 649.—**CAN.**

t. —— *Mortgagee's pretended sale.*] —SPAIN *v.* WATT (1869), 16 Gr. 260. —**CAN.**

s. —— *Whether description of situation of mortgaged land.*]—WIGGINS *v.* HENDRICKS (1872), 1 Pug. 152.—**CAN.**

b. —— *Abandonment of land by defendant.*]—Abandonment by deft. of the land in question must be alleged in statement of claim, otherwise pltf. is not entitled to judgment in an undefended action for foreclosure of an agreement of sale.—ARMSTRONG *v.* SIEBELS (1914), 24 Man. L. R. 782.—**CAN.**

c. —— *Fact that mortgage was taken—By way of additional security.*]—In an action by a bank upon a mtge. upon real estate it is not necessary to allege in the statement of claim facts showing that the mtge. was taken by way of additional security to a pre-existent debt.—CANADIAN BANK OF

Sect. 7.—Foreclosure or sale: Sub-sect. 5, G. (a) & (b), H., I. & J.]

23 L. T. O. S. 44; 18 Jur. 527; 2 W. R. 174; 52 E. R. 118; *on appeal*, 5 De G. M. & G. 55, L. JJ.

Annotations:—**Mentd.** Campbell *v.* Hooper (1855), 3 Sm. & G. 153; Wood *v.* Dwarris (1856), 11 Exch. 493.

3015. —— Covenant for payment.]—In a foreclosure action, where a mtgee. applies, on motion for judgment, not only for foreclosure but also for a personal order for payment of the mtge. debt & interest against a mtgor. who has made default in entering appearance & in delivering a defence, the statement of claim ought, however shortly, to contain an express statement of the covenant upon which the personal order for payment is claimed.—LAW *v.* PHILBY (1887), 56 L. T. 230; 35 W. R. 401; *subsequent proceedings*, 56 L. T. 522.

3016. —— ——.]—WETHERED *v.* COX, [1888] W. N. 165.

(b) Defence.

See R. S. C., Ord. 19, r. 17.

3017. Irrelevant matter—Matter injurious to plaintiff's character.]—In a foreclosure suit, where for the alleged purpose of showing that the suit had been instituted through a vindictive motive, deft. introduced into his answer matter injurious to the pltf.'s character, & which had previously been made the subject of a public document. The ct., on exceptions for scandal, ordered such matter to be expunged as irrelevant to the question at issue.—EDMUNDS *v.* BROUGHAM (LORD) (1866), 13 L. T. 790; 12 Jur. N. S. 156.

3018. Admissions—Discretion of court to make order.]—An action having been commenced in Nov. 1876, to enforce an equitable mtge. with written memorandum dated in Feb. 1876, deft. admitted the mtge., but alleged, by way of defence, that it was part of the agreement that pltf. should not require a legal mtge., nor any payment of principal or interest for a year from the time of the advance. Pltf. moved for the ordinary foreclosure decree on the admissions in the pleadings; & the motion was refused:—*Held:* the Vice-Chancellor had a discretion as to whether a case was a proper one for making an order on motion under R. S. C., 1875, Ord. 40, r. 11; & the Ct. of Appeal ought not to interfere with the exercise of that discretion.—MELLOR *v.* SIDEBOTTOM (1877), 5 Ch. D. 342; 46 L. J. Ch. 398; 37 L. T. 7; 25 W. R. 401, C. A.

3019. —— What constitutes.]—In a foreclosure action the statement of claim stated an original mtge. deed, a deed of assignment, & that a sum remained due on the security. The statement of defence stated that defts. did not admit the correctness of these statements, & required proof thereof. Pltf. moved for judgment on admissions in pleadings:—*Held:* pltf.'s case on these pleadings must be taken to be admitted, but leave to amend was given.—RUTTER *v.* TREGENT (1879), 12 Ch. D. 758; 48 L. J. Ch. 791; 41 L. T. 16; 27 W. R. 902.

Annotations:—**Apld.** Lumsden *v.* Winter (1882), 30 W. R. 751. **Reld.** Graves *v.* Terry (1882), 51 L. J. Q. B. 464.

3020. —— ——.]—The statement of claim in a foreclosure action set out the purport & effect of several mtge. deeds, & alleged that they were duly executed. The statement of defence craved leave to refer to the deeds, when produced, &, save as by such deeds, when produced, should appear, did not admit that the same were of or to the purport or effect in the statement of claim mentioned. Upon motion for judgment on admissions in the pleadings, the deeds being produced in ct.:—*Held:* there was a sufficient admission of the execution of the deeds, & as it appeared, on their being produced in ct., that they were of the dates & made between the parties mentioned in the statement of claim, pltfs. were entitled to judgment.—BARNARD *v.* WIELAND (1882), 30 W. R. 947.

3021. —— Defence delivered out of time—Judgment on admissions.]—A defence delivered after the expiration of the time limited by the rules cannot be treated as a nullity. Where, therefore, the ct. treating such a defence as a nullity, had upon a motion for judgment in default of delivering a defence, given a judgment for foreclosure, the Ct. of Appeal held the judgment improperly given. But as the defence substantially admitted pltf.'s claim the Ct. of Appeal under order R. S. C., Ord. 58, r. 4, ordered the notice of motion to be amended, &, the notice

COMMERCE *v.* PERKINS (1915), 33 W. L. R. 78.—**CAN.**

d. —— *Amount of advance.*]—In an action for foreclosure pltf. must establish the amount of his advance.—SINGER *v.* GOLDHAR, [1924] 2 D. L. R. 141; 55 O. L. R. 267.—**CAN.**

e. *Contents of indorsement.*]—The indorsement on an office copy of the bill must specify distinctly which relief pltf. seeks, whether sale or foreclosure.—DREWRY *v.* O'NEAL, 2 Ch. Ch. 204.—**CAN.**

f. *Whether amendment allowed.*]—Pltf. indorsed his writ of summons & filed his statement of claim to recover possession of the land in dispute, as being the assignee of a lease made by him to defts., who assigned to a third party, who assigned & surrendered to pltf. The defence was that the lease was in effect a mtge., & fraud & want of consideration were alleged:—*Held:* pltf. could not amend his statement of claim, & ask a foreclosure of the land as mtgee.—MCILHARGEY *v.* MCGINNIS (1882), 9 P. R. 157.—**CAN.**

g. *Necessity for—After appearance of defendant.*]—In an action for foreclosure deft. entered an appearance under O. J. Act, r. 68, limiting his defence to one item in the particulars indorsed on the writ of summons. The appearance did not state that deft. did not require the delivery of a statement of claim:—*Held:* after such appearance a statement of claim was unnecessary.—PEEL *v.* WHITE (1885), 11 P. R. 177.—**CAN.**

h. —— ——.]—In a mtge. action for payment, foreclosure, etc., deft. entered an appearance in which she stated that she did not require the delivery of a statement of claim, & added: "Take notice that deft. disputes the amount claimed by pltf.":—*Held:* the record was then complete, & a statement of claim was unnecessary & irregular.—MAHONEY *v.* HORKINS (1891), 14 P. R. 117.—**CAN.**

k. *Plaintiff's claim for deficiency on sale—Whether tantamount to a claim for foreclosure & sale.*]—DE WITT *v.* SIMMS, [1924] 1 D. L. R. 592; 56 N. S. R. 515.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 5.—G. (b).

l. *When defence struck out.*]—To an action brought by a first mtgee. for foreclosure, defts., purchasers of the equity of redemption, pleaded that after the making of pltf.'s mtge., the mtgor. made a second mtge. of the same lands, which was still outstanding & unpaid. Pltf. applied to strike out the defence, under Ord. 25, r. 4:—*Held:* the defence should be struck out.—WILLIAMS *v.* MORSE, 20 C. L. T. 418.—**CAN.**

m. *No time for payment in mortgage—Plea that principal sum be payable—Within ten years.*]—HIGGINS *v.* MCLACHLAN, R. E. D. 441.—**CAN.**

n. *Necessity for specifically pleading defence.*]—Deft., in a foreclosure suit, cannot defeat a motion for a receiver by a general affidavit that he has a good defence to the suit; he must specify the defence distinctly to enable pltf. to meet it, & the ct. to judge of it.—AIKINS *v.* BLAIN (1867), 13 Gr. 646.—**CAN.**

o. ——.]—LOUGHEED *v.* HAMILTON (1907), 7 W. L. R. 204.—**CAN.**

p. *Plea of payment to unauthorised party.*]—CAMERON *v.* MCDONALD (1900), 33 N. S. R. 469.—**CAN.**

q. *Purchase of land at tax sale.*]—HISLOP *v.* JOSS (1901), 22 C. L. T. 144; 3 O. L. R. 281.—**CAN.**

r. *Technical points of law—Whether amendment permitted.*]—In a foreclosure action the only defence was by W., a second mtgee. & it consisted solely of technical points of law, which were heard & disposed of by the judge:—*Held:* after the decision on the hearing upon points of law, deft. W. would not be permitted to amend the defence, inasmuch as, if W. had any ground of

being treated as amended, gave judgment for pltf. upon admissions in the defence.—GILL *v.* WOODFIN (1884), 25 Ch. D. 707; 53 L. J. Ch. 617; 50 L. T. 490; 32 W. R. 393, C. A.

Claims between co-defendants — Raised on counterclaim.]—*See* PRACTICE.

H. Interlocutory Application.

3022. Motion to expedite hearing—Setting down as short cause.]—A bill for a foreclosure cannot be set down as a short cause unless by consent.—RASHLEIGH *v.* DAYMAN (1817), 2 Madd. 147; 56 E. R. 289.

Annotation:—**Folld.** Lewin *v.* Moline (1838), 1 Beav. 99.

3023. ——.]—It is contrary to the practice, to advance a foreclosure suit to be heard as a short cause, unless with the consent of deft.—LEWIN *v.* MOLINE (1838), 1 Beav. 99; 8 L. J. Ch. 96; 48 E. R. 876.

3024. ——.]—Upon a motion to advance a foreclosure suit, notice of motion must be given to the opposite party.—POWELL *v.* CALLOWAY (1840), 11 Sim. 51; 9 L. J. Ch. 337; 4 Jur. 859; 59 E. R. 792.

3025. ——.]—Where a decree for foreclosure has been made against defts., subsequently discovered to be infants, the ct. will not rehear the cause, nor expedite the foreclosure of their equity of redemption, but a supplemental suit must be filed, or another suit instituted.—SCAWEN *v.* NICHOLSON (1853), 22 L. J. Ch. 632; 21 L. T. O. S. 334; 17 Jur. 369.

3026. Stay of proceedings—By mortgagee.]—A motion by deft. in a foreclosure suit for the ordinary decree under 9 Geo. 2, c. 20, s. 2, cannot be resisted by pltf. on the ground that he has, pending the action, parted with the legal estate; nor, if the action has been entered for trial, on the ground that he desires to stay proceedings, in order to take advantage of a transfer & right of consolidation arising since the entry for the trial. R. S. C., Ord. 33, r. 1, does not entitle a pltf. to dismiss his action after it has been entered for trial.—MATTHEWS *v.* ANTROBUS (1879), 49 L. J. Ch. 80.

Annotation:—**Folld.** Monteiro *v.* Cotterell & Minter (1924), 68 Sol. Jo. 843.

3027. ——.]—Once an action is entered for trial pltf. cannot discontinue without either the written consent of the parties or the leave of the ct. & accordingly a notice of discontinuance under R. S. C., Ord. 26, r. 1, served by pltf. after the action had been entered for trial by defts. was held ineffective.—MONTEIRO *v.* COTTERELL & MINTER (1924), 68 Sol. Jo. 843.

I. Service of Proceedings.

3028. Substituted service of writ—Absconding mortgagor.]—Mtgor. deft. in a foreclosure action had absconded from his place of business in May, 1879, & had gone to Australia. Leave was given to the equitable mtgee. to serve the writ upon the relations of the mtgor., the mtgee. undertaking to apply for a sale at the trial.—WOLVERHAMPTON & STAFFORDSHIRE BANKING CO. *v.* BOND (1881), 43 L. T. 721; 29 W. R. 599.

——.]—*See* R. S. C., Ord. 10.

Service of writ out of jurisdiction.]—*See* R. S. C., Ord. 11, r. 1 (h).

Service of decree.]—*See* Sub-sect. 5, K., *post.*

3029. Indorsement of service—Omission of day of service.]—FOAT *v.* BASSET, [1888] W. N. 255.

J. Evidence.

See, generally, EVIDENCE, Vol. XXII., pp. 19 *et seq.*

3030. Where payment not in issue—Necessity to prove mortgage.]—On a bill by a mtgee., where the payment to the mtgor. of the money secured by the mtge. deed, is not put in issue by the answer, the mtgee. need only prove her mtge. deed, & is not obliged to prove also the payment of the consideration.—MINOT *v.* EATON (1826), 4 L. J. O. S. Ch. 134.

3031. Entries in book of deceased attorney—Of mortgagor—To prove payment.]—CLARK *v.* WILMOT, No. 2970, *ante.*

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defence upon the merits, it should have been pleaded with the points of law.—RITCHIE *v.* PYKE (1904), 40 N. S. R. 476.—**CAN.**

t. *No consideration given for mortgage.*]—CANADIAN BANK OF COMMERCE *v.* HARVEY (1915), 33 W. L. R. 35; 9 W. W. R. 638.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 5.—H.

a. *Injunction — Continuance of.*]—Where in a foreclosure suit an interim injunction has been granted to restrain cutting timber, the registrar has no power to grant a decree on *præcipe*, with a provision for continuing the injunction.—KING *v.* FREEMAN, 1 Ch. Ch. 350.—**CAN.**

b. —— *On what terms granted — Payment of interest on outstanding bonds.*]—WOOD *v.* HARE (*circa* 1878), R. E. D. 201.—**CAN.**

c. *Application to change relief — From sale to foreclosure.*]—MCCOLLUM *v.* CASTON (1901), 21 C. L. T. 189, 235; 1 O. L. R. 240.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 5.—I.

d. *Substituted service — Advertisement.*]—The ct. will permit a service of a bill by publication upon a deft. in a foreclosure suit, who has left the jurisdiction, though deft. sought to be advertised is merely an incumbrancer by virtue of a subsequent mtge.—ROBSON *v.* REESOR, 1 Ch. Ch. 280.—**CAN.**

e. —— ——.]—ROBLIN *v.* GREELY (1877), 7 P. R. 125.—**CAN.**

f. ——.]—SEATH *v.* MCILROY (1867), 2 Ch. Ch. 93.—**CAN.**

g. —— *On inspection of insolvent's estate.*]—Where a bill had been filed for foreclosure, & deft., the official assignee of the mtgor., absconded before the bill was served, an order was granted allowing substitutional service on one of the two inspectors of insolvent's estate.—LONDON & CANADIAN LOAN & AGENCY CO. *v.* THOMPSON (1879), 8 P. R. 91.—**CAN.**

h. *Notice — Of final order.*]—A motion for a final order is an *ex p.* proceeding; it is unnecessary to serve notice thereof even on infant owners of the equity of redemption who have answered.—HENDERSON *v.* COWAN, 1 Ch. Ch. 297.—**CAN.**

k. —— *Of motion.*]—In case of a motion to dispense with payment of the purchase-money into ct. & for a vesting order, in favour of a purchaser under a decree, who is also one of pltfs., notice must be served on the mtgor. where he has appeared by solicitor.—MCMASTER *v.* KEMPSHALL, 1 Ch. Ch. 329.—**CAN.**

l. —— ——.]—It is unnecessary to present a petition for foreclosure after abortive sale; it is sufficient to serve a notice of motion on the mtgor.—ODELL *v.* DOTY (1862), 1 Ch. Ch. 207.—**CAN.**

m. *Proceedings in master's office.*]—As a general rule, notice of the proceedings in the master's office should be served upon a mtgor. against whom the bill has been taken *pro confesso*, whenever pltf. proves a claim in addition to that alleged in the bill.—MCCORMICK *v.* MCCORMICK (1874), 6 P. R. 208.—**CAN.**

n. *Necessity for order allowing service.*]—An action for foreclosure of a mtge. is governed by O. J. Act, r. 78, & no order allowing service is necessary & on default of appearance judgment may be entered on *præcipe* according to the former practice in Chancery.—CHAMBERLAIN *v.* ARMSTRONG (1882), 2 P. R. 212.—**CAN.**

o. *Contents of affidavit of service.*]—It is not sufficient in an affidavit of service of summons in a foreclosure suit to state that deft. was served with a true copy, without stating that it was indorsed with a true copy of the indorsement on the summons.—JACKSON *v.* HUMPHREY (1896), 1 N. B. Eq. Rep. 341.—**CAN.**

p. *Copy of summons—Whether served on prior incumbrancers.*]—UNION TRUST CO. *v.* DUPLAT (1908), 7 W. L. R. 459.—**CAN.**

q. *Service of notice on guardian—Sufficiency of.*]—GORDHAN DAS *v.* MUSSMMAT RUKMAN, ETC. (1919), I. L. R. 1 Lah. 292.—**IND.**

PART XIII. SECT. 7, SUB-SECT. 5.—J.

r. *Onus of proof of release of mortgage—On defendant.*]—MURRAY *v.* MCDONALD (*circa* 1880), R. E. D. 142.—**CAN.**

Sect. 7.—Foreclosure or sale: Sub-sect. 5, J., K. & L.; sub-sect. 6, A. & B. (a).]

3032. Competency of bankrupt mortgagor as witness—To prove notice to mortgagee—Of prior incumbrance.]—CLARK *v.* WILMOT, No. 2970, *ante.*

3033. Action by first mortgagee against mortgagor & second mortgagee—Necessity to prove second mortgage.]—On a bill by first mtgee. against mtgor. & second mtgee., pltf. should prove the second mtge., otherwise he can only take an inquiry at the first hearing.—GUARDNER *v.* BOUCHER (1850), 13 Beav. 68; 51 E. R. 26.

3034. Defendant out of jurisdiction—Evidence by affidavit.]—LLOYD *v.* —— (1850), 15 L. T. O. S. 246; 14 Jur. 568.

3035. —— ——.]—GARDINER *v.* HARDY, [1876] W. N. 153; 2 Char. Pr. Cas. 231.

3036. Defendant appearing to writ—Not appearing at trial—Necessity for affidavit of service.]—BAIRD *v.* EAST RIDING CLUB & RACE COURSE CO., [1891] W. N. 144.

K. The Decree.

3037. How application made—By motion—Some parties infants.]—Order made, on motion in a foreclosure suit, to the same effect as a decree, although the order could not be made under 7 Geo. 2, c. 20, owing to some of the parties interested in the equity of redemption being infants, & consequently incapable of admitting pltf.'s title.—GRANE *v.* MITCHELL (1840), 10 Sim. 484; 9 L. J. Ch. 171; 59 E. R. 703.

Annotation:—**Consd.** Taylor *v.* Coates (1843), 3 Hare, 263.

3038. —— **By summons—Facts not in dispute.**]—There is no jurisdiction to give judgment for foreclosure upon summons, although the facts are not in dispute.—LLOYD *v.* LLOYD (DAVID) & CO., LTD. (1878), 26 W. R. 572.

3039. Against whom made—Some defendants out of jurisdiction.]—Mtgor. devised a mtged. estate, in trust for sale, & to divide the produce amongst his nine children: two of the children were living out of the jurisdiction, & on a bill for foreclosure, a decree was made against the other seven only.—RUNCORN *v.* NICHOLSON (1836), 5 L. J. Ch. 203.

3040. Service of decree—On parties out of jurisdiction.]—In a foreclosure suit, by a mtgee. who had been in possession twelve years, against several defts., trustees & beneficiaries under the will of the original mtgor., some of whom were out of the jurisdiction in America, the bill having been ordered to be taken *pro confesso* against defts. out of the jurisdiction, & at the hearing none of defts. appearing, service of copy of the decree upon defts. out of the jurisdiction was permitted to be made by advertisement in two London, & one American, newspapers.—HYDE *v.* LARGE (1874), L. R. 19 Eq. 48; 23 W. R. 22.

L. Proceedings after Decree.

3041. Addition of parties—Subsequent incumbrancer discovered after decree for foreclosure.]—Decree for foreclosure upon an original claim on further directions, & on the hearing of a supplemental claim, where the existence of an incumbrance subsequent to that of plaintiff was found by the master, & the subsequent incumbrancer was brought before the ct. by the supplemental claim.—ROBINSON *v.* TURNER (1852), 9 Hare, 488; 68 E. R. 603.

3042. —— **Subsequent incumbrance discovered after order for sale.**] — GWATKIN *v.* DOWLING, [1887] W. N. 208.

3043. —— **Plaintiff trustees—Change of trustees after foreclosure absolute—Mortgagor wishing to re-open foreclosure.**] — In a foreclosure action brought by the public officer & estate trustees of an insurance society a final order for foreclosure absolute was made on Dec. 3, 1907. Two of the trustees died after that date. New trustees had been appointed in their places & the mtged. estates vested in them. W., one of defts., being desirous of making an application to open the foreclosure, presented a petition of course for an order of revivor, & an order was made in chambers that the action should for the future be carried on between W. as pltf. & the surviving defts. & the new trustees as defts. On motion to discharge this order:—*Held:* there could not be a revivor under the modern practice, & the right course would have been for W. to apply to the

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PART XIII. SECT. 7, SUB-SECT. 5.—K.

t. *Service of decree.*]—ELLIOTT *v.* HELLIWELL, FERHAN *v.* HAYES (1858), 1 Ch. Ch. 6.—**CAN.**

a. —— *Proof of service—When dispensed with.*]—Where there was no evidence to show that infants had been served with a decree of foreclosure, reserving to them a day to show cause on attaining their majority, but it was shown that they had been served with notice of proceedings under Quieting Titles Act proof of service of the decree was dispensed with.—*Re* GILCHRIST (1879), 8 P. R. 472.—**CAN.**

b. *Amendment—Whether granted ex parte.*]—On an application *ex p.* for leave to amend after the decree by correcting the description of the mtged. premises:—*Held:* the application could not be granted *ex p.*—BANK OF MONTREAL *v.* POWER, 2 Ch. Ch. 47.—**CAN.**

c. —— *Inquiry as to priorities.*]—MOFFATT *v.* MARCH (1852), 3 Gr. 163.—**CAN.**

d. *Whether necessity for judge's direction—For registrar to draw up decree.*]—The fact that a married woman is deft. to a foreclosure suit (the time for her separate answer having elapsed) does not render it necessary to apply to a judge for a direction to the registrar to draw up the decree on *præcipe*, as the registrar has power to do so without any direction.—MACFIE *v.* MCDOUGALL, 1 Ch. Ch. 259.—**CAN.**

e. *Decree for summary reference to master — When made — Necessity for proving execution of conveyance.*]—CREELMAN *v.* CLEFFORD (1850), 2 Gr. 213.—**CAN.**

f. *Effect of erroneous decree.*]—A decree for foreclosure being erroneous, the ct. refused to pronounce a final decree on default of payment.—COMMERCIAL BANK *v.* GRAHAM (1850), 4 Gr. 419.—**CAN.**

g. *Leave to file answer after decree—When granted.*]—WILLIAMS *v.* ATKINSON (1858), 1 Ch. Ch. 34.—**CAN.**

h. *Form of decree.*]—Where a mtgor. has executed several mtgees., in one only of which his wife joined, the proper decree on a bill for foreclosure against the widow & devisees of the mtgor., is one in the usual form against them all, with a declaration that upon payment of the mtge. executed by the widow, she shall, if she choose, be let into her dower.—THIBODO *v.* COLLAR (1850), 1 Gr. 147.—**CAN.**

k. ——.]—PERKINS *v.* VANDERLIP (1865), 11 Gr. 488.—**CAN.**

l. ——.]—Where there is a dispute as to the ownership of the equity of redemption, the decree should usually contain a direction to the master to inquire as to the ownership before a day is appointed for payment.—CAYLEY *v.* HODGSON (1867), 13 Gr. 433.—**CAN.**

m. ——.]—NORTH OF SCOTLAND CANADIAN MORTGAGE CO. *v.* BEARD (1883), 9 P. R. 546.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 5.—L.

n. *Addition of parties—Purchaser or assignees.*]—Where mtgors. had been foreclosed, & the mtgees. had subsequently sold the property:—*Held:* the mtgors. could not, several years afterwards, move in the suit against the final order for irregularity, without having made the purchasers or their assignees parties to the suit.—BOULTON *v.* DON & DANFORTH ROAD CO., 1 Ch. Ch. 335.—**CAN.**

o. —— *Purchasers of portion of mortgaged property.*]—RUMBLE *v.* MOORE (1859), 1 Ch. Ch. 59.—**CAN.**

p. —— *Registered owners.*]—SECURITY LOAN & TRUST CO. *v.* DUHAN (Alta.), [1919] 3 W. W. R. 346.—**CAN.**

q. *Devisee—When entitled to common order to revive.*]—Where a sole pltf. in a foreclosure suit dies after decree, his devisee is entitled, on *præcipe*, to the common order to revive.—GEDDES *v.* ALLAN, 1 Ch. Ch. 336.—**CAN.**

r. *Affidavit showing circumstances of possession—When required—Three years' delay since final order.*]—Where more than three years had elapsed since the final order, the ct. required

trustees for their consent to the new trustees being added as pltfs., &, if they refused, to apply under R. S. C., Ord. 17, r. 4, to have them added as defts.—PENNINGTON *v.* CAYLEY, [1912] 2 Ch. 236; 81 L. J. Ch. 522; 107 L. T. 116; 56 Sol. Jo. 550.

3044. Rectification of register—Form of order—Foreclosure order not foreclosing instrument of charge.]—Form of order under Land Transfer Act, 1875 (c. 87), s. 95, rectifying the register in a case where a foreclosure order had foreclosed a mtge. by deed of registered land without foreclosing the contemporaneous instrument of charge.—WEYMOUTH *v.* DAVIS, [1908] 2 Ch. 169; 77 L. J. Ch. 585; 99 L. T. 333.

Annotation:—**Folld.** London City & Midland Executor & Trustee Co. *v.* Cave, [1925] W. N. 159.

3045. —— ——.]—LONDON CITY & MIDLAND EXECUTOR & TRUSTEE CO., LTD. *v.* CAVE, [1925] W. N. 159.

SUB-SECT. 6.—THE ORDER.

A. In General.

3046. Form of order—Mortgage of reversionary interest in stock.]—PONTEN *v.* PAGE (1816), 1 Maddock's Chancery Practice, 3rd ed. p. 664.

Annotation:—**Consd.** Wayne *v.* Hanham (1851), 9 Hare, 62.

3047. —— ——.]—SLADE *v.* RIGG, No. 2250, *ante*.

3048. —— ——.]—Mtgee. of a reversionary interest in stock filing a bill to realise his security, is entitled to a decree for foreclosure in default of payment, that being the ordinary method whereby the ct. excludes the right of redemption; & although he may, in some cases, be entitled to a decree for sale, there is no rule or practice of the ct. which compels him to submit to such a decree.—WAYNE *v.* HANHAM (1851), 9 Hare, 62; 20 L. J. Ch. 530; 17 L. T. O. S. 151; 15 Jur. 506; 68 E. R. 415.

3049. —— Mortgage of present interest in stock.]—PIPER *v.* COKE (1832), 3 Seton's Judgments & Orders, 7th ed. 1923.

3050. —— Where position of mortgaged property not identified.]—BROWN *v.* VERNON (1852), 1 W. R. 104.

3051. —— Where mortgage debt payable by instalments.]—GREENOUGH *v.* LITTLER, No. 2199, *ante*.

B. Accounts and Inquiries.

(*a*) *In General.*

3052. Accounts taken separately—Foreclosure & personal covenant.]—ROLLS *v.* ELLIS (1892), 37 Sol. Jo. 66.

3053. Chief clerk's certificate—Irregularity as to date—Effect of waiver by defendant.]—(1) To facilitate the computation of interest in a foreclosure suit, the chief clerk's certificate was dated July 15, 1874, but was not signed by the chief clerk till July 31, 1874:—*Held:* the certificate was irregular.

(2) Deft. attended several appointments to settle the certificate between July 15 & 31:—*Held:* as he must have known that July 15 was fixed as the date of the certificate, he had by his conduct waived the irregularity.—BUCKERIDGE *v.* WHALLEY (1875), 23 W. R. 224, L. C. & L. J.

3054. Right of mortgagor to insist on—Insufficient security—Form of order.]—Mtgees. abstained from bringing in the accounts directed by a foreclosure judgment on the ground that needless expense would be occasioned thereby, the security being alleged to be already insufficient:—*Held:* there being no evidence before the ct. that the taking of the accounts would be a reckless proceeding, the mtgors. were entitled to an order on the mtgees. to bring in the accounts, but that the order must be prefaced with a statement that it was insisted on by the mtgors., & be without prejudice to an application by the mtgees. to stay proceedings in case they should be able to prove the proceedings reckless.—TAYLOR *v.* MOSTYN (1883), 25 Ch. D. 48; 53 L. J. Ch. 89; 49 L. T. 483; 32 W. R. 256, C. A.

Annotations:—**Consd.** Stevens *v.* Theatres, [1903] 1 Ch. 857. **Reld.** Hop Exchange Assocn. *v.* Assocn. of Land Financiers (1886), 55 L. T. 611.

3055. Form of order—Must not prejudice trial—Application not to be treated as trial of action.]—When an order for preliminary accounts is obtained under R. S. C., 1875, Ord. 15, r. 1, after issuing the writ of summons in a foreclosure action, & after simple appearance to the writ by deft., the order should not prejudice the trial of any issues which might be raised by the pleadings subsequently delivered by inserting as of common form the words "& the judge not requiring any trial of this action other than this application."—GATTI *v.* WEBSTER (1879), 12 Ch. D. 771; 48 L. J. Ch. 763; 41 L. T. 18; 27 W. R. 935.

—— **In debenture-holder's action.**]—*See* COMPANIES, Vol. X., pp. 808, 809, Nos. 5140–5160.

Admissibility in evidence of account books.]—*See* EVIDENCE, Vol. XXII., p. 362, Nos. 3689–3693.

3056. Special circumstances affecting taking of account—To be mentioned at trial.]—(1) Any special matter affecting the state of the account as between mtgor. & mtgee. in a foreclosure action

an affidavit showing the circumstances of the possession since the final order, & that deft. had never relinquished possession.—IRVING *v.* MUNN (1861), 1 Ch. Ch. 240.—**CAN.**

t. Amendment of bill—After decree & report—Whether allowed.]—After decree & report in a foreclosure suit, the ct. refused to amend a mistake in the description of the property in the bill.—LAWRASON *v.* BUCKLEY (1869), 15 Gr. 585.—**CAN.**

a. Ignorance of rights to equity of redemption—Application for liberty to withdraw disclaimer—& amend answer.]—GLENNY *v.* MURDOCK (1841), Fl. & K. 277.—**IR.**

PART XIII. SECT. 7, SUB-SECT. 6.—A.

b. Form of order—Mortgage of two lots of land subject to separate vendor's liens.]—EMPIRE CREAM SEPARATOR CO. *v.* FRIER (1917), 45 N. B. R. 1; 36 D. L. R. 356.—**CAN.**

c. —— *Where personal judgment asked for.*]—In an action for foreclosure or sale under a mtge., where there are no special circumstances & pltf. asks for personal judgment & establishes his right thereto, the order made should follow Rules of Court, App. Form 121.—LONDON & BRITISH NORTH AMERICA CO., LTD. *v.* HAIGH & INVESTMENT TRUSTEES CO., LTD., [1922] 1 W. W. R. 172; 62 D. L. R. 592; 15 Sask. L. R. 71.—**CAN.**

d. Payment out of court—Amount found due by master.]—The purchase-money for lands sold under a mtge. was paid into ct.:—*Held:* the mtgor. must have notice of any application to pay out to pltf. the amount found due him by the master's report.—SMITH *v.* KERR (1853), 3 Gr. 609.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—B. (a).

e. When fresh accounts to be taken.]—DALLIMORE *v.* ORIENTAL BANK CORPN. (1877), 3 V. L. R. (Eq.) 203.—**AUS.**

f. ——.]—Where, in a mtge. action, after the amount due under the mtge. has been fixed by the order *nisi*, a pltf. accepts a payment on account it is not necessary, under the Alberta practice, to direct a new account to be taken & fix a new date for payment where the amount of the claim as reduced can be easily calculated by deft.—ALLAN *v.* VAIR (Alta.) (1913), 25 W. L. R. 203; 4 W. W. R. 1344; 13 D. L. R. 194.—**CAN.**

g. ——.]—If after the certificate of amount due & order for sale made in a mtge. action & before the time for redemption rents are collected from the premises on the mtgee.'s behalf, new accounts must be taken & a new date fixed for redemption.—DUNFORD *v.* LEICESTER, [1921] 2 W. W. R. 585.—**CAN.**

h. Affidavit as to value.]—RAMSEY

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should be brought forward at the trial & the judgment should direct the chief clerk to have regard to any such matter specifically.

(2) The trustee in bkpcy. of a mtgor. having, after a foreclosure judgment directing the usual accounts & inquiries, claimed to be entitled to have the accounts taken on the footing that he was entitled to redeem on payment of the amount at which the mtgee. had valued his security in the bkpcy.:—*Held:* the trustee should have asked at the hearing for a special declaration, & in the absence of any such declaration the question could not be raised during the mechanical operation of taking an ordinary account.—SANGUINETTI *v.* STUCKEY'S BANKING CO. (No. 2), [1896] 1 Ch. 502; 65 L. J. Ch. 340; 74 L. T. 269; 44 W. R. 308; 40 Sol. Jo. 295.

(*b*) *Covenant Account.*

3057. Right to account of principal & interest.]—Where an old warrant of attorney had been given to secure a debt & interest, the sum for which judgment was to be confessed being for the amount of the debt only, the ct. granted a rule to enter up judgment for the debt, & so much for interest as the master should find to be due thereon.—CHALK *v.* WALTON (1843), 5 Man. & G. 573; 1 Dow. & L. 39; 6 Scott, N. R. 693; 134 E. R. 689.

3058. —— Unless amount proved or agreed at trial.]—FARRER *v.* LACY, HARTLAND & CO., No. 2200, *ante*.

3059. Rate of interest—As provided by mortgage.]—A. made a mtge. to B. for £1,769, payable by five equal payments, within the space of five years, with interest at 5 per cent. But the mtgor. covenanted, that if the money was not paid at those times, or within three months after, he would for every sum so unpaid, pay the mtgee. interest after the rate of 8 per cent. until actual payment. The money was not paid according to the terms of the deed, & therefore the mtgee. filed a bill to foreclose. The ct. decreed an account of the principal money & interest, at 5 per cent. only. But on an appeal, this decree was reversed, & the mtgor. was ordered to be charged with interest, at 8 per cent. from the end of three months after each payment became due.—BURTON *v.* SLATTERY (1725), 5 Bro. Parl. Cas. 233; 2 E. R. 648, H. L.

3060. —— ——.]—LEE *v.* DUNSFORD, No. 3077, *post*.

3061. What costs included—Costs in respect of covenant for payment only.]—FARRER *v.* LACY, HARTLAND & CO., No. 2200, *ante*.

3062. Right to judgment for immediate payment—Where amounts proved or admitted at trial—Discretion of judge to give time.]—FARRER *v.* LACY, HARTLAND & CO., No. 2200, *ante*.

3063. —— ——]—Where pltf., in a foreclosure action makes a claim for personal payment of the principal, & that sum is admitted to be due at the trial, he is entitled, in the absence of special circumstances, to an order for immediate payment.—INSTONE *v.* ELMSLIE (1886), 54 L. T. 730; 34 W. R. 592; 2 T. L. R. 662.

3064. —— After amount certified—Discretion of judge to give time.]—FARRER *v.* LACY, HARTLAND & CO., No. 2200, *ante*.

3065. —— Failure of defendant to appear—Not where account only claimed.]—Deft. to a foreclosure action did not appear to the writ. Pltf. by his statement of claim alleged that a specified amount was due to him in respect of principal & interest, but asked that an account might be taken of what was due. On a motion by pltf. for judgment in default of pleading, deft. did not appear:—*Held:* as deft. had not appeared on the hearing of the motion, pltf. was, notwithstanding deft.'s omission to plead, not entitled to any relief which he had not asked by his statement of claim, &, consequently, he was not entitled to immediate judgment upon the deft.'s covenant for payment of the amount alleged to be due, but the judgment must be for payment of the amount found to be due upon taking the account in chambers.—FAITHFULL *v.* WOODLEY (1889), 43 Ch. D. 287; 59 L. J. Ch. 304; 61 L. T. 808; 38 W. R. 326.

3066. Form of order—Mortgagee in possession.]—ROLLS *v.* ELLIS (1892), 37 Sol. Jo. 66.

3067. —— Where receiver appointed.]—BARBER *v.* JECKELLS, [1893] W. N. 91.

What arrears of interest recoverable.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 422, 482, Nos. 995–998, 1452.

(*c*) *Mortgage Account.*

3068. Right to order for account—Against infant devisees of mortgaged property.]—TAYLOR *v.* COATES, No. 2847, *ante*.

3069. What must be taken into account—Rents & profits—Mortgagee in possession.]—PENRHYN (LORD) *v.* HUGHES, No. 2689, *ante*.

3070. —— —— **When receiver appointed.**]—BARBER *v.* JECKELLS, [1893] W. N. 91.

3071. —— —— ——.]—BLAIBERG *v.* GATTI (1896), 100 L. T. Jo. 441.

Annotation:—**Folld.** Simmons *v.* Blandy, [1897] 1 Ch. 19.

3072. —— —— ——.]—In a foreclosure action in which a receiver of rents & profits had been appointed:—*Held:* the judgment ought to direct that in taking the account pltf. should be charged with the amount, if anything, paid into ct. by the receiver, & such a sum as should be in the receiver's hands at the date of the certificate, & with such a sum, if any, as pltf. should submit to be charged with in respect of rents & profits to come into the receiver's hands prior to the order for foreclosure absolute.—SIMMONS *v.* BLANDY, [1897] 1 Ch. 19; 66 L. J. Ch. 83; 75 L. T. 646; 45 W. R. 296.

3073. —— —— **Receipt after master's report—Necessity for new reference to master.**]—ALDEN *v.* FOSTER, No. 3270, *post*.

3074. —— **Costs—Not of unnecessary affidavit.**]

v. MCDONALD (1880), 8 P. R. 283.—**CAN.**

k. *Report of referee as to amount—Discretion of court to consider.*]—On application for an order for foreclosure & sale the judge to whom the application is made has authority to open up the question of the correctness of the report of a referee as to the amount due.—WALLACE *v.* HARRINGTON (1901), 34 N. S. R. 1.—**CAN.**

l. *Application for order.*]—The practice of applying under M. R. 794, for an order to proceed with the taking of accounts upon a judgment *nisi* in foreclosure proceedings disapproved.—PAULSON *v.* HATHAWAY (B. C.), [1917] 2 W. W. R. 760.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—B. (b).

3057 1. *Right to account of principal & interest.*]—*Semble:* the account of principal & interest in a foreclosure suit directed to be taken before the decree was drawn up, could not be taken after the death of the party bound to pay, who had died before this was done.—GALBRAITH *v.* ARMSTRONG (*circa* 1858), 1 Ch. Ch. 33.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—B. (c).

m. *Computation of amount due—Advance by loan society.*]—ALLIANCE SOCIETY OF LONDON *v.* CHISHOLM (1881), R. E. D. 414.—**CAN.**

n. *What may be found due.*]—On

—PERPETUAL INVESTMENT BUILDING SOCIETY *v.* GILLESPIE, [1882] W. N. 4.

3075. —— Amount received on covenant account.]—GRUNDY *v.* GRICE (1877), 2 Seton's Judgments & Orders, 4th ed. 1036.

Annotation :—**Refd.** Hunter *v.* Myatt (1884), 28 Ch. D. 181.

3076. —— ——.] — In a foreclosure action, where judgment is taken against the mtgor. personally upon his covenant to pay principal & interest, the proper form of decree is to order payment by him within one month, then to direct an account directing the chief clerk to have regard to the amount received by means of the personal judgment.—HUNTER *v.* MYATT (1884), 28 Ch. D. 181; 54 L. J. Ch. 615; 52 L. T. 509; 33 W. R. 411.

—— ——.]—A mtgee. claimed payment, or, in default, sale or foreclosure. Judgment was given for immediate payment of principal & interest proved to be due, &, in default, for foreclosure, the account being directed with interest at the rate provided by the mtge., pltf. bringing into account what, if anything, should be received under the judgment.—LEE *v.* DUNSFORD (1884), 45 L. J. Ch. 108; 51 L. T. 590.

Annotation :—**Refd.** Wethered *v.* Cox, [1888] W. N. 165.

3078. —— ——.]—BARBER *v.* JECKELLS, [1893] W. N. 91.

3079. —— Special matter—Necessity for special direction to chief clerk. — SANGUINETTI *v.* STUCKEY'S BANKING CO. (No. 2), No. 3056, *ante*.

3080. Right of mortgagor to set-off.]—In taking the accounts between mtgor. & mtgee., whether in a foreclosure or in a redemption suit, the mtgor. is entitled to the benefit of set-off.—*Re* AGRA & MASTERMAN'S BANK, ANDERSON'S CASE (1866), L. R. 3 Eq. 337; 36 L. J. Ch. 73; 15 W. R. 246.

Annotation :—**Refd.** Mersey Steel & Iron Co. *v.* Naylor (1882), 9 Q. B. D. 648.

(d) Inquiries.

3081. What inquiries will be directed—As to deterioration of mortgaged property—Wilful neglect of defendant.]—PRETTYJOHN *v.* PYKE (1809), 3 Seton's Judgments & Orders, 7th ed. 1888.

3082. —— As to priorities of incumbrancers.]—FOURNIER *v.* PAINE (1835), 9 Bli. N. S. 282; 5 E. R. 1297; *sub nom.* TURNER *v.* DICKENSON, 3 Cl. & Fin. 593, H. L.

3083. —— ——.]—*Semble :* in a foreclosure suit against subsequent incumbrances, about the priority of whose incumbrances there is a doubt, it is necessary that the priorities should be settled by a preliminary reference to the master.—COLERIDGE *v.* COLLETON (1848), 11 L. T. O. S. 432.

3084. —— ——.]—Upon a bill of foreclosure by first mtgee., there was a contest between the defts., the *puisne* mtgees., as to their respective priorities. The ct. held that it must, in the first instance, direct an inquiry.—DUBERLY *v.* DAY (1851), 14 Beav. 9; 18 L. T. O. S. 58; 51 E. R. 190.

3085. —— —— Jurisdiction of master.] — A reversioner in fee expectant on the death of a tenant for life aged sixty-one, mortgaged in 1819, his reversion by way of trust to secure repayment of an advance of £500 on the death of the tenant for life, with £500 more if the tenant for life died within five years, & twice as much more if he died after that period. To a foreclosure bill filed by a mtgee., stating subsequent incumbrances, & that some specified defts. claimed an interest in the mtged. property, one of these defts. put in an answer claiming to be entitled under the above-mentioned security. By the decree the usual reference was directed as to incumbrances & their priorities. The above deft. claimed as an incumbrancer under this decree & the master disallowed his claim :—*Held :* the master had jurisdiction so to decide, although the security was not impeached by the pleadings.—MANSFIELD (EARL) *v.* OGLE (1855), 7 De G. M. & G. 181; 3 Eq. Rep. 907; 24 L. J. Ch. 450; 25 L. T. O. S. 209; 1 Jur. N. S. 603; 3 W. R. 557; 44 E. R. 7, L. JJ.

3086. —— As to extent of security.]—FOURNIER *v.* PAINE (1835), 9 Bli. N. S. 282; 5 E. R. 1297; *sub nom.* TURNER *v.* DICKENSON, 3 Cl. & Fin. 593, H. L.

3087. —— Not as to heir of party entitled to equity of redemption.]—The ct. will not under Ord. 5, May 9, 1839, direct an inquiry, in a suit for foreclosure, of who was the heir-at-law of a party who was entitled to the equity of redemption of mtged. premises.—WARNER *v.* MOORE (1841), 10 L. J. Ch. 371; 5 Jur. 910.

— In debenture-holders' action.]—*See* COMPANIES, Vol. X., p. 809, No. 5161.

3088. Discretion of court to grant inquiry.]—Form of inquiry in a bill of foreclosure, where deft. suggests by his answer that pltf. has been in possession & paid himself interest.

Whether the mtgee. has been in possession or not, is incidental to the accounts; & though it is entirely in the discretion of the ct. to grant an inquiry as to that fact, it is usual to do so upon the suggestion contained in the answer (KNIGHT BRUCE, V.-C.).—DOBSON *v.* LEE (1842), 1 Y. & C. Ch. Cas. 714; 62 E. R. 1084.

C. Foreclosure Nisi.

(a) In General.

3089. Whether injunction granted against waste.]—KETTLE *v.* CORBIN (1758), 1 Dick. 314; 21 E. R. 290.

3090. Whether liberty to apply for sale granted.]—The ct., in making a foreclosure decree, gave liberty to any party to apply in chambers for a sale.—BURMESTER *v.* MOXON (1866), 35 Beav. 310; 55 E. R. 915.

taking the account in foreclosure suits no more can be found due than the amount claimed by the indorsement on the copy of the bill served.—BOYD *v.* WILSON (1863), 1 Ch. Ch. 258. —**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—B. (d).

3082 i. *What inquiries will be directed—As to priorities of incumbrancers.*]—On proceeding in the master's office, upon a reference as to incumbrances in foreclosure cases, it is not necessary to search in the office of any deputy registrar of the ct. to ascertain whether bills have been filed upon registered judgments, as such bills only preserve the rights of the judgment creditors in the particular suits in which they are filed.—GRAINGER *v.* GRAINGER (1861), 1 Ch. Ch. 241.—**CAN.**

o. —— *As to ownership by purchase at tax sale.*]—Pltfs. filed a bill of foreclosure. Defts. set up that they were absolute owners by virtue of a tax sale & the proceedings in a foreclosure suit. Both defences failed; & defts. claiming at the bar that pltfs. should redeem the prior mtge., the ct. granted a reference in such terms as would enable defts. to establish that claim, if well founded, in the master's office.—JONES *v.* BANK OF UPPER CANADA (1867), 13 Gr. 201.—**CAN.**

p. —— *As to sale by mortgagee.*]—Deft. contended that the master should take into account a certain sale by pltf., as mtgee. to a person who, it appeared, had not paid his purchase-money. There was no specific mention of this sale in the pleadings or judgment :—*Held :* the proposed inquiry was not within the scope of the pleadings or the judgment.—ROWLAND *v.* BURWELL (1888), 12 P. R. 607.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—C. (a).

q. *Lands not set out in bill.*]—A ct. will not grant a decree of foreclosure in the first instance, where the lands of the judgment debtor are not specifically set out & the value of them stated in the bill.—GLASS *v.* FRECKELTON (1861), 8 Gr. 522.—**CAN.**

r. *Rights of defendant added after*

Sect. 7.—Foreclosure or sale: Sub-sect. 6, C. (a), (b) i. & ii., & (c).]

3091. —— Notice to mortgagor.]—Where, in an action for foreclosure, the mtgor. had not had notice of the mtgees.' intention to ask for a sale instead of foreclosure of the mtged. property, & did not appear, the ct. declined to exercise its discretion, under Conveyancing & Law of Property Act, 1881 (c. 41), s. 25 (2), as to directing a sale. A decree for foreclosure was made, with liberty to apply in chambers for an order for sale, upon giving notice to the mtgor.—WESTERN DISTRICT BANK, LTD. *v.* TURNER (1882), 47 L. T. 433.

3092. Whether order rectified—Accidental omission.]—The accidental omission, in drawing up the common decree for redemption, of the usual direction to mtgor. to pay what should be found due, "within six months after the master shall have made his report" :—*Held :* an error which might be corrected by petition, under Ord. 45, Apr. 1828. —BIRD *v.* HEATH (1848), 6 Hare, 236 ; 12 Jur. 861 ; 67 E. R. 1154.

3093. —— Error in chief clerk's certificate.]—ECKERSLEY *v.* ECKERSLEY, [1884] W. N. 133.

3094. When order set aside—Mistake as to heir of mortgagor.]—In a foreclosure action, where judgment had been obtained against deft. the alleged eldest son & heir-at-law of the mtgor. who had died intestate & a contract for sale had been entered into subject to the sanction of the judge in chambers, it having been found that there was no evidence of deft.'s heirship, on motion by pltfs. it was ordered that the judgment be set aside, & the action dismissed without costs.—LANCASTER BANKING CO. *v.* COOPER (1878), 9 Ch. D. 594 ; 27 W. R. 164.

(*b*) *Against Mortgagor.*

i. *Form of Order.*

3095. Foreclosure of two mortgages—Action against purchaser & personal representative.]—Mortgage by W. to B. & D. to secure £2,500 & interest, & as an additional security a mtge. by J., M. purchased the premises mortgaged by W., subject to the mtge. Bill of foreclosure against M. & the representatives of J. to foreclose the two mtges. It was decreed that in case M. should redeem pltf., & the premises mortgaged by W. should be conveyed to M., & those mortgaged by J. to the representatives of J. But in case the representatives of J. should redeem pltf., the premises comprised in each of the mtges. should be conveyed to them, & in case of failure by M., or the representatives of J., to redeem, that to the parties should stand foreclosed as to all the mtged. premises.—BECKETT *v.* MICKLETHWAITE (1821), 6 Madd. 199 ; 56 E. R. 1067.

3096. —— Mortgagor joining as surety in further mortgage.]—ALDWORTH *v.* ROBINSON, No. 1606, *ante*.

3097. —— One a joint mortgage.]—Form of decree of foreclosure where the mtgee. held two mtges. ; by one of which, property, belonging partly to A. & partly to B., was conveyed to secure money advanced to A. & B. in different proportions, with a proviso for redemption, on payment of the money by them, or either of them ; &, by the other, property belonging to A., & partly comprised in the first mtge., was covenanted to be conveyed to secure the debt of A.—HIGGINS *v.* FRANKIS (1846), 15 L. J. Ch. 329 ; 10 Jur. 328.

Annotation :—**Consd.** Bowker *v.* Bull (1850), 1 Sim. N. S. 29.

3098. Claim of dower out of mortgaged premises—Paramount to mortgagee.]—Form of a decree of foreclosure where a widow claimed dower out of the mtged. premises, paramount, to some extent, to the mtgee.—JONES *v.* GRIFFITH (1845), 2 Coll. 207 ; 63 E. R. 702.

3099. Order against one of several tenants in common—Partition in case of redemption.]—D., in Feb. 1857, entered into an agreement, for himself & brothers & sisters, to sell to pltf. eight fields, forming part of an estate in W., for the sum of £1,000, & pltf. was to have possession on Mar. 25 following. The agreement was signed by A. & B. only ; but the bill alleged that D., & his four brothers & sisters, who were tenants in common of the equity of redemption, agreed to sell the property to pltf., & that A. & B., or at least one of them, signed the agreement as agents or agent of their brothers & sister. Pltf., with the privity of the five tenants in common, paid the purchase-money to the mtgee. in part satisfaction of the mtge., & he was let into possession, & expended moneys in draining, etc. An abstract of title was furnished & accepted, but before the conveyance was prepared, pltf. & his solr. received notice not to prepare it, as the five vendors would not execute in, on the ground that one of them did not concur in the sale & the others declined to complete. D., & A. & B., admitted that they agreed to sell the fields to pltf., & that they believed their brothers & sister would concur in the agreement, but that they had no authority for them to sell, of which pltf. was, as alleged, aware. A. & B. denied that they signed on behalf of any one. C. & G. denied that they had ratified the agreement, & submitted that they were not bound ; but it appeared that G. was, with D. & A. & B., present when the purchase-money of £1,000 was paid to the mtgee. D., & A. & B., submitted to a decree for specific performance :—*Held :* (1) as to C.'s one-sixth share in the equity of redemption, pltf. was entitled to a decree that he should redeem or be foreclosed ; in case of redemption, there should be a partition ; (2) pltf. must pay the costs of the mtgee., & he was entitled to those costs, & the costs of the suit, as against D., & A., B., & G.—DAVIES *v.* DAVIES (1860), 3 L. T. 233 ; 6 Jur. N. S. 1320.

order nisi.]—Deft. added after an order *nisi* may, without formally entering an appearance, pay the arrears & obtain relief for foreclosure, under Land Titles Act, s. 93 (10).—WASSON *v.* HARKER (1912), 22 W. L. R. 609 ; 3 W. W. R. 218 ; 8 D. L. R. 88 ; 5 Sask. L. R. 364.—**CAN.**

t. *Restoration of order.*] — Order *nisi* for foreclosure in a mtge. action restored, after being reversed, on the ground that the examination of the manager of pltf. co showed that he did not have a personal knowledge of condition of the mtge. account.—GREAT WEST PERMANENT LOAN CO. *v.* MCEVERS & WATSON (Sask.), [1918] 2 W. W. R. 396 ; 40 D. L. R. 755.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—C. (b) i.

a. *Payment by instalments under decree—Subsequent default.*]—Where a decree of foreclosure obtained upon a mtge. payable by instalments has been stayed upon payment of the amount actually due, & a subsequent default occurs, the proper order to make is to direct the whole sum secured to be paid with liberty to deft. to pay the sum actually due, & stay proceedings thereon.—STRACHAN *v.* DEVLIN (1857), 1 Ch. Ch. 8.—**CAN.**

b. *Dispute as to ownership of equity.*]—A mtgee. having filed a bill to foreclose against two rival claimants of the equity of redemption, the ct. directed the usual redemption by, & conveyance to, the person *primâ facie* entitled to the equity, with a right to the other claimant, at any time before the day appointed for payment, to show himself to be entitled.—RUMSEY *v.* THOMPSON (1860), 8 Gr. 372.—**CAN.**

c. *Dispensing with reference.*] — In an action for foreclosure upon the return of pltf.'s motion in chambers for judgment upon the statement of claim, the judge pronounced the "usual order for foreclosure *nisi*." Pltf.

3100. Mortgage of East India Company pension—Direction for execution of power of attorney.]—In a suit to foreclose mtged. property consisting (*inter alia*) of a pension from the East India Co., there was added to the ordinary form of foreclosure decree a direction that the mtgor. should, in the event of the decree becoming absolute, execute a power of attorney enabling the mtgee. to receive the pension.—JAMES *v.* ELLIS (1871), 24 L. T. 12; 19 W. R. 319.

3101. Claim for personal payment joined with claim for foreclosure.]—In a foreclosure action, since the Jud. Acts, where both forms of relief are expressly claimed, an order for personal payment may be combined with an order for foreclosure.—GIBBON *v.* WALKER (1878), 38 L. T. 217.

3102. Claim for possession joined with claim for foreclosure.]—The minutes of the order in a mtgee.'s action, where possession of the mtged. premises is (*inter alia*) claimed, should contain a direction that, in default of deft. redeeming, he should deliver up possession of the mtged. premises to pltf., inasmuch as the order for possession is a conditional order like a foreclosure order, & requires to be made absolute like a foreclosure order.—WILLIAMSON *v.* BURRAGE (1887), 56 L. T. 702.

Annotation :—**Consd.** Keith *v.* Day (1888), 39 Ch. D. 452.

3103. Mortgaged estate vested in infant—Trust for sale—Direction for conveyance to mortgagee by executrix.]—In a foreclosure action, where the estate of the mtgor. was devised in trust for sale & had become vested in an infant, who was also one of the persons beneficially interested :—*Held :* the decree should contain a direction that, in case the mtgees. were not redeemed within six months, the infant should be a trustee for them within Trustee Act, & extrix. of the mtgor. be ordered to convey the estate to the mtgees. on his behalf.—FOSTER *v.* PARKER (1878), 8 Ch. D. 147.

Annotation :—**Consd.** Mellor *v.* Porter (1883), 25 Ch. D. 158.

3104. Order against representative of intestate—Insufficient estate.]—PEAT *v.* GOTT, [1885] W. N. 46.

In debenture-holders' action.]—*See* COMPANIES, Vol. X., pp. 808, 809, Nos. 5140-5160.

ii. *Provision for Redemption.*

3105. Time for redemption—General rule—Six months.]—CANTER *v.* WODEHOUSE (1874), L. R. 19 Eq. 49, n.

Annotation :—**Refd.** Hyde *v.* Large (1874), L. R. 19 Eq. 48.

3106. —— —— ——.]—After judgment in a foreclosure action, & the certificate of the master, finding the amount due for principal, interest, & costs up to the date of the certificate, & adding the amount of interest due up to the time allowed by the judgment for redemption, that is, six months from the date of the certificate, the mtgor. cannot redeem before the expiration of the six months upon payment of the principal & interest up to the time of payment only, but must pay the full amount found due by the certificate.—HILL *v.* ROWLANDS, [1897] 2 Ch. 361; 66 L. J. Ch. 689; 77 L. T. 34; 46 W. R. 26; 41 Sol. Jo. 639, C. A.

3107. —— How computed—Calendar not lunar months.]—When a decree of foreclosure is made, the time for redeeming must be computed according to calendar months, & not according to lunar ones.—ANON. (1740), Barn. Ch. 324; 2 Eq. Cas. Abr. 605; 27 E. R. 664, L. C.

Annotation :—**Consd.** Schiller *v.* Petersen, [1924] 1 Ch. 394.

3108. —— Mortgagor cannot redeem before time fixed—On payment of interest up to time of payment only.]—HILL *v.* ROWLANDS, No. 3106, *ante*.

3109. Who may redeem—Second mortgagee—Though second mortgage not known to first mortgagee.]—After a decree by first mtgee. to foreclose the mtgor., a second mtgee. may redeem the first, though the first mtgee. had no notice of the second mtge. before the decree.—GODFREY *v.* CHADWELL (1707), 2 Vern. 601; 23 E. R. 993, L. C.

3110. —— Devisees of mortgagor.]—S. devised a lease for lives, after payment of his debts, to his two grand-children H. & W., but if either of them died without heirs of their own bodies, then the share of him so dying, should go to testator's other grandchild C. W. died without issue. On a bill filed by a mtgee. to foreclose, it was held, that H. & C. were entitled to redeem in equal moieties.—WASTNEYS *v.* CHAPPELL (1714), 3 Bro. Parl. Cas. 50; 1 E. R. 1170, H. L.

Annotations :—**Mentd.** Norton *v.* Frecker (1737), 1 Atk. 524; Slade *v.* Pattison (1835), 5 L. J. Ch. 51; Edwards *v.* Champion (1853), 1 Eq. Rep. 419.

(c) *Against Mortgagor and Subsequent Incumbrancers.*

3111. Pulsne mortgagees must be foreclosed first—Though mortgaged estate vested in infant.]—A. has a first mtge., & B. a second, & subject to these mtges. the estate is settled on C. for life,

sought to take out a ct. order dispensing with a reference : — *Held :* as the material did not indicate that such a course was to be pursued, the order should not issue in the proposed form.—CAMPBELL *v.* MAZUR (1915), 32 W. L. R. 439; 24 D. L. R. 893.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—C. (b) ii.

3105 i. *Time for redemption—General rule—Six months.*]—In suits by judgment creditors for the sale of the debtors property, the debtor is entitled like a mtgor., to six months to redeem before the sale takes place.—WHITE *v.* BEASLEY (1851), 2 Gr. 660.—**CAN.**

3105 ii. ——————.]—*Primâ facie* a mtgor. is entitled to six months to pay.—RIGNEY *v.* FULLER (1853), 4 Gr. 198.—**CAN.**

3105 iii. —— —— ——.]—In mtge. cases the limit of six months is not a hard & fast one.—DAVIS *v.* ALVENSLEBEN (1914), 29 W. L. R. 296; 6 W. W. R. 1184; 20 D. L. R. 112.—**CAN.**

3105 iv. ——————.]—Where an order *nisi* for foreclosure of a mtge. fixed the redemption period later than the usual six months, & the mtgor. for whose benefit such lengthy period has been granted applies before the expiration of six months to reduce the period to six months & offers & is able to pay the six months' interest, & judge in chambers may in his discretion grant the application.—WESTERN IMPERIAL CO., LTD. *v.* NICOLA LAND CO., [1921] 2 W. W. R. 342.—**CAN.**

d. —— *Discretion of court.*]—In deciding as to whether there should be a long or short period for redemption, or, in default, foreclosure, after an abortive sale of the mtged. premises, in an action to enforce a mtge., the facts & circumstances of the case should be taken into consideration.—SCARLETT *v.* BIRNEY (1893), 15 P. R. 283.—**CAN.**

e. Place of payment.]—The mtgee. need not remain at the place appointed by the master's report during all the time limited for payment of the mtge. money; his attendance so early as to allow a reasonable time for payment before the expiration of the hour named will suffice.—SAUNDERSON *v.* CASTON (1851), 2 Gr. 436.—**CAN.**

f. Where several owners of equity.]—Where portions of an estate under mtge. are conveyed away by the mtgor., one day for payment of the amount will be given to all the persons interested in the equity of redemption.—HILL *v.* FORSYTH (1859), 7 Gr. 461.—**CAN.**

g. Extension of time.]—*Held :* where, in a mtge. suit, a payment is made during the time fixed for redemption, & no notice of credit is given, there should be an order referring it to the master to fix, or the order may itself fix, a new day for payment.—MANITOBA & NORTH WEST LOAN CO. *v.* SCOBELL (1885), 2 Man. L. R. 125.—**CAN.**

h. Order must contain provision for redemption.]—THOMAS *v.* PARKER (N. S.) (1917), 34 D. L. R. 367.—**CAN.**

k. Effect of abnormal conditions.]—While, owing to unfortunate conditions in certain farming districts, greater indulgence than heretofore may well be granted to a defaulting mtgor. or purchaser in respect to the time allowed him for redemption, yet before such indulgence is granted it should most clearly appear that the purchaser will have thereby a reasonable prospect of making good his defaults & putting the contract in good standing.—NORRIS *v.* HUSE (Sask.), [1922] 1 W. W. R. 351.—**CAN.**

Sect. 7.—Foreclosure or sale: Sub-sect. 6, C. (c).]

remainder on D., an infant. A. brings a bill to foreclose, though B. has not the like remedy over against D., who because of his infancy cannot be foreclosed; yet B. must redeem A. in six months, or be foreclosed.—DRAPER *v.* CLARENDON (EARL) (1705), 2 Vern. 518; 23 E. R. 931.

Annotations:—**Dbtd.** Winchester (Bp.) *v.* Beavor (1797), 3 Ves. 314. **Refd.** Adams *v.* Paynter, Adams *v.* Lloyd, Adams *v.* Paynter (1844), 8 Jur. 1063.

3112. ——.]—In a foreclosure suit against puisne mtgees. & the mtgor., an order must be made foreclosing the former absolutely, before proceeding to foreclose the mtgor.—WHITBREAD *v.* LYALL (1856), 8 De G. M. & G. 383; 25 L. J. Ch. 791; 27 L. T. O. S. 278; 2 Jur. N. S. 671; 44 E. R. 437, L. JJ.

Annotations:—**Folld.** Webster *v.* Patteson (1884), 53 L. J. Ch. 621; Martineau *v.* Yorke (1893), 38 Sol. Jo. 42.

3113. —— **Further time to mortgagor—Further account.**]—In an action for exors. of a mtgee. against the mtgor. & a puisne mtgee. an order *nisi* for foreclosure was made, giving successive periods of redemption. After the time fixed for redemption & before final judgment was obtained against the puisne mtgee., & before the expiration of the time allowed to the mtgor., pltfs. received a sum of money for rent. A further account had been taken against mtgor., & a further day fixed for redemption by him:—*Held:* (1) it was irregular to fix a further time for the mtgor. to redeem until the puisne mtgee. had been finally foreclosed; & the receipt of moneys for rent after the time fixed for the puisne mtgee. to redeem & before final judgment obtained against him did not open the foreclosure against him.—WEBSTER *v.* PATTESON (1884), 25 Ch. D. 626; 53 L. J. Ch. 621; 50 L. T. 252; 32 W. R. 581.

Annotation:—**Refd.** National Permanent Mutual Benefit Bldg. Soc. *v.* Raper, [1892] 1 Ch. 54.

3114. —— —— ——.]—MARTINEAU *v.* YORKE (1893), 38 Sol. Jo. 42.

3115. Right of puisne mortgagee to redeem—On payment of debt & costs of all parties.]—In a suit for foreclosure, on motion by a subsequent mtgee., the bill was ordered to be dismissed on the mover paying into ct. a fixed sum on or before a day specified, to answer pltf.'s claim, & the costs of pltf. & other defts.—CHALLIE *v.* GWYNNE (1846), Kay, App. XLVI.; 69 E. R. 337.

Annotation:—**Refd.** Paynter *v.* Carew (1854), 23 L. T. O. S. 21.

3116. Whether successive periods allowed for redemption—General rule.]—As a general but not invariable rule, when there are several defts. to a foreclosure action, one period for redemption should be allowed to all defts.—MUTUAL LIFE ASSURANCE SOCIETY *v.* LANGLEY (1884), as reported in 26 Ch. D. 686; 51 L. T. 284; *on appeal* (1886), 32 Ch. D. 460, C. A.

Annotations:—**Mentd.** Flint *v.* Howard, [1893] 2 Ch. 54; Mack *v.* Postle, [1894] 2 Ch. 449; Stephens *v.* Green, Green *v.* Knight, [1895] 2 Ch. 148; Lloyd's Bank *v.* Pearson, [1901] 1 Ch. 865; *Re* Dallas, [1904] 2 Ch. 385.

3117. —— ——.]—A., a first mtgee., brought an action for foreclosure against the mtgor., his trustee in bkpcy., & two subsequent incumbrancers, C. & R. Defts. all appeared, & C. & R. put in statements of defence. C.'s defence alleged that his mtge. was registered in Middlesex without notice, & therefore had priority over R. R.'s defence made no answer to this allegation. At the hearing A. asked for a foreclosure decree, giving only one period of redemption for all defts. C. & R. both claimed that the decree should give successive periods for redemption:—*Held:* the mere fact that R.'s defence did not deny the allegation of priority in C.'s defence could not be taken as an admission by R. of the priority of C.'s mtge., therefore, the priorities were in dispute, & the pltf. was entitled to have only one period of redemption, as in *Bartlett* v. *Rees*, No. 3122, *post. Semble:* even in a case in which the priorities are not in dispute, the ct. will not now give successive periods for redemption.—TUFDNELL *v.* NICHOLLS (1887), 56 L. T. 152.

3118. —— ——.]—YOUNG *v.* JARVIS (1892), 3 Seton's Judgments & Orders, 6th ed. p. 1897.

3119. —— **Not in case of judgment creditors.**]—Upon a foreclosure claim by a mtgee. against a mtgor. & subsequent mtgees. & judgment creditors:—*Held:* judgment creditors ought not to stand exactly in the position of mtgees., & the ct. made a decree fixing one period for redemption by all the judgment creditors, as if their judgments formed one incumbrance only.—STEAD *v.* BANKS (1852), 5 De G. & Sm. 560; 22 L. J. Ch. 208; 19 L. T. O. S. 102; 16 Jur. 945; 64 E. R. 1242.

3120. —— **Where all parties claim under same instrument.**]—BEEVOR *v.* LUCK, BEEVOR *v.* LAWSON, No. 1604, *ante*.

3121. —— **Where parties claim under different instruments.**]—BEEVOR *v.* LUCK, BEEVOR *v.* LAWSON, No. 1604, *ante*.

3122. —— **Where dispute as to priorities not affecting plaintiff.**]—In a foreclosure suit, when questions as to priorities not affecting pltf. are raised between co-defts., the ct. will fix a day certain for all to redeem or be foreclosed, without prejudice to the rights of the several defts. *inter se*. The ct. will not give them successive rights of redemption.—BARTLETT *v.* REES (1871), L. R. 12 Eq. 395; 40 L. J. Ch. 599; 25 L. T. 373; 19 W. R. 1046.

Annotations:—**Folld.** Cork *v.* Russell (1871), 41 L. J. Ch. 226; General Credit & Discount Co. *v.* Glegg (1883), 48 L. T. 182. **Distd.** Platt *v.* Mendel (1884), 27 Ch. D. 246 **Folld.** Smith *v.* Olding (1884), 32 W. R. 386; Tufdnell *v.* Nicholls (1887), 56 L. T. 152. **Refd.** Bradley *v.* Riches (1878), 26 W. R. 910.

3123. —— ——.]—GENERAL CREDIT & DISCOUNT CO. *v.* GLEGG, No. 2883, *ante*.

3124. —— ——.]—(1) The settled practice of the ct. in a foreclosure action, where there are incumbrances subsequent to that of pltf., to grant successive periods of redemption to the subsequent incumbrancers & the mtgor., will only be departed from where special reason for so doing is shown. (2) The fact that there is a contest as to priorities between the subsequent incumbrancers may be a reason for departing from the ordinary practice.

Where such a contest was raised upon the pleadings, & the nature of the property & other special circumstances were such as to render any delay peculiarly disadvantageous to pltfs., the ct. fixed one period of nine months for redemption by the mtgors., a co. in liquidation, & two sets of incumbrancers subsequent to pltfs.—LEWIS *v.* ABERDARE & PLYMOUTH CO. (1884), 53 L. J. Ch. 741; 50 L. T. 451.

Annotation:—*As to* (2) **Distd.** Platt *v.* Mendel (1884), 51 L. T. 424.

3125. —— ——.]—Where in a foreclosure action there are puisne mtgees. entitled to redeem,

PART XIII. SECT. 7, SUB-SECT. 6.—C. (c).

3116 1. *Whether successive periods allowed for redemption—General rule.*]—*Held:* there should be only one period of six months allowed for redemption, for all parties, mtgor. & subsequent incumbrancers.—RICE *v.* MURRAY (1884), 2 Man. L. R. 37.—**CAN.**

1. *Subsequent incumbrancer—Leave to come in after order nisi.*]—An incumbrancer, who had been foreclosed by the master's report, was admitted to prove on explaining his

successive periods of redemption will be given at the request of any such mtgee., but not at the request of the mtgor.

In a foreclosure action by the transferee of the first mtgee., the statement of claim alleged that defts. other than the mtgor. claimed to have some charge upon the mtged. premises subsequent to pltf.'s charge. None of defts., including the mtgor., put in a defence or appeared at the bar:—*Held:* pltf. was entitled to a foreclosure judgment on the pleadings, allowing one period of redemption as against all defts.—PLATT *v.* MENDEL (1884), 27 Ch. D. 246; 51 L. T. 424; 32 W. R. 918; *sub nom.* PLATT *v.* MENDEL, GURNEY *v.* CANTERBURY (VISCOUNTESS), 54 L. J. Ch. 1145.

Annotation:—**Distd.** Tufdnell *v.* Nicholls (1887), 56 L. T. 152.

3126. —— ——.]—TUFDNELL *v.* NICHOLLS, No. 3117, *ante*.

3127. —— **Mortgagee in possession.**]—INGOLDSBY *v.* RILEY (1873), 3 Seton's Judgments & Orders, 7th ed. p. 1908.

3128. —— **Where several mortgages consolidated.**]—(1) Where a mtgee. has consolidated several mtges. of different properties made by the same mtgor., who has conveyed away the respective equities of redemption to various purchasers, upon foreclosure by the mtgee., the earliest purchaser of any part in point of time, or a subsequent purchaser of that part from him who stands in his shoes, will have the first right of redeeming the whole; & if he does not do so then the purchasers of other parts will be entitled successively in order of date to redeem the whole.

(2) If the first purchaser of a part has bought that part subject to a mtge. debt he, or whoever stands in his place at the time of consolidation & redemption, must pay that mtge. debt.—LOVEDAY *v.* CHAPMAN (1875), 32 L. T. 689.

3129. —— **In absence of mortgagor.**]—SWEET *v.* COMBLEY (1882), 25 Ch. D. 463, n.

Annotation:—**Refd.** Platt *v.* Mendel (1884), 51 L. T. 424.

3130. —— **Where small amount available for subsequent incumbrancers.**]—CRIPPS *v.* WOOD, No. 2833, *ante*.

3131. —— **At request of second mortgagee—Not of mortgagor.**]—PLATT *v.* MENDEL, No. 3125, *ante*.

3132. —— —— **Mortgage of reversionary interest.**]—BERTLIN *v.* GORDON, [1886] W. N. 31.

3133. —— —— **Good reason must be shown.**]—Pltfs. in a foreclosure action were first mtgees.; the second incumbrancer was a jointress; pltfs. were the third mtgees.; there were several subsequent mtgees. An order was made giving the jointress six months to redeem; in case she did redeem, giving three months to pltfs., as third mtgees. to redeem subject to the jointure, & a third period of three months to the subsequent incumbrancers, but if she did not redeem giving them a second period only of three months.

I do not see how I can direct a sale now; there is nothing to show the value of the property (NORTH, J.).—SMITHETT *v.* HESKETH (1890), 44 Ch. D. 161; 59 L. J. Ch. 567; 62 L. T. 802; 38 W. R. 698.

3134. —— **Where none of defendants appear.**]—PLATT *v.* MENDEL, No. 3125, *ante*.

3135. —— —— **Second mortgagee surety for mortgagor.**]—Mtgee. standing in the position of first mtgee. brought an action for foreclosure against the mtgor. & a prior mtgee. who had joined in the mtge. to pltf. in order to postpone his security & as surety for the mtgor. Defts. not appearing, & it being proved that notice had been served upon them of motion for foreclosure against both of them, if they should not pay the amount due within six months from the date of the chief clerk's certificate:—*Held:* judgment must be granted accordingly; defts. not being entitled under the circumstances to successive period for redemption in the usual way.—SMITH *v.* OLDING (1884), 25 Ch. D. 462; 54 L. J. Ch. 250; 50 L. T. 357; 32 W. R. 386.

Annotation:—**Distd.** Mutual Life Assce. Soc. *v.* Langley (1884), 26 Ch. D. 686.

3136. —— —— **Whether allegation that incumbrancers "entitled" or "claim to be entitled."**]—Where a pltf. in a foreclosure action alleges in his pleading that a subsequent incumbrancer is "entitled" to a charge, the ct. will only make the usual order for foreclosure, allowing successive periods for redemption, but where the pleading simply states that the subsequent incumbrancer "claimed to be entitled," then, if he does not appear to make any claim, the ct. will make an order fixing one period only.—DAVIES *v.* MANLEY (1885), 1 T. L. R. 226; *subsequent proceedings*, 54 L. J. Ch. p. 637.

3137. —— —— ——.]—In a foreclosure judgment against the mtgor. & subsequent incumbrancers, only one period for redemption will be fixed where none of defts. appear on the motion for judgment; whether it is alleged by the statement of claim that the subsequent incumbrancers are "entitled" or only that they "claim to be entitled" to charges upon the mortgaged premises.—DOBLE *v.* MANLEY (1885), 28 Ch. D. 664; 54 L. J. Ch. 636; 52 L. T. 246; 33 W. R. 409.

Annotations:—**Folld.** Davies *v.* Manley (1885), 54 L. J. Ch. p. 637. **Expld.** Tufdnell *v.* Nicholls (1887), 56 L. T. 152. **Distd.** Smithett *v.* Hesketh (1890), 44 Ch. D. 161.

3138. ——.]—CORK (EARL) *v.* RUSSELL (1871), as reported in 41 L. J. Ch. 226.

Annotation:—**Mentd.** Hatton *v.* Haywood (1874), 43 L. J. Ch. 372.

3139. Form of order—On payment of plaintiff by subsequent incumbrancer.]—In a suit for foreclosure & redemption by one of several successive mtgees., upon motion by a subsequent incumbrancer, the bill was ordered to be dismissed with costs against all the other defts., without prejudice to any other suit, upon payment by deft. moving of a certain sum of money into ct. on or before a certain day, such money to be invested & accumulated. Pltf. to pay the taxed costs of all the other defts., & to have them over from deft. moving, who was ordered to pay to pltf. & other defts. their costs of this application; & deft. moving, by his counsel, undertaking to indemnify pltf. against any proceedings which might be taken in the meantime by any party for redeeming pltf.'s securities, a reference was directed, to ascertain what was due to pltf. for principal & interest; & the taxing master was ordered to tax his costs & those of the mtgees. other than deft. moving, who, as well as pltf., were to have liberty to apply.—JONES *v.* TINNEY (1845), Kay, App. XLV.; 69 E. R. 336.

Annotation:—**Refd.** Paynter *v.* Carew (1854), Kay, App. XXXVI.

3140. —— **On bankruptcy of mortgagor—Judgment must show right of official receiver—Value of redemption.**]—Mtgor. was adjudicated bkpt., & his estate became vested in the official receiver in bkpcy. for the county of Lancaster.

neglect to come in & undertaking to rank after a puisne incumbrancer who had already proved his claim.—BECHER *v.* WEBB (1879), 7 P. R. 445.—CAN.

m. *Service of order on subsequent incumbrancer.*]—ACADIA LOAN CORPN. *v.* WOOD (1906), 1 E. L. R. 121.—CAN.

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The mtgee. assessed the value of his mtge. security in accordance with the rules contained in schedule II. to the Bkpcy. Act, 1883 (c. 52). The mtge. debt amounted to £4,566 10*s.* 1*d.* & the assessed valuation of the mtge. security was £3,500. The mtgee. commenced a foreclosure action against the official receiver & subsequent incumbrancers. Upon motion for judgment in default of pleading: —*Held:* the judgment for foreclosure ought to show on the face of it that the official receiver was entitled to redeem the mtged. property at a sum less than that at which the subsequent incumbrancers were entitled to redeem the mtged. property.—KNOWLES *v.* DIBBS (1889), 60 L. T. 291; 37 W. R. 378.

Annotation:—**Consd.** Sanguinetti *v.* Stuckey's Banking Co. (No. 2), [1896] 1 Ch. 502.

3141. —— Liberty to apply.]—JONES *v.* TINNEY, No. 3139, *ante*.

3142. —— —— Addition of further amounts on redemption.]—In the case of a judgment in a foreclosure action, where, in addition to the mtgor., there are several defts. who have charges on the mtged. property subsequent to pltf.'s mtge., & one time is given for defts. or any of them to redeem pltf., there should be added to the form of order, a direction that defts. or deft., so redeeming pltf. are or is to be at liberty to apply for the addition to the judgment of any further amounts & directions consequent thereon which by reason of such redemption the ct. may think just, & that on such application deft. so applying is not to give pltf. notice thereof.—BIDDULPH *v.* BILLITER-STREET OFFICES CO., LTD. (1895), 72 L. T. 834; 39 Sol. Jo. 559; 13 R. 572.

(d) Foreclosure by Mesne Incumbrancers.

3143. Order for conveyance in default of payment — Subject to prior charge.] — WALLIS *v.* CRIMES (1667), 1 Cas. in Ch. 89; 22 E. R. 708.

Annotations:—**Mentd.** Fry *v.* Porter (1669), 1 Cas. in Ch. 138; Albemarle's Case (1692), 2 Rep. Ch. 417; Bath & Mountague's Case (1693), 3 Cas. in Ch. 55; Marks *v.* Marks (1718), 1 Stra. 129; Blake *v.* Luxton (1815), Coop. G. 178.

3144. Form of order—Action by third mortgagee.]—DUBERLEY *v.* WARING (1776), 3 Seton's Judgments & Orders, 7th ed. 1909.

3145. —— Action by second mortgagee.] — JACKSON *v.* BRETTALL (1795), 3 Seton's Judgments & Orders, 7th ed. 1908.

3146. —— As to costs—On failure to redeem.]—PELLY *v.* WATHEN (1851), 1 De G. M. & G. 16; 21 L. J. Ch. 105; 18 L. T. O. S. 129; 16 Jur. 47; 42 E. R. 457, L.JJ.

Annotations:—**Folld.** Hallett *v.* Furze (1885), 31 Ch. D. 312. **Reid.** *Re* Llewellin, [1891] 3 Ch. 145. **Mentd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421; *Re* Long, *Ex p.* Fuller (1881), 44 L. T. 63; Brunton *v.* Electrical Engineering Corpn., [1892] 1 Ch. 434.

3147. —— —— ——.]—In an action by a puisne mtgee. to redeem the first mtgee. & foreclose the mtgor., the proper form of judgment is that, in default of pltf. redeeming the action be dismissed with costs.—HALLETT *v.* FURZE (1885), 31 Ch. D. 312; 55 L. J. Ch. 226; 54 L. T. 12; 34 W. R. 225; 2 T. L. R 208.

3148. Stay of proceedings—On payment in by mortgagor—Reconveyance subject to prior mortgages.]—A., a subsequent mtgee. of certain estates belonging to C. filed his bill against C. & all the prior mtgees., praying a decree of foreclosure against C. On a motion by C. for an order to stay all further proceedings in the suit by A. on payment of what was due to him for principal, interest & costs, an order was made, that all further proceedings in the suit should be stayed & that A. should reconvey the mtged. estates to C. subject to the prior mtges. on payment into ct. by C. of a sum sufficient to satisfy the amount due to A. for principal money, & interest & the costs as between solr. & client of A. & the other mtgees., defts. in the suit.—LASTETT *v.* CLIFFE (1840), 9 L. J. Ch. 393; 5 Jur. 403, L. C.

3149. Apportionment of payments to prior mortgagees—Proceeds of sale in court.]—The mtge. of a mesne incumbrancer extended over the whole of certain estates, parts of which had been previously mortgaged to other persons, & parts of which were also subsequently mortgaged. The mesne incumbrancer filed his bill for an account, & for redemption of the prior & foreclosure of the subsequent mtges., & a decree was made by consent of all parties interested that the whole of the estates should be sold; that the proceeds of the sale should be paid into ct., & apportioned according to the value of the parts of the estates comprised in the several mtges. & that the priorities of the incumbrances should be ascertained on further directions. No question was raised as to the incumbrances or their priorities, but only as to the costs:—*Held:* each of the prior mtgees. was to be paid his principal, interest, & costs out of the sum in ct. apportioned in respect of his mtge., & not out of the general fund.—WILD *v.* LOCKHART, LEE *v.* LOCKHART (1847), 10 Beav. 320; 16 L. J. Ch. 519; 50 E. R. 605.

(e) Foreclosure by Equitable Mortgagees.

3150. Time for redemption—Six months.]—NEWTON *v.* ALDOUS (1804), cited 2 My. & K. at p. 421; 39 E. R. 1004.

Annotation:—**Folld.** Parker *v.* Housefield (1834), 2 My. & K. 419.

3151. —— ——.]—PARKER *v.* HOUSEFIELD, No. 2861, *ante*.

3152. —— ——.]—In a suit instituted by an equitable mtgee. for the enforcement of his security, the mtgor. will be allowed by the decree six months to redeem.—THORPE *v.* GARTSIDE (1837), 2 Y. & C. Ex. 730; 7 L. J. Ex. Eq. 30; 160 E. R. 587.

Annotation:—**Reid.** Ashworth *v.* Mounsey (1853), 9 Exch. 175.

3153. Form of order—Conveyance in default of payment—Bankrupt mortgagor.]—A man borrows money & pledges the title deed of his estate, & promises to execute a mtge., but does not, & becomes a bkpt., his assignees were ordered to pay what due, & if they did not, to convey the estate to pltf. in fee.—PYE *v.* DAUBUZ (1792), as reported in 2 Dick. 759; 21 E. R. 465; *But see*, 3 Bro. C. C. 595, L. C.

Annotation:—**Mentd.** *Re* Brown, *Ex p.* Turpin (1832), Mont. 443.

3154. —— —— "Foreclose" not to be omitted.]—A decree for foreclosure in the case of an equitable mtge. ought not to omit the word "foreclose," but ought to contain directions that upon default the mtgor. will be foreclosed, that the hereditaments will be discharged from all equity of redemption, & that a conveyance must be executed. —LEES *v.* FISHER (1882), 22 Ch. D. 283; 31 W. R. 94, C. A.

Annotations:—**Reid.** Mellor *v.* Porter (1883), 25 Ch. D. 158; Farrer *v.* Lacy, Hartland (1885), 31 Ch. D. 42.

3155. —— Against infant heir of mortgagor.]—Where a person creates an equitable mtge.; & dies intestate before he has conveyed the legal estate, leaving an infant heir, the equitable mtgee. can obtain only a modified decree against this infant.—OLDAKER *v.* PETFORD (1823), 2 L. J. O. S. Ch. 47.

D. Sale.

(a) When Order Made.

See Sub-sect. 2, A. (*a*), (*b*), B. & D., *ante.*

(b) Form of Order.

i. *In General.*

3156. Account taken of principal, interest & costs—Sale in default of payment after stated interval—Proceeds of sale to be paid into court.]—STAINS *v.* RUDLIN (1852), 20 L. T. O. S. 88; 16 Jur. 965; 1 W. R. 13; 9 Hare, App. 53, n.; 68 E. R. 788.

Annotation:—**Refd.** Lloyd *v.* Whittey (1853), 17 Jur. 754.

3157. Whether sale of part of property may be ordered—Where part subject of legal proceedings.]—Order for sale of part of the property comprised in a security, without prejudice to the creditors' lien upon the remainder; which was at the time unsaleable, from being the subject of litigation.—*Re* PRICE, *Ex p.* WACE (1842), 2 Mont. D. & De G. 730; 6 Jur. 1069.

3158. Where several incumbrancers.]—A claim was filed for foreclosure before 15 & 16 Vict. c. 86, came into operation. There were several incumbrances, & on an application under sect. 48 of that Act, the ct. made an order for sale of the mtged. property, & directed accounts of the sums due to the several incumbrancers.—CATOR *v.* REEVES (1852), 22 L. J. Ch. 19; 20 L. T. O. S. 105; 16 Jur. 1004, L.JJ.

3159. Equitable mortgage by deposit of deeds.]—PARKER *v.* SIDNEY, [1879] W. N. 135.

What terms may be imposed.]—*See* Sub-sect. 2, A. (*c*), *ante.*

Conduct of sale.]—*See* Sub-sect. 2, A. (*d*), *ante.*

ii. *What Orders may be Included.*

3160. Vesting order—Not necessary when mortgagee has legal estate—Equity of redemption in infant.]—Vesting order as to the equity of redemption in an infant, against whom, in a foreclosure suit, a decree for sale had been made, refused, on the ground that the mtgee. had the legal estate, & that all equities were bound by the order for sale.—*Re* WILLIAMS' ESTATE (1852), 5 De G. & Sm. 515; 21 L. J. Ch. 437; 19 L. T. O. S. 152; 64 E. R. 1222.

3161. Order for execution of disentailing deed.]—In a mtge. suit by a judgment creditor of a tenant in tail in possession, the latter was ordered to execute a disentailing deed, in order to give full effect to pltf.'s charge.—LEWIS *v.* DUNCOMBE (1855), 20 Beav. 398; 52 E. R. 656.

Annotations:—**Refd.** Round *v.* Bell (1861), 30 Beav. 121; Bankes *v.* Small (1887), 36 Ch. D. 716; *Re* Anthony, Anthony *v.* Anthony, [1893] 3 Ch. 498.

Mortgage of copyholds.]—*See* COPYHOLDS, Vol. XIII., p. 116, No. 1473.

On lunacy of mortgagor.]—*See* LUNATICS, Vol. XXXIII., pp. 221, 222, Nos. 1307, 1309.

On lunacy of mortgagee.]—*See* LUNATICS, Vol. XXXIII., p. 222, Nos. 1316–1321.

E. Foreclosure Absolute.

(a) In General.

3162. Effect of—Estate no longer subject to mortgage.]—An estate which testator holds as mtgee. will not pass under a general devise of all lands to uses in strict settlement although testator at the making of his will had obtained a decree for an account in a bill of foreclosure; for the estate does not lose the quality of a mtge. until the final order of foreclosure.—THOMPSON *v.* GRANT (1819), 4 Madd. 438; 56 E. R. 767.

3163. —— Complete foreclosure.]—PREES *v.* COKE, No. 3272, *post.*

3164. Necessity for order.]—Mtgor. cannot be finally foreclosed, until an order absolute be obtained for that purpose.—SHERIFF *v.* SPARKS (1737), West *temp.* Hard. 130; 25 E. R. 857, L. C.

3165. —— Release of equity of redemption—By tenant in tail.]—Bill of foreclosure against tenant for life, & the first remainderman in tail. The usual decree made, the time for redemption being elapsed, tenant in tail released the equity of redemption, so that the decree was never made absolute:—*Held:* binding on those in remainder.—REYNOLDSON *v.* PERKINS (1769), Amb. 564; 1 Dick. 427; 27 E. R. 362, L. C.

Annotations:—**Refd.** Pendleton *v.* Booth (1859), 1 Giff. 35; Prees *v.* Coke (1871), 6 Ch. App. 645. **Mentd.** Moody *v.* Walters (1809), 16 Ves. 283.

3166. When made in first instance—Disclaimer by some of defendants.]—If some of defts. in a foreclosure suit disclaim, the ct. will decree them to be foreclosed, & not simply dismiss the bill as against them.—PERKIN *v.* STAFFORD (1841), 10 Sim. 562; 59 E. R. 733.

3167. —— —— No claim to redeem by other.]—WEBSTER *v.* WEBSTER (1852), 20 L. T. O. S. 21.

3168. —— ——.]—The ct. will decree a foreclosure against defts. who disclaim any interest, instead of simply dismissing the bill as against them.—JOHNSON *v.* CLARKE (1855), 3 W. R. 193.

3169. —— Not on default of appearance of mortgagor.]—In a foreclosure suit the bill was taken *pro confesso* against two of defts. The cause was brought to a hearing, & these defts. did not appear:—*Held:* pltf. was entitled only to the ordinary decree, & not to a decree of foreclosure absolutely against them.—BRIERLY *v.* WARD

PART XIII. SECT. 7, SUB-SECT. 6.—D. (b) i.

n. "*The said land & premises be sold.*"]—POWER *v.* FOSTER (1901), 34 N. S. R. 479.—**CAN.**

o. *Provision for notice of advertisement.*]—Where an order for sale contains a provision that two months' notice of the time, etc., should be given in a certain newspaper it means that the notice must be inserted once each week in that newspaper for two months prior to the sale.—CANADIAN MORTGAGE & INVESTMENT CO. *v.* MCCRANEY, MACKENZIE & HUTCHINSON, [1917] 2 W. W. R. 181; 10 Sask. L. R. 94; 34 D. L. R. 769.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—D. (b) ii.

p. *Vesting order.*]—CANADA PERMANENT MORTGAGE CORPN., LTD. *v.* JESSE (Sask.) (1909), 11 W. L. R. 295.—**CAN.**

q. *Discretion of court—To order sale free from incumbrances.*]—In foreclosure proceedings by a mtgee. where the whole amount of the mtge. is not due the mtgee. is not entitled as a matter of right to an order *nisi* directing that upon default in payment of the amount found to be due the property shall be sold subject to the amounts which will not have accrued due upon the mtge. at the date of sale. The ct. may order a sale free from incumbrances or in its discretion when settling the conditions direct the sale to be subject to the mtge.—GREAT WEST PERMANENT LOAN CO. *v.* JONES (1914), 30 W. L. R. 130; 7 W. W. R. 767; 8 Alta. L. R. 45.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—E. (a).

r. *When made in first instance—Deficiency on sale.*]—When the land foreclosed & sold does not bring the amount due the application should be for an order to show cause why an execution should not issue for the balance, & not for an order absolute in the first instance.—NORTHUP *v.* JEAN (1858), 3 N. S. R. (2 Thom.) 232.—**CAN.**

t. *May be made ex parte.*]—CORBOR *v.* OAKSHOTT (1913), 25 W. L. R. 311; 5 W. W. R. 1; 13 D. L. R. 528; 6 Alta. L. R. 245.—**CAN.**

a. *Final order—When granted.*]—Where a mtgee. had become bkpt. & he, with his assignees, had filed a bill to foreclose, a final order was granted, although one of the assignees being absent had not executed the power of attorney to receive the mtge. money, or made affidavit of non-payment.—LYMAN *v.* KIRKPATRICK (1851), 2 Gr. 625.—**CAN.**

b. —— ——.]—Where the report appointing the time & place for payment has not been confirmed before the day appointed for payment, a final order will not be granted.—

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(1850), 20 L. J. Ch. 46; 16 L. T. O. S. 358; 15 Jur. 277.

3170. —— ——.]—Immediate foreclosure, in case the mtgor. did not appear, was claimed by the pleading. The mtgor. made default in appearance, & the ct. made only an ordinary foreclosure decree.—PATEY *v.* FLINT (1879), 48 L. J. Ch. 696; 40 L. T. 651; 27 W. R. 595.

—— Against infant.]—*See* INFANTS, Vol. XXVIII., p. 326, Nos. 1933–1938.

3171. May be made ex parte.]—WITHALL *v.* NIXON, No. 3214, *post.*

3172. Effect of receipt of rents—By mortgagee—After account taken.]—PREES *v.* COKE, No. 3272, *post.*

3173. —— Before date fixed for redemption—Where receiver appointed.]—HOARE *v.* STEPHENS, No. 3278, *post.*

3174. —— After date fixed for redemption—Before affidavit sworn—Further account not necessary.]—(1) Where a mtgee. receives rents after default is made in payment of the principal & interest on the day fixed for redemption, but before the affidavit of such default is sworn, an order for final foreclosure will nevertheless be granted without any further account.

(2) Form of affidavit in support of an application for foreclosure absolute discussed.—NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY *v.* RAPER, [1892] 1 Ch. 54; 61 L. J. Ch. 73; 65 L. T. 668; 40 W. R. 73; 36 Sol. Jo. 61.

3175. Effect of death of one defendant—Appointment of representative by court—Not necessary to add as defendant.]—NEAL *v.* BARRETT, [1887] W. N. 88.

(*b*) *Order against Infant.*

Infant must be given a day to show cause.]—*See* INFANTS, Vol. XXVIII., p. 325, Nos. 1922–1930.

When absolute in first instance.]—*See* INFANTS, Vol. XXVIII., p. 326, Nos. 1933–1938.

On what grounds order may be impeached.]—*See* INFANTS, Vol. XXVIII., pp. 325, 326, Nos. 1931, 1932.

Service of proceedings.]—*See, generally,* INFANTS, Vol. XXVIII., pp. 320, 321, Nos. 1863–1876.

Effect of attainment of full age during proceedings.]—*See, generally,* INFANTS, Vol. XXVIII., p. 323, Nos. 1901–1905.

Surrender of copyholds.]—*See* COPYHOLDS, Vol. XIII., p. 115, No. 1464.

(*c*) *Procedure to Obtain Order.*

i. *In General.*

3176. Service of order nisi—Not necessary on parties not appearing.]—In a foreclosure suit, in which, as to some of defts., the bill had been taken *pro confesso*, the ct. directed that for the purpose of confirming the master's report, an order *nisi* should be served upon defts. who had appeared, & that upon that order being made absolute, the report should be confirmed absolutely as to defts., against whom the bill had been taken *pro confesso.*—ANDERSON *v.* STATHER (1849), 14 L. T. O. S. 83; 14 Jur. 263.

Annotation:—**Mentd.** Chaffers *v.* Baker (1855), 3 Eq. Rep. 639.

3177. —— —— Trustee.]—In a foreclosure suit, when the bill had been ordered to be taken *pro confesso* against a trustee deft., out of the jurisdiction, & he had been served with the order without the notice specifying the time within which he must appear & object, as required by Consolidated Ord. 23, r. 11, the ct., after the lapse of three years from the decree, upon being satisfied that service of the order upon him was unnecessary altogether dispensed with such service, & made the order absolute.—THURGOOD *v.* CANE (1863), 32 Beav. 156; 7 L. T. 703; 11 W. R. 297; 55 E. R. 61.

3178. Service of notice of intention to proceed—After more than one year elapsed—What is a "proceeding"—R. S. C., Ord. 64, r. 13.]—BLAKE *v.* SUMMERSBY, [1889] W. N. 39.

3179. Filing of order of revivor—Death of mortgagee during proceedings—R. S. C., Ord. 67, r. 4.]—JACKSON *v.* KILHAM, [1891] W. N. 171.

ii. *What Mortgagee must Prove.*

3180. Non-payment at time & place appointed—Punctuality not essential.]—Foreclosure may be made absolute although the mtgee. does not attend at the first moment of the time appointed for payment of the mtge. money.—ANON. (1844), 1 Coll. 273; 63 E. R. 416.

Annotations:—**Folld.** Bernard *v.* Norton (1864), 3 New Rep. 701. **Refd.** Lechmere *v.* Clamp (No. 3) (1862), 31 Beav. 578.

— ——.]—Foreclosure made absolute, although the mtgee. did not attend until the expiration of the first half of the hour appointed for payment of the money.—SCOTT *v.* SAUNDERS (1850), 16 L. T. O. S. 209.

3182. —— ——.]—The ct. will make an order for foreclosure absolute, although the mtgee. has not attended at the spot named for payment of the mtge. money until after the time fixed by the parties.—BERNARD *v.* NORTON (1864), 3 New Rep. 701; 10 L. T. 183.

3183. —— Attendance for part of time only sufficient.]—LECHMERE *v.* CLAMP (No. 3), No. 3206, *post.*

3184. —— Attendance by agent—Whether authority to receive money necessary.]—Under the common decree in a foreclosure suit, the chief

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MOUNTAIN *v.* PORTER (1862), 1 Ch. Ch. 207.—**CAN.**

c. —— ——.]—Where the Crown holds the equity of redemption no absolute order of foreclosure can be pronounced, but only that in default of payment the mtge. be at liberty to enter into possession.—DUNN *v.* A.-G. (1864), 10 Gr. 482.—**CAN.**

d. —— ——.]—Where a mtgee. receives money on the mtge. account between the time of taking the account & the time fixed for payment he must either serve upon deft. before the time named for payment the notice provided for in R. 255 or apply for a new reference under R. 257; otherwise he is not entitled to a final order.—GOUZEE *v.* MIDDLE WEST INVESTMENT CO., [1920] 3 W. W. R. 885.—**CAN.**

e. *Order for delivery up of mortgaged premises—When made.]*—The ct., after the final order had been made, & acted on by pltf., ordered the delivery up of possession of the mtged. premises, though not asked for upon the order being obtained.—LAZIER *v.* RANNEY (1857), 6 Gr. 323.—**CAN.**

f. *Who may grant order—Whether local judge—Of Supreme Court of British Columbia.]*—A local judge of the Supreme Ct. of British Columbia has no jurisdiction under Ord. 27, r. 11, to grant a judgment for foreclosure & supplement the same by an order absolute.—*Re* LOOMIS *v.* ABBOTT, *Re* LAND REGISTRY ACT (B. C.) (1915), 33 W. L. R. 347; 9 W. W. R. 676; 22 B. C. R. 330.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—E. (c) i.

g. *Duty of registrar—On registration of order.]*—A registrar cannot require as a condition of registering an order absolute for foreclosure that the mtgee. should vacate his personal judgment & give an undertaking not to proceed thereon. In such case the duty of the registrar is confined to making an endorsement on the certificate stating what incumbrances it was subject to, & that it was based on an order absolute.—SCOTTISH TEMPERANCE LIFE ASSURANCE CO. *v.* VANCOUVER DISTRICT REGISTRAR OF TITLES (B.C.), [1917] 1 W. W. R. 666; 36 D. L. R. 152.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—E. (c) ii.

3184 i. *Non-payment at time & place appointed — Attendance by agent — Whether authority to receive money*

clerk's certificate having fixed a time & place for the repayment by the mtgor. of what was due for principal & interest, pltfs.' solr. attended at the time & place appointed, but without any power of attorney from pltfs. to receive the mtge. moneys; the mtgor. made default. Upon a motion for the order absolute to foreclose:—*Held:* it was the mtgor.'s right to have every formality strictly observed.—GURNEY *v.* JACKSON (1853), 1 Sm. & G. App. XXVI.; 67 E. R. 1330.

Annotation:—**Refd.** Lechmere *v.* Clamp (No. 3) (1862), 31 Beav. 578.

3185. ——— ——— ———.]—On a motion to make a foreclosure decree absolute:—*Held:* not necessary that the person attending at the Rolls Chapel should have authority to give a receipt where no one appeared to pay.—LONDON MONETARY ADVANCE & ASSURANCE SOCIETY *v.* BROWN (1868), 16 W. R. 782.

3186. ——— ——— ———.]—In a foreclosure suit pltf.'s agent attended during the prescribed time for payment, but without a power of attorney to receive the money. No one attended to pay. On an *ex p.* application, the foreclosure was made absolute.—MACRAE *v.* EVANS (1875), 24 W. R. 55.

3187. ——— ——— ———.]—Under a decree for foreclosure an agent of the mtgees. attended at the place appointed for payment of the money, & during the whole of the appointed time, but without any power of attorney to receive the money. No one appeared on behalf of the mtgors.:—*Held:* the foreclosure ought to be made absolute.—COX *v.* WATSON (1877), 7 Ch. D. 196; 47 L. J. Ch. 263.

Annotation:—**Refd.** Crawley *v.* Fuller, [1890] W. N. 35.

3188. ——— ——— ———.]—After judgment for foreclosure, an agent of the mtgee. attended at the place appointed for the payment of the money, but the mtgor. failed to attend:—*Held:* the mtgee., upon production of an affidavit stating that his agent had received the power of attorney, enabling him to receive the money, was entitled to have foreclosure made absolute.—HART *v.* HAWTHORNE (1880), 42 L. T. 79.

3189. ——— ——— ———.]—MOORE & ROBINSON'S NOTTINGHAMSHIRE BANKING CO. *v.* HORSFIELD, [1882] W. N. 43.

3190. ——— ——— ———.]—CRAWLEY *v.* FULLER, [1890] W. N. 35.

3191. ——— ——— ———.]—KING *v.* HOUGH, [1895] W. N. 60.

3192. Non-payment since date of attendance—Whether affidavit by agent sufficient.]—Upon an application for an order for foreclosure absolute, where an affidavit of non-payment had been made by the person attending on behalf of pltf. to receive the mtge. moneys, the ct. declined to dispense with an affidavit by pltf. stating that he had not received the mtge. moneys between the date of the attendance & the date of the application.—BARROW *v.* SMITH (1885), 52 L. T. 798; 33 W. R. 743.

3193. ——— ——— **Mortgagor not appearing.**]—Mtgee. had obtained a foreclosure judgment *nisi*, & now moved the ct. to grant him foreclosure absolute. He had made no affidavit of non-payment of moneys due to him, but the solr.'s clerk, who attended on his behalf to receive the money due on the security, had made an affidavit of non-payment. Deft. had not appeared in the action since its commencement:—*Held:* on a motion by a mortgagee for foreclosure absolute, pltf.'s personal affidavit of non-payment might be dispensed with.—FRITH *v.* COOKE (1885), 52 L. T. 798; 33 W. R. 688.

3194. ——— ——— **Mortgagee out of jurisdiction.**]—(1) Upon a motion for a final order of foreclosure, an affidavit made on Feb. 20, last by D., one of two joint mtgees., & by S., was tendered in evidence. J., the other mortgagee, had in 1874 gone to reside in New Zealand, & had granted S., a power of attorney, to act for him in the matter of the mtge. Under the authority of this power, & under power of attorney granted by D. S. had attended on Jan. 31, last to receive payment of the mtge. moneys. The affidavit stated that J. was still in New Zealand; that default had been made in payment of the mtge. moneys, & that the whole of this sum remained due to the mtgees.:—*Held:* the affidavit was not sufficient, & more recent evidence must be adduced.

(2) At the subsequent hearing of the motion on affidavit made by S. alone on Mar. 21, last was produced. In this S. stated that J. was still residing in New Zealand, that D. was away from his home in Derbyshire, & that his whereabouts was unknown, & that to the best of his knowledge the mtge. moneys remained unpaid:—*Held:* an affidavit made by S. alone was insufficient.—DOCKSEY *v.* ELSE (1891), 64 L. T. 256.

3195. Who may make affidavit—Whether all mortgagees must join—Where one is out of jurisdiction.]—BOSTOCK *v.* SHAW (1848), 10 L. T. O. S. 481.

——— ——— ———.]—Where one of six mtgees. had made an affidavit for himself positively, & for the other mtgees. to the best of his knowledge & belief, that the debt had not been paid, & one of

necessary.]—POWERS *v.* MERRIMAN (1864), 1 Ch. Ch. 225.—**CAN.**

3184 ii. ——— ——— ———.]—Where the usual affidavit of non-payment is made by the agent of pltf. his authority need not be produced.—RADCLYFFE *v.* DUFFY (1864), 1 Ch. Ch. 302.—**CAN.**

h. ——— *Sunday—Whether final order refused.*]—HOLCUMB *v.* LEACH (1852), 3 Gr. 449.—**CAN.**

k. ——— *Whether necessary to show—Attendance of other incumbrancers.*]—On moving for an order absolute to sell for default of payment of the sum found due by the master, it need not be shown that any incumbrancer, besides pltf., attended at the time appointed for payment of the several incumbrancers.—IRVINE *v.* WHITEHEAD (1858), 1 Ch. Ch. 10.—**CAN.**

l. *Who may make affidavit.*]—Where co-mtgees. are made co-pltfs., the affidavit as to non-payment, to obtain a final order, should be made by all of them.—ANNIS *v.* WILSON (1863), 1 Ch. Ch. 217.—**CAN.**

m. ——— *Agent—Sufficiency of.*]—In a suit at the instance of mtgees. resident in Scotland against defts. formerly in Canada, but now in England or elsewhere, it is not sufficient on a motion for a final order for sale for pltf.'s agent to negative payment. Pltf. also must do so.—MCKECHNIE *v.* MCKECHNIE (1858), 1 Ch. Ch. 42.—**CAN.**

n. ——— ——— ———.]—The certificate of the registrar upon taking the accounts under the mtge. in a foreclosure action directed that the balance found due should be paid by the mtgor. at the office of the agent of pltf. (foreign) co. in Victoria. Upon motion for final decree upon the affidavit of non-payment as directed, made by the agent:—*Held:* the affidavit of both principal & agent was necessary.—CANADA SETTLERS' LOAN CO. *v.* RENOUF (1897), 5 B. C. R. 243.—**CAN.**

o. ——— ——— *Negativing possession & receipt of rents & profits.*]—In applying for a final order for sale the usual affidavit of pltf. must negative possession & the receipt of rents & profits.—BURFORD *v.* LYMBURNER (1861), 1 Ch. Ch. 275.—**CAN.**

p. ——— ——— ———.]—On application for a final order, pltf., should show that he has not been in possession, or in the receipt of the rents & profits.—SCOTT *v.* MCDONELL (1862), 1 Ch. Ch. 193.—**CAN.**

q. ——— ——— *Officer of company.*]—WESTERN ASSURANCE CO. *v.* CAPREOL (1864), 1 Ch. Ch. 227.—**CAN.**

r. ——— ——— *Solicitor.*]—Where pltf. resides out of the jurisdiction, & the affidavit as to non-payment is made by his solr., it must be shown that pltf. has no other agent within the jurisdiction authorised to receive the money.—TAYLOR *v.* CUTHBERT (1864), 1 Ch. Ch. 240.—**CAN.**

t. ——— ———.]—Where pltf. resides out of the jurisdiction, the affidavit of non-payment being made by an agent of pltf., it must be shown where the custody of the mtge. has

Sect. 7.—Foreclosure or sale: Sub-sect. 6, E. (c) ii., (d) i. & ii., & (e); sub-sects. 7 & 8, A. (a).

the remaining five mtgees. was out of the jurisdiction, & the others in the jurisdiction. On motion, *ex p.*, on behalf of pltfs. for an order absolute for foreclosure:—*Held:* the affidavit in support of the motion was not sufficient, & an affidavit must be made by all the mtgees. in the jurisdiction, & the matter mentioned again to the ct.—KINNAIRD *v.* YORKE (1889), 60 L. T. 380.

3197. ——— ——— ———.]—DOCKSEY *v.* ELSE, No. 3194, *ante*.

3198. Form of affidavit.] — NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY *v.* RAPER, No. 3174, *ante*.

(*d*) *Form of Order.*

i. *In General.*

3199. Foreclosure by consent.] — PIERSON *v.* GRUNDELL (1822), 3 Seton's Judgments & Orders, 7th ed. 1918.

3200. ———.]—Form of order for foreclosure taken by consent without account.—BOYDELL *v.* MANBY (1852), 9 Hare, App. liii; 68 E. R. 788.

3201. ———.]—CHISHOLM *v.* FERGUSON (1855), 3 Seton's Judgments & Orders, 7th ed. 1925.

ii. *What Orders may be Included.*

3202. Order for delivery of deeds—When express covenant only.]—WISEMAN & BENLEY *v.* WESTLAND, FISHER, BENSON, DAVIS & STANBRIDGE, No. 1511, *ante*.

3203. —— **Foreclosure against puisne incumbrancer—Not deeds affecting only equity of redemption.**]—First mtgee., obtaining a judgment for foreclosure against a puisne incumbrancer, is not entitled to the insertion of an order, that deeds in deft.'s possession affecting only the equity of redemption be delivered up to him.—GREENE *v.* FOSTER (1882), 22 Ch. D. 566; 52 L. J. Ch. 470; 48 L. T. 411; 31 W. R. 285.

Annotation:—**Refd.** Lewin *v.* Jones (1884), 53 L. J. Ch. 1011.

3204. Decree for partition—Right of owners of equity of redemption—Not against will of mortgagee.]—A decree for a partition is not properly incident to a foreclosure or redemption suit, in such a way that the owners of the equity of redemption can be allowed to insist on it against the will of the mtgee., who has no interest in the question.—WATKINS *v.* WILLIAMS, HAVERD *v.* CHURCH (1851), 3 Mac. & G. 622; 19 L. T. O. S. 13; 42 E. R. 400; *sub nom.* WATKINS *v.* WILLIAMS, HAVERD *v.* DAVIS, 21 L. J. Ch. 601; 16 Jur. 181, L. C.

Annotations:—**Mentd.** Henderson *v.* Cross (1861), 29 Beav. 216; Perry *v.* Merritt (1874), L. R. 18 Eq. 152; Shaw *v.* Ford (1877), 7 Ch. D. 669; Sinclair *v.* James (1894), 63 L. J. Ch. 873.

3205. Vesting order—Mortgagor out of jurisdiction.]—On making an order of foreclosure absolute, the ct. refused to add a declaration under Trustee Act, 1850 (c. 60), that the mtgor. being out of the jurisdiction is a trustee, in order to found upon it a subsequent application for a vesting order. Such a declaration can be obtained only on a separate application.—SMITH *v.* BOUCHER (1852), 1 Sm. & G. 72; 20 L. T. O. S. 88; 16 Jur. 1154; 1 W. R. 51; 65 E. R. 32.

3206. —— **Mortgagor not to be found**]—In a foreclosure suit the money was to be paid between 12 & 1. The agent of the mtgees. attended during the whole of that period, but without a power of attorney to receive the money. The mtgees. themselves only attended twenty-five minutes. No one attended to pay. The foreclosure was made absolute; & it appearing that the mtgor. could not be found, he was declared a trustee, & a vesting order was made, vesting the property in the mtgees.—LECHMERE *v.* CLAMP (No. 3) (1862), 31 Beav. 578; 1 New Rep. 81; 32 L. J. Ch. 276; 7 L. T. 411; 9 Jur. N. S. 482; 11 W. R. 83; 54 E. R. 1263.

Annotations:—**Apld.** London Monetary Advance Co. *v.* Bean (1868), 18 L. T. 349; Macrae *v.* Evans (1875), 24 W. R. 55.

3207. —— ———.]—Deft. in a foreclosure suit having made default, & it being impossible to find him, a motion was made under Ord. 22, r. 15, to take the bill *pro confesso*, & make the decree absolute. In drawing up the order the registrar considered that he could only make the order absolute:—*Held:* there must be an order similar to that in *Lechmere* v. *Clamp*, No. 3206, *ante*.—LONDON MONETARY ADVANCE CO. *v.* BEAN (1868), 18 L. T. 349.

3208. —— **Where mortgage contains declaration of trust.**]—A mtge. by sub-demise of leasehold property contained an absolute declaration of trust by the mtgor. of his reversion. Mtgor. having refused to convey, the ct. decreed judgment for foreclosure of the equity of redemption of the premises, & of the reversionary term; but the ct. refused to make a vesting order as to the reversion until the decree absolute.—BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO. *v.* SUGDEN (1878), 47 L. J. Ch. 691; 26 W. R. 631.

3209. Order for possession.] — Redemption barred, but no possession to be decreed.—ANON. (1678), 2 Cas. in Ch. 244; 22 E. R. 927, L. C.

3210. ———.]—CRAVEN BANK *v.* HARTLEY, [1886] W. N. 189.

Annotation:—**Refd.** Jenkins *v.* Ridgley (1893), 41 W. R. 585.

3211. ———.]—LACON *v.* TYRRELL, No. 3004, *ante*.

3212. —— **Whether enforceable by writ.**]—An order for foreclosure absolute is not a judgment for the recovery of the possession of land within R. S. C. 1875, Ord. 42, r. 3. Hence after foreclosure absolute pltf. is not entitled to a writ of possession.—WOOD *v.* WHEATER (1882), 22 Ch. D. 281; 52 L. J. Ch. 144; 47 L. T. 440; 31 W. R. 117.

3213. ———.]—*Re* HIGG'S MORTGAGE, GODDARD *v.* HIGG, [1894] W. N. 73.

3214. —— **Where order nisi for possession.**]—Where an order *nisi* for foreclosure & possession had been made the order absolute also provided for possession & was made *ex p.*—WITHALL *v.* NIXON (1885), 28 Ch. D. 413; 54 L. J. Ch. 616; 33 W. R. 565.

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been.—RAE *v.* SHAW (1864), 1 Ch. Ch. 209.—**CAN.**

a. *Proof that defendant was alive—At date of final order.*]—Where a bill was served on deft. personally, & about a year afterwards a final order of foreclosure was granted in the suit:—*Held:* a purchaser was not entitled to insist on pltf. (the vendor) proving that deft. was alive when the final order was made.—HENDERSON *v.* SPENCER (1881), 8 P. R. 402.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 6.—E. (d) i.

b. *Non-disclosure of facts*]—A final decree of foreclosure had been obtained in a suit where the true position of parties was not disclosed, or material facts had been misrepresented, & a bill was subsequently filed to enforce a claim against the party beneficially interested as pltf. in that suit:—*Held:* a decree other than would have been proper had the true position of the parties to that suit been stated, would be refused.—WILSON *v.* HODGSON (1868), 14 Gr. 543.—**CAN.**

c. *Whether signature of local master necessary.*]—Final order of foreclosure made by a local master in chambers & issued, bearing his name, under the seal of the ct. & signed by the local registrar, complies with the provisions of R. 618 (Sask.), & does not require to be signed by the local master.—*Re* LAND TITLES ACT, FITZGERALD *v.* MAYO (1915), 31 W. L. R. 795.—**CAN.**

3215. —— ——.]—WILLIAMSON *v.* BURRAGE, No. 3102, *ante*.

3216. —— ——.]—KEITH *v.* DAY, No. 3008, *ante*.

3217. —— **Though not asked for in action or summons.**]—SALT *v.* EDGAR, No. 3003, *ante*.

3218. —— ——.]—An order for foreclosure absolute in a foreclosure action commenced by summons, may, as against deft. mtgor. in possession, he having been served & not appearing, include an order for delivery of possession by him to pltf., even though the summons did not ask for delivery of possession.—BEST *v.* APPLEGATE (1887), 37 Ch. D. 42 ; 57 L. J. Ch. 506 ; 57 L. T. 599 ; 36 W. R. 397.

Annotation :—**Refd.** Jenkins *v.* Ridgley (1893), 41 W. R. 585.

3219. —— ——.]—MANCHESTER & LIVERPOOL BANK *v.* PARKINSON, No. 3005, *ante*.

3220. —— —— **Charging order on stock.**]—RICKETTS *v.* RICKETTS, [1891] W. N. 29.

3221. —— ——.]—JENKINS *v.* RIDGLEY, No. 3006, *ante*.

3222. —— **Must contain description of property.**]—An order for the delivery of possession of mtged. property by the mtgor. to the mtgee. forming part of a judgment for foreclosure absolute, ought to contain a description of the property as set forth in the mtge. deed, in order that the writ of possession may be filled up in such a way as to enable the sheriff to identify the property of which he is directed to deliver possession.—THYNNE *v.* SARL, [1891] 2 Ch. 79 ; 60 L. J. Ch. 590 ; 64 L. T. 781.

3223. —— **Whether made ex parte.**]—LE BAS *v.* GRANT, No. 3007, *ante*.

3224. —— **Only made after foreclosure absolute —In foreclosure action.**]—Possession of mtged. premises is not ordered in a foreclosure action until after foreclosure absolute, & it is not the practice of the cts. in appointing receivers & managers of mtged. hereditaments to make any order for delivery of possession of land as distinct from the possession of such stock-in-trade & effects, including books & documents, as are necessary to enable the managing part of the order to be carried out by the receiver.—NATIONAL PROVINCIAL BANK OF ENGLAND, LTD. *v.* UNITED ELECTRIC THEATRES, LTD., [1916] 1 Ch. 132 ; 85 L. J. Ch. 106 ; 114 L. T. 276 ; 80 J. P. 153 ; 32 T. L. R. 174 ; 60 Sol. Jo. 274 ; 14 L. G. R. 265 ; [1916] H. B. R. 56.

Annotation :—**Mentd.** National Provincial Bank of England *v.* Charnley (1923), 93 L. J. K. B. 241.

See R. S. C., Ord. 18, r. 2.

(*e*) *Stamp Duty.*

See Stamp Act, 1891 (c. 39), ss. 54, 57 ; Finance Act, 1898 (c. 10), s. 6 ; *&, generally*, REVENUE.

3225. Ad valorem duty chargeable—Equitable mortgage.]—Where an equitable mtgee. obtains an order absolute for foreclosure under which the mtgor. is directed to execute, & does execute, a conveyance of all his estate & interest in the property to the mtgee., the conveyance is a "conveyance on sale" within Stamp Act, 1891 (c. 39), s. 54, & is chargeable with *ad valorem* duty under the head "Conveyance or transfer on sale" in sched. I. to that Act.—HUNTINGTON *v.* INLAND REVENUE COMRS., [1896] 1 Q. B. 422 ; 65 L. J. Q. B. 297 ; 74 L. T. 28 ; 44 W. R. 300 ; 12 T. L. R. 143 ; 40 Sol. Jo. 212, D. C.

Annotations :—**Consd.** *Re* Lovell & Collard's Contract, [1907] 1 Ch. 249 ; *Re* de Leeuw, Jakens *v.* Central Advance & Discount Corpn., [1922] 2 Ch. 540.

3226. —— **Disposition in security.**]—A bond & disposition in security contained a power of sale. The creditor exposed for sale the property held in security at a price less than the amount due under his security, & failed to find a purchaser. The creditor then applied to the sheriff under Heritable Securities (Scotland) Act, 1894 (c. 44), s. 8, & the sheriff issued a decree that the debtors had forfeited their rights of redemption, & that the creditor was vested absolutely in the subjects at the price named :—*Held :* the transaction constituted a sale to the creditor, & was chargeable, by Stamp Act, 1891 (c. 39), ss. 54, 57, & sched. I. thereto, with *ad valorem* duty.—INLAND REVENUE COMRS. *v.* TOD, [1898] A. C. 399 ; 67 L. J. P. C. 42 ; 78 L. T. 571 ; 14 T. L. R. 400, H. L.

3227. —— **Legal mortgage.**]—LIGHTWOOD *v.* BURSILL (1896), cited in [1907] 1 Ch. at p. 255.

Annotation :—**Refd.** *Re* Lovell & Collard's Contract, [1907] 1 Ch. 249.

3228. —— ——.]—An order for foreclosure absolute of a legal mtge. made after Stamp Act, 1891 (c. 39), but before Finance Act, 1898 (c. 10), came into force, must be stamped with *ad valorem* duty as being an order of the ct. whereby an estate of interest in property "upon the sale thereof is transferred to or vested in a purchaser."

Semble : upon the construction of Stamp Act, 1891 (c. 39), s. 54, apart from Finance Act, 1898 (c. 10), *ad valorem* duty was payable on an order foreclosing a legal mtge.—*Re* LOVELL & COLLARD'S CONTRACT, [1907] 1 Ch. 249 ; 76 L. J. Ch. 246 ; 96 L. T. 382.

Annotation :—**Consd.** *Re* de Leeuw, Jakens *v.* Central Advance & Discount Corpn., [1922] 2 Ch. 540.

SUB-SECT. 7.—COSTS.

See Part XVIII., *post*.

SUB-SECT. 8.—OPENING FORECLOSURE.

A. Under What Circumstances Time will be Enlarged.

(*a*) *Enlargement before Decree Absolute.*

3229. Not granted as of course—Discretion of court.]—Motion to enlarge the time for foreclosing, is not of course, although the interest be paid up, & the costs paid. Where there is no opposition, the ct. will give further time in its discretion.

It is certainly not of course. *Non constat* that the security may be sufficiently ample (RICHARDS, C.B.).—QUARLES *v.* KNIGHT (1820), 8 Price, 630 ; 146 E. R. 1318.

PART XIII. SECT. 7, SUB-SECT. 8.—A. (a).

3229 i. *Not granted as of course—Discretion of court.*]—On a motion to open foreclosure it appeared that the debt & costs amounted to about $3,000, & the property was worth $7,000. The master, under the circumstances set out in the report, refused the motion, pltf. having been forbearing, & deft. negligent throughout. — MILES *v.* CAMERON (1883), 9 P. R. 502.—**CAN.**

3229 ii. —— ——.]—OUCHTERLONY *v.* PALGRAVE MINING CO. (1897), 29 N. S. R. 414.—**CAN.**

3229 iii. —— ——.]—It is discretionary in the ct. to extend the time for redemption & where a master has extended the time & his order has been confirmed by a judge in chambers the Ct. of Appeal will not interfere unless the discretion has been exercised on a wrong principle.—MCGREGOR *v.* PETERSON & WILLIAMS (1916), 34 W. L. R. 133 ; 10 W. W. R. 349.—**CAN.**

3229 iv. —— ——.]—HOWE *v.* HOWE (1916), 34 W. L. R. 941 ; 10 W. W. R. 1263.—**CAN.**

3229 v. —— ——.]—MACKIE *v.* STANDARD TRUSTS CO., [1922] 1 W. W. R. 566 ; 67 D. L. R. 201 ; 17 Alta. L. R. 236.—**CAN.**

3229 vi. —— ——.]—MORMAN *v.* ANDERSON (Sask.), [1926] 1 W. W. R. 909.—**CAN.**

3229 vii. —— ——.]—The slightest ground will induce a court of equity to extend the time of sale in a foreclosure

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3230. —— Necessity for ample security.] — QUARLES *v.* KNIGHT, No. 3229, *ante.*

3231. —— ——.]—In a foreclosure suit, an order to enlarge the time for payment of the mtge. money, is by no means of course, but may be refused, where no excuse for the default is stated, & the security does not appear to be ample. The usual condition on which it is granted is, on payment of interest & costs before the time appointed by the master for payment of the whole; in this case, however, it was ordered, that upon payment of the interest & costs within a month, the time should be enlarged for five months.—EYRE *v.* HANSON (1840), 2 Beav. 478; 9 L. J. Ch. 302; 48 E. R. 1266.

Annotations:—**Folld.** Geldart *v.* Hornby (1841), 6 Jur. 78. **Consd.** Ford *v.* Wastell (1847), 6 Hare, 229. **Refd.** Holford *v.* Yate (1855), 1 K. & J. 677.

3232. —— Necessity for assignment of sufficient reason.]—A first application by a mtgor., to enlarge the time given him to redeem, refused; no reason being assigned why the money was not to be paid on the day fixed by the report.—NANNY *v.* EDWARDS (1827), 4 Russ. 124; 6 L. J. O. S. Ch. 20; 38 E. R. 752.

Annotations:—**Folld.** Geldart *v.* Hornby (1841), 6 Jur. 78. **Consd.** Ford *v.* Wastell (1847), 6 Hare, 229. **Refd.** Eyre *v.* Hanson (1840), 2 Beav. 478.

3233. —— ——.]—EYRE *v.* HANSON, No. 3231, *ante.*

3234. ——.]—CAMPBELL *v.* MOXHAY, No. 2724, *ante.*

3235. —— In favour of assignee added after judgment nisi.]—*Re* PARBOLA, LTD., BLACKBURN *v.* PARBOLA, LTD., No. 2973, *ante.*

3236. What will be considered sufficient reason—Slight grounds.]—PATCH *v.* WARD, No. 2978, *ante.*

3237. —— Reasonable prospect of mortgagor discharging debt.]—FORREST *v.* SHORE, No. 3320, *post.*

(b) Enlargement after Entry of Order Absolute.

3238. Whether enlargement obtainable.]—Time enlarged for the performance of a decree for the redemption of a mtge.—ISMOORD *v.* CLAYPOOL (1666), 1 Rep. Ch. 262; 9 Sim. 317, n.; 21 E. R. 568.

Annotation:—**Folld.** Ford *v.* Wastell (1847), 16 L. J. Ch. 372.

cause.—JESSOP *v.* KING (1812), 2 Ball & B. 97.—**IR.**

3230 i. —— *Necessity for ample security.*]—GEMMEL *v.* BURN (1878), 7 P. R. 381.—**CAN.**

3230 ii. —— ——.]—An order to enlarge the time for payment of a mtge. debt is by no means of course; & though a strong reason is not required, it will be refused where none is assigned, or where the security does not appear ample.—IDINGTON *v.* TRUSTS & GUARANTEE CO., LTD. (Alta.), [1917] 2 W. W. R. 154; 34 D. L. R. 86.—**CAN.**

3234 i. ——.]—ANON. (1853), 4 Gr. 61.—**CAN.**

3237 i. *What will be considered sufficient reason—Reasonable prospect of mortgagor discharging debt.*]—FORD *v.* STEEPLES (1844), 1 O. S. 282.—**CAN.**

3237 ii. —— ——.]—Deft. seeking to open foreclosure should show some reasonable excuse for not redeeming at the proper time, also that he has a prospect of paying the mtge. debt if time be given him, & that the property is of much greater value than the amount due.—JOHNSON *v.* ASHBRIDGE (*circa* 1866), 2 Ch. Ch. 251.—**CAN.**

3237 iii. —— ——.]—Where the day to pay money reported due on a mtge. was past, the ct. allowed the mtgor. six months' further time to redeem, on condition of paying the costs of the motion, & interest on the whole sum found due, it appearing that the security was good, & the mtgor. in a fair way to raise money.—STREET *v.* O'REILLEY (1867), 2 Ch. Ch. 270.—**CAN.**

3237 iv. —— ——.]—CAMERON *v.* CAMERON (1869), 2 Ch. Ch. 375.—**CAN.**

3237 v. —— ——.]—A substantial extension of the time allowed by an order *nisi* for redemption in a mtge. action refused on the application of a third mtgee., there being no evidence of any probability of the mtgor. obtaining the money to pay off the debt, but a second short extension was granted to permit the subsequent incumbrancers to decide whether or not to redeem.—SASKATCHEWAN MORTGAGE & TRUST CORPN., LTD. *v.* O'CONNER, [1925] 1 W. W. R. 497.—**CAN.**

d. —— *Mortgagor hindered by mortgagee's advertisement.*]—GILMOUR *v.* MYERS (*circa* 1866), 2 Ch. Ch. 179.—**CAN.**

e. —— *Second mortgagee on sea voyage.*]—CAMERON *v.* RUTLEDGE (Y. T.) (1905), 2 W. L. R. 473.—**CAN.**

f. —— *Arranging new loan.*] — BRODIE *v.* PATTERSON (1912), 21 O. W. R. 235; 3 O. W. N. 685; 1 D. L. R. 901.—**CAN.**

g. —— *To give third mortgagee opportunity to redeem.*]—In an action by a first mtgee., a third mtgee. was given an extension beyond the time fixed by the order *nisi* for redemption; it appearing that the third mtgee. intended to redeem should the second mtgee. not do so.—BRAID *v.* MCDOWELL (B. C.), [1919] 3 W. W. R. 596.—**CAN.**

h. *Statutory foreclosure.*] — Where the formalities prescribed by Real Property Act, for the foreclosure of a mtge. under the Act have been complied with & there has been no fraud, the ct. has no power to re-open the foreclosure.—CAMPBELL *v.* BANK OF NEW SOUTH WALES (1883), 16 N. S. W. Eq. 285.—**AUS.**

k. ——.]—WILLIAMS *v.* BOX (1910), 13 W. L. R. 451.—**CAN.**

l. *Abatement of suit.*]— This suit became abated between the date of the report & the time fixed by it for payment by subsequent incumbrancers. An application for a final order for foreclosure was refused, & a new day was appointed, allowing the incumbrancers an additional time for payment, equal to the time the suit remained abated.—BIGGAR *v.* WAY (1879), 8 P. R. 158.—**CAN.**

m. *Final order found to be invalid —Right to redeem not lost.*]—MARTIN *v.* EVANS (1917), 39 O. L. R. 479; 38 Sask. L. R. 376.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 8.—A. (b).

3238 i. *Whether enlargement obtainable.*] — NATIONAL MUTUAL LIFE ASSOCN. *v.* BENJAMIN (1900), 21 N. S. W. Eq. 96: 17 N. S. W. W. N. 52.—**AUS.**

3238 ii. ——.]—Where a purchaser of the equity of redemption paid the amount found due to pltf.:—*Held:* this was a payment by deft., or some one on his account, & the final order of foreclosure was set aside.—REID *v.* COOPER (1860), 2 Ch. Ch. 90.—**CAN.**

3238 iii. ——.]—A foreclosure was opened eighteen months after the final order, where the mtgor. was illiterate & had no solr. in the cause, & misunderstood the object of the bill, which was the only paper served on him; the mtge. bearing twelve per cent. interest, the property appearing to be three times the value of the incumbrance, & the whole or greater part of the property being still in the possession of the mtgor.—PLATT *v.* ASHBRIDGE (1865), 12 Gr. 105.—**CAN.**

3238 iv. ——.]—Where pltf. can be replaced in the same position he occupied before the default, & recompensed for any damage he may have suffered, & where there appears a prospect of the amount of the mtge. money being paid within the period asked for, the ct. will not refuse to open the foreclosure.—WADDELL *v.* MCCOLL (1866), 2 Ch. Ch. 62.—**CAN.**

3238 v. INDEPENDENT ORDER OF FORESTERS *v.* PEGG (1900), 20 C. L. T. 400; 19 P. R. 254.—**CAN.**

3238 vi. ——.]—SCOTTISH AMERICAN INVESTMENT CO. *v.* BREWER (1901), 21 C. L. T. 522; 2 O. L. R. 369.—**CAN.**

3238 vii. ——.]—BARNES *v.* BAIRD (1904), 15 Man. L. R. 162.—**CAN.**

3238 viii. ——.]—Under Man. Real Property Act, R. S. M., 1902 (c. 148), s. 126, as amended by 5 & 6 Edw. 7, c. 75, s. 3, (Man.), the ct. has equitable jurisdiction to open up foreclosure proceedings in respect of mtges. foreclosed under sects. 113 & 114 of the Act, notwithstanding the issue of a certificate of title, in the same manner & upon the same grounds as in the case of ordinary mtges., at all events where rights of a third party holding the status of a *bonâ fide* purchaser for value have not intervened.—WILLIAMS *v.* BOX (1910), 19 Man. L. R. 560; 31 C. L. T. 251; 44 S. C. R. 1.—**CAN.**

3238 ix. ——.]—The fact that a payment was made to the mtgee. after the order *nisi* was made, that negotiations for a settlement were carried on until the final order was obtained & that the property is apparently worth much more than the amount of the mtge., constitute equitable grounds for opening up the foreclosure.—COLONIAL INVESTMENT & LOAN CO. *v.* MCMANUS, [1918] 1 W. W. R. 561; 11 Sask. L. R. 61.—**CAN.**

3238 x. ——.]—The ct. has no jurisdiction to open up a foreclosure under Real Property Act, R. S. M. 1913, c. 171, regularly & properly obtained in accordance with the provisions of that Act.—SAMWELL *v.* BRITISH AMERICAN MORTGAGE CORPN., [1920] 2 W. W. R. 638.—**CAN.**

3238 xi. ——.]—ANON. (1846), 10 I. Eq. R. 174.—**IR.**

3238 xii. ——.]—*Re* POWER & CARTON'S CONTRACT (1890), 25 L. R. Ir. 459.—**IR.**

3239. ——.]—Let the son have six months' longer time, from this day, to redeem. Take till Michaelmas term to redeem: if money not then paid, let the order to foreclose stand & this to be peremptory (WRIGHT, LORD KEEPER).—ABNEY *v.* WORDSWORTH (1701), 9 Sim. 317, n.; 59 E. R. 380, n.

3240. ——.]—Pltf. obtained the common decree for foreclosure, & afterwards the order absolute, which last-mentioned order was enrolled. Upon motion by deft. for the enlargement of the time fixed by the order absolute for the payment of the mtge. debt:—*Held:* the enrolment of the order need not be vacated, & the ct. was not precluded from enlarging the time.—FORD *v.* WASTELL (1848), 2 Ph. 591; 6 Hare, 229; 17 L. ... 368; 13 L. T. O. S. 461; 12 Jur. 404; 41 E. R. 1071, L. C.

Annotations:—**Folld.** Thornhill *v.* Manning (1851), 1 Sim. N. S. 451. **Refd.** Prees *v.* Coke (1871), 6 Ch. App. 645.

3241. ——.]—THORNHILL *v.* MANNING, No. 3331, *post.*

3242. —— **Former procedure.**]—Deft., who has allowed a decree *nisi* to be made absolute against him, by not appearing to show cause against it, is not entitled, as of course, to a rehearing, & therefore it is irregular for a party so situated to obtain an order to rehear the cause upon the common petition; the proper course is to present a special petition, praying that the order making the decree absolute may be discharged, & that the party may be at liberty to show cause against the decree.—BOOTH *v.* CRESWICKE (1841), Cr. & Ph. 361; 41 E. R. 528, L. C.; *subsequent proceedings* (1842), 6 Jur. 1023, L. C.

3243. —— **Property sold by mortgagee.**] —CAMPBELL *v.* HOLYLAND, No. 2979, *ante.*

3244. —— **On presentation of strong case—Inevitable necessity.**]—COCKER *v.* BEVIS (1665), 1 Cas. in Ch. 61; Freem. Ch. 129; 22 E. R. 695; *sub nom.* COKER *v.* BEAVIT, 1 Rep. Ch. 253.

Annotation:—**Folld.** Ford *v.* Wastell (1847), 6 Hare, 229.

3245. —— **Default owing to unusual & accidental circumstances.**]—LEE *v.* HEATH (1747), 9 Sim. 306; 9 L. J. Ch. 117; 59 E. R. 375, L. C.

3246. —— ——.]—NANFAN *v.* PERKINS (1766), 9 Sim. 308; 9 L. J. Ch. 114; 59 E. R. 376, L. C.

Annotation:—**Folld.** Jones *v.* Creswicke (1839), 9 Sim. 304.

3247. —— ——.]—CROMPTON & STAMFORD *v.* EFFINGHAM (EARL) (1782), 9 Sim. 311; 9 L. J. Ch. 116; 59 E. R. 377, L. C.

Annotations:—**Consd.** Jones *v.* Creswicke, Booth *v.* Creswicke (1839), 9 L. J. Ch. 113; Ford *v.* Wastell (1847), 2 Ph. 591.

3248. —— **Non-compliance with terms of decree.**] —If anybody has obtained a decree of foreclosure on terms which have not been complied with, the proper application should have been to open the foreclosure (LORD LOUGHBOROUGH, C.).—COX *v.* PEELE (1788), 2 Bro. C. C. 334; 29 E. R. 186, L. C.

3249. —— ——.]—JOACHIM *v.* M'DOUALL (1798), 9 Sim. 314; 9 L. J. Ch. 117; 59 E. R. 379, L. C.

Annotation:—**Folld.** Jones *v.* Creswicke, Booth *v.* Creswicke (1839), 9 L. J. Ch. 113.

3250. —— ——.]—Under a decree in a foreclosure suit, the time fixed for payment of principal, interest & costs, was July 31. On July 25, deft. obtained an order, referring it to the master to fix a further time on his paying the interest & costs on the first-mentioned day. Deft., however, failed to make that payment, &, on Aug. 3 following, pltf. obtained the usual order for foreclosure absolute; but, owing to the press of business in the registrar's office, it was not drawn up. On Aug. 16 deft. moved for a further extension of time, on the ground that a person who had agreed to lend him the amount of the principal, interest & costs was prevented, by illness, from coming to London on July 31, & his wife, whom he had deputed to bring the money, was prevented from doing so, by the coach being full on July 30. —JONES *v.* CRESWICKE, BOOTH *v.* CRESWICKE (1839), 9 Sim. 304; 9 L. J. Ch. 113; 4 Jur. 216; 59 E. R. 374; *on appeal* (1841), 5 Jur. 763, L. C.

Annotation:—**Refd.** Ford *v.* Wastell (1847), 6 Hare, 229.

3251. —— ——.]—PATCH *v.* WARD, No. 2978, *ante.*

3252. —— ——.]—CAMPBELL *v.* HOLYLAND, No. 2979, *ante.*

3253. —— **Discovery of new evidence showing court mistaken as to priorities.**]—In a foreclosure suit, a decree was made declaring a deft.'s mtge. entitled to priority over that of pltf. Subsequently a former clerk of that deft.'s solr. gave evidence as to the date of deft.'s mtge., & produced a document tending to show that the mtge. was of later date than it was believed to

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3243*a.* —— *Property sold by mortgagee.*]—KELLY *v.* IMPERIAL LOAN & INVESTMENT CO. (1885), 11 S. C. R. 516.—**CAN.**

n. —— *Action by purchaser of equity of redemption.*]—A decree of foreclosure absolute, drawn up & entered, was set aside at the instance of a purchaser of the equity of redemption, whose interest was acquired after the institution of the suit to foreclose, but without notice of it.—HILLIARD *v.* CAMPBELL (1859), 7 Gr. 96.—**CAN.**

o. —— *Rights of third party intervening.*]—COLLINS *v.* DENISON (1869), 2 Ch. Ch. 465.—**CAN.**

p. —— ——.]—CAMERON *v.* WOLFE ISLAND CO. (1873), 6 P. R. 91.—**CAN.**

q. —— ——.]—RICHARDS *v.* THOMPSON (1911), 18 W. L. R. 179; 4 Sask. L. R. 213.—**CAN.**

r. —— ——.]—CREDIT FONCIER FRANCO CANADIEN *v.* REDEKOPE (Sask.), [1919] 2 W. W. R. 158; 46 D. L. R. 225.—**CAN.**

t. —— ——.]—An application to set aside a final order of foreclosure should be refused where it appears that subsequent to the issue of title under a foreclosure order an interest has been acquired in the lands by a third person, unless such third person is brought before the ct. or notified of the proceedings.—MANUFACTURERS LIFE INSURANCE CO. *v.* CROKER, [1920] 3 W. W. R. 331.—**CAN.**

a. —— ——.]—The fact that the land has been sold to a third person is not alone an insuperable obstacle. The mtgor. may be permitted to redeem whenever the equities in favour of it undoubtedly outweigh all that are against it.—DOVERCOURT LAND BUILDING & SAVING CO. *v.* DUNVEGAN HEIGHTS LAND CO. (1920), 47 O. L. R. 105; 17 O. W. N. 482.—**CAN.**

b. —— *On payment of principal & interest.*]—TRINITY COLLEGE *v.* HILL (1884), 10 A. R. 99.—**CAN.**

c. —— *Concealment of material circumstances.*]—Deft. having appealed promptly to open the foreclosure, & it appearing that pltf. & M. were acting in collusion to injure deft., & various material facts & circumstances in regard to the accounts not having been brought before the judge who made the final order, the foreclosure was opened. —HILL *v.* HANDY (B. C.) (1914), 27 W. L. R. 266; 6 W. W. R. 244; 17 D. L. R. 87.—**CAN.**

d. —— *Irregularity in proceedings.*] —Where a final judgment foreclosing a mtgor.'s equity of redemption has been obtained without service of the writ of summons upon the mtgor. he is entitled to have the judgment set aside, notwithstanding the fact that the mtgee. has obtained a certificate of indefeasible title under Land Registry Act, R. S. B. C., 1911 (c. 127), s. 14 a, as amended by the Act of 1917 (c. 33), s. 2 (5), & has sold the property without notice of the irregularity.—CANADA PERMANENT MORTGAGE CORPN. *v.* NATHA SINGH, [1921] 2 W. W. R. 361.—**CAN.**

3248*a.* —— *Non-compliance with terms of decree.*]—In a suit brought by a mtgee. for sale of the mtged. property, a decree was passed directing that the mtgor. should pay the mtge. debt within six months, & that in default his right of redemption should be foreclosed. The money not having been paid within the appointed time, the ct. was bound to pass an order absolute for sale; it had no power to enlarge the time for payment.—TANIRAM *v.* GAJANAN (1899), I. L. R. 24 Bom. 300.—**IND.**

e. *Recovery of judgment.*]—The recovery of a judgment against deft. after a final order opens the foreclosure & lets deft. in to redeem.—MILLS *v.* CHOATE (1869), 2 Ch. Ch. 433.—**CAN.**

f. ——.]—PAISLEY *v.* BRODDY (1885), 11 P. R. 202.—**CAN.**

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be at the hearing of the cause; & their lordships being convinced that there had been no want of diligence on pltf.'s part:—*Held:* this was evidence which could not possibly have been used when the decree was made; if adduced it would probably have altered the judgment of the ct.; & leave to file a bill of review had been properly given.—THOMAS *v.* RAWLINGS (1864), 11 L. T. 721; 10 Jur. N. S. 1192; 13 W. R. 248, L. JJ.

Annotations:—**Refd.** *Re* Hoghton, Hoghton *v.* Fiddey (1874), L. R. 18 Eq. 573; Birch *v.* Birch (1902), 86 L. T. 364.

3254. —— Increase in value of mortgage property before decree absolute.]—BEATON *v.* BOULTON, [1891] W. N. 30.

3255. —— Discretion of court.] — ABDY *v.* BROWN (1894), 39 Sol. Jo. 10.

(c) Successive Enlargement.

3256. When granted—On presentation of strong case—Though last order peremptory.]—It requires a strong case to induce the ct. to make a fourth order, enlarging the time for the payment of mtge. money, decreed to be paid. If deft. has done all he can to obtain the money, & has been baffled in his purpose, by unexpected delays, & there appears a strong probability of the money being raisable within three months, the ct. would feel disposed to enlarge the time. It is sworn that the objections to the title are satisfactorily answered, & the solr. also swears, he verily believes the sales will be completed within three months. The last order does certainly purport to be a peremptory order, but, I think, the ct. has sometimes, in these cases, given further time, notwithstanding that expression. Let deft. take an order for three months further time, on the usual terms (PLUMER, V.-C.).—EDWARDS *v.* CUNLIFFE (1816), 1 Madd. 287; 56 E. R. 100.

Annotations:—**Refd.** Eyre *v.* Hanson (1840), 2 Beav. 478; Ford *v.* Wastell (1847), 6 Hare, 229. **Mentd.** Brewin *v.* Austin (1838), 2 Keen, 211.

3257. —— ——.]—Mtgor., who had permitted a decree *nisi* for foreclosure to be made absolute against him, he having obtained several enlargements of time for payment of the amount found due to the mtgee., in all of which he made default, was permitted to rehear the original decree upon terms, having satisfied the ct. that he had a case for a rehearing upon the merits.—BOOTH *v.* CRESWICKE (1842), 6 Jur. 1023, L. C.

3258. What will be considered sufficient reason—Mortgaged property of greater value then incumbrance—Mortgagor having promised not to ask for further time.]—ANON. (1740), Barn. Ch. 221; 27 E. R. 621.

3259. —— Defendant having done all possible to raise money—Prevented by unexpected delays.]—EDWARDS *v.* CUNLIFFE, No. 3256, *ante*.

(d) Concurrence of Other Proceedings.

3260. Appeal by mortgagor—Right to redeem in dispute—Terms on which enlargement granted.]—Equitable mtge. by deposit of deed. The ct. refused to suspend the execution of a decree, obtained by a mtgee., until six months after hearing an appeal; but gave six months on bringing the money into ct., consenting to a receiver, & paying interest & costs, on pltf.'s undertaking to repay, if the decree should be reversed.—MONKHOUSE *v.* BEDFORD CORPN. (1810), 17 Ves. 380; 34 E. R. 147, L. C.

Annotations:—**Refd.** Brewin *v.* Austin (1838), 2 Keen, 211; Holford *v.* Yate (1855), 1 K. & J. 677.

3261. —— —— ——.]—The time appointed for redemption enlarged, on terms, pending an appeal to the House of Lords.

My only doubt has been as to the costs of the suit. I think I must order C. to pay into ct. the principal & interest found due on the mtge. security £4,558. I must then direct it to be invested, & the dividends to be paid to F., on his undertaking to repay them if the decree should be reversed, & C. must at once pay the costs of suit & of this application. Thereupon I will enlarge the time to redeem until June 1, 1856, with liberty to apply (ROMILLY, M.R.).—FINCH *v.* SHAW, COLYER *v.* FINCH (1855), 20 Beav. 555; 52 E. R. 718.

3262. Exceptions taken to master's report or order—Plaintiff negotiating with defendant after disallowance of exceptions.]—Where, in a suit of foreclosure, pending exceptions to the master's report, which are afterwards disallowed, & after the time fixed by the report for the payment of the money, pltf. negotiates with defts., with respect to the payment of his debt, he cannot apply to have them foreclosed from the day originally given them.—GROVE *v.* COOPER (1823), 1 L. J. O. S. Ch. 197.

3263. —— Form of application.]—Where, in a foreclosure suit, exceptions are taken to the master's report, & the time appointed for payment of the mtge. money is likely to elapse before the exceptions are heard, deft. should apply to the ct. upon the exceptions being filed, to have the time enlarged until the exceptions are disposed of.—RENVOIZE *v.* COOPER (1823), 1 Sm. & St. 364; 57 E. R. 146.

3264. —— ——.]—Some time after judgment *nisi* for foreclosure, which directed accounts against pltfs. as mtgees. in possession, but contained no inquiry or direction as to improper working of the collieries, it was discovered that the mines had been flooded in consequence, as the mtgors. alleged, of the improper working of the mtgees. or their sub-lessees in removing the pillars. The mtgors. applied to have under the foreclosure judgment as it stood an inquiry with reference to the flooding, & to charge the mtgees. with the injury so caused:—*Held:* although the application was wrong in form, as such an inquiry should have been obtained through a supplemental judgment, or by an addition to the existing judgment, yet as a probable case had been made out of serious damage to the mtged. property by the acts of the mtgees. in possession, the mtgors. should not be absolutely foreclosed & left to the remedy of an action against the mtgees., or on the covenants of the lease against the lessees, but were entitled to such an inquiry, & in taking the accounts to charge the mtgees. with the amount of the injury. The ct., in order to settle the question cheaply & expeditiously, directed a reference to ascertain whether the flooding had been caused by the improper working by the mtgees. or lessees or any persons acting by their permission, & if so what was the amount of loss or damage caused thereby, & added a direction that the mtgees., in taking the accounts directed by the foreclosure judgment, should be charged with the amount of such loss or damage.—TAYLOR *v.* MOSTYN (1886), 33 Ch. D. 226; 55 L. J. Ch. 893; 55 L. T. 651, C. A.

Annotation:—**Mentd.** *Re* Gregory Love & Co., Francis *v.* The Co., [1916] 1 Ch. 203.

3265. —— ——.]—PENNINGTON *v.* CAYLEY, No. 3043, *ante*.

(e) Death of Joint Mortgagee.

3266. Appointment of new day for payment.]—A foreclosure was decreed in default of payment

to three mtgees., who were entitled "on a joint account." Before the day appointed for payment arrived, one of the mtgees. died:—*Held:* the foreclosure could not be made absolute, but the ct. appointed a new day for payment to the survivors.—BLACKBURN *v.* CAINE (1856), 22 Beav. 614; 52 E. R. 1245.

3267. ——.]—Where two joint mtgees. have obtained an order for the payment of the mtge. money, but before the day fixed for the payment has arrived, one of them dies, & the mtgor. does not attend to pay the money on the day fixed, an order can be obtained by the sole surviving mtgee. for the appointment of a new day, on the arrival of which, in case of the mtgor.'s default, he can have the order for foreclosure made absolute.—KINGSFORD *v.* POILE (1859), 8 W. R. 110.

3268. ——.]—BROWELL *v.* PLEDGE, [1888] W. N. 166.

(f) Receipt of Rents.

i. *By Mortgagee in Possession.*

3269. Between master's certificate & day appointed for payment.]—A mtgee. received rents between the master's report & the day fixed for payment. Default being made:—*Held:* the mtgee. was not then entitled to an order absolute.—GARLICK *v.* JACKSON (1841), 4 Beav. 154; 49 E. R. 297.

Annotation:—**Refd.** Alden *v.* Foster (1842), 5 Beav. 592.

3270. ——.]—If a mtgee. receives rents after the master's report & before the day appointed for payment, there must be a further reference & account, & a new day appointed for payment.—ALDEN *v.* FOSTER (1842), 5 Beav. 592; 7 Jur. 8; 49 E. R. 708.

3271. ——.]—In a foreclosure suit, the mtgee. having received rents between the date of the master's report & the day appointed for payment, the ct., on motion, referred it back to the master to continue the accounts, & to fix a new day.—ELLIS *v.* GRIFFITHS (1844), 7 Beav. 83; 49 E. R. 994.

3272. ——.]—A foreclosure is not complete until the final order has been made, & the final order cannot be obtained if rents have been received by the mtgee. since the account was taken.

Where a solr. & mtgee. took a conveyance from the mtgor., a day labourer, who had no independent legal advice:—*Held:* the deed was not valid unless the circumstances were all explained to the mtgor., & the *onus* of showing that this was done lay on the solr.—PREES *v.* COKE (1871), 6 Ch. App. 645, L. C.

3273. ——.]—A mtgee. in possession who receives a sum by way of rent from the mtged. property in the interval between the filing of the chief clerk's certificate & the day fixed for payment, thereby opens the account & cannot get a final order without getting another certificate fixing another day for redemption.—ALLEN *v.* EDWARDS (1873), 42 L. J. Ch. 455; 21 W. R. 471.

See, also, No. 3317, *post.*

3274. After default on day appointed for payment—Before affidavit of default.]—When a mtgee. receives rents after default is made in payment of the principal & interest on the day fixed by the chief clerk's certificate, but before the affidavit of such default is made, an order for final foreclosure will be granted without further account.—CONSTABLE *v.* HOWICK (1858), 5 Jur. N. S. 331; 7 W. R. 160.

Annotations:—**Distd.** Prees *v.* Coke (1871), 6 Ch. App. 645; Jenner-Fust *v.* Needham (1886), 55 L. J. Ch. 407. **Folld.** National Permanent Mutual Benefit Bldg. Soc. *v.* Raper, [1892] 1 Ch. 54.

3275. —— ——.]—NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY *v.* RAPER, No. 3174, *ante.*

3276. —— **Before final judgment against second mortgagee—& before expiration of time allowed mortgagor for redemption.**]—WEBSTER *v.* PATTESON, No. 3113, *ante.*

ii. *By Receiver.*

3277. Between master's certificate & day appointed for payment—Saving expense of further account—Affidavit of amount due to day of notice of motion to fix further day.]—Where a receiver has received rents of mtged. property between the date of the certificate under a foreclosure judgment & the day fixed for redemption the mtgee. is not entitled to the rents so received, except on the terms of bringing them into account as between mtgee. & mtgor., & a fresh date must be fixed for redemption.

The ct. to save the expense & delay of a further reference to chambers allowed mtgees. to file an affidavit showing the exact amount which would be due to them for principal, interest, & costs, after allowing for everything received, brought down to the day for which notice of motion was given to fix another day for redemption.—JENNER-FUST *v.* NEEDHAM (1886), 32 Ch. D. 582; 55 L. J. Ch. 629; 55 L. T. 37; 34 W. R. 709, C. A.

Annotations:—**Distd.** Coleman *v.* Llewellin (1886), 34 Ch. D. 143. **Apld.** Peat *v.* Nicholson (1886), 54 L. T. 569; Ross Improvement Comrs. *v.* Usborne, [1890] W. N. 92. **Distd.** Ingham *v.* Sutherland (1890), 63 L. T. 614. **Consd.** Cheston *v.* Wells (1893), 62 L. J. Ch. 468. **Refd.** National Permanent Mutual Benefit Bldg. Soc. *v.* Raper, [1892] 1 Ch. 54.

3278. ——.]—In a foreclosure action the fact that a receiver appointed by the ct. had received rents since the certificate under the order *nisi* is no bar to an immediate order of foreclosure absolute on default of payment pursuant to the certificate.—HOARE *v.* STEPHENS (1886), 32 Ch. D. 194; 55 L. J. Ch. 511; 54 L. T. 230; 34 W. R. 410.

Annotation:—**Refd.** National Permanent Mutual Benefit Bldg. Soc. *v.* Raper, [1892] 1 Ch. 54.

3279. —— **Receipts belonging to party redeeming—Or mortgagee foreclosing—Judgment giving liberty to apply for payment.**]—A receiver having been appointed in a foreclosure action relating to a mtged. mining property, let on lease at certain rents & royalties, a foreclosure judgment *nisi* was given in 1884. This judgment contained a special direction that any persons redeeming the premises under the judgment, or pltfs. in case of foreclosure, were to be at liberty to apply for payment of any moneys in the hands of the receiver. The mtgor. made default in payment at the time fixed for redemption:—*Held:* the judgment for foreclosure *nisi* not having been appealed from, that judgment must be taken to have decided who was entitled to the money in the receiver's hands, & on making the foreclosure absolute, pltfs. were entitled to such moneys without any further account or further period of redemption being allowed.—COLEMAN *v.* LLEWELLIN (1886), 34 Ch. D. 143; 55 L. T. 647; 35 W. R. 82; *sub nom.* COLMAN *v.* LLEWELLIN, 56 L. J. Ch. 1, C. A.

Annotations:—**Consd.** Smith *v.* Pearman (1888), 58 L. T. 720; Cheston *v.* Wells, [1893] 2 Ch. 151.

3280. —— —— —— ——.]—Where after the commencement of a foreclosure action concerning certain property, subject to a mtge. which included the goodwill of a business, a receiver & manager had been appointed, the ct. directed a proviso to be inserted in the order for foreclosure, that any person redeeming, or, in the event of

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foreclosure, pltf. should be at liberty to apply to the judge in chambers for payment of any money in ct. or in the hands of the receiver.—SMITH *v.* PEARMAN (1888), 58 L. T. 720; 36 W. R. 681.

3281. —— —— —— ——.]—Pltf. commenced a foreclosure action on Dec. 22, 1882, asking for judgment for principal & interest, a receiver, & the usual order for an account & foreclosure. A receiver had been appointed & a statement of claim delivered. Deft. had not appeared. Pltf. moved for judgment in default of appearance, asking, in addition to the order for payment & the usual foreclosure order, for the direction given in *Coleman* v. *Llewellin*, No. 3279, *ante*, "That any person redeeming under this order, & pltf. in case of foreclosure, should be at liberty to apply in chambers for the payment of any moneys in ct. or in the hands of the receiver":—*Held:* this direction can only be inserted under special circumstances, which were not shown to exist in this case; & the order for payment of principal & interest could only be made on production of an affidavit that nothing had been received on account thereof since the issue of the writ.—CHESTON *v.* WELLS, [1893] 2 Ch. 151; 62 L. J. Ch. 468; 68 L. T. 197; 41 W. R. 374; 37 Sol. Jo. 284; 3 R. 367.

3282. —— **Receipts representing corpus of mortgage property.**]—Where the receiver appointed after a judgment for foreclosure had a balance in his hands which represented *corpus* of the mtged. property, the ct. held that pltf. was entitled to have the foreclosure judgment made absolute without any further account being taken.—WELCH *v.* NATIONAL CYCLE WORKS CO., LTD. (1886), 55 L. T. 673; 35 W. R. 137.

3283. —— **Omission of rents received from accounts—Error discovered after foreclosure absolute.**]—Some months after the usual order for foreclosure absolute had been made in favour of first mtgees. against the mtgor. & second mtgees., & after the first mtgees. acting upon that order had actually sold portions of the mtged. property, the mtgor. discovered that the receiver had omitted from his accounts certain rents which he had received. The mtgor. accordingly moved that the foreclosure might be re-opened; & that the first mtgees. might be restrained from parting with the legal estate of the mtged. property:—*Held:* there was no evidence that the first mtgees. had received any of the rents for which the receiver had not accounted, & there was no reason why the foreclosure should be re-opened merely because the receiver, who was not the agent of the first mtgees. for all purposes, but was an officer of the ct., had made a mistake which the mtgor. had not discovered before it was too late; the case did not come within the authority of *Jenner-Fust* v. *Needham*, No. 3277, *ante*, & therefore the motion failed.—INGHAM *v.* SUTHERLAND (1890), 63 L. T. 614.

3284. —— **Mortgagee submitting to be charged—With certain sum in respect of receipts—Receipts not exceeding sum credited.**]—BARBER *v.* JECKELLS, [1893] W. N. 91.

3285. —— —— —— ——.]—CHRISTY *v.* GODWIN (1893), 38 Sol. Jo. 10.

3286. —— —— —— ——.]—SIMMONS *v.* BLANDY, No. 3072, *ante*.

3287. —— —— **Liberty to either party to apply for payment of receipts.**]—When in a foreclosure action pltf., in order to avoid opening the foreclosure by claiming payment of rents come to the hands of the receiver in the action between the date of the certificate & the day fixed for the redemption, submits to be charged in account with a sum certain in the hands of the receiver in respect of such rents, the judgment should reserve liberty to either party to apply for payment of any money come to the hands of the receiver.—LUSK *v.* SEBRIGHT (1894), 71 L. T. 59.

3288. Partly before & partly after day appointed for payment—Receiver & manager.]—The receiver & manager, appointed before judgment in a foreclosure action, received moneys that represented the gross takings in the business of the mtged. property, which was a leasehold public-house. The moneys were received from day to day, partly before & partly after the date fixed for redemption.

The ct. made a final order for foreclosure & directed that the receiver & manager should pass forthwith his final account, & be discharged, his recognisance & bond to be vacated.—HOLT & CO. *v.* BEAGLE (1886), 55 L. T. 592.

3289. ——.]—Receiver, appointed before judgment in a foreclosure action, received rents both before & after the day fixed for payment of the mtge. money:—*Held:* a further account must be taken, & a further period of one month from the date of the new certificate given to the mtgor. to redeem.—PEAT *v.* NICHOLSON (1886), 54 L. T. 569; 34 W. R. 451.

3290. —— **Amount received not sufficient to cover receiver's remuneration & expenses.**]—ELLENOR *v.* UGLE, [1895] W. N. 161.

3291. After day appointed for payment.]—ROSS IMPROVEMENT COMRS. *v.* USBORNE, [1890] W. N. 92.

Annotation:—**Consd.** National Permanent Mutual Benefit Bldg. Soc. *v.* Raper, [1892] 1 Ch. 54.

See Nos. 3274-3276, *ante*.

(g) Action on Covenant by Mortgagee.

3292. Foreclosure opened—Action after foreclosure.]—*Re* BIRCH (1726), Gilb. Ch. 186; 25 E. R. 130.

3293. —— ——.]—DASHWOOD *v.* BLYTHWAY (1729), 1 Eq. Cas. Abr. 317; 21 E. R. 1072.

3294. —— ——.]—PERRY *v.* BARKER, No. 2672, *ante*.

3295. —— ——.]—LOCKHART *v.* HARDY, No. 2186, *ante*.

3296. —— ——.]—HIGGS *v.* BAKER (1905), 50 Sol. Jo. 141.

(h) Sale under Power.

3297. Foreclosure opened—Whether agreement to sell sufficient.]—Mtgee., with power of sale, obtained a foreclosure decree, & then entered into an agreement to sell the estate, with a clause providing that as the vendor was mtgee., with power of sale, she would only enter into the usual covenant that she had not incumbered. The purchaser objected to the validity of the foreclosure decree, & insisted upon having the conveyance under the power of sale; & on the vendor declining to convey in that form, instituted a suit for specific performance, in which the vendor adduced evidence, showing that the above-mentioned clause was inserted by inadvertence &

3292 1. *Foreclosure opened—Action after foreclosure.*]—SMART *v.* COTTLE (1863), 10 Gr. 59.—CAN.

that she never intended to incur the risk of opening the foreclosure by conveying under the power :— *Held :* the misapprehension was a sufficient defence to the enforcement of a conveyance under the power.

It was insisted that the foreclosure was as much opened by the agreement to sell under the power as it would be by a conveyance. I am by no means satisfied that this was the case (TURNER, C.J.).—WATSON *v.* MARSTON (1853), 4 De G. M. & G. 230 ; 43 E. R. 495.

Annotations :—**Consd.** Stevens *v.* Theatres, [1903] 1 Ch. 857. **Mentd.** Falcke *v.* Gray (1859), 4 Drew. 651 ; Carroll *v.* Keays, Keays *v.* Carroll (1873), 22 W. R. 243 ; Hickman *v.* Berens, [1895] 2 Ch. 638.

——.]—*See, also*, No. 2249, *ante*.

(*i*) *Fraud.*

3298. Mortgage in fraud of judgment creditor.]—BIRD *v.* GANDY (1715), 2 Eq. Cas. Abr. 251 ; 7 Vin. Abr. 45, pl. 20 ; 22 E. R. 213.

3299. Gross fraud.]—On suggestion of a gross fraud, the ct. will, upon an original bill, overrule a plea of a decree, & a report made & confirmed thereon, if the suggestion of fraud be not denied. —LOYD *v.* MANSELL (1722), 2 P. Wms. 73 ; 24 E. R. 645.

Annotations :—**Mentd.** Manaton *v.* Molesworth, Wortley *v.* Molesworth (1757), 1 Eden. 19 ; Palmer *v.* Mure (1773), 2 Dick. 489 ; Henderson *v.* Cook (1858), 4 Drew. 306.

3300. Any unfair conduct.]—The ct. will open the foreclosure, if there be any unfair conduct in the mtgee.—SOLEY *v.* SALISBURY (1725), 9 Mod. Rep. 153 ; 88 E. R. 372.

3301. Necessity to show actual fraud.]—FULLER *v.* WILLIS (1831), 1 My. & K. 292, n. ; 39 E. R. 693.

Annotation :—**Consd.** Leith *v.* Irvine (1833), 1 My. & K. 277.

3302. ——.]—PATCH *v.* WARD, No. 2978, *ante*.

(*j*) *Mortgagee bequeathing Security as a Debt.*

3303. Foreclosure not opened.]—After a decree of foreclosure had been made absolute, & the mtgee. for many years in possession, he made his will, & thereby disposed of the mtge. debt, in these words : "if Mrs. S.'s debt be well paid, as I doubt not but it will, I order my exor. to pay the sum of £4,800 (which was the exact amount of the debt) amongst the children of my nephew : —*Held :* this devise did not open the foreclosure, & testator's calling it a debt, did not alter the nature of his estate in the premises.—TOOKE *v.* ELY (BP.) (1705), 5 Bro. Parl. Cas. 181 ; 2 E. R. 613.

3304. ——.]—STUCKVILLE *v.* DOLBEN (undated), cited in 15 Vin. Abr. p. 476, pl. 1.

Annotation :—**Refd.** Ord *v.* Smith (1725), Cas. *temp.* King 9.

(*k*) *Devise of Mortgaged Land to Mortgagor by First Mortgagee.*

3305. Whether foreclosed mortgage to second mortgage opened.]—A. mortgages land to B. & after mortgages the farm land to C. B. the first mtgee. forecloses C. & afterwards devises the premises to the mtgor. *Qu. :* whether C. may now in equity set aside the first mtge.—COOK *v.* SADLER (1691), 2 Vern. 235 ; 23 E. R. 752.

(*l*) *Allegation of Loss of Title Deeds.*

3306. Enlargement granted—Form of order.]—LUCCRAFT *v.* HITE (1785), 2 Hare, 14, n.

B. Conditions of Enlargement.

3307. On payment of interest—On whole sum reported due.]—(1) If a mtgor. or puisne mtgee. prays to enlarge the time to redeem, he must pay interest for the whole sum reported due for principal, interest, & costs.

(2) Where a decree is made for creditors to be paid according to their priority, if the estate is deficient, the principal only shall bear interest, after the confirmation of the report.—NEAL *v.* A.-G. (1729), Mos. 246 ; 25 E. R. 376, L. C.

Annotation :—*As to* (2) **Apld.** Whatton *v.* Cradock (1836), 1 Keen, 267.

3308. —— —— **& costs of application.**]—Deft. in a foreclosure suit may obtain an enlargement of the time limited for absolute foreclosure upon slight evidence of the probability of his being able to pay off the mtge. ; but the order will only be made upon the terms of his paying a large part of the interest due to pltf. within a short specified time, & paying interest upon the aggregate sum found to be due to pltf. for principal, interest & costs from the date of the certificate & the costs of the application ; & that, if he fail to pay the specified sum to pltf. for interest at the time appointed, he shall be absolutely foreclosed.—HOLFORD *v.* YATE (1855), 1 K. & J. 677 ; 69 E. R. 631.

3309. On payment of interest & costs due.]—Where the amount of principal & interest due upon a mtge. has been found by the master's report, the rule now is to compute subsequent interest upon the principal only ; & the time for payment of the money found due upon a mtge. is enlarged upon the terms of paying the interest & costs found due.—WHATTON *v.* CRADOCK (1836), 1 Keen, 267 ; 6 L. J. Ch. 178 ; 48 E. R. 309.

Annotations :—**Folld.** Brewin *v.* Austin (1838), 2 Keen, 211. **Refd.** Elton *v.* Curteis (1881), 19 Ch. D. 49.

3310. ——.]—On bills of foreclosure, when the mtgor. asked to enlarge the time appointed for payment, & the ct. thought proper to grant the application, the practice formerly was not to order any immediate payment, but to order subsequent interest to be computed on the aggregate amount of principal, interest, & costs already reported. For many years past, however, the practice has been to enlarge the time only on the terms of first paying the interest & costs already reported ; & these being paid, subsequent interest is to be computed on the principal only, that alone remaining unpaid. . . . If, for any special reason, the ct. should think fit to enlarge the time without ordering any immediate payment, I conceive that it would now be proper to order the subsequent interest to be computed on the aggregate amount of principal, interest, & costs before computed.—BREWIN *v.* AUSTIN (1838), 2 Keen, 211 ; 48 E. R. 609.

& costs of application.]—WAKERELL *v.* DELIGHT (1803), 9 Ves. 36 ; Coop. G. 27 ; 32 E. R. 514, L. C.

PART XIII. SECT. 7, SUB-SECT. 8.—B.

3307 i. *On payment of interest—On whole sum reported due.*]—In foreclosure proceedings, an order may be made that upon payment of interest at the rate set out in the mtge. upon moneys due for principal, interest & costs, proceedings be stayed until conditions improve, & that, in default, the lands may be offered for sale at an upset price, with liberty to all parties to bid.—BENJAMIN *v* MARSAN (1915), 8 W. W. R. 358.—**CAN.**

3308 i. —— —— *& costs of application.*]—Where there was delay on the mtgor.'s part, but he showed a reasonable prospect of being able to pay in a few months, the time was extended, the principal & intereest were directed to be capitalised, & interest on the whole paid, & the costs of the application to be paid in a week.—CAHUAC *v.* DURIE (1869), 2 Ch. Ch. 394.—**CAN.**

g. ——.]—HOWARD *v.* MACARA (1858), 1 Ch. Ch. 27.—**CAN.**

3309 i. *On payment of interest & costs due.*]—EVERSON *v.* HODGSON, [1921] 1 W. W. R. 825 ; 14 Sask. L. R. 158.—**CAN.**

Sect. 7.—Foreclosure or sale: Sub-sect. 8, B., C. & D.; sub-sect. 9. Sect. 8: Sub-sect. 1.]

3312. —— ——.] — WAKEMAN *v.* FARMER (1846), 6 L. T. O. S. 363.

3313. —— **Within prescribed period.**]—EYRE *v.* HANSON, No. 3231, *ante*.

3314. —— **Within one month—Enlargement for five months.**]—EYRE *v.* HANSON, No. 3231, *ante*.

3315. —— —— **Enlargement three months.**]—Where, after the second report & day of payment fixed in a foreclosure suit, the mtgor. was prevented by the act of the mtgee from receiving the rents of the property, the time of payment was ordered to be enlarged for three months, upon payment by the mtgor, within one month of the interest & costs found due by the last report, notwithstanding there was doubt whether the value of the security was ample.—GELDARD *v.* HORNBY (1841), 1 Hare, 251; 6 Jur. 78; 66 E. R. 1026.

3316. —— **Within two weeks—Enlargement four months.**]—WAKEMAN *v.* FARMER (1846), 6 L. T. O. S. 363.

3317. —— **Forthwith.**]—Where a mtgee. receives rents between the report & day of payment, it is not the practice, on directing the accounts to be continued & the time to be extended, to order the mtgor. forthwith to pay the arrears of interest & costs.—BUCHANAN *v.* GREENWAY (1849), 12 Beav. 355; 50 E. R. 1097.

3318. —— —— **Notwithstanding infancy of mortgagor.**]—Even in the case of infants, the ct. will only extend the time for payment of the mtge. money, upon the terms of immediate payment of the interest & costs.—COOMBE *v.* STEWART (1851), 13 Beav. 111; 16 L. T. O. S. 454; 51 E. R. 44.

3319. On payment of substantial portion of interest due—Within short time.]—HOLFORD *v.* YATE, No. 3308, *ante*.

3320. —— **Forthwith.**]—Where mtged. premises afford an ample security for the mtge. debt & interest the ct. will, when there is shown a reasonable prospect of the mtgor.'s being able to discharge the debt, enlarge the time fixed for foreclosure absolute upon immediate payment by the mtgor. to the mtgee. of a substantial portion of the interest accrued due & costs.—FORREST *v.* SHORE (1884), 32 W. R. 356.

3321. Effect of non-compliance.]—On a bill of foreclosure, an order being obtained, enlarging the payment of the principal money, on condition of the interest being paid, deft. neglecting to pay the interest, pltf. obtained the usual decree absolute, on motion, as of course.—JONES *v.* ROBERTS (1825), M'Cle. & Yo. 567; 148 E. R. 538, Ex. Ch.

3322. ——.]—HOLFORD *v.* YATE, No. 3308, *ante*.

3323. Computation of subsequent interest.]—Where the time fixed by the decree in a foreclosure suit for payment of principal, interest & costs is enlarged, the ct. will direct subsequent interest to be computed on the aggregate sum found due for principal, interest & costs.—BRUERE *v.* WHARTON (1835), 7 Sim. 483; 58 E. R. 922.

3324. ——.]—WHATTON *v.* CRADOCK, No. 3309, *ante*.

3325. —— **On payment of interest ordered.**]—BREWIN *v.* AUSTIN, No. 3310, *ante*.

3326. —— **Where no terms imposed.**]—BREWIN *v.* AUSTIN, No. 3310, *ante*.

3327. —— ——.]—Where the time for payment of principal, interest & costs, under a foreclosure decree is enlarged, & no terms are imposed as to the payment of subsequent interests, such subsequent interest is to be calculated upon the principal sum due & the unpaid costs & not upon the aggregate sum of principal, interest & costs.—WHITFIELD *v.* ROBERTS (1861), 7 Jur. N. S. 1268; 9 W. R. 844.

Annotations:—**Refd.** Elton *v.* Curtels (1881), 45 L. T. 435. **Mentd.** Hartland *v.* Murrell (1873), 43 L. J. Ch. 94.

C. Effect of Acquiescence or Delay.

3328. General rule—Time not enlarged.]—A bill to redeem after a decree of foreclosure made absolute, & eleven years acquiescence in the mtgee.'s possession, dismissed with costs.—WICHALSE *v.* SHORT (1713), 3 Bro. Parl. Cas. 558; 1 E. R. 1497; *sub nom.* WHISHALL *v.* SHORT, 2 Eq. Cas. Abr. 177, H. L.

3329. —— ——.]—It is not consistent with the rules & practice of Cts. of Equity, or warranted by precedents, to enlarge the time for redemption of a mtge. after the mtgor.'s acquiescence for six years, under a foreclosure by his own consent; & especially, after an alteration has been made in the estate, either in pulling down the buildings or enlarging them, or otherwise.—LANT *v.* CRISPE (1719), 5 Bro. Parl. Cas. 200; 2 Eq. Cas. Abr. 599; 2 E. R. 626, H. L.

3330. —— ——.]—As F. in a former cause, where he might have done it, did not insist on a redemption, the foreclosures could not regularly be kept open, but on the whole circumstances I allow three months (LORD HARDWICHE, C.).—FLEETWOOD *v.* JANSEN & MENNILL (1742), 2 Atk. 467; 26 E. R. 682, L. C.

3331. —— ——.]—The time fixed, by the decree in a foreclosure suit, for payment of principal interest & costs, enlarged by the Vice-Chancellor, notwithstanding the decree had been made absolute, & the order absolute had been signed & enrolled.

It is quite impossible to lay down any general rule as to the circumstances which will induce the ct. to open a decree of foreclosure; but this I must observe that the ct. has a very strong inclination to give assistance to a mtgor., if he applies promptly & the ct. has the means of giving the mtgee. immediate payment; & perhaps that is the only clue which the ct. has to guide it (SHADWELL, V.-C.).—THORNHILL *v.* MANNING (1851), 1 Sim. N. S. 451; 20 L. J. Ch. 604; 17 L. T. O. S. 208; 61 E. R. 174.

Annotations:—**Folld.** Campbell *v.* Holyland (1877), 7 Ch. D. 166. **Refd.** Ingham *v.* Sutherland (1890), 63 L. T. 614.

3332. Exceptions to rule—Value of equity of redemption much more than amount of mortgage debt—Mortgagor having been distressed.]—A decree of foreclosure was opened after sixteen years, the equity of redemption being worth much

PART XIII. SECT. 7, SUB-SECT. 8.—C.

3328 i. *General rule—Time not enlarged.*]—ROBSON *v.* CARPENTER (1865), 11 Gr. 293.—**CAN.**

3328 ii. —— ——.]—The ct. will not open foreclosure in aid of a deft. who has been guilty of laches, & shows no efforts to avoid foreclosure, or save his estate.—BROTHERS *v.* LLOYD (1867), 2 Ch. Ch. 119.—**CAN.**

h. *Exceptions to rule—Litigation pending.*]—The existence of litigation as to the ownership of the equity of redemption is "good & sufficient cause," within the meaning of Regulation 3, 1793, why a mtgee. should delay instituting proceedings for foreclosure.—PRANNATH ROY CHOWDRY *v.* RAMRUTTON ROY (1859), 8 W. R. 29, P. C.—**IND.**

k. *What amount of delay or acquiescence may prevent enlargement—Seven months.*]—Seven months after the final order the mtgor. moved to set it aside, on the ground that several mesne incumbrancers had not been made parties, either before decree or

more than was due upon the account; & the mtgor. having been distressed, an account was ordered to be taken of what was due for principal, interest, & costs, & liberty given to redeem.—BURGH *v.* LANGTON (1724), 5 Bro. Parl. Cas. 213; 2 Eq. Cas. Abr. 609; 2 E. R. 635, H. L.

3333. —— Fraud of mortgagee.]—Mtge. made to be redeemed with the mtgor.'s own money; this, as a designed fraud, will let the mtge. be redeemed after the usual time prescribed for redemption by the rules of the ct.—ORD *v.* SMITH (1725), Cas. *temp.* King, 9; 25 E. R. 193.

Annotations :—**Refd.** Whiting *v.* White (1792), 2 Cox, Eq. Cas. 290; Hansard *v.* Hardy (1812), 18 Ves. 455.

3334. —— Whether on ground of mere errors in form.]—A decree of foreclosure, after an acquiescence of twenty years, shall not be set aside upon a bill of review for errors in form only, & not of substance; & therefore a demurrer to such a bill is good.—JONES *v.* KENRICK (1727), 5 Bro. Parl. Cas. 244; 2 E. R. 655, H. L.

Annotation :—**Refd.** Senhouse *v.* Earle (1755), Amb. 285.

3335. —— Discretion of court to grant enlargement in special circumstances.]—FLEETWOOD *v.* JANSEN & MENNILL, No. 3330, *ante*.

3336. What amount of delay or acquiescence may prevent enlargement—Eleven years.]—WICHALSE *v.* SHORT, No. 3328, *ante*.

3337. —— Six years.]—LANT *v.* CRISPE, No. 3329, *ante*.

3338. —— Twenty years.]—JONES *v.* KENRICK, No. 3334, *ante*.

3339. —— Six months.]—Where deft. in a foreclosure suit obtained an order for leave to file a counter-claim by way of set-off, & through the negligence of his solr., no counterclaim was delivered, & a decree of foreclosure was made in his absence, an application more than six months afterwards for leave to file the counterclaim was refused on the ground of delay.—WILKINS *v.* BEDFORD (1876), 35 L. T. 622.

3340. —— Three years.]—ABDY *v.* BROWN (1894), 39 Sol. Jo. 10.

D. Costs of Enlargement.

3341. Assignment after foreclosure—Costs of enlargement payable by assignee.]—JAMES *v.* HARDING, No. 2981, *ante*.

SUB-SECT. 9.—LOSS OF RIGHT TO SUE FOR FORECLOSURE.

Under Statutes of Limitation—Charges on personalty.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 316–318, Nos. 24–36.

—— Mortgages of realty.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 471–476, Nos. 1350–1397.

—— Payment or acknowledgment.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 411 *et seq.*

SECT. 8.—**BANKRUPTCY OF MORTGAGOR.**

SUB-SECT. 1.—IN GENERAL.

See, generally, BANKRUPTCY, Vol. IV., p. 364, Nos. 3383 *et seq.*; COMPANIES, Vol. X., p. 791, Nos. 4971 *et seq.*

3342. Validity of security—Against trustee in bankruptcy.]—BAINBRIDGE *v.* PINHORN, No. 2908, *ante*.

3343. —— ——.]—On May 2, 1837, freehold & copyhold estates were mortgaged by C. to T., subject to a proviso for redemption on payment of £10,000 on May 2, 1844, with interest half-yearly in meantime. Prior to any default, C. paid to T. £7,000 by cheque, & gave him two bills of exchange, drawn by C. & Co., upon & accepted by C. for £1,620 at three months after date, & for £1,500 at six months after date, being together the total amount of the mtge. debt & interest. Upon the receipt of the cheque & two acceptances, T. signed the following memorandum: "London, Dec. 23, 1839—Received this day of C., the sum of £7,000 in cash, & two bills of exchange, as under, for £3,120, drawn by C. & co. of M., upon & accepted by the said C., one dated Dec. 16, for £1,620, the other dated Dec. 23, for £1,500, & which cheque for £7,000 & bills for £3,120, making together £10,120, are in full of principal & interest due to me upon a mtge. of C.'s freehold property in K. & S. for £10,000, & I do hereby undertake whenever required, to execute a conveyance of the said property. T." T. gave this memorandum, together with the title & mtge. deeds of the premises, to C. The cheque for £7,000 was paid, but both the bills of exchange were dishonoured; C. afterwards conveyed all his estate to a trustee for the benefit of his creditors, & then became bkpt. T. never reconveyed the premises :—*Held :* as between T. & C. & his assignee by deed, & his assignees in bkpcy., the receipt of the cheque & bills, & the giving the above memorandum, did not discharge the mtged. premises from the mtge., but that on their dishonour, T. was entitled to a decree against them all for the restoration of the title & mtge. deeds, & to a decree of foreclosure.—TEED *v.* CARRUTHERS (1842), 2 Y. & C. Ch. Cas. 31; 6 Jur. 987; 63 E. R. 14.

Annotation :—**Mentd.** Frail *v.* Ellis (1852), 22 L. J. Ch. 467.

3344. —— ——.]—A mtgee. is entitled as against the assignees of a bkpt. to the proceeds of

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in the master's office. The application was refused with costs, on the ground of laches & because the objection was not taken in the master's office.—CAMERON *v.* LYNES (1859), 1 Ch. Ch. 42.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 9.

l. *Delay.*]—In Jan. 1841, an original decree of foreclosure had been made. In pursuance thereof the master made his report, & in May of the same year the cause was set down for hearing on further directions, but the decree then pronounced was not drawn up or any entry made thereof. A motion now made to allow pltf. to draw up & enter *nunc pro tunc* the decree on further directions, from minutes alleged to have been prepared by the registrar, was refused.—DRUMMOND *v.* ANDERSON (1852), 3 Gr. 150.—**CAN.**

m. *Right of subsequent incumbrancer—On death of mortgagee.*]—In a suit for sale of mtged. property, an incumbrancer had proved a claim. Pltf., the mtgee., who had been paid in full, having died :—*Held :* on an application by such subsequent incumbrancer for the usual order for redemption & foreclosure after an abortive sale, that it was unnecessary to revive the suit.—COULSON *v.* SHEEHEY (1863), 1 Ch. Ch. 216.—**CAN.**

n. *Mortgagee selling property.*]—A. lent B. $2,000 & took two mtges. from the borrower, each for $1,000, on separate property. The mtgee. foreclosed on one of the mtges., & then parted with the property :—*Held :* no bar to a foreclosure of the mtge.—BALD *v.* THOMPSON (1869), 16 Gr. 177.—**CAN.**

o. *Mortgage by purchaser—Misrepresentation by mortgagee.*]—In an action for foreclosure of a certain mtge. of lands, the defence set up that the mtge. was given to secure a balance of purchase-money for the land due from deft.: that pltf. at the time of the purchase falsely represented that no one was in possession of the land :—*Held :* on account of the misrepresentations pltf.'s action must be dismissed.—KEAYS *v.* EMARD (1885), 10 O. R. 314.—**CAN.**

PART XIII. SECT. 8, SUB-SECT. 1.

p. *Mortgagee may foreclose.*]—RUSSEL *v.* DAVEY (1857), 6 Gr. 165.—**CAN.**

q. ——.]—In an action brought, by leave, against a co. in liquidation under Winding-up Act, R. S. C., 1906 (c. 144) :—*Held :* pltf. was entitled to a final order for foreclosure of

Sect. 8.—Bankruptcy of mortgagor: Sub-sects. 1, 2 & 3.]

sale of mtged. premises into the possession of which he entered several days prior to the bkpcy. —*Re* KERSLAKE, *Ex p.* ALLUM (1853), 1 Bankr. & Ins. R. 47.

3345. —— ——.]—W. L., on June 14, 1858, in consideration of forbearance of pltf. in not requiring the immediate repayment of the moneys he had advanced to or for him, signed an agreement undertaking to give & execute to pltf. a charge on the interests to which, by right of marriage with Mrs. L., he was or claimed to be entitled in the property settled on, or in or to which she might be interested or entitled in respect of, her former marriage, or the income arising therefrom, as a security to pltf. for the repayment of the moneys he had advanced to him; & W. L. pledged himself not to incumber his interests in such property or income by way of settlement or otherwise. Notice of the agreement was on the following day sent by pltf. to deft. A., one of the trustees. W. L., on June 18, 1858, with the knowledge but without the consent of pltf., executed a post-nuptial settlement, by which he conveyed all his interest, in right of his wife, in the property settled on her, on her first marriage, to trustees, on trusts for her for life, then for himself for life, & after the decease of the survivor, for the children of the marriage. On July 13, 1858, W. L. executed a deed, whereby he charged all the dividends, interest, & annual proceeds of the trust funds which were settled at the time of his wife's first marriage, & also his share in the trust funds themselves, with the payment of £800 & interest from June 14, 1858, to pltf. W. L. also assigned the same property to the pltf. by way of mtge., with a proviso for redemption on repayment of the said sum & interest by him:—*Held:* a valid equitable charge was created by the agreement of June 14, 1858, in favour of pltf., as a creditor of W. L. upon the dividends, etc., to which the wife was entitled under her first marriage settlement; the deed of mtge. of July 13, 1858, bound the estate of W. L. only; inasmuch as, by the post-nuptial settlement of June 18, 1858, the whole of the dividends had been subject to the charge, settled to the separate use of the wife, & vested in trustees for her benefit, it was improper to reserve an equity of redemption to W. L.; yet the deed operated as a recognition of the debt due to pltf., &, coupled with the agreement of June 14, gave plaintiff a right to an account, & payment of what should be found due; & in default of payment, a right of foreclosure against W. L. & his assignee in insolvency.—CAREW *v.* ARUNDEL (1861), 5 L. T. 498; 8 Jur. N. S. 71.

3346. —— —— **Notice of incumbrance.**]—Testator, by his will, gave certain property to trustees therein named in trust for sale; part of the property was sold, & the proceeds were paid into ct. to the credit of the cause. A share of the property having been mortgaged by one of the parties entitled thereto, notice thereof was given by the mtgee. to the surviving trustee. The remainder of the property was afterwards sold, & the proceeds arising from the sale were also paid into ct. The party who created the incumbrance became insolvent:—*Held:* the above notice was sufficient to bind his assignees.—MATTHEWS *v.* GABB (1845), 15 Sim. 51; 6 L. T. O. S. 42; 9 Jur. 649; 60 E. R. 535.

Annotations:—**Distd.** Mutual Life Assce. Soc. *v.* Langley (1884), 26 Ch. D. 686. **Reld.** Thompson *v.* Tomkins (1862), 2 Drew. & Sm. 8.

3347. —— —— **Mortgage by deposit of title deeds.**]—Under 6 Geo. 4, c. 16, s. 65, the equitable mtgee. of a bkpt. tenant in tail was entitled to have his lien made good as against the fee simple of premises of which bkpt. was seised as tenant in tail.—*Re* JACKAMAN, *Ex p.* WISE (1828), Mont. & M. 65.

3348. Destruction of security—Insurance moneys —Payment into court.]—A. & B. insured, in their joint names, certain leasehold premises which A. had mortgaged to B., & B. paid the premium on the insurance, & the policy was delivered to him. Afterwards the premises were destroyed by fire; & then A. became bkpt., & his assignees prevailed on the insurance co. to pay the money due on the policy to them; & they afterwards paid it into the bank to the credit of the accountant in bkpcy. B. filed a bill against the assignees, praying that the money received from the co. might be applied in satisfaction of his mtge. debt. The answer of the assignees tended to impeach the mtge. on the ground of usury. The ct., however, ordered them to pay the amount of the money into ct.—ROGERS *v.* GRAZEBROOKE (1842), 12 Sim. 557; 11 L. J. Ch. 329; 6 Jur. 495; 59 E. R. 1247, L. C.

3349. —— **Mortgagee ranks with ordinary creditors.**]—The lessee of a public-house at Dover, being under a covenant to leave & deliver up the premises with the fixtures, whether trade or otherwise, at the expiration or other determination of the term, not only insured the premises in pursuance of a covenant contained in the lease, but having laid out considerable sums in enlarging & altering the premises, effected separate insurances in his own name of the house, of the trade fixtures, & of his own household goods. He had also mortgaged the premises comprised in the lease. A fire took place, & the lessee, having obtained part of the insurance money, committed an act of bkpcy. by absconding, & was adjudicated a bkpt.—Inasmuch as the act of bkpcy. of the tenant also determined the term, the mtgees., having lost their security, were permitted to prove for their debt.—*Re* BARKER, *Ex p.* GORELY (1864), as reported in 5 New Rep. 22; 11 L. T. 319, L. C.

Annotations:—**Mentd.** Rayner *v.* Preston (1880), 14 Ch. D. 297; Westminster Fire Office *v.* Glasgow Provident Investment Soc. (1888), 13 App. Cas. 699; Sinnott *v.* Bowden, [1912] 2 Ch. 414.

3350. Election to claim under mortgage—After notice of deed of composition—Claim under deed barred.]—A debtor executed a deed, by which, after reciting that he was owner of the lease of his house of business, & of the fixtures & stock in trade and furniture, he purported to assign the property to trustees, in trust for the benefit of creditors, parties to the deed; & the deed contained a general release from the creditors of all claims against the debtor. Certain creditors who had notice of the deed, &, after such notice, made use of a mtge. security, which had been previously given them by debtor in respect of a debt due at the time of the execution of the deed, were not permitted to take advantage of the deed, after having claimed in opposition to it by asserting their title as mtgees. in respect of a debt prior

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property mortgaged by deft. co. by way of a trust deed securing a debenture issue.—MICHIGAN TRUST CO. *v.* CANADIAN PUGET SOUND LUMBER CO., TEMPLE *v.* CANADIAN PUGET SOUND LUMBER CO. (B. C.), [1918] 3 W. W. R. 274.—CAN.

r. *Whether sale stayed.*]—HOSKINS *v.* JOHNSTON (1875), 6 P. R. 257.—CAN.

to the execution of the trust deed.—PERRETT *v.* LATREILLE (1834), 3 L. J. Ch. 121.

Right to growing crops.]—*See* BANKRUPTCY, Vol. IV., p. 366, Nos. 3396–3398.

SUB-SECT. 2.—RIGHTS TO RENTS AND PROFITS.

3351. Equitable mortgagee—From date of petition for sale.]—An equitable mtgee. is entitled to the produce of the mtged. estate from the time of presenting his petition for a sale.—*Re* HARVEY, *Ex p.* BIGNOLD (1827), 2 Gl. & J. 273.

Annotations :—**Consd.** *Re* Keer, *Ex p.* Bignold (1832), 2 Deac. & Ch. 398; *Re* Gordon, *Ex p.* Official Receiver (1889), 6 Morr. 150. **Reld.** *Re* Postle, *Ex p.* Bignold (1834), 2 Mont. & A. 16.

3352. —— Not before sale.] — An equitable mtgee. is not entitled to the rents & profits of the mtged. estate previous to the sale.—*Re* TILLS, *Ex p.* ALEXANDER (1827), 2 Gl. & J. 275, L. C.

Annotations :—**Consd.** *Re* Keer, *Ex p.* Bignold (1832), 2 Deac. & Ch. 398; *Re* Norman, *Ex p.* Burrell (1838), 2 Deac. 76; *Re* Gordon, *Ex p.* Official Receiver (1889), 61 L. T. 299. **Reld.** *Re* Postle, *Ex p.* Bignold (1834), 2 Mont. & A. 16.

3353. —— Before or from order of sale.]—An equitable mtgee. is entitled to rents from the date of the order for sale.—*Re* KEER, *Ex p.* BIGNOLD (1832), 2 Deac. & Ch. 398; 1 L. J. Bcy. 100, Ct. of R.

Annotations :—**Apld.** *Re* Burris (1851), 18 L. T. O. S. 292. **Consd.** *Re* Gordon, *Ex p.* Official Receiver (1889), 61 L. T. 299.

3354. —— ——.]—In general an equitable mtgee. is not entitled to the rents prior to the date of the order for sale.—*Re* POSTLE, *Ex p.* BIGNOLD (1834), 4 Deac. & Ch. 259; 2 Mont. & A. 16; 4 L. J. Bcy. 1; *subsequent proceedings* (1835), 4 Deac. & Ch. 262.

Annotations :—**Reld.** *Re* Gordon, *Ex p.* Official Receiver (1889), 61 L. T. 299; Finck *v.* Tranter, [1905] 1 K. B. 427.

3355. —— ——.]—Where, the bkpt. having absconded, an equitable mtgee. enters into possession of the premises, & the assignees afterwards acquiesce in his continuing in possession, he is entitled to the profits before the order of sale, & from the time of his entry.—*Re* POSTLE, *Ex p.* BIGNOLD (1835), 2 Mont. & A. 214; 4 L. J. Bcy. 58; *previous proceedings* (1834), 4 Deac. & Ch. 259.

Annotations :—**Reld.** *Re* Gordon, *Ex p.* Official Receiver (1889), 61 L. T. 299; Finck *v.* Tranter, [1905] 1 K. B. 427.

3356. —— ——.]—(1) An equitable mtgee. cannot enter on the premises, & is therefore obliged to apply for the interposition of this ct. to direct a sale; & he is held to be entitled to the rents from the time of the order for sale, because he might then have a receiver appointed, the moment he asked it; & the order of sale, therefore, is considered as equivalent to the appointment of a receiver (*per* CUR.).

(2) A legal mtgee. can enter, if he chooses, immediately on the forfeiture, & must stand on his legal right; he has already sufficient advantages over the other creditors (*per* CUR.).—*Re* TOMBS, *Ex p.* LIVING (1835), 1 Deac. 1; 2 Mont. & A. 223, Ct. of R.

Annotation :—*As to* (2) **Distd.** *Re* Medley, *Ex p.* Barnes (1838), 3 Deac. 223.

3357. —— —— **To time of sale.**]—This was the common petition by an equitable mtgee., praying a sale as usual, & also praying to be allowed the rents received by the assignees since the fiat issued.

In this ct. the equitable mtgee. is never allowed the rents, except those falling due between the date of the order of sale and the time of sale (*per* CUR.).—*Re* BIRKS, *Ex p.* CARLON (1837), 3 Mont. & A. 328; 2 Deac. 333, Ct. of R.

3358. —— ——.]—*Re* PEARSON, *Ex p.* SCOTT (1838), 3 Mont. & A. 592; 3 Deac. 304.

3359. —— From date of reference to inquiry as to title.]—Where a petition was presented for the common equitable mtgee.'s order, supported by evidence that was not satisfactory to the ct., & the ct. referred it to the comr. to inquire into the circumstances of the deposit:—*Held:* on the comr. finding in favour of the petitioner's claim, the petitioner was entitled to the rents from the date of the order or reference.

The order will be of the usual kind in other respects; the costs of the inquiry before the comr. must come out of the mtged. property (KNIGHT BRUCE, V.-C.).—*Re* FEAVER, *Ex p.* SMITH (1844), 3 Mont. D. & De G. 680; 13 L. J. Bcy. 21; 3 L. T. O. S. 264; 8 Jur. 584.

3360. Legal mortgagee—From date of entry.]—*Re* TOMBS, *Ex p.* LIVING, No. 3356, *ante*.

3361. —— From date of notice by mortgagee to tenant—Notice of mortgagor's bankruptcy.]—A. having after execution of the contract, mortgaged the premises & become bkpt., of which the mtgee. gave B. notice:—*Held:* the mtgee. might bring an action of use & occupation against B. for the rent accruing in the half year during which the notice was given.—RAWSON *v.* EICK (1837), 7 Ad. & El. 451; 2 Nev. & P. K. B. 423; Will. Woll. & Dav. 675; 7 L. J. Q. B. 17; 112 E. R. 539.

See, also, BANKRUPTCY, Vol. IV., p. 366, Nos. 3390–3398.

SUB-SECT. 3.—REALISATION OF SECURITY.

3362. Sale of mortgaged property—Mortgagee's right to bid.]—Mtgee. of bkpt.'s estate, allowed on motion, to bid for same, on a sale of the mtged. estate.—*Re* CARLILL, *Ex p.* MARSH (1815), 1 Madd. 148; 56 E. R. 56.

3363. —— ——.]—Mtgee. of premises to be sold under the general order, permitted to bid at the sale.—*Re* ——, *Ex p.* DU CANE (1816), Buck. 18.

3364. —— ——.]—Mtgee. who was the sole assignee & principal creditor, there being only one other creditor to a small amount, permitted to bid for the estate subject to the approbation of the master, the mtgee. undertaking to make good the deficiency between the sum bid & the price to be fixed by the master in case he should not approve of the bidding.—*Re* SALISBURY, *Ex p.* —— (1818), Buck. 245.

3365. —— ——.]—Equitable mtgee. of property belonging to a bkpt., who has written evidence of the mtge., will be allowed the costs of his petition for the sale of the premises, though the petition further prays, that he may be at liberty to be a bidder at the sale.—*Re* KING, *Ex p.* JACKMAN (1823), 2 L. J. O. S. Ch. 11.

3365. —— ——.]—Where an equitable mtgee. is also an assignee, a solr. will be appointed to take the account & conduct the sale.—*Re* CORLESS, *Ex p.* LEES (1832), 2 Deac. & Ch. 360.

3367. —— ——.]—Costs of application of mtgee. to bid at the sale, ordered to be paid out of the proceeds.—*Re* THORNTON, *Ex p.* SAY (1832), 1 Deac. & Ch. 32; Mont. 364; 1 L. J. Bcy. 17.

3368. —— ——.]—This ct. has jurisdiction to order sale of estate legally mtged., on application of mtgee., giving him leave to bid.—*Ex p.* BACON (1832), 2 Deac. & Ch. 181.

3369. —— ——.]—*Re* BELL, *Ex p.* ASHLEY (1833), 1 Mont. & A. 82; 3 Deac. & Ch. 510; 3 L. J. Bcy. 9.

Sect. 8.—*Bankruptcy of mortgagor: Sub-sect.* 3. *Sect.* 9. *Part XIV. Sect.* 1: *Sub-sects.* 1 & 2, *A., B. & C.* (*a*).]

3370. —— ——.]—No rule to prevent a mtgee. bidding at a sale of the mtged. premises (ROSE, J.). —*Re* DITCHMAN, *Ex p.* BULL (1833), 2 L. J. Bcy. 76.

3371. —— —— **Sale under power.**]—A mtgee. with a power of sale cannot be permitted to bid unless he waives his power of sale, comes in under the flat, & has the premises put up for sale under the order of the comrs., when the assignees will have the conduct of the sale (*per* CUR.).—*Re* HAGLEY, *Ex p.* DAVIS (1833), 1 Mont. & A. 89; 3 Deac. & Ch. 504.

3372. —— ——.]—A mtgee. having bid without leave, an order to bid *nunc pro tunc* was made.—*Re* HADWEN, *Ex p.* PEDDER (1834), 3 Deac. & Ch. 622; 1 Mont. & A. 327.

3373. —— ——.]—Where an assignee of a bkpt., who was also the second mtgee. of property about to be sold by public auction, under the flat, applied for liberty to bid at the sale, the ct. refused to give such permission, but allowed the appt. to name a price at which he should be at liberty to purchase, in the event of there being no bidder to that amount.—*Re* STOKES, *Ex p.* HOLLYMAN (1844), 2 L. T. O. S. 405; 8 Jur. 156.

Annotation:—**Refd.** *Re* Worth, *Ex p.* Young (1845), De G. 146.

3374. —— **Petition for liberty to bid—Costs of petition.**]—A mtgee. presented a petition for liberty to bid at the sale of the mtged. estate in the bkpcy., & for payment of the costs of the application out of the estate. The ct. gave him such costs only on the assignees stating that the petition was presented at their request.—*Re* ELVINS, *Ex p.* COURT (1843), 1 L. T. O. S. 433; *sub nom. Ex p.* COORT, 7 Jur. 864.

3375. —— —— ——.]—An order was made, with the consent of the mtgee. of an estate of the bkpt., with a power of sale that it should be sold in the bkpcy. A petition was presented by the mtgee. for liberty to bid at the sale, & for payment of the costs of the application out of the purchase-money; to which the assignees consented:—*Held:* petitioner was not entitled to such costs, unless the assignees would state that the petition was presented at their request.—*Re* DANKS, *Ex p.* DANKS (1843), 12 L. J. Bcy. 45.

3376. Petition for sale—Dispute as to priority.]—Petitioner, who was an equitable mtgee., discovered that the bkpt. had made other mtges. & given other liens on the same property, of which the legality of some & the priority of others, were disputed by the petitioner; prayed a sale of the property & that the proceeds might be applied towards the reduction of his debt—& in case the other parties should come in & submit to the jurisdiction of the ct.; then that the ct. would settle the respective priorities of those parties & the petitioner:—*Held:* the ct. could make no such order, unless those parties were regularly before the ct.; & it would be disadvantageous to bkpt.'s estate to make an order for the sale of the property until the interests of the respective parties were precisely ascertained. Under these circumstances the petition was dismissed with costs.—*Re* FRANCIS, *Ex p.* BIGNOLD (1836), 1 Deac. 515; 3 Mont. & A. 706.

Annotation:—**Refd.** Lloyd *v.* Attwood, Attwood *v.* Lloyd (1859), 33 L. T. O. S. 209.

3377. Power of sale on notice to repay—Failure to give notice.]—Equitable mtgees., under a deposit of title deeds by way of pledge, cannot effect a valid assignment of the premises comprised therein, in the event of the person so pledging them becoming bkpt., unless the assignees of the bkpt. join in the conveyance, although a power of sale be given by the agreement entered into at the time of the deposit, on notice to repay the money intended to be secured, if no such notice has been given.—HAWKINS *v.* RAMSBOTTOM (1814), 1 Price, 138; 2 Rose, 151; 145 E. R. 1357.

3378. Leaseholds acquired after bankruptcy—Mortgagee in possession—Right to sell.]—Mtgee. in possession of leaseholds acquired by the mtgor. after bkpcy. can sell them if the trustee in bkpcy. has not intervened.—*Re* CLAYTON & BEAUMONT'S CONTRACT (1895), 2 Mans. 345.

SECT. 9.—RIGHTS AGAINST INSOLVENT ESTATE OF DECEASED MORTGAGOR.

See Administration of Estates Act, 1925 (c. 23), s. 34; *&, generally*, EXECUTORS, Vol. XXIV., pp. 815–823.

Part XIV.—Discharge of Mortgages.

SECT. 1.—BY REDEMPTION.

SUB-SECT. 1.—WHO MAY REDEEM.

See Part VII., Sect. 3, *ante*.

SUB-SECT. 2.—PROPERTY AVAILABLE FOR REDEMPTION.

A. On Death of Mortgagor.

See, generally, EXECUTORS, Vol. XXIII., pp. 333–348, 473–530, Nos. 3981–4147, 5425–5970.

Settled estates.]—*See* SETTLEMENTS.

B. Where Several Properties Liable.

Whether mortgage debt apportioned ratably—General rule.]—*See* EXECUTORS, Vol. XXIII., pp. 493–495, Nos. 5604–5613.

3379. —— **Provision for primary security in mortgage deed.**]—The purchaser of an estate A., in order to secure the payment of the purchase-money, executed a deed, by the first part of which another estate B. was mortgaged for the whole sum, & by the latter part of which, the estate A. was also mortgaged as a further & collateral security. Afterwards the two estates became the

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PART XIII. SECT. 9.

t. *Liability for damages.*]—The administrators of the insolvent estate of a deceased mtgor. are not liable in damages to his mtgee. as upon a *devastavit*, because they release the purchaser of the equity of redemption in the mtged. property from his liability to indemnify the mtgor. in respect of the mtge., no claim having been made upon them by the mtgee. in respect of the mtge.—HIGGINS *v.* ONTARIO TRUSTS CORPN. (1900), 27 A. R. 432; 20 C. L. T. 347.—**CAN.**

a. *Bankruptcy rules apply.*]—ROSS *v.* ROSS (1890), 25 L. R. Ir. 362.—**IR.**

b. ——.]—*Re* BROWNE'S ESTATE, [1903] 1 I. R. 245.—**IR.**

c. *Effect of Registry Act.*]—*Re* BOONE'S ESTATE (1887), 7 Nfld. L. R. 196.—**NFLD.**

property of two different persons, who respectively derived title from the purchaser:—*Held:* upon the words of the deed, & the circumstances of the transaction, the estate B. was the primary security, &, as between the owners of the two properties, the estate A. was not to be resorted to for the payment of any part of the mtge. debt, till the estate B. was exhausted.

But may not a man make a mtge. of two estates in such a way, that, though the incumbrancer may go against both or either, yet, if the owner of the equity of redemption shall have created, in the meantime, two different titles to those estates, so that they shall go to different persons, the estate, which was the primary security, shall remain the primary security as between the persons claiming under that mtgor. (LORD ELDON, C.).—BUTE (MARQUIS) *v.* CUNYNGHAME (1826), 2 Russ. 275; 38 E. R. 339, L. C.

Annotations:—**Expld.** Leonino *v.* Leonino (1879), 10 Ch. D. 460; *Re* Athill, Athill *v.* Athill (1880), 16 Ch. D. 211. **Consd.** *Re* Dunlop, Dunlop *v.* Dunlop (1882), 21 Ch. D. 583.

3380. —— ——.]—Testator held shares in a banking co. by whose deed of settlement it was provided that if any shareholder did not on demand pay all moneys due from him to the co., the directors might declare his shares forfeited, & that nevertheless he should still be liable to pay the debt, & it was also provided that a shareholder must have paid all moneys due from him to the co. before he could transfer his shares. Testator borrowed money from the co., & deposited the deeds of certain real estate with them as security. By his will he gave the above estate to his son A., & his residuary property to his other sons. A. claimed that testator's shares in the bank should contribute ratably to payment of the debt:—*Held:* (1) the provisions of the deed of settlement did not create a charge or lien on the shares for a debt due from the holder, & no case for contribution arose; (2) also if the deed of settlement had charged the shares with all debts due from the shareholder to the co., a debt for which real estate had been specifically mortgaged would still have been payable out of the mtged. estate before resorting to the shares which were only subject to a general lien.—*Re* DUNLOP, DUNLOP *v.* DUNLOP (1882), 21 Ch. D. 583; 48 L. T. 89; 31 W. R. 211, C. A.

Annotation:—*As to* (1) **Reld.** Hopkinson *v.* Mortimer, Harley, [1917] 1 Ch. 646.

3381. —— **Property charged in aid of primary security.**]—B. mortgaged estate X. for £800, &, on same day, he charged estate Y., in aid, to the extent of £200. B. died, having devised estate Y., but intestate as to estate X.:—*Held:* the whole £800 was, as between the devisees & heir, primarily chargeable on estate X.—STRINGER *v.* HARPER (1858), 26 Beav. 33; 4 Jur. N. S. 1009; 6 W. R. 763; 53 E. R. 808.

Annotation:—**Distd.** *Re* Athill, Athill *v.* Athill (1880), 43 L. T. 581.

3382. —— **Property charged as collateral security—Meaning of "collateral."**] — The word collateral, taken by itself, has no such meaning as was contended in argument: it is not equivalent to "secondary," "auxiliary," "subsidiary" or "only to be made use of in aid": the three securities were all one transaction, & the properties comprised in the second & third securities must as between themselves bear the mtge. debt ratably. There will, accordingly, be a declaration to this effect (HALL, V.-C.).—EARLY *v.* EARLY, WILLIAMS *v.* EARLY (1878), 16 Ch. D. 214, n.; 49 L. J. Ch. 826, n.

3383. —— **Property subject to general lien only.**]—*Re* DUNLOP, DUNLOP *v.* DUNLOP, No. 3380, *ante*.

3384. —— **Declaration of primary security by mortgagor.**]—It is quite clear that either by special agreement to be found in the instrument creating the mtge. itself, or by declaration on the part of testator, he can, where two or more properties are comprised in the same security, direct the order in which the securities are to be applied *inter se* so as to make one the first & another the second, & so forth, available for the purposes of the charge (CHITTY, J.).—*Re* DUNLOP, DUNLOP *v.* DUNLOP (1882), 21 Ch. D. 583; 48 L. T. 89; *affd.*, 21 Ch. D. p. 591, C. A.

Annotation:—**Reld.** Hopkinson *v.* Mortimer, Harley, [1917] 1 Ch. 646.

On death of mortgagor.]—*See* Sub-sect. 2, A., *ante*.

Marshalling of assets.]—*See* Sub-sect. 2, C., *post*.

C. Marshalling of Assets.

(a) In General.

See, generally, EQUITY, Vol. XX., pp. 499–503, Nos. 2298–2328.

3385. Parties to action—Settlement of one estate—Subsequent mortgage to plaintiff—Exoneration clause.]—Two estates A. & B., were subject to same mtge. The owner, on the marriage of his son, settled A. in strict settlement, & the trustees were empowered "from time to time, when & as occasion should require," to sell any part of A. & pay off the mtge., so as to exonerate B. The owner afterwards mortgaged B. to pltfs., but without any express mention of the exoneration clause. Pltf. having filed a bill to enforce the exoneration clause, without making the trustees of the settlement parties, it was dismissed, with costs.—ROOKE *v.* KENSINGTON (LORD) (1856), 21 Beav. 470; 25 L. J. Ch. 366; 27 L. T. O. S. 32; 2 Jur. N. S. 755; 4 W. R. 409; 52 E. R. 940; *on appeal*, 25 L. J. Ch. 567, L. JJ.

Application to estates of deceased mortgagor.]—*See* EXECUTORS, Vol. XXIII., pp. 525 *et seq.*

Application on bankruptcy of mortgagor.]—*See* BANKRUPTCY, Vol. V., pp. 636, 637, Nos. 5725, 5726.

PART XIV. SECT. 1, SUB-SECT. 2.—C. (a).

d. *General principle.*]—RUTHERFORD *v.* RUTHERFORD (1896), 17 P. R. 228.—**CAN.**

e. ——.]—L. & J., the owners of estate X., & A., the owner of estate Y., by two collateral mtges., mortgaged the estates to T. & insured the buildings & chattels on both estates with loss on buildings, if any, payable to T. as her interest might appear. L. & J. subsequently mtged. estate X. to D. to secure an indebtedness of L., J. & A. to D., & covenanted to insure the lands to their full insurable value & assign & deliver over the policy to D.:—*Held:* D. having security only upon estate X., was entitled to insist that the insurance moneys should be so marshalled as to throw T.'s claim firstly upon the fund realised out of estate Y.—DOMINION LUMBER *v.* GELFAND (1916), 34 W. L. R. 624; 10 W. W. R. 145, 751.—**CAN.**

f. ——.]—*Semble:* where the mtgor. sells not merely the equity of redemption but conveys a portion of the property itself free from any liability to contribute to the mtge. debt, the purchaser may insist upon the mtgee. proceeding in the first instance, against the property in the hands of the mtgor.—KRISHNA AYYAR *v.* MUTHUKUMARASAWMIYA PILLAI (1905), I. L. R. 29 Mad. 217.—**IND.**

g. ——.]—Where there are two creditors who have taken securities for their respective debts, & the security of the first creditor ranges over two funds, while the security of the second is confined to one of these funds, the ct. will marshall the assets so as to throw the person who has two funds liable to his demand, on that which is not liable to the debt of the second creditor.—BALDWIN *v.* BELCHER, *Re* CORNWALL (1842), 3 Dr. & War. 173; 2 Con. & Law. 131; 6 I. Eq. R. 65.—**IR.**

Sect. 1.—*By redemption: Sub-sect.* 2, *C.* (*b*).]

(*b*) *In Whose Favour Doctrine Applies.*

3386. Second mortgagee.]—Suppose a person, who has two real estates, mortgages both to one person, & afterwards only one estate to a second mtgee., who had no notice of the first; the ct., in order to relieve the second mtgee., have directed the first to take his satisfaction out of that estate only which is not in mtge. to the second mtgee., if that is sufficient to satisfy the first mtge., in order to make room for the second mtgee., even though the estate descended to two different persons (LORD HARDWICKE, C.).—LANOY *v.* ATHOL (DUKE) (1742), 2 Atk. 444; 9 Mod. Rep. 398; 26 E. R. 668, L. C.

Annotations:—**Apld.** Barnes *v.* Racster (1842), 1 Y. & C. Ch. Cas. 401; Gibson *v.* Seagrim (1855), 20 Beav. 614. **Consd.** Flint *v.* Howard, [1893] 2 Ch. 54. **Refd.** Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377. **Mentd.** Sykes *v.* Meynal (1763), Dick. 369; Lechmere *v.* Charlton (1808), 15 Ves. 193; Graves *v.* Hicks (1833), 6 Sim. 391; Hickling *v.* Boyer (1851), 3 Mac. & G. 635; Loosemore *v.* Knapman (1853), Kay, 123.

3387. ——.]—Two properties, X. & Y., were mortgaged to A., & afterwards X. alone was mortgaged to B.:—*Held:* B. was entitled to have the securities marshalled, so as to throw A.'s mtge., in the first instance, on estate Y.—GIBSON *v.* SEAGRIM (1855), 20 Beav. 614; 24 L. J. Ch. 782; 26 L. T. O. S. 65; 52 E. R. 741.

Annotations:—**Consd.** *Re* Lawder, Hill, etc. (1861), 5 L. T. 188; Flint *v.* Howard, [1893] 2 Ch. 54.

3388. ——.]—A second mtgee. of property which forms part only of the property comprised in the prior mtge., has a right to compel the prior mtgee. to resort for payment, first, to the property which is not included in the second mtge.—LAWRANCE *v.* GALSWORTHY (1857), 30 L. T. O. S. 112; 3 Jur. N. S. 1049.

Annotation:—**Mentd.** Nutt *v.* Easton (1899), 80 L. T. 353.

3389. Creditors of testator—Mortgage by executor.]—An exor. mortgaged his testator's estate conjointly with his own for £3,000, of which £1,000 was declared invalid as against testator's estate. A creditors' suit was afterwards instituted, & the exor. subsequently made a further charge on the same estates for £2,500, & which was declared invalid, as regarded the testator's estate:—*Held:* the creditors had no equity to compel the mtgee. to obtain payment of his first mtge. wholly out of the exor.'s private estate, so as to exonerate testator's estate for their benefit.—SHALCROSS *v.* DIXON (1838), 7 L. J. Ch. 180.

3390. Representatives of mortgagor—Mortgage of company's estate—Subsequent personal bond.]—B., & other committee men of a public co., mortgaged the co.'s estate, & covenanted personally to pay the money. They afterwards entered into a personal obligation, by bond, for another debt. B. died, having certain shares vested in him as trustee to the co. By the decree, the shares were ordered to be sold, & the produce applied in payment of the debts of the co., for which the estate of B. was liable:—*Held:* the representatives of B. had a right to have the fund applied in payment of the bond debt, in priority of the mtge. debt.—LAWRENCE *v.* KEMPSON (1844), 7 Beav. 574; 49 E. R. 1189.

3391. Judgment creditor of mortgagor.]—A., who was seised in fee of four estates, mortgaged two of them, & afterwards executed a settlement, on his marriage, of the mtged. estates, & of one of the others, under which he took a life interest, with remainder to his son B. in tail. There was a covenant in the settlement by A. against incumbrances, but there was no recital showing that there were any incumbrances. A. afterwards mortgaged the fourth estate, & took the benefit of the Insolvent Debtors Act. Soon afterwards a judgment creditor, being also equitable mtgee. of a mining lease on one of the estates, filed a bill against A.'s assignee & B. the tenant in tail, & against the other incumbrancers, praying a sale in satisfaction of the judgment debt, & of what pltf. might pay in discharge of prior incumbrances, subject to the estate & interest of B. under the settlement:—*Held:* the settled estate must be regarded as exonerated from incumbrances as between A. the tenant for life, & B. the tenant in tail, & pltf. was subject to the same equities as A. the settlor, & the judgment being of a later date than the settlement, B. the tenant in tail, was not affected by such judgment.—HUGHES *v.* WILLIAMS (1852), 3 Mac. & G. 683; 19 L. T. O. S. 341; 16 Jur. 415; 42 E. R. 423, L. C.

Annotation:—**Mentd.** Lewis *v.* McKay, Algate *v.* Vugler, Clark *v.* Potter (1924), 93 L. J. K. B. 840.

3392. ——.]—B., on his marriage, settled certain estates then in mtge. on himself for life, with remainder to his first & other sons in tail, & covenanted against incumbrances: he afterwards mortgaged other estates, & became insolvent. A bill was filed by his assignee under the insolvency against the several incumbrancers on all the estates & against the tenant in tail, praying an account of what was due on the several incumbrances, that their prioritics might be ascertained, & for a sale or redemption. A decree was made in the suit, directing that, on pltf. & deft., the tenant in tail, paying what was due on the respective incumbrances, the unsettled estates should be conveyed to the party redeeming, & that the settled estates should be conveyed on the trusts of the settlement, &, in default of redemption, that the bill should be dismissed:—*Held:* the decree for redemption, being permissive only as against the tenant in tail, was correct, & a decree for a sale would have been improper.—CHAPPELL *v.*

PART XIV. SECT. 1, SUB-SECT. 2.—C. (b).

3386 i. *Second mortgagee.*]—ERNST BROTHERS CO. *v.* CANADA PERMANENT MORTGAGE CORPN. (1920), 47 O. L. R. 362; 18 O. W. N. 136.—**CAN.**

3386 ii. ——.]—A. was possessed of two estates, X. & Y. X. was subject to a mtge. & prior incumbrances. Y. was subject to the prior incumbrances, but not to the mtge. A subsequent judgment affected both estates:—*Held:* the mtgee. was entitled to have the securities marshalled, so as to have the prior incumbrances paid in the first instance, as far as possible, out of the produce of the lands of Y.—*Re* SCOTT'S ESTATE (1863), 14 I. Ch. R. 63.—**IR.**

3391 i. *Judgment creditor of mortgagor.*]—*Re* FOX (1856), 5 I. Ch. R. 541.—**IR.**

3391 ii. ——.]—There being first a mtge. by deed affecting lands of A. & B.; secondly, a judgment mtge. affecting the lands of A.; thirdly, a judgment mtge. affecting both denominations; & the lands of A. having been appropriated to the payment of the prior mtge.:—*Held:* the first judgment mtge. creditor had a right to marshal against the second.—*Re* LYNCH'S ESTATE (1867), 1 I. R. Eq. 396.—**IR.**

h. *Party claiming under voluntary settlement—Right to throw mortgage debt on unsettled estate—Not as against subsequent mortgagee.*]—*Re* LYSAGHT'S ESTATE, [1903] 1 I. R. 235.—**IR.**

k. —— *Verbal representation that estate free from incumbrancers.*]—TIGHE *v.* DOLPHIN, [1906] 1 I. R. 305.—**IR.**

l. *Purchaser for value—Where covenant against incumbrances.*]—A., being the registered owner of Whiteacre & Blackacre & other lands, mortgaged all to pltf. He then sold Whiteacre to B., & afterwards Blackacre to K., covenanting in each case against all incumbrances. The various instruments were respectively registered immediately after their execution:—*Held:* B.'s right, as between him & K., was to throw the whole mtge. & not merely a ratable part on Blackacre.—JONES *v.* BECK (1871), 18 Gr. 671.—**CAN.**

m. —— ——.]—GOING *v.* FARRELL (1814), Beat. 472.—**IR.**

—.]—A party seised of

REES (1852), 1 De G. M. & G. 393; 20 L. T. O. S. 57; 16 Jur. 417; 42 E. R. 603, L. C.

Annotations:—**Refd.** *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385. **Mentd.** Petre *v.* Petre (1853), 1 Drew. 371; Lewis *v.* McKay, Algate *v.* Vugler, Clark *v.* Potter (1924), 93 L. J. K. B. 840.

3393. —— Claiming under creator of voluntary settlement.]—DOLPHIN *v.* AYLWARD, No. 3408, *post.*

3394. Party claiming under voluntary settlement —Right to throw mortgage debt on unsettled estate.]—B. executed a voluntary settlement of real estate to uses in favour of his four children, & he covenanted that the estate should remain to those uses & for quiet enjoyment. B. afterwards mortgaged the settled estate with his own unsettled estates & died:—*Held:* the children were entitled to throw the mtges. on the unsettled estate &, as against legatees, to prove under the covenants against the settlor's assets for the damage they had sustained by the mtge.—HALES *v.* COX (1863), 32 Beav. 118; 55 E. R. 46; *sub nom.* HALES *v.* COX, *Re* HALES, 1 New Rep. 344; 8 L. T. 134; 9 Jur. N. S. 1305; 11 W. R. 331.

Annotations:—**Consd.** *Re* Walhampton Estate (1884), 26 Ch. D. 391. **Apld.** Mallott *v.* Wilson, [1903] 2 Ch. 494. **Refd.** *Re* Jones, Farrington *v.* Forrester, [1893] 2 Ch. 461. **Mentd.** Harding *v.* Howell (1889), 14 App. Cas. 307.

3395. —— ——.]—Mtgee. of lands, part of which are comprised in a voluntary settlement, must first resort to the unsettled lands, & will not be thrown upon the settled property, in order to favour unsecured creditors, against whom the voluntary settlement is good.—ANSTEY *v.* NEWMAN (1870), 39 L. J. Ch. 769.

3396. —— ——.]—In 1888, the settlor mortgaged part of the property comprised in the voluntary settlement; in 1899, this mtge. was paid off, & a transfer thereof taken for the benefit of the settlor's estate:—*Held:* the beneficiaries under the settlement were entitled to have the settlor's estate marshalled, & the mtge. discharged out of the unsettled portion of his assets.

I felt somewhat embarrassed by the use of the expression "*void ab initio*"; but I am satisfied now that the true meaning is that, not in regard to all persons & for all purposes is the case to be treated as though the legal estate had never passed, but that as regards the trustee & the person to whom the grant was made, he is, in respect of his liabilities, his burdens, & his rights, in exactly the same position as though no conveyance had ever been made to him (BYRNE, J.).—MALLOTT *v.* WILSON, [1903] 2 Ch. 494; 72 L. J. Ch. 664; 89 L. T. 522.

3397. Party claiming under charges on estate.]—In 1805 a lessee for lives, with proviso for renewal, charged the hereditaments, subject to his own life interest in part, with £1,500, &, subject thereto, conveyed the premises in trust for his son, W., testator in the cause. In 1811 W. settled the premises, subject to the life interest in part, & as to the whole charged with the £1,500, on himself, his wife, & eldest son; & further charged same with £2,000 for his younger children. In 1815, the tenant for life having died, W. executed deeds reciting, erroneously, that the whole of the £1,500 charges had been paid off, & taking from the trustee, in breach of trust, a conveyance of the hereditaments to himself absolutely, freed from the £1,500 charges; but there was no evidence that this deed was ever acted on. In 1818, the *cestuis que vie* having all died, W. obtained a renewal of the lease, but without prejudice to a question whether the lessee had not lost the right of compelling a renewal. In 1819 W. purchased the reversion in fee of the leaseholds, the latter not being merged. In 1838 W. was party to a deed whereby he recited that he had paid £1,200, part of the £1,500, but that when he did so he did not intend that same should sink into or be extinguished in the premises. In 1845 he appropriated the remaining £300 to himself as part of his share in the estate of the *cestui que trust* thereof, who had died. By his will, after reciting to the like effect, he devised the hereditaments comprised in the deed of 1805, subject to all such incumbrances as same might at his decease be subject to, & from the payment of which he exonerated his personal estate, to his son T. absolutely, subject to a further charge. W. died in 1859. T. entered into possession & disputed his liability to pay either the £1,500 or the £2,000, but paid interest up to 1869:—*Held:* if the above sums had been charged on the leasehold only, & not on the reversion, the mtgees. must have had recourse to the reversion first.

It was further contended that, if the claim of the pltfs. should be held only to extend to the existing lease, the mtgees., whose security comprehended the reversion, ought to resort to that estate in the first instance so as to leave as much as possible of the value of the leasehold for the purpose of satisfying such claim; & this would, I think, be consistent with the well-established principles upon which this ct. directs the marshalling of securities so as to preserve the rights of, & do full justice between the parties interested (BACON, V.-C.).—TRUMPER *v.* TRUMPER (1872), L. R. 14 Eq. 295; 41 L. J. Ch. 673; *affd.* (1873), 8 Ch. App. 870; 42 L. J. Ch. 641; 29 L. T. 86; 21 W. R. 692, L. JJ.

3398. Purchaser for value—Where covenant for further assurance.]—The owner of an estate mortgaged it, & afterwards sold an undivided moiety of it. The conveyance to the purchaser did not mention the mtge., but it contained a covenant by the vendor with the purchaser for further assurance. The two moieties afterwards devolved on different persons. In a partition action:—*Held:* as between the owners of the two moieties, the unsold moiety must bear the mtge. debt.—*Re* JONES, FARRINGTON *v.* FORRESTER, [1893] 2

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several estates, & indebted by judgment, settled one of the estates for valuable consideration, with a covenant against incumbrances, & subsequently acknowledges other judgments:—*Held:* the prior judgments should be thrown altogether on the unsettled estates, & the subsequent judgment creditors had no right to make the settled estate contribute.—AVERALL *v.* WADE (1835), L. & G. *temp.* Sugd. 252, 262.—**IR.**

o. —— ——.]—A. mtged. B. to V., & gave him as a collateral security a judgment, which attached on both B. & W. Subsequently V. assigned his debt & securities to C. A. at the same time mortgaged V. to C. for a further sum, with a covenant against all incumbrances, except the mtge. to V.:—*Held:* C., as against a puisne incumbrancer, was entitled to be paid the debt assigned to him by V. out of W. first, so as to leave B. unimpaired to meet the second mtge. made to C. himself.—*Re* RODDY'S ESTATE (1861), 11 I. Ch. R. 369.—**IR.**

p. —— ——.]—*Re* ROCHE'S ESTATE (1890), 25 L. R. Ir. 271.—**IR.**

q. —— ——.]—M'CARTHY *v.* M'CARTIE (No. 2), [1904] 1 I. R. 100, 113; 38 I. L. T. 3.—**IR.**

r. *Voluntary assignee—Charge paramount to assignor's title.*]—A. being seised in fee of L. & other lands, subject to a charge not created by himself, by a voluntary deed conveyed away the lands of L. & covenanted that he, his heirs, & assigns, would do any further act for the better & more effectually assuring the lands to the grantee, his heirs & assigns; & he devised the other lands. The charge was paid off by sale of part of the devised lands:—*Held:* the devisee entitled to contribution from the owner of L.—KER *v.* KER (1869), 4 I. R. Eq. 25.—**IR.**

t. —— *Assignment of part of mortgaged property—Other part not liable to*

Sect. 1.—By redemption: Sub-sect. 2, C. (b) & (c) i. & ii.]

Ch. 461; 62 L. J. Ch. 996; 69 L. T. 45; 3 R. 498.

Annotations:—**Apld.** *Re* Cook's Mortgage, Lawledge *v.* Tyndall, [1896] 1 Ch. 923. **Distd.** *Re* Darby's Estate, Rendall *v.* Darby, [1907] 2 Ch. 465. **Reld.** Hill *v.* Hickin, [1897] 2 Ch. 579; *Re* Repington, Wodehouse *v.* Scobell (1904), 73 L. J. Ch. 533. **Mentd.** Kenrick *v.* Mountsteven (1899), 48 W. R. 141; *Re* Coulson's Trusts, Prichard *v.* Coulson (1907), 97 L. T. 754; Carnell *v.* Harrison, [1916] 1 Ch. 328.

3399. Voluntary assignee—Charge not paramount to assignor's title.]—An assignor deposited with his bankers the title deeds of certain leasehold premises together with a policy of assurance on his own life & certain dock warrants, & executed a deed of charge & memorandum of deposit to secure the payment of the balance for the time being due on any accounts he might have with the bank. He subsequently, by a voluntary deed, assigned the leasehold premises to his wife. The deed contained no reference to the charge & memorandum of deposit, & no covenants for title, express or implied. By his will he gave all his property to trustees upon trusts for the benefit of his wife & children. On the death of the assignor his exors. paid off the debt due to the bank. On an application to the ct. for the determination of the question whether the widow, as assignee of the leaseholds, was liable to contribute to the payment of the debt:—*Held:* the charge being one created by the assignor himself, & not a charge paramount to his own title, the widow was under no liability to contribute.—*Re* DARBY'S ESTATE, RENDALL *v.* DARBY, [1907] 2 Ch. 465; 76 L. J. Ch. 689; 97 L. T. 900.

Annotation:—**Apld.** *Re* Best, Parker *v.* Best, [1924] 1 Ch. 42.

3400. ——.]—An assignor mtged. two policies of assurance on his life with trustees of the insurance co. to secure £125 & interest, & entered into a personal covenant for payment thereof. Subsequently he made a voluntary assignment of the policies to his wife, & the deed contained no reference to the mtge. On the assignor's death the insurance co. paid to the widow only the amount of the policies less the debt & interest:—*Held:* the widow was entitled to be reimbursed out of the estate of the assignee the amount so deducted.—*Re* BEST, PARKER *v.* BEST, [1924] 1 Ch. 42; 93 L. J. Ch. 63; 130 L. T. 311; 68 Sol. Jo. 102.

Equitable mortgagee.]—*See* EXECUTORS, Vol. XXIII., p. 526, No. 5934.

Surety.]—*See* GUARANTEE, Vol. XXVI., p. 111, Nos. 775–780.

Principal as against agent.]—*See* EQUITY, Vol. XX., pp. 501, 502, Nos. 2322–2324.

Life insurance society.]—*See* INSURANCE, Vol. XXIX., p. 369, Nos. 2966, 2967.

(c) *Against Whom Doctrine Applies.*

i. *In General.*

3401. General rule—Only against mortgagor & volunteers claiming under him.]—Defts. were auctioneers & had sold for a customer a brewery, & part of the proceeds of the sale was in their hands subject to their claim for charges incurred in connection with the sale; they had also in their hands the balance of the price of some furniture sold by them for the same customer. Pltf. was a creditor of defts.' customer, & he by letter charged the proceeds of the sale of the brewery in favour of pltf. Defts. wrote to pltf. acknowledging the receipt of the letter of charge. Defts. afterwards paid their customer the balance of the price of the furniture, & appropriated the part of the proceeds of the sale of the brewery in their hands to the payment of their charges:—*Held:* (1) defts., as auctioneers, had a lien for their charges upon the part of the proceeds of the sale of the brewery in their hands; (2) defts. were at liberty to appropriate the part of the proceeds of the sale of the brewery in their hands to the payment of their charges, & were not bound to take payment of their charges out of the price of the furniture in order to enable pltf. to obtain payment of his charge, & the doctrine of marshalling did not apply.

(3) Assets shall not be marshalled where by so doing another man's right would be prejudiced (LINDLEY, L.J.).—WEBB *v.* SMITH (1885), 30 Ch. D. 192; 55 L. J. Ch. 343; 53 L. T. 737; 1 T. L. R. 225, C. A.

3402. —— ——.]—P., in 1876, conveyed certain paper mills to H. by way of mtge. for securing £6,000, & by deed of even date assigned a reversionary interest in personalty as collateral security for the same debt. In 1882 P. made a second mtge. of the paper mills & the reversion to pltf. for £5,000; & in 1884 P. made a third mtge. of the paper mills only to pltf. for £2,500. In 1885 a deed was executed whereby pltf. transferred his mtge. for £2,500 to H., & released the paper mills from his mtge. for £5,000; so that H. became first & second mtgee. of the paper mills, as well as first mtgee. of the reversion, & pltf. second mtgee. of the reversion. P. made subsequent mtges. both of the paper mills & the reversion. Pltf. foreclosed the mtges. on the reversion which were subsequent to his own, & then brought an action claiming to redeem H.'s mtge. on the reversion on payment of £6,000, & to have a transfer from him of his first mtge. on the paper mills, as a security for what he had paid:—*Held:* (1) pltf. was entitled to redeem the reversion & paper mills on payment of the £6,000 to H.; (2) the sum paid by him must be apportioned between the paper mills & the reversion, according to their respective values; (3) pltf. was entitled to have a conveyance of the reversion absolutely, & of the paper mills to be held as security for such part of the money paid as should be apportioned to that property.

(4) The right of a subsequent mtgee. of one of the estates to marshal . . . is an equity which is not enforced against third parties, that is, against any one except the mtgor. & his legal representatives claiming as volunteers under him. It is not enforced against a mtgee. or purchaser of the other estate. If both estates are subject to separate second mtge. the ct. apportions the first mtge. between them (KAY, L.J.).—FLINT *v.* HOWARD, [1893] 2 Ch. 54; 62 L. J. Ch. 804; 68 L. T. 390; 2 R. 386, C. A.

Annotation:—*As to* (4) **Folld.** Baglioni *v.* Cavalli (1900), 83 L. T. 500.

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contribute.]—HOLLINSHEAD *v.* DEVANE (1914), 49 I. L. T. 87.—**IR.**

a. —— *No covenant to indemnify.*]—Where a man mortgages two properties, & subsequently makes a voluntary conveyance of the equity of redemption of one of them, but such conveyance contains no covenant on his part to pay off the mtge. or to indemnify the transferees from it, the doctrine of marshalling does not apply at the instance of the transferees to compel the mtgee. to resort to the part of the property retained by the vendor.—*Re* STEPHENSON, SOLOMON, ETC. *v.* TRUSTEES, EXECUTORS & AGENCY CO. OF NEW ZEALAND, LTD. (1911), 30 N. Z. L. R. 145.—**N.Z.**

3401 i. *General rule—Only against mortgagor & volunteers claiming under him.*]—DOUGLAS *v.* COOKSEY (1868), 2 I. R. Eq. 311.—**IR.**

b. *Assignee in bankruptcy.*]—The puisne mtgee.'s general right to compel

3403. Married woman.] — Husband & wife joined in creating two mtges. on the life interest of the wife in freehold & copyhold estates, the first mtgee. having a charge on both freeholds & copyholds, & the second on the freeholds only:—*Held:* as against the wife surviving, the second mtgee. was entitled to require that the first mtgee. should be satisfied out of the copyholds so far as they would extend.—TIDD *v.* LISTER (1853), 3 De G. M. & G. 857; 23 L. T. O. S. 101; 2 W. R. 184; 43 E. R. 336; *sub nom.* TIDD *v.* LISTER, BASSIL *v.* LISTER, 23 L. J. Ch. 249; 18 Jur. 543.

Annotations:—**Distd.** Hudson *v.* Carmichael (1854), Kay, 613. **Mentd.** *Re* Duffy's Trust (1860), 28 Beav. 386; Life Assocn. of Scotland *v.* Siddal (1861), 3 De G. F. & J. 271; Durham *v.* Crackles (1862), 1 New Rep. 165; *Re* Carr's Trusts (1871), L. R. 12 Eq. 609; Taunton *v.* Morris (1879), 11 Ch. D. 779.

—.]—*See, further,* HUSBAND & WIFE, Vol. XXVII., pp. 116, 153–157, Nos. 933, 1236–1278.

3404. Purchaser — When legal estate not obtained.]—A. became mtgee. of a portion of certain lands charged under a will with debts & legacies. The mtgor. was devisee of the lands & likewise one of the exors. of the will. The same person acted as solr. for the mtgor. & mtgee. The latter received the mtge., & some, but not all the material title-deeds of the mtged. estate came into his possession. The mtgor. afterwards mortgaged this & the other portion of the lands to B., & finally sold the first portion of the lands to pay the legacies which were charged on the whole. B. became the purchaser. Both A. & B. acted in ignorance of each other's rights:—*Held:* as against the mtgor., he was, in equity, entitled to throw on the other portion of the estate the debts & legacies; & the purchaser, not having obtained the legal estate in the property, was affected by this equity.—COLYER *v.* FINCH (1856), 5 H. L. Cas. 905; 26 L. J. Ch. 65; 28 L. T. O. S. 27; 3 Jur. N. S. 25; 10 E. R. 1159, H. L.; *varying* S. C. *sub nom.* FINCH *v.* SHAW, COLYER *v.* FINCH (1851), 19 Beav. 500.

Annotations:—**Refd.** Thorpe *v.* Holdsworth (1868), L. R. 7 Eq. 139; Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292; Heath *v.* Crealock (1873), L. R. 18 Eq. 215; Taylor *v.* Russell, [1891] 1 Ch. 8. **Mentd.** Carter *v.* Carter (1857), 3 K. & J. 617; Perry Herrick *v.* Attwood (1857), 2 De G. & J. 21; Hipkins *v.* Amery (1860), 2 Giff. 292; Hunt *v.* Elmes (No. 2) (1860), 28 Beav. 631; Phillips *v.* Phillips (1861), 4 De G. F. & J. 208; Hooper *v.* Gumm, McLellan *v.* Gumm (1865), 13 L. T. 187; Wilkinson *v.* Castle (1868), 37 L. J. Ch. 467; Dixon *v.* Muckleston (1872), 8 Ch. App. 155; R. *v.* Shropshire Union Ry. & Canal Co. (1873), L. R. 8 Q. B. 420; Corser *v.* Cartwright (1875), L. R. 7 H. L. 731; Heath *v.* Pugh (1881), 6 Q. B. D. 345; *Re* Hawthorne, Graham *v.* Massey (1883), 23 Ch. D. 743; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482; Manners *v.* Mew (1885), 29 Ch. D. 725; *Re* Rebbeck, Bennett *v.* Rebbeck (1894), 63 L. J. Ch. 596; *Re* Venn & Furze's Contract, [1894] 2 Ch. 101; *Re* Henson, Chester *v.* Henson, [1908] 2 Ch. 356.

3405. Purchaser of equity of redemption.]—WOOD *v.* WEST (1895), 40 Sol. Jo. 114.

3406. ——.]—FLINT *v.* HOWARD, No. 3402, *ante.*

3407. Surety.]—Mtge. of two funds to A. with a covenant by a surety. Second mtge. of one of the funds to B. B.'s fund having been exhausted in part payment of A.'s debt & A.'s mtge. having been transferred to the surety on payment by him of the balance:—*Held:* B. had a right to marshal the securities as against the surety.—SOUTH *v.* BLOXAM (1865), 2 Hem. & M. 457; 5 New Rep. 506; 34 L. J. Ch. 369; 12 L. T. 204; 11 Jur. N. S. 319; 71 E. R. 541.

Annotations:—**Expld.** Dixon *v.* Steel, [1901] 2 Ch. 602. **Mentd.** *Re* Toogood's Legacy Trusts (1889), 61 L. T. 19.

3408. Claimant under voluntary settlement—In favour of judgment creditor claiming under settlor.]—A. being seised in fee of certain lands, subject to a charge for marriage portions, gave judgments for the amount of the charges upon the occasions of the marriages. Subsequently, on his own marriage, he executed a voluntary settlement reciting those charges & settling the land on himself for life, remainders over in strict settlement. A. afterwards executed two separate mtges. of the lands, & still later, on the marriage of his son, executed articles of agreement, reciting the voluntary settlement & the mtges. During A.'s life some of the above incumbrances were paid out of his life estate, & after his death a judgment creditor whose debt was later in date than the mtge. debts, & secured by judgment on his life estate, sought that so much of the mtge. debts as had been paid out of the life estate of A. as should be necessary to satisfy the demands of creditors whose demands affected the life estate alone, should be raised by sale of part of the inheritance in exoneration of the life estate:—*Held:* the applt. was not entitled to the relief sought, since cts. of equity will not, where there has been a voluntary settlement, interfere to disturb that settlement in favour of a person whose claim is derived only through the settlor.

You cannot as against the volunteers, on behalf of the judgment creditor claiming under him who created the voluntary settlement so marshal the whole estate as to throw the *onus* on the volunteers (LORD HATHERLEY, C.).—DOLPHIN *v.* AYLWARD (1870), L. R. 4 H. L. 486; 23 L. T. 636; 19 W. R. 49, H. L.

Annotations:—**Refd.** *Re* Walhampton Estate (1884), 26 Ch. D. 391; *Re* Townley, Public Trustee *v.* Allder, [1922] 1 Ch. 154. **Mentd.** Godfrey *v.* Poole (1888), 13 App. Cas. 497.

3409. Assignee in bankruptcy—In favour of surety.]—A. having effected policies upon his own life with an assurance office, mortgaged them to the office as a security for successive loans. In one of these mtges. B. became surety for repayment of the amount borrowed. A. subsequently became bkpt., & B. was compelled as surety to pay part of the debt.

Upon A.'s death:—*Held:* as against A.'s assignee in bkpcy., B. was entitled to marshal the securities so as to obtain repayment out of the balance of the several policy moneys of the amount which he had been compelled as surety to pay.—HEYMAN *v.* DUBOIS (1871), L. R. 13 Eq. 158; 41 L. J. Ch. 224; 25 L. T. 558.

——.] — *See, further,* BANKRUPTCY, Vol. V., pp. 636, 637, 704, Nos. 5725–5727, 6182.

3410. Mortgagee.]—FLINT *v.* HOWARD, No. 3402, *ante.*

Shareholder of limited company.]—*See* COMPANIES, Vol. IX., p. 346, No. 2188.

ii. *Subsequent Incumbrancers.*

3411. General rule—Debt thrown ratably on both estates.]—BARNES *v.* RACSTER, No. 4116, *post.*

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the prior mtge., who has a second fund to resort to, & the common fund is a deficient one, to exhaust the second fund before he touches the common one, exists when the mtgor. has become bkpt.—BALDWIN *v.* BELCHER. *Re* CORNWALL (1842), 3 Dr. & War. 173; 6 I. Eq. R. 65.—**IR.**

PART XIV. SECT. 1, SUB-SECT. 2.—C. (c) ii.

3411 i. *General rule — Debt thrown ratably on both estates.*]—*Re* LAWDER'S ESTATE (1861), 11 I. Ch. R. 346; 13 Ir. Jur. 210.—**IR.**

3411 ii. —— ——.]—OCEAN ACCIDENT & GUARANTEE CORPN., LTD. & HEWITT *v.* COLLUM, [1913] 1 I. R. 337.—**IR.**

3411 iii. —— ——.]—*Re* ARCHER'S ESTATE, [1914] 1 I. R. 285.—**IR.**

3411 iv. —— ——.]—The owner of two estates, A. & B., & his predecessors

Sect. 1.—*By redemption: Sub-sect.* 2, *C.* (*c*) *ii. sub-sects.* 3, 4 & 5. *Sect.* 2: *Sub-sect.* 1, *A.*]

3412. —— ——.]—A. being seised in fee of a freehold & copyhold estate, borrows various sums of money of B., amounting in the whole to £4,000, upon mtge. of the freehold estate alone. A. afterwards, in 1832, borrows £500 more of B., on the security of both the freehold & copyhold estate This mtge. is effected by distinct instruments relating to each property respectively, neither of them referring to the other. In 1833, A. borrows a sum of £400 of C., on mtge. of the freehold estate alone, subject to B.'s incumbrances thereon. Again, in 1838, A., being indebted to D. in £600, executes to him a mtge. for that sum of the copyhold estate alone, without notice of the £500 incumbrance. In 1837, B. has notice of C.'s security, & in 1838, after having sold both the estates, under powers of sale, & received the purchase-money, he has notice of D.'s security. The produce of the freehold estate being insufficient to pay B. & C. in full, but that of the freehold & copyhold being sufficient for that purpose, C. claims to have the whole of the £500 charge thrown upon the produce of the copyhold estate, in order that he may receive payment out of that of the freehold; on the other hand, D. claims to be paid the whole of his debt out of the produce of the copyhold estate, in priority to C.:—*Held:* the claim of neither party could prevail to the fullest extent; but the £500 being by the security of 1832 charged on the freehold & copyhold estates, ratably, that is to say, in proportion to their respective net values, & without preference, C. had an equity of the nature claimed by him, to the extent of that proportion of the £500 which is charged upon the copyhold estate, while, in other respects, in relation to that estate, D. had priority over C.—BUGDEN *v.* BIGNOLD (1843), 2 Y. & C. Ch. Cas. 377; 63 E. R. 167.

Annotations:—**Distd.** Bowker *v.* Bull (1850), 1 Sim. N. S. 29. **Apld.** Wood *v.* West (1895), 40 Sol. Jo. 114. **Refd.** Flint *v.* Howard, [1893] 2 Ch. 54. **Mentd.** Rooper *v.* Harrison (1855), 2 K. & J. 86.

3413. —— ——.]—Where a mtgor. having two funds mortgaged both to A., then one to B., then both to C., & B. claimed that A. should pay himself first out of the one on which he, B., had no charge, C., objecting to B.'s claim, it was refused.—WELLESLEY *v.* MORNINGTON (LORD) (1869), 17 W. R. 355, L. C.

3414. —— ——.]—Where a person mortgages Blackacre & Whiteacre to A., & then mortgages Blackacre to B. & Whiteacre to C., the rights between B. & C. are to compel the payment of A.'s debt out of the two estates ratably, so that there shall be left of those estates the proper proportion for B. & C. respectively.

So, also, where there are two funds, either or both of which A. has the right to apply in paying himself & one of such funds is assigned to B. & the other to C., then, whether that right arises from a positive charge or by operation of law, in the circumstances under which the two funds came into A.'s hands, it is a right which he can exercise against both B. & C., & an equity to an apportionment of A.'s debt exists between B. & C.—MOXON *v.* BERKELEY MUTUAL BENEFIT BUILDING SOCIETY (1890), 59 L. J. Ch. 524; 62 L. T. 250.

Annotation:—**Folld.** Baglioni *v.* Cavalli (1900), 49 W. R. 236.

3415. —— ——.]—FLINT *v.* HOWARD, No. 3402, *ante*.

3416. —— ——.]—Mtgor. by deed, dated Feb. 24, 1894, mortgaged a leasehold house in which he was carrying on the business of a restaurant keeper to A. This mtge. included the lease, the goodwill of the business, the fittings, & fixtures. On Aug. 16, 1894, the mtgor. mortgaged the house alone to B., & on Aug. 22, 1894, gave a charge on the lease, goodwill, fixtures, & fittings to C., The interest on the mtge. fell into arrear, & the property was sold for £1,300, which in the assignment was apportioned £160 for the lease, £1,000 for the goodwill, & £140 for the fixtures.

B., the holder of the second mtge., claimed to be entitled to the whole proceeds. It was said that it was quite impossible to sever the goodwill from the lease. For C. it was said that the principle of *Barnes* v. *Racster*, No. 4116, *post*, applied, & that the purchase-money ought to be apportioned between the goodwill & the house:—*Held:* the purchase-money must be apportioned.—BAGLIONI *v.* CAVALLI (1900), 83 L. T. 500; 49 W. R. 236; 45 Sol. Jo. 78.

3417. Effect of charge of debts in will.]—B. being seised in fee of estates P. & C., & also of other estates, made separate mtges. of P. & C., & by his will devised all the estates to trustees, upon trust by sale or mtge. to raise money to pay his debts & legacies, & subject thereto upon trust for his daughter Mrs. H. for life, for her separate use, with remainder upon such trusts as she should by deed or will appoint. Mrs. H., by virtue of her power, mortgaged P. to A. in fee, by a deed reciting that testator's debts & legacies had been paid, which was not the fact, & containing an unqualified covenant by Mr. & Mrs. H. against incumbrances. Subsequently Mrs. H., by virtue of her power, mortgaged C. to D. in fee, & made similar mtges. of other parts of the devised estates:—*Held:* (1) however the case might have stood if these mtges. had been made by virtue of an ownership in fee, the recital & covenant in A.'s mtge. gave him no right to have P. exonerated from testator's debts & legacies out of C. & the other estates, as against D. & the other subsequent mtgees. under the power of appointment; (2) the charge of debts contained in the will did not give A. any right as against Mrs. H.'s other mtges., to have testator's mtge. on P. paid out of all the devised estates ratably, but that it must be borne by P.—STRONGE *v.* HAWKES, HAWKES *v.* HAWKES (1859), 4 De G. & J. 632; 45 E. R. 246, L. JJ.

3418. Effect of assignment subject to prior charges.]—Mtgor. being entitled in reversion to funds A. & B., made three mtges. Mtge. 1 included both funds; mtge. 2 included A. only; & mtge. 3 included both funds. Mtges. 1 & 2 were in the form of assignments of the funds to the mtgees., upon trust to receive the same when payable, to pay the mtge. debts thereout, & then transfer or pay the surplus to the mtgor. Mtge. 3 was an assignment of the funds to which the mtgor.

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in title created incumbrances affecting them: the first on A. & B.; the second on A.; & the third on A. & B. The third incumbrancer had notice of the prior charges. A. was sold, but the proceeds were not sufficient to pay more than the first incumbrance & part of the second. B. having been subsequently sold:—*Held:* the owners of the second incumbrance were not entitled to marshal, but only to have an apportionment of the first incumbrance between A. & B., & to have a recoupment on this basis.—SMYTH *v.* TOMS, [1918] 1 I. R. 338.—IR.

3411 *v.* ——.]—Where a person mortgaged estates X. & Y. to A., then estate Y. to B., & finally estates X. & Y. to C.; B. obtained a transfer to himself of A.'s securities, & under the power of sale in A.'s mtge. sold both the estates:—*Held:* he was not allowed to apply the proceeds of estate X., in payment of the mtge. originally given to A. to the exoneration of estate Y., but the first mtge. was to be treated as paid ratably out of estates X. & Y.—OLLIVIER *v.* COLONIAL BANK (1886), 5 N. Z. L. R. 239 (S. C.)—N.Z.

was entitled under mtges. 1 & 2 after payment of the debts thereby secured. Fund A. was absorbed in payment of mtge. 1 :—*Held :* although fund B. was not included in mtge. 2, it must be applied in satisfaction of that mtge. in full, in priority to mtge. 3.—*Re* MOWER'S TRUSTS (1869), L. R. 8 Eq. 110 ; 20 L. T. 838.

3419. Subsequent incumbrancer also first mortgagee.]—Mtgee. of a life estate & policies of assurance had also obtained subsequent judgments, being charges under Judgments Act, 1837 (c. 110), on the life estate. There were intervening incumbrances on the life estate only. On his first mtge. being discharged out of the life estate : —*Held :* the next incumbrancer was entitled, on the principle of marshalling, to be paid out of the policies, & the first mtgee. could not by consolidating his securities throw his subsequent charges on the policies so as to prevent this.—FORD *v.* TYNTE (1872), 41 L. J. Ch. 758 ; 27 L. T. 304.

SUB-SECT. 3.—RESTRICTIONS ON RIGHT TO REDEEM.

See Part VII., Sect. 4, *ante*.

SUB-SECT. 4.—AMOUNT REPAYABLE.

See Part VII., Sect. 5, *ante*.

SUB-SECT. 5.—ENFORCEMENT OF EQUITY OF REDEMPTION.

See Part VII., Sect. 8, *ante*.

SECT. 2.—BY DISCHARGE OF DEBT.

SUB-SECT. 1.—PAYMENT.

A. In General.

3420. Payment must be true & effectual—Not merely colourable.]—In *ejectione firmæ* on special verdict it appeared that J. seised in fee by deed indented, enfeoffed W. & his heirs with a proviso that such feoffment should be void on payment of a certain sum of money by J. within a year after the death of W. to the heirs, exors., or administrators of W., W. enfeoffed E. whose estate came to G. the lessor of pltf. Afterwards W. died, & D. his son & heir, & A. his wife, took out administration. D. & A. made a letter of attorney to G. to demand, etc., the said sum, of which T. gave notice to J., & afterwards & within the year, by agreement between J. & D., the said sum was paid to D., & all was presently repaid except about one-third part. J. re-entered, upon whom G. entered & made the lease to pltf. who entered & was possessed until deft. ousted him, but the special verdict did not convey any interest or authority to the deft. under the said J. :—*Held :* (1) the condition ought to be performed by a true & effectual payment ; (2) as the heir was expressly named in the condition, if all the money had been paid to him, *bonâ fide*, it would have been sufficient, although W., his father, conveyed over his whole estate in the land.—GOODALL'S CASE (1597), 5 Co. Rep. 95 b ; Jenk. 261 ; 77 E. R. 202 ; *sub nom.* GOODALE *v.* WYET, Cro. Eliz. 383 ; Gouldsb. 176 ; Moore, K. B. 708 ; Poph. 99, Ex. Ch.

Annotations :—*As to* (2) **Refd.** Thornborough *v.* Baker (1675), 3 Swan. 628. *Generally*, **Mentd.** Turner's Case (1610), 8 Co. Rep. 132 a ; Foster *v.* Jackson (1615), Hob. 52 ; Duncombe *v.* Wingfield (1617), Hob. 254 ; Worledge *v.* Bonbury (1617), Cro. Jac. 436 ; Castle *v.* Hobbs (1625), Cro. Car. 21 ; Brockhams Case (1628), Litt. 128 ; Kent *v.* Steward (1634), Cro. Car. 358 ; Gymlett *v.* Sands (1635), Cro. Car. 391 ; Thomason *v.* Mackworth (1666), O'Bridg. 502 ; Barker *v.* Keete (1678), Freem. K. B. 249 ; Lodge *v.* Jennings (1727), Gilb. Ch. 255 ; Camplin *v.* Bullman (1761), Park. 198.

3421. Payment must be of whole amount due.]—Mtgee. assigns his mtge. for less than is really due to him. The mtgor. shall not redeem without paying the whole money due on the mtge. Where there are subsequent incumbrances or creditors in the case, a man that buys in a prior incumbrance shall be allowed only what he really paid. But otherwise it is, as between him & the mtgor. or his heir.—WILLIAMS *v.* SPRINGFEILD (1687), 1 Vern. 476 ; 23 E. R. 602, L. C.

Annotation :—**Refd.** Morret *v.* Paske (1740), 2 Atk. 52.

3422. Presumption from non-payment of interest.]—Although non-payment of interest for twenty years on a mtge. where clear, & no demand, raises a presumption of payment, yet, on doubtful circumstances, & the original mtge. admitted, it was referred to the master to inquire whether any interest had been paid.—TRASH *v.* WHITE (1791), 3 Bro. C. C. 289 ; 29 E. R. 542, L. C.

Annotation :—**Consd.** Christophers *v.* Sparke (1820), 2 Jac. & W. 223.

3423. Set-off.]—B. was surety for a sum of £7,000, due from C. to L. Payment was also secured by a mtge. from C. to L. The mtged. estate was sold by C. to the Moseley Green co., who covenanted to pay the mtge. debt. Afterwards, the co. gave L., the mtgee., a promissory note for the amount ; but, before it arrived at maturity, a winding-up order, under the Joint-Stock Companies Acts, 1856 & 1857, had been made. After the winding-up order L. transferred the mtge. & securities, & indorsed the note, to X. B., having been settled on the list of contributories, paid X., & thereupon the mtge. was transferred, & the note indorsed to him :—*Held :* B. was entitled to set-off the sum due on the note against

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PART XIV. SECT. 2, SUB-SECT. 1.—A.

c. *Payment must be true & effectual.*]—GIBB *v.* WARREN (1859), 7 Gr. 496. —**CAN.**

d. ——.]—CAMERON *v.* KERR (1878), 3 A. R. 30.—**CAN.**

3421 i. *Payment must be of whole amount due.*]—BACON *v.* SHIER (1869), 16 Gr. 485.—**CAN.**

3421 ii. ——.]—*Re* KELLY & COLONIAL INVESTMENT & LOAN CO. (N. W. T.) (1906), 3 W. L. R. 62.—**CAN.**

3422 i. *Presumption from non-payment of interest.*]—Where interest on a mtge. has not been paid, & the mtgee. has never entered, it will be presumed that the money has been paid at the day, & consequently that the mtgee. has no subsisting title.—DOE d. DUNLOP *v.* MCNAB (1849), 5 U. C. R. 289.—**CAN.**

e. *Order changing place of payment—Whether service necessary.*]—JONES *v.* BAILEY (1850), 1 Gr. 353.—**CAN.**

f. —— ——.]—Where mtge. money was ordered to be paid into an agency of a bank, & before the day appointed the agency was closed :—*Held :* on a motion to substitute another bank, a new day for payment must be fixed, & the order served.—KING *v.* CONNOR (1864), 1 Ch. Ch. 274.—**CAN.**

g. *Debt discharged by surety — At request of principal.*]—PRESTON *v.* TWIGG (1861), 11 C. P. 281.—**CAN.**

h. *Order appointing new day for payment—Previous order undated.*]—Where the master's report directing the payment on a day being six months from the date, is not dated, & the decree gives six calendar months, a new day must be appointed for payment.—SCOTT *v.* MCKEOWN (*circa* 1863), 1 Ch. Ch. 186.—**CAN.**

k. —— *Whether service necessary—Absconding defendant.*]—Service of an order appointing a new day for payment will be dispensed with where the mtgor. is an absconding deft., against whom the bill has been taken *pro confesso* after service by publication.—ELLWOOD *v.* SCOTT (*circa* 1863), 1 Ch. Ch. 190.—**CAN.**

l. —— —— *Defendant out of jurisdiction.*]—ADAMS *v.* EAMER (1864), 1 Ch. Ch. 260.—**CAN.**

m. —— *Mortgage for purchase-money*

Sect. 2.—By discharge of debt: Sub-sect. 1, A. & B.]

a call made upon him; & to the extent of the amount so set-off the mtge. was satisfied for the benefit of the co.—*Re* MOSELEY GREEN COAL & COKE CO., LTD., BARRETT'S CASE (No. 2) (1865), 4 De G. J. & Sm. 756; 5 New Rep. 496; 34 L. J. Bcy. 41; 12 L. T. 756; 13 W. R. 559; 46 E. R. 1116, L. C.

3424. Payment into court—By purchaser of estate subject to charge.]—B. purchased an estate, subject to a pecuniary charge:—*Held:* he was not entitled to pay the amount of the charge into ct. under the Trustee Relief Act.—*Re* BUCKLEY'S TRUST (1853), 17 Beav. 110; 1 Eq. Rep. 18; 22 L. J. Ch. 934; 21 L. T. O. S. 71; 17 Jur. 478; 51 E. R. 974.

3425. —— By mortgagor when sued—Mortgage Act, 1733 (c. 20).]—BOURTON *v.* WILLIAMS, No. 3431, *post.*

3426. Tender properly made & improperly rejected—Not equivalent to payment.]—BANK OF NEW SOUTH WALES *v.* O'CONNOR, No. 3475, *post.*

Tender generally.]—*See* CONTRACT, Vol. XII., pp. 319 *et seq.*

Payment by cheque to debenture-holder.]—*See* COMPANIES, Vol. X., p. 813, No. 5194.

Mortgagee's right to appropriate.]—*See* CONTRACT, Vol. XII., p. 483, No. 3956.

Payment of mortgage on lunatic's estate.]—*See* LUNATICS, Vol. XXXIII., pp. 216, 217, Nos. 1238–1241.

B. Payment to Solicitor or Agent.

3427. Whether good discharge of mortgagor—Payment to scrivener.]—HENN *v.* CONISBY (1667), 1 Cas. in Ch. 93; 22 E. R. 710.

3428. —— ——.]—Money paid in by the borrower to the scrivener, no good payment to conclude the lender.—DEGG *v.* OSBASTON (1668), 1 Cas. in Ch. 111; 22 E. R. 719.

3429. —— —— Delivery of mortgage deed.]—Payment of interest of mtgee. to the scrivener is good, if he has the bond or mtge. deed. So of principal, if he deliver up the bond.—WHITLOCK *v.* WALTHAM (1708), 1 Salk. 157; 91 E. R. 146.

Annotations:—**Consd.** Wilkinson *v.* Candlish (1850), 5 Exch. 91. **Reld.** River Clyde Trustees *v.* Duncan (1853), 21 L. T. O. S. 37.

—— ——.]—*See, also,* AGENCY, Vol. I., p. 365, Nos. 736–743.

3430. —— Payment to trustee—Authorised to lend on security.]—An authority given by testator to his trustee to lay out money on security, includes in it, an authority to give sufficient discharges to the borrowers.—WOOD *v.* HARMAN (1820), 5 Madd. 368; 56 E. R. 935.

Annotation:—**Consd.** Locke *v.* Lomas (1852), 5 De G. & Sm. 326.

3431. —— Payment to solicitor—Action to recover mortgage debt.]—A husband brought an action in the names of himself & wife to recover £200 due on a mtge. made to his wife before her marriage. Mtgor. obtained an order in the action that on payment of the principal & interest into ct. the action should be stayed, that a reconveyance should then be executed, & that on its execution the money should be paid out of the ct. An arrangement was made that the wife should receive £100, & the husband the rest, & the mtgor., on being informed by pltfs.' attorney that pltfs. had settled their differences on those terms, consented to the payment out of ct. to pltfs.' attorney. The money was accordingly paid out to pltfs.' attorney; but he, claiming a lien on the £100 for some costs, offered the wife only £83, which she would not receive. The wife survived her husband, & died without having received any part of the money, & without having executed a reconveyance. A suit for foreclosure having been instituted by her exors. & devisees:—*Held:* independently of Mortgage Act, 1733 (c. 20), the mtgor. & his estate were discharged from the debt, inasmuch as the receipt of the attorney of pltfs. in the action was a good discharge.—BOURTON *v.* WILLIAMS (1870), 5 Ch. App. 655; 39 L. J. Ch. 800; 21 L. T. 781; 18 W. R. 1089, L. C. & L. J.

3432. —— —— Holding deeds & receiving interest.]—Mtge. was transferred to pltf. without notice to defts., the mtgors., who were trustees of a charity, the same solr. acting for both the mtgee. & transferee. This solr. was authorised, on behalf of the original mtgees., to receive the interest, but had no authority to receive principal. On behalf of the transferee he retained the deeds. Subsequently the mtgors. paid off the mtge. debt to the solr., who thereupon handed them the original mtge., & all the other deeds except the transfer. He never told the transferee or original mtgees. of this repayment, but applied the money to his own use, & obtained from the original mtgees. a deed, which they executed, believing it

—*Purchaser encumbered with prior mortgage—Discretion of judge.*]—G. *v.* V. (1866), 2 Ch. Ch. 33.—**CAN.**

n. *Payment into bank—Duties of bank manager.*]—The manager of the bank where mtge. money is directed to be paid should certify that the money has not been paid before, as well as on or since, the day appointed.—FARRELL *v.* STOKES (1863), 1 Ch. Ch. 201.—**CAN.**

o. —— *Validity of bank certificate.*]—HURD *v.* SEYMOUR (1865), 1 Ch. Ch. 332.—**CAN.**

p. *Mortgage payable in foreign currency.*]—A mtge. being payable in lawful money of a foreign country, the holder thereof, in seeking to foreclose, is entitled only to claim the amount in the current money of that country, or its equivalent at the time of default made in payment, or at any time subsequent at his option.—MORRELL *v.* WARD, DOW *v.* WARD (1863), 10 Gr. 231.—**CAN.**

q. ——.]—AMERICAN CHICLE CO. *v.* SOMERVILLE PAPER BOX CO. (1921), 64 D. L. R. 547; 50 O. L. R. 517.—**CAN.**

r. *Covenant to release any land sold during mortgage—General payment by assignee.*]—WEBBER *v.* O'NEIL (1864), 10 Gr. 440.—**CAN.**

t. *Acceleration of payment—Whether mortgagee bound to accept full payment before due.*]—A mtgee. is not obliged to accept payment of the whole principal & interest of a mtge. on which only certain interest is due & in respect of which a bill for foreclosure has been filed.—GREEN *v.* ADAMS (1867), 2 Ch. Ch. 134.—**CAN.**

s. *Payment direct to purchaser.*]—If the owner, instead of paying the redemption money to the county treasurer for the sheriff's vendee, pays it to the latter personally, & he accepts it, the payment is, in equity, effectual.—CAMERON *v.* BARNHART (1868), 14 Gr. 661.—**CAN.**

b. *Certificate of discharge—Whether must contain payer's name.*]—CARRICK *v.* SMITH (1874), 35 U. C. R. 348.—**CAN.**

c. *Power of executors & trustees to give valid discharge of mortgage.*]—*Ex p.* JOHNSON (1875), 6 P. R. 225.—**CAN.**

d. ——.]—Where a mtge. is made to all of the exors. & trustees under a will, there is no power in any less than all of them, who are living, to give a valid discharge of the mtge., unless some special power has been conferred upon them to do so.—*Re* SPELLMAN & LITOVITZ (1919), 44 O. L. R. 30.—**CAN.**

e. *Taking note of third party—Whether amounts to extinguishment of debt.*]—The taking by a mtgee. of the note of a third party is not of itself an extinguishment of the mtge. debt.—COTTON *v.* STACK (1876), 3 Pug. 424.—**CAN.**

f. *Proof of payment of debt—On whom lies.*]—COLWELL *v.* ROBINSON (1883), 23 N. B. R. 69.—**CAN.**

g. ——.]—TRUE *v.* BURT (1903), 2 N. B. Eq. Rep. 497.—**CAN.**

h. *Mortgage to secure payment of promissory note—Mortgage discharged on retirement of note.*]—JACK *v.* JACK (1885), 12 A. R. 476.—**CAN.**

k. —— ——.]—WATEROUS ENGINE WORKS CO. *v.* LIVINGSTON (1904), 24 C. L. T. 338; 7 O. L. R. 740; 3 O. W. R. 670.—**CAN.**

l. *Mortgage to secure balance of purchase-money—Extending over five years—Right to discharge after five years.*]—

to be a mere appointment of new trustees of the charity. This deed recited the repayment of the mtge. debt, but contained no indorsed receipt. The mtgors. regarded it as a reconveyance.

The mtge. money being lost by the default of the solr.:—*Held:* the payment to the solr. had been made by the mtgors. in their own wrong; it was not a payment to the transferee, & he was entitled to foreclose. *Qu.:* on whom the loss would have fallen if the case had been one of an account settled directly between the mtgors. & the original mtgees.—WITHINGTON *v.* TATE (1869), 4 Ch. App. 288; 20 L. T. 637; 17 W. R. 559, L. C.

Annotation:—**Distd. & Expld.** *Re* Southampton's Estate, Allen *v.* Southampton, Banfather's Claim (1880), 16 Ch. D. 178.

3433. —— —— —— Solicitor acting for both parties.]—Pltf. lent to deft. £1,000, upon the security of an indenture, which contained a covenant by deft. to surrender certain copyhold premises to pltf.'s use. No surrender was made. D., who acted as attorney for both parties, signed a receipt for the money, & the title deeds were delivered to him, & he prepared & delivered to deft., but without pltf.'s knowledge, a schedule of the deeds, at the foot of which was a memorandum signed by D., acknowledging the receipt of the deeds, & undertaking to deliver them up on payment of the principal money & interest. The mtge. deed remained in D.'s possession, & he from time to time received the interest & paid it over to pltf. The principal money was paid to D., who appropriated it to his own use, & died insolvent:—*Held:* neither the possession of the mtge. deed nor the receipt of interest was any evidence of an authority to D. to receive the principal, & consequently, pltf. was entitled to recover it from deft.—WILKINSON *v.* CANDLISH (1850), 5 Exch. 91; 19 L. J. Ex. 166; 155 E. R. 39.

Annotations:—**Apld.** Sims *v.* Brutton (1850), 5 Exch. 802; Kent *v.* Thomas (1856), 1 H. & N. 473. **Refd.** Bourdillion *v.* Roche (1858), 27 L. J. Ch. 681. **Mentd.** Sweetings *v.* Pearce (1859), 29 L. J. C. P. 265.

3434. —— —— —— ——.]—P., a solr. employed both by a mtgor. & mtgee., received the interest on the mtge. debt regularly. After a time he fraudulently obtained from the mtgor. a portion of the principal. At first the mtgee. received his interest regularly from P. at his office; but ultimately P. allowed the interest to fall into arrear till a large sum became due to the mtgee. During this time the mtgee. made no application to the mtgor. in consequence of the irregularity in payment. In Sept. 1853, the mtgor. paid the mtgee. £13 13*s.* 9*d.*, as a half year's interest on the principal remaining due; that led to an explanation & the discovery of the fraudulent receipt of the principal by P. The mtgee. did not repudiate the payment at the time. On Feb. 24, the mtgor. wrote to inquire in what way he should pay the half-year's interest just due, expressing his fear that P. would not be able to make good his defalcations to the mtgee. On Feb. 26, the mtgee. wrote requesting payment by cheque, & on Mar. 4, the mtgee. again wrote, saying that he believed that P. was hopelessly involved, & suggesting that the loss should be divided between them:—*Held:* P. was the agent of the mtgee. to receive the interest but not the principal; & in order to bind the mtgee. by the acts of P. in receiving the principal, it was necessary to show either that what he did was with the intention of adopting the acts of P. or that the position of the mtgor. was altered.—KENT *v.* THOMAS (1856), 1 H. & N. 473; 156 E. R. 1287

3435. —— —— —— ——.]—Certain property was conveyed to pltf. as security for an advance, the mtge. deed being prepared by pltf.'s solr., who kept the deeds & received the interest from the mtgor. on behalf of pltf. The solr. was in the habit of making investments for pltf. on mtge., purchase, or otherwise, & of keeping the various deeds in his possession. The solr., without pltf.'s knowledge or authority, gave notice to the mtgor. calling in the principal money due under the mtge., & the mtgor. repaid the money to the solr. upon being handed a deed of reconveyance purporting to be signed by pltf. & the title deeds of the property. Pltf.'s signature to the reconveyance was a forgery, & pltf. never received the money nor did he know that it had been paid off:—*Held:* the solr. had no authority to receive the principal money, & pltf. was entitled to have the security enforced against the mtgor.—JARED *v.* WALKE (1902), 18 T. L. R. 569; 46 Sol. Jo. 484.

3436. —— —— —— —— Mortgagee not disclosed.]—A. borrowed £8,000 on mtge. from his solr., B. Of this money £800 belonged to C., a client of B.'s, who had handed it to B. for investment. No notice was ever given to A., either by B. or by C., that the £800 belonged to C. Afterwards A. paid off the £8,000, & B. shortly after died insolvent. On a claim made by C. for the £800 against A.:—*Held:* as C., by his negligence in not giving notice of his claim to A., had enabled A. to pay back the whole of the mtge. money to B., he had no equity to compel A. to pay part of the money over again; & claim refused.—*Re* SOUTHAMPTON'S (LORD) ESTATE, ROPER'S CLAIM (1880), 50 L. J. Ch. 155; *sub nom.* ALLEN *v.* SOUTHAMPTON (LORD), ROPER'S CLAIM, 43 L. T. 625; 29 W. R. 210.

Annotation:—**Refd.** *Re* Southampton's Estate, Allen *v.* Southampton, Banfather's Claim (1880), 29 W. R. 231.

See, generally, SOLICITORS.

Under a mtge. given to secure the balance of purchase-money, in which the principal is payable by instalments extending beyond five years, the mtgor. is at any time after such last-named period, entitled to a discharge upon payment of the principal & interest together with three months' additional interest.—*Re* PARKER, PARKER *v.* PARKER (1894), 24 O. R. 373.—**CAN.**

m. *Inaccurate statement of amount due—Tender of that amount—Whether tender valid.*]—The tender of the amount shown to be due by a statement furnished by the holder of a security absolute on its face is good, even though upon taking accounts there may be a large amount due.—MCLAUGHLIN *v.* TOMPKINS (1917), 44 N. B. R. 249.—**CAN.**

n. *Payment overdue—Plaintiff thereby rendered liable on collateral security—Liability of defendant.*]—HOSTYN *v.* BULL, [1920] 3 W. W. R. 882.—**CAN.**

o. *Agreement to pay off whole amount on any interest day—Unpaid balance tendered—Right to discharge.*]—PROUSKY *v.* ADELBERG, [1926] 4 D. L. R. 866; 59 O. L. R. 471.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 1.—B.

3433 i. *Whether good discharge of mortgagor—Payment to solicitor—Holding deeds & receiving interest—Solicitor acting for both parties.*]—BOWIE'S TRUSTEES *v.* WATSON, [1913] S. C. 326; 50 Sc. L. R. 202; [1912] 2 S. L. T. 458.—**SCOT.**

p. —— *Payment to mortgagee's general agent—Before day limited by deed.*]—BURROUGH *v.* CRANSTON, CRANSTON *v.* BURROUGH (1840), 2 I. Eq. R. 203.—**IR.**

q. *Authority to solicitor to collect interest—Whether includes authority to collect principal.*]—An authority by pltf. to his attorney to collect the interest due on a mtge. in pltf.'s, & not in the attorney's possession, does not entitle the attorney to receive payment of the principal.—PALMER *v.* WINSTANLEY (1874), 23 C. P. 586.—**CAN.**

r. —— —— ——.]—*Re* FLINT & JELLETT (1880), 8 P. R. 361.—**CAN.**

t. —— —— ——.]—The *onus* of showing that a solr., who is in possession of a mtge. & collects the interest, has authority also to collect the principal, is upon the mtgor., & unless this *onus* is clearly discharged, the mtgor. & not the mtgee. must bear the loss arising from the solr.'s misappropriation of the funds.—*Re* TRACY, SCULLY *v.* TRACY (1894), 21 A. R. 454.—**CAN.**

Sect. 2.—By discharge of debt: Sub-sect. 1, C. & D.; sub-sects. 2 & 3. Sect. 3: Sub-sect. 1.]

C. Where Money Advanced on Joint Account.

See Law of Property Act, 1925 (c. 20), s. 111.

3437. Payment to co-trustee—In possession of title deeds — Not good discharge of debt.] — GOLDNEY *v.* BOWER (*circa* 1828), cited in 30 L. J. Ch. at p. 217.

Annotation :—**Refd.** Cottam *v.* Eastern Counties Ry. (1860), 1 John. & H. 243.

3438. Payment to co-mortgagee—During lifetime of other mortgagee—Discharge of debt at law—No discharge of security.]—The legal estate in a term of years was vested in A., B., & C., as trustees for D. & E., mtgees. & joint tenants. By an indenture executed by all parties except E., the term was merged, the mtge. money being expressed to be paid to D. & E., & D. alone signed the receipt :—*Held :* though the action to recover the money was gone by the release of one joint tenant, the land was not discharged, & specific performance of a contract to purchase the land under that title refused.—MATSON *v.* DENNIS (1864), 4 De G. J. & Sm. 345 ; 10 Jur. N. S. 461 ; 12 W. R. 926 ; 46 E. R. 952 ; *sub nom.* MATSON *v.* DENNIS, MATSON *v.* WOODTHORPE, 10 L. T. 391, L. J.J.

Annotations :—**Consd.** Steeds *v.* Steeds (1889), 22 Q. B. D. 537. **Folld.** Powell *v.* Brodhurst, [1901] 2 Ch. 160.

3439. ——— ——— ——— ———.]—Where mtgees. have advanced money on a joint account, payment to one of them during the others' lifetime, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest, if any, even though the payee ultimately becomes the survivor in the joint account.—POWELL *v.* BRODHURST, [1901] 2 Ch. 160 ; 70 L. J. Ch. 587 ; 84 L. T. 620 ; 49 W. R. 532 ; 17 T. L. R. 501 ; 45 Sol. Jo. 502.

D. Effect of Payment.

See, now, Law of Property Act, 1925 (c. 20), s. 116.

3440. Mortgagee trustee for mortgagor.]—When the mtge. money is paid, the mtgee. & his heirs are trustees for the mtgor. & his heirs.—HALL *v.* DENCH (1685), 2 Rep. Ch. 297 ; 1 Vern. 342 ; 21 E. R. 683, L. C.

Annotations :—**Refd.** Lincoln's Case (1695), Freem. Ch. 202 ; Banks *v.* Sutton (1732), 2 P. Wms. 700 ; Sparrow *v.* Hardcastle (1754), Amb. 224 ; Brydges *v.* Chandos (1794), 2 Ves. 417. **Mentd.** Vernon *v.* Jones (1691), Freem. Ch. 117 ; Lamb *v.* Parker (1705), 2 Vern. 495.

3441. ———.]—DIMOCK'S CASE (OR HOBART *v.* SELBY) (1704), Freem. Ch. 273 ; 22 E. R. 1205.

3442. ———.]—BALDWIN *v.* BANISTER (1718), 3 P. Wms. 251, n. ; 24 E. R. 1050.

Annotations :—**N.F.** Dobson *v.* Land (1850), 8 Hare, 216. **Consd.** Shaw *v.* Bunny (1865), 2 De G. J. & Sm. 468. **Refd.** Kirkwood *v.* Thompson (1865), 2 Hem. & M. 392.

3443. ——— Mortgagor tenant at will to mortgagee —Real Property Limitation Act, 1833 (c. 27), ss. 7, 25, 34.]—(1) When the money due upon a mtge. has been paid to the mtgee., but no reconveyance has been executed, the mtgor. becomes from the date of such payment a tenant at will to the mtgee. & the legal estate of the mtgee. is extinguished by thirteen years adverse possession of the mtgor.

(2) Above Act, sect. 25, relates to express trusts only, & does not apply to the relation between a mtgee. whose mtge. has been satisfied & the mtgor. —SANDS TO THOMPSON (1883), 22 Ch. D. 614 ; 52 L. J. Ch. 406 ; 48 L. T. 210 ; 31 W. R. 397.

Annotations :—**Consd.** Warren *v.* Murray, [1894] 2 Q. B. 648. **Refd.** Charles *v.* Jones (1887), 35 Ch. D. 544.

———.]—*See, also,* Nos. 1425, 1425*a*, *ante*.

3444. Cessation of mortgagee's interest in mortgaged estate.]—Where R., in possession of a shop, premises, etc., for the sale of wine & spirits, mortgaged them, with the appurtenances, licences, etc., to pltfs., who, upon the bkpcy. of the mtgor., sold the premises in question & paid themselves & another mtgee., leaving a third mtge. creditor unpaid ; but the licences, being then suspended through the default of the bkpt., were not put up for sale, & deft., the assignee of the bkpt., sold the goodwill of the premises & the licences, which, by an arrangement made with the revenue, he had received :—*Held :* pltfs. could not maintain an action for money had & received for the sum paid for the licences to deft., inasmuch as pltf.'s interest ceased altogether upon the discharge of their debt, & the licences, for the sale of which they sought to recover, were not the licences assigned to them by way of mtge., which were forfeited, but fresh licences obtained by deft., & at his expense & trouble.—MANIFOLD *v.* MORRIS (1839), 5 Bing. N. C. 420 ; 2 Arn. 19 ; 7 Scott, 404 ; 8 L. J. C. P. 218 ; 3 Jur. 362 ; 132 E. R. 1160.

SUB-SECT. 2.—ACCORD AND SATISFACTION.

Accord & satisfaction generally, *see* CONTRACT, Vol. XII., pp. 437 *et seq.*

3445. Acceptance of composition — Right of creditor to retain security—Express stipulation necessary.] — Upon a composition between a debtor & his creditors, a creditor cannot ostensibly accept a composition, & sign the deed which expresses his acceptance of the terms, & at the same time stipulate for or secure to himself a peculiar & separate advantage which is not expressed upon the deed.

A creditor holding a security for his debt may stipulate to have the benefit of it, in addition to the amount of the composition offered by a debtor to his creditors ; but he must either hold himself entirely aloof from the other creditors, or distinctly communicate with them on the subject, if he at all acts in common with them.

A debtor entered into a negotiation for a compromise with his creditors, but there did not appear to have been any general meeting of them, or any

PART XIV. SECT. 2, SUB-SECT. 1.—C.

a. Payment to co-trustee—Whether mortgage discharged.]—EWART *v.* SNYDER (1867), 13 Gr. 55.—**CAN.**

b. ———.]—*Re* CAREW'S ESTATE, *Ex p.* MERRICK (1854), 4 I. Ch. R. 112, P. C.—**IR.**

c. Payment to co-mortgagee—Without knowledge of other mortgagee—Whether mortgage discharged.]—The sum due upon a mtge. was paid to one of the two mtgees., & he gave an acquittance without the knowledge of the other mtgee. :—*Held :* the mtge. had been discharged.—BARBER MARAN *v.* RAMANA GOUNDAN (1897), I. L. R. 20 Mad. 461.—**IND.**

d. Mortgage to partners—Dissolution of partnership—Rights of mortgagee.]—ALLISON *v.* MCDONALD (1894), 23 S. C. R. 635.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 1.—D.

e. Mortgage paid but not cancelled—Whether mortgagee beneficial interest in property.]—DOE *v.* BAXTER (1852), 7 N. B. R. (2 All.) 377.—**CAN.**

f. Right of mortgagor to discharge.]—CANADIAN NORTHERN INVESTMENT CO. *v.* CAMERON (1916), 34 W. L. R. 866 ; 10 W. W. R. 959.—**CAN.**

g. Payment between order nisi & final order—Whether final order should be made.]—Where a mtgor. makes a payment to the mtgee. between the order *nisi* & the application for a final order, the final order should not be made unless he has had an opportunity of coming in & explaining the circumstances under which the payment was made.—INTERIOR TRUST CO. *v.* OSADCHUK, [1925] 1 W. W. R. 957 ; 19 Sask. L. R. 372.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 2.

h. Arrangement between mortgagee & some of several mortgagors—Position of mortgagors not parties to arrangement.]—The rule that an arrangement between some of several mtgors. & the mtgee., whereby the mtgors. are

agreement entered into by them generally; one of the creditors stipulated that he should have the benefit of a mtge. security which he held, in addition to the amount of composition. He accepted the composition, but did not then execute the composition deed; he afterwards realised his mtge. security, & then executed the composition deed, by which he purported to release his debtor altogether, without any reservation of the mtge. security; another creditor subsequently executed the composition deed. The agreement was not communicated to the other creditors, but there was no fraudulent concealment:—*Held:* on grounds of public policy, the creditor was not entitled to retain his mtge. security in addition to the amount of the composition.—CULLINGWORTH *v.* LOYD (1840), 2 Beav. 385; 9 L. J. Ch. 218; 4 Jur. 284; 48 E. R. 1230.

Annotations:—**Apld.** Bush *v.* Simpson (1844), 14 Sim. 239. **Refd.** Pfleger *v.* Browne (1860), 28 Beav. 391; Soc. Générale de Paris *v.* Geen (1883), 8 App. Cas. 606.

3446. —— —— Valued for purpose of composition.]—B. & co. were creditors of a partnership for £2,400, for which they held a security comprising joint property of the firm & also separate property of one of the partners. The firm being in difficulties, the joint creditors agreed to accept a composition, & B. & co. valued their security at £800, & proved & received the composition upon the balance. Subsequently they received from their security more than £800 & interest from the date of valuation. Four years after the close of the composition debtors brought an action to redeem their security. B. & co. claimed to retain the security on the separate property until they had received payment in full of their claim, on the ground that they need not have deducted the separate property:—*Held:* B. & co. having received £800 from the security & accepted the composition on the balance, their whole debt was discharged, & they could not retain the separate security.—COULDERY *v.* BARTRUM (1881), 19 Ch. D. 394; 51 L. J. Ch. 265; 45 L. T. 689; 30 W. R. 141, C. A.

Annotations:—**Refd.** Soc. Générale de Paris *v.* Geen (1883), 8 App. Cas. 606. **Mentd.** *Re* Button, *Ex p.* Voss (1905), 74 L. J. K. B. 403.

3447. —— —— ——.]—In 1903 P. as surety executed mtges. of certain property of his own to a bank to secure the overdraft of P. Brothers, a firm in which he was not a partner. The mtge. deeds all contained a provision that the bank should be at liberty without affecting their rights under the mtges. among other things "to vary, exchange or release any other securities held or to be held by the bank for or on account of the moneys thereby secured or any part thereof" . . . "& to compound with, give time for payment of, & accept compositions from & make any arrangements with debtors or any of them."

In 1908 P. Brothers, being insolvent, called their creditors together, & a scheme was arranged whereby a co. was formed who should take over certain properties of the firm for realisation & should issue debentures to the creditors at the rate of 25*s.* for each £1 of their debts in full discharge thereof. The bank in accordance with this scheme applied for debenture stock on a form which contained an express agreement by appcts. to accept such debenture stock in full discharge of all their claims against P. Brothers. The amount of the debt in respect of which debenture stock was to be issued was £1,900. This amount was arrived at by deducting from the total debt due to the bank £1,630 the value put upon securities held by them on the property of the firm; but no deduction was made on account of P.'s mtges. The interest on the debenture stock not having been paid, the bank threatened to sell the property comprised in P.'s mtges. In an action by P. for reconveyance of the mtged. property on the footing that nothing was due on the mtge.:—*Held:* as to the £1,900 the debt was completely discharged & therefore the surety's property was released, but as to the £1,630 the debt remained unpaid, although the principal debtor was released; consequently by the express terms of the mtge. deeds the surety's property continued liable.—PERRY *v.* NATIONAL PROVINCIAL BANK OF ENGLAND, [1910] 1 Ch. 464; 79 L. J. Ch. 509; 102 L. T. 300; 54 Sol. Jo. 233, C. A.

3448. Devise of equity of redemption—In part discharge of mortgage debt—Acceptance of devise.]—There may be an acceptance of a devise of an equity of redemption by the mtgee. from the mtgor. in part satisfaction of the mtge. debt.—DAVIE *v.* MESSITER (1861), 3 L. T. 874; 7 Jur. N. S. 349, L. C.

3449. Acceptance of other security—In lieu of mortgage.]—MILN *v.* WALTON, No. 3629, *post.*

3450. —— —— Securities given by personal representative.]—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* SHEFFIELD & SCOTT (1888), 4 T. L. R. 629.

3451. —— —— —— Debentures of company formed by mortgagor.]—An insolvent trader assigned his business, to a one man co., for shares & debentures, & induced a *bonâ fide* mtgee. of his business who was no party to the formation of the co. to accept some of the debentures in substitution for his mtge. Shortly afterwards the trader became bkpt., & his assignment to the co. was set aside as fraudulent under 13 Eliz. c. 5, & as an act of bkpcy. under Bkpcy. Act, 1883 (c. 52), s. 4 (1) (*b*). The co.'s debentures were worthless:—*Held:* the mtgee. was not remitted to his original position & had no charge on the assets of the bkpt., but only had a right to prove in the bkpcy for the damages he had sustained by reason of debtor's fraud in inducing him to accept worthless debentures for his security.—*Re* GOLDBURG, *Ex p.* SILVERSTONE, [1912] 1 K. B. 384; 81 L. J. K. B. 382; 105 L. T. 959; 19 Mans. 44.

SUB-SECT. 3.—RELEASE.

See Sect. 3, *post.*

SECT. 3.—RELEASE OF SECURITY OR DEBT.

SUB-SECT. 1.—IN GENERAL.

See DEEDS, Vol. XVII., p. 229, Nos. 439–442.

3452. What amounts to release—Cancellation of mortgage—Deed necessary to reconvey legal estate.]—If a mtgee. cancels a mtge., & it is found so in his possession, it is as much a release as

released from their liability under the mtge. in consequence of payment of a portion of the debt or otherwise, does not affect mtgors. not parties to the arrangement, if their rights against the co-mtgors. are likely to be prejudiced thereby, has no application, where the mtgor., who is not a party, is sought to be made liable only for his just share of the debt.—VENKATACHELLA CHETTY *v.* SRINIVASA VARADA CHARIAR (1905), I. L. R. 28 Mad. 555.—**IND.**

PART XIV. SECT. 3, SUB-SECT. 1.

k. ***What amounts to release—Memorandum in handwriting of deceased mortgagor.***]—Pltf., as administratrix, sought to foreclose a mtge. made by deft., who alleged that deceased mtgee. had delivered to him a memorandum, signed by him, as follows: "The mtge. which I hold of W. J. W., bearing date, etc., for £200, is not payable to my heirs, exors. or administrators after

Sect. 3.—*By release of security or debt: Sub-sects.* 1 & 2, *A. & B.*]

cancelling a bond, but it does not convey or revest the estate in the mtgor., for that must be due by some deed (LORD HARDWICKE, C.).—HARRISON *v.* OWEN (1738), 1 Atk. 520; West *temp.* Hard. 527; 26 E. R. 328, L. C.

3453. —— Delivery of mortgage deed—As donatio mortis causâ.]—A delivery up of mtge. deeds does not cancel the debt; but the delivery up of such deeds & of a bond, given at the time of the mtge., for the purpose of releasing or acquitting the debt, in case the donor should not recover from the illness with which she was then afflicted, is, it seems, an effectual *donatio mortis causâ.*—HURST *v.* BEACH (1820), 5 Madd. 351; 56 E. R. 929.

Annotations:—**Mentd.** Lord *v.* Sutcliffe (1828), 2 Sim. 273; Guy *v.* Sharp (1833), Coop. *temp.* Brough. 80; Thorne *v.* Rooke (1841), 2 Curt. 799; Suisse *v.* Lowther (1843), 2 Hare, 424; Kirk *v.* Eddowes (1844), 3 Hare, 509; Lee *v.* Pain (1845), 4 Hare, 201; Roch *v.* Callen (1848), 6 Hare, 531; Sayre *v.* Cramp (1854), 2 W. R. 438; Thurnall *v.* Rayner (1856), 4 W. R. 404; Gordon *v.* Anderson (1858), 32 L. T. O. S. 119; Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525.

3454. —— Memorandum in handwriting of deceased mortgagor—Mortgage debt "not to be enforced."]—H. was indebted to testator for £550 on a mtge., with covenant for repayment, dated 1834, & on a promissory note for £100, dated 1836. H. paid interest on these sums to testator down to his death in 1840, & subsequently to the exors. of testator to 1846. An administration suit being instituted, a memorandum was discovered in the handwriting of testator, but which had never been propounded for probate, in which the two sums were mentioned in one sum, with the words in the margin, "not to be enforced":—*Held:* this was not sufficient evidence of a release by testator to relieve H. from accounting for these sums to testator's estate.—PEACE *v.* HAINS (1853), 11 Hare, 151; 17 Jur. 1091; 68 E. R. 1226.

Annotation:—**Mentd.** *Re* Milnes, Milnes *v.* Sherwin (1885), 53 L. T. 534.

3455. Right of trustee mortgagee to release security—On receipt of whole purchase-money.]—A trustee mtgee. has power to release part of his security on receipt of the whole of the purchase-money produced thereby.

Where, therefore, trust legacies were charged by will upon freehold & leasehold properties, & the persons entitled to the property subject to the charge, one of them being also the trustee of the legacies, agreed to sell to a purchaser a leasehold house & premises forming part of the estate on the terms that the whole purchase-money of this leasehold should be received by the trustee of the legacies:—*Held:* the vendors could make a good title to the leasehold house & premises freed & discharged from the trust legacies.—*Re* MORRELL & CHAPMAN'S CONTRACT, [1915] 1 Ch. 162; 84 L. J. Ch. 191; 112 L. T. 545; 59 Sol. Jo. 147.

SUB-SECT. 2.—RIGHT TO RECONVEYANCE.

A. When Arising.

See, now, Law of Property Act, 1925 (c. 20), s. 115.

3456. Tender of mortgage debt—Whether mortgagee entitled to time to peruse reconveyance.]—Where there are covenants in a deed of assignment on the part of a mtgee., he may refuse to take the principal & interest, though tendered, till he has had an opportunity of advising with his attorney whether he may safely execute.—WILTSHIRE *v.* SMITH (1744), 3 Atk. 89; 26 E. R. 854; *sub nom.* WILSHAW *v.* SMITH, 9 Mod. Rep. 441, L. C.

Annotations:—**Consd.** Webb *v.* Crosse, [1912] 1 Ch. 323; Graham *v.* Seal (1918), 88 L. J. Ch. 31. **Reid.** Joy *v.* Birch (1836), 10 Bli. N. S. 201; Jenkins *v.* Jones (1860), 2 Giff. 99.

3457. —— —— Notice of tender to mortgagee.]—It is the duty of a mtgee. on being paid by the mtgor. the principal, interest, & costs due upon the mtge., & contemporaneously with such payment, to hand to the mtgor. the title deeds together with

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my death.—I. W. W.":—*Held:* the memorandum, even if there were no suspicious circumstances about it, would not operate as a release of the mtge. either at law or in equity, & plff. was entitled to a decree.—WOODWORTH *v.* WOODWORTH (1879), R. E. D. 337.—**CAN.**

l. —— *Registered memorandum.*]—DALGETY & CO., LTD. *v.* BENISS, [1921] S. A. S. R. 252.—**AUS.**

m. —— *Conveyance to third party by mortgagor—By arrangement with mortgagee.*]—A. mortgaged land in fee to B., & before the time for redemption expired, on an arrangement with B., A. conveyed these same lands in fee to C., in full satisfaction of the debt secured by mtge. No reconveyance from B. to A. was proved. C. went into possession & held for about thirteen years, when B. made a conveyance in fee of the same premises to D., claiming the title through this mtge.:—*Held:* D. was not entitled to recover in ejectment, & if necessary a reconveyance from B. to A. might be presumed.—DOE d. MCLEAN *v.* WHITESIDES (1836), 5 O. S. 92.—**CAN.**

n. ——.]—HAAR *v.* HENLEY (1859), 18 U. C. R. 494.—**CAN.**

o. *Necessity for execution.*]—BROWN *v.* OSBORNE (1861), 11 C. P. 500.—**CAN.**

p. *Necessity for seal.*]—A discharge of mtge., not being under seal, is not an estoppel as to the fact of payment.—BIGELOW *v.* STALEY (1864), 14 C. P. 276.—**CAN.**

q. *Mortgagee bound by terms.*]—A mtgor. wrote to his mtgee. stating that a sale had been arranged of a portion of the property for £100, & urging him to release the same for that sum. Subsequently the mtgee. released upon receipt of £50 only:—*Held:* the mtgor. was entitled to credit on his mtge. for £100 mentioned in his letter.—BALL *v.* JARVIS (1864), 10 Gr. 568.—**CAN.**

r. ——.]—*Re* LAND TITLES ACT (Sask.), [1918] 2 W. W. R. 937.—**CAN.**

t. ——.]—A mtgee. by releasing, without any payment, part of the mtge. security, deprives himself of the right of demanding payment from one who was liable under the mtge. covenant but who was not the owner of the land at the time of the release or a consenting party to the release.—GRONLUND *v.* CURLETTE (Alta.), [1924] 2 D. L. R. 582; [1924] 2 W. W. R. 337.—**CAN.**

a. *Agreement to release.*]—MCKENZIE *v.* YIELDING (1865), 11 Gr. 406.—**CAN.**

b. ——.]—SPINNEY *v.* PUGSLEY (1880), R. E. D. 398.—**CAN.**

c. *Presumption of release from circumstances.*]—Although not distinctly shown, yet the circumstances induced the belief that the arrangement embraced a discharge of the mtge. debt, & the ct. dismissed a bill of foreclosure filed by the mtgee. several years afterwards.—FAIR *v.* TATE (1867), 13 Gr. 160.—**CAN.**

d. ——.]—CAYLEY *v.* MCDONALD (1868), 14 Gr. 540.—**CAN.**

e. *Right to release after lapse of time.*]—BELL *v.* BROWN (*circa* 1873), R. E. D. 20.—**CAN.**

f. *Statutory discharge not affected by minor alteration.*]—SAYLES *v.* BROWN (1880), 28 Gr. 10.—**CAN.**

g. *Unintentional discharge—Intention immaterial.*]—MAY *v.* SIEVEWRIGHT (1893), N. B. Dig. 314.—**CAN.**

h. *Power of court to grant release—On payment into court of amount & interest—Absence of mortgagee.*]—*Re* GALLAGHER (1912), 22 O. W. R. 226; 3 O. W. N. 1302; 5 D. L. R. 729.—**CAN.**

k. —— —— ——.]—*Re* WORTHINGTON & ARMANO (1915), 7 O. W. N. 837; 33 O. L. R. 191.—**CAN.**

aa. *Necessity for registration.*]—*Re* LAND TITLES ACT (Sask.), [1918] 3 W. W. R. 348.—**CAN.**

bb. *Registration by one of three executors of mortgagee.*]—A mtge. was made to J. C. in 1884. In 1889, after J. C.'s death, a discharge of the mtge. signed by only one of the three exors. to whom probate of J. C.'s will was granted, was registered:—*Held:* the discharge was valid under the enactment in force at the time of registration.—*Re* STAIR & YOLLES, [1925] 3 D. L. R. 1201; 57 O. L. R. 338.—**CAN.**

PART XIV. SECT. 3, SUB-SECT. 2.—A.

cc. *Payment of mortgage debt—Payment into court—No dispute as to amount owing.*]—In ejectment on a mtge., the ct. will not order the proceedings to be stayed, & a reconveyance to be executed on payment into ct. by deft. of the money due upon the bond & mtge.,

a duly executed reconveyance of the mtged. property.

Where therefore a mtgor. who had given notice to the mtgee. that he would attend for that purpose made a tender of the amount due upon the mtge. & the mtgee. refused to hand over to the mtgor. then & there an indorsed reconveyance of the mtged. property with the title deeds, & an action for redemption was subsequently brought by the mtgor., the ct. refused to allow the mtgee. interest & costs subsequent to the date of the tender & ordered him to pay the costs of the action.—ROURKE *v.* ROBINSON, [1911] 1 Ch. 480; 80 L. J. Ch. 295; 103 L. T. 895.

Annotations:—**Distd.** Webb *v.* Crosse, [1912] 1 Ch. 323. **Reld.** Edmondson *v.* Copland, [1911] 2 Ch. 301; Graham *v.* Seal (1918), 88 L. J. Ch. 31.

3458. —— —— **Tender conditional on execution of reconveyance—Persons to whom tender made not conveying parties.**]—WEBB *v.* CROSSE, No. 4029, *post*.

3459. —— —— —— **Previously seen & approved by mortgagee.**]—After due notice of his intention to pay off a mtge. an offer by the mtgor. at the appointed time & place to pay in cash the full sum due on the mtge. for principal, interest & costs, he having the cash with him at the time, conditionally upon the mtgee. then & there executing a reconveyance of the mtged. premises. which he has previously seen & approved, & handing over the title deeds, is a good legal tender to stop interest running; & it is the duty of the mtgee. then & there to execute the reconveyance & hand over the title deeds, & his failure to do so will render him liable to pay the costs of an action to redeem.—GRAHAM *v.* SEAL (1918), 88 L. J. Ch. 31; 119 L. T. 526, C. A.

3460. Payment of mortgage debt—Payment into court—Largest sum to which debt can amount.]—Estates being conveyed, among other purposes, to secure a debt of comparatively small amount, the ct. will not direct a release upon payment into ct. of the largest sum to which the debt can in probability amount; the incumbrancer being entitled to retain the security till the debt is discharged.—POSTLETHWAITE *v.* BLYTHE (1818), 2 Swan. 256; 36 E. R. 613, L. C.

Annotations:—**Apld.** Richards *v.* Platel (1841), Cr. & Ph. 79. **Consd.** Bank of New South Wales *v.* O'Connor (1889), 14 App. Cas. 273.

3461. —— **Mortgagee must reconvey at once.**]—The mtgee. has a right to make use of all his remedies against the mtgor. for obtaining payment of his money; but as soon as the mtge. money has been fully paid, he is bound to deliver over the mtged. estate to the mtgor. (ROMILLY, M.R.).—PALMER *v.* HENDRIE (1859), 27 Beav. 349; 54 E. R. 136.

Annotations:—**Consd.** Kinnaird *v.* Trollope (1888), 39 Ch. D. 636; Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451. **Reld.** Walker *v.* Jones (1865), 3 Moo. P. C. C. N. S. 397; Rudge *v.* Richens (1873), L. R. 8 C. P. 358; *Re* Hoyles, Row *v.* Jagg, [1911] 1 Ch. 179.

3462. —— ——.]—Every mtgor. has the right to have a reconveyance of the mtged. property on payment of the money due upon the mtge.; & every mtgee. is charged with the duty of making such reconveyance upon such payment being made.—WALKER *v.* JONES (1866), L. R. 1 P. C. 50; 3 Moo. P. C. C. N. S. 397; 35 L. J. P. C. 30; 14 L. T. 686; 12 Jur. N. S. 381; 14 W. R. 484; 16 E. R. 151, P. C.

Annotations:—**Consd.** Kinnaird *v.* Trollope (1888), 39 Ch. D. 636. **Foll.** Rourke *v.* Robinson, [1911] 1 Ch. 480. **Consd.** Graham *v.* Seal (1918), 88 L. J. Ch. 31. **Reld.** *Re* Oxford & Canterbury Hall Co. (1870), 5 Ch. App. 433; Rudge *v.* Richens (1873), L. R. 8 C. P. 358; Ellis' Trustee *v* Dixon Johnson, [1924] 2 Ch. 451; Aman *v.* Southern Ry., [1926] 1 K. B. 59.

3463. —— ——.]—ROURKE *v.* ROBINSON, No. 3457, *ante*.

B. Persons entitled to Reconveyance.

3464. Mortgagor.]—PALMER *v.* HENDRIE, No. 3461, *ante*.

3465. ——.]—BRECON CORPN. *v.* SEYMOUR, No. 3493, *post*.

3466. ——.]—WALKER *v.* JONES, No. 3462, *ante*.

3467. ——.]—ROURKE *v.* ROBINSON, No. 3457, *ante*.

3468. —— **After assignment of equity of redemption—When sued on personal covenant—Conveyance subject to subsisting equities.**]—Mtgor. who has absolutely assigned his equity of redemption in the mtged. property, acquires, when sued by the mtgee. upon the covenant to pay principal & interest contained in the mtge., a new right to redeem, & is entitled upon paying the mtge. money to a reconveyance to himself, subject to any equity of redemption vested in any other person, & he is so entitled, even if after the assignment of the equity of redemption the assignee has further charged the property either to the original mtgee. or to some other person. In 1870 defts. mortgaged property to pltfs. to secure £12,000 & interest, & entered into the usual covenants for payment of principal & interest. In 1872 defts., for value, absolutely assigned their equity of redemption to B., & he covenanted to indemnify them against the £12,000 & interest. In 1875 B. further charged the property to pltf. to secure £8,000 & interest, covenanting that it should not be redeemable except upon payment of the £8,000 as well as the £12,000. B. afterwards became insolvent, & the property having depreciated in value, pltfs. brought an action against defts. on the covenant contained in the mtge. of 1870, to recover the £12,000 & interest. In a special case stated in the action:—*Held*:

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together with the costs of the action, where the whole amount secured by the mtge. is not admitted to be due.—DOE d. MCKENZIE *v.* RUTHERFORD (1842), 7 U. C. R. 172.—**CAN.**

o. ——.]—RUMOHR *v.* MARX (1882), 3 O. R. 167.—**CAN.**

p. ——.]—GILLEN *v.* ROMAN CATHOLIC EPISCOPAL CORPN. OF DIOCESE OF KINGSTON IN CANADA (1884), 7 O. R. 146.—**CAN.**

q. ——.]—So long as the covenant to pay endures, the mtgor. is liable to pay when sued by the mtgee.; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land.—FORSTER *v.* IVEY (1900), 20 C. L. T. 402; 32 O. R. 175.—**CAN.**

r. —— *Without notice of assignment.*]—LAWTON *v.* HOWE (1883), N. B. Dig. 311.—**CAN.**

t. —— *Fraudulent assignment obtained by solicitor.*]—MCCORMICK *v.* COCKBURN (1900), 31 O. R. 436.—**CAN.**

a. *Not while debt outstanding.*]—WELLS *v.* RITCHIE (1839), 6 O. S. 13.—**CAN.**

b. *Absolute title passed to mortgagee—Intention to create mortgage.*]—LIVINGSTON *v.* WOOD (1880), 27 Gr. 515.—**CAN.**

c. ——.]—PETERKIN *v.* MCFARLANE (1881), 9 A. R. 429.—**CAN.**

d. —— ——.]—SHERLOCK *v.* WALLACE (1902), 1 O. W. R. 54, 393.—**CAN.**

e. *Appeal from order directing reconveyance.*]—BOLL *v.* NORTH BRITISH INVESTMENT CO. (1887), 12 P. R. 284.—**CAN.**

PART XIV. SECT. 3, SUB-SECT. 2.—B.

3464 i. *Mortgagor.*]—NELSON *v.* ROBERTSON (1850), 1 Gr. 530.—**CAN.**

3464 ii. ——.]—A mtgor. or other party entitled to the equity of redemption has a right to obtain at his own expense from the mtgee. a reconveyance of the mtged. premises, including a covenant against incumbrances.—MCLENNAN *v.* MCLEAN (1879), 27 Gr. 54.—**CAN.**

3464 iii. ——.]—Where pltf., the mtgor. of certain lands, sold the same for a sum in excess of the amount of his mtge., the purchaser raising such excess by a mtge. to deft., the original mtgee., pltf. was held entitled to an assignment of the mtge. made by him on his paying deft. merely the amount due thereon.—WHEELER *v.* BROOKE (1894), 26 O. R. 96.—**CAN.**

Sect. 3.—By release of security or debt: Sub-sect. 2, B. & C.; sub-sect. 3, A., B., C. & D.]

pltfs. were entitled to judgment for the £12,000 & interest, but only upon the terms that they reconveyed the property to defts. subject to such equity of redemption as might be subsisting in any person or persons other than defts. themselves. —KINNAIRD *v.* TROLLOPE (1888), 39 Ch. D. 636; 57 L. J. Ch. 905; 59 L. T. 433; 37 W. R. 234; 4 T. L. R. 697; *subsequent proceedings* (1889), 42 Ch. D. 610.

Annotations:—**Consd.** Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451. **Refd.** *Re* Hoyles, Row *v.* Jagg, [1911] 1 Ch. 179.

3469. Trustees of mortgagor—Cestuis que trust not necessary parties.]—Mtgor. having conveyed his equity of redemption to trustees on trusts for sale, by a deed of even date, referred to in the conveyance, declared the trusts of the money produced by the sale, which trusts were first to pay expenses of the trusts, & then debts generally, & afterwards to divide the remainder of the money among several persons.

The trustees having sold the estate, made application, & paid the mtgee. the debt & interest due to him, applied to him, to convey the legal estate to a trustee for them. The mtgee., acting by the advice of counsel, refused to execute the deed, unless the *cestuis que trust* were made parties: —*Held:* that they were not necessary parties.— ANGIER *v.* STANNARD (1834), 3 My. & K. 566; 3 L. J. Ch. 216; 40 E. R. 216

3470. Persons claiming under mortgagor.]—Equitable mtgees. by deposit of title deeds took, at the time of the mtge., a conveyance from the mtgor. of the legal estates in the mtged. properties. They were subsequently paid off, when they surrendered to the mtgor. his title deeds, but did not give up the conveyance. They afterwards claimed a right to retain it as against his subsequent mtgees. of the same properties, on the ground that it comprised other property besides those specifically mtged. to them:—*Held:* those claiming under the mtgor. were entitled to a reconveyance of the legal estates in the specifically mtged. properties.—YOUNG *v.* WHITCHURCH & ELLESMERE BANKING CO. (1867), 37 L. J. Ch. 186; 17 L. T. 406.

3471. Person interested in equity of redemption—From whom payment of mortgage debt accepted.]—(1) Mtgee. is not bound to convey the legal estate in the mtged. property & to deliver up the title deeds to a person from whom he has accepted payment of principal, interest, & costs, if that person has only contracted to purchase a part of the mtged. estate, & has not accepted the title.

(2) On tender by a person having a partial interest giving right to redeem the mtgee. is bound to convey, but the conveyance should reserve the equities of the other persons interested.—PEARCE *v.* MORRIS (1869), 5 Ch. App. 227; 39 L. J. Ch. 342; 22 L. T. 190; 18 W. R. 196, L. C.

Annotations:—*As to* (1) **Consd.** Tarn *v.* Turner (1888), 57 L. J. Ch. 452. *As to* (2) **Apld.** Hall *v.* Heward (1886), 32 Ch. D. 430; Kinnaird *v.* Trollope (1888), 39 Ch. D. 636; Tarn *v.* Turner (1888), 39 Ch. D. 456. **Consd.** Corbett *v.* National Provident Institution (1900), 17 T. L. R. 5. **Refd.** Magnus *v.* Queensland National Bank (1887), 36 Ch. D. 25; Flint *v.* Howard, [1893] 2 Ch. 54.

Mortgagee with notice of subsequent incumbrances.]—*See* Sub-sect. 2, C., *post.*

C. Mortgagee with Notice of Subsequent Incumbrancers.

3472. Not compelled to reconvey to mortgagor—Until satisfied that incumbrancers paid off.]—A legal mtgee. of an estate, who has received notice of subsequent equitable mtges., cannot be compelled, upon being paid off his mtge. debt by the mtgor., to hand over to him the title deeds of the estate & to execute a reconveyance to him in the ordinary form without being satisfied that the subsequent equitable mtges., of which he has received notice, have been paid off.—CORBETT *v* NATIONAL PROVIDENT INSTITUTION (1900), 17 T. L. R. 5.

3473. —— Without consent of incumbrancers.]—Mtgee. is not safe in transferring to the mtgor. or his nominee without the consent of puisne incumbrancers, of whose charges he has notice. Conveyancing Act, 1881 (c. 41), s. 15 & Conveyancing Act, 1882 (c. 39), s. 12, have not altered the pre-existing rule in this respect.—*Re* MAGNETA TIME CO., LTD., MOLDEN *v.* THE CO. (1915), 84 L. J. Ch. 814; 113 L. T. 986.

SUB-SECT. 3.—RIGHT TO DELIVERY OF TITLE DEEDS.

A. When Arising.

3474. On payment of amount due.]—ROURKE *v.* ROBINSON, No. 3457, *ante.*

3475. Whether on tender of amount due—Tender properly made & improperly refused—Order for payment into court.]—(1) Where there has been an equitable deposit of deeds to secure repayment of a loan an action of detinue cannot be maintained therefor prior to repayment. The remedy is by a suit for redemption, or by summary application for the deeds on terms of substituting for the security a sum of money equal to the amount secured with a proper margin. In cases of legal or equitable mtge., a tender properly made & improperly rejected is not equivalent to payment.

LORD ELDON said: "I take it to be contrary to the whole course of proceeding in this ct. to compel a creditor to part with his security till he has received his money. Nothing but consent can authorise me to take the estate from pltf. before payment." To some extent the strictness of that rule has been relaxed in modern times, & it is now the practice, where a proper tender has been made & refused, to make an order giving the mtgor. liberty to pay into ct. a stated sum sufficient to cover the amount of principal & interest & the probable costs of the suit, & then upon payment into ct., but not till then, the mtgee. is required by the order to deliver up the title deeds. It would be contrary to equity to order a mtgee. to deliver up the title deeds of property on which he has a security upon any other terms (LORD MACNAGHTEN).

(2) [A mtgee.] is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct & may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably (LORD MACNAGHTEN).

(3) If a mtgee. rejects a tender he rejects it at his own risk & in an action for redemption he may be refused his costs in consequence, or may even be ordered to pay costs (LORD MACNAGHTEN).— BANK OF NEW SOUTH WALES *v.* O'CONNOR (1889), 14 App. Cas. 273; 58 L. J. P. C. 82; 60 L. T. 467; 38 W. R. 465; 5 T. L. R. 342, P. C.

Annotations:—*As to* (1) **Refd.** Edmondson *v.* Copland (1911), 105 L. T. 8. *As to* (3) **Foll.** Graham *v.* Seal (1918), 88 L. J. Ch. 31.

3476. —— Notice of tender given.]—ROURKE *v.* ROBINSON, No. 3457, *ante.*

3470 1. *Persons claiming under mortgagor.*]—JONES *v.* SHORTREED (1907), 9 O. W. R. 795; 14 O. L. R. 142.—CAN.

3477. ——— ———.]—GRAHAM *v.* SEAL, No. 3459, *ante*.

B. Persons Entitled to Delivery.

3478. Mortgagor.]—DOBSON *v.* LAND, No. 3486, *post*.

3479. ———.]—BRECON CORPN. *v.* SEYMOUR, No. 3493, *post*.

3480. ———.]—*Re* WADE & THOMAS, No. 3485, *post*.

3481. ———.]—ROURKE *v.* ROBINSON, No. 3457, *ante*.

3482. ——— **Or assignee.**]—CHILTON *v.* CARRINGTON, No. 3492, *post*.

3483, ——— ———.]—GREENOUGH *v.* LITTLER, No. 3489, *post*.

3484. Person interested in equity of redemption—From whom payment of mortgage debt accepted.]—PEARCE *v.* MORRIS, No. 3471, *ante*.

C. What Documents must be Delivered.

3485. All documents relating to mortgaged property—Copy of draft deed of reconveyance.]—(1) A firm of solrs. acting for a number of sets of persons, five in all, interested in moneys secured upon mtge., on the mtge. being paid off, in their bill of costs charged the exors. of the mtgor. with the cost of five copies of the draft deed of transfer, & the taxing master having disallowed the charge for four such copies:—*Held:* the taxing master was right in allowing the costs of only one copy.

(2) Mtgee. or transferee of a mtge., though entitled to keep a fair copy of the draft deed for his own protection until the transaction is completed, has no right to keep copies of the mtge. deed or deed of transfer after he is paid off, but whatever copies he has are as a general rule copies paid for by the mtgor., & to be delivered up to him when he pays off the mtge.—*Re* WADE & THOMAS (1881), 17 Ch. D. 348; 50 L. J. Ch. 601; 44 L. T. 599; 29 W. R. 625.

3486. Trust deeds transferring mortgages—Mortgagee retaining by consent—Must furnish attested copies—& covenant for production.]—(1) Where mtgees. declared trusts of the mtge. moneys, & transferred the mtges. by the same deeds:—*Held:* on redemption, the trust deeds must be delivered to the mtgor., or in the case of one of them, being a marriage settlement, the mtgees. retaining it, by his consent, were bound to furnish him, at their expense, with attested copies & a covenant for production.

(2) Mtgor. had, before mtgees entered into possession, indorsed to the mtgees. bills of exchange for the arrears of interest. The bills fell due after possession was taken & were dishonoured:—*Held:* the interest was in arrear when possession was taken so as to preclude the mtgor. from claiming to have the accounts of the receipts of the mtgees. taken with rests.—DOBSON *v.* LAND (1851), 4 De G. & Sm. 575; 64 E. R. 963.

3487. Former mortgage & reconveyance between same parties.]—When there has been an assignment of a mtge., & a reconveyance to mtgor., & then a remortgage to the same mtgee., upon the usual order on redemption for delivery up of deeds relating to the title of the mtged. property, the original mtge. & reconveyance, as they form links in the title, ought to be delivered up.—HUDSON *v.* MALCOLM (1862), 10 W. R. 720.

3488. Securities deposited by way of equitable mortgage.]—A banker holding securities which have been deposited with him by way of equitable mtge., must deliver up the securities upon being paid the amount covered by the deposit.—*Re* GROSS, *Ex p.* ADAIR (1871), 24 L. T. 198; *affd.* on other points, *sub nom. Re* GROSS, *Ex p.* KINGSTON, 6 Ch. App. 632, L. JJ.

Annotations:—**Refd.** Cuthbert *v.* Robarts, Lubbock (1908), 100 L. T. 62. **Mentd.** Bailey *v.* Finch (1871), L. R. 7 Q. B. 34; Bailey *v.* Johnson (1871), L. R. 6 Exch. 279; *Re* Mawson, *Ex p.* Hardcastle (1881), 44 L. T. 523; Greenwell *v.* National Provincial Bank (1883), Cab. & El. 56; Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243; Bank of New South Wales *v.* Goulburn Valley Butter Co. Proprietary, [1902] A. C. 543.

3489. Judgment against mortgagor on personal covenant.]—In a foreclosure action personal judgment for the mtge. debt being given against the mtgor., & a foreclosure judgment against the mtgor. & a purchaser from him:—*Held:* the purchaser, in the event of his redeeming the mtge., would be entitled to have transferred to him the personal judgment against the mtgor., as being one of the securities held by the mtgee. for the debt.—GREENOUGH *v.* LITTLER (1880), 15 Ch. D. 93; 42 L. T. 144; 28 W. R. 318.

Annotation:—**Mentd.** Aman *v.* Southern Ry., [1926] 1 K. B. 59.

D. Mortgagee's Right of Detention.

See, now, Law of Property Act, 1925 (c. 20), s. 96(2).

3490. Where mortgage deed comprises other property—One trust deed transferring several mortgages—Conditions entitling mortgagor to mortgage deed.]—Three mtges. on the estates of distinct mtgors. were vested in the same trustees by one deed, which was prepared in the master's office, in a suit for executing the trust. Upon the application of one of the mtgors. for liberty to redeem & to have his mtge. deed delivered up to him:—*Held:* he was entitled to have the deed, on his executing to the trustees a covenant to produce it, & paying the costs of the application; & the costs properly incurred in preparing & settling the covenant should be borne by the mtgee.'s estate.—CAPPER *v.* TERRINGTON (1844), 1 Coll. 103; 13 L. J. Ch. 239; 8 Jur. 140; 63 E. R. 340.

3491. ——— **Reconveyance of undivided moiety—Covenant by mortgagee for production.**]—Mtgee. being decreed to reconvey one undivided moiety of an estate included in his security, a part of the debt being satisfied, to the mtgor., & being entitled to retain the title deeds of the whole estate, is bound to covenant to produce the deeds.—YATES *v.* PLUMBE (1854), 2 Sm. & G. 174; 65 E. R. 354.

3492. For payment of sum not covered by mortgage—Sum due on trading account.]—By agreement between A., a publican, & B., a brewer, it was stipulated that A. should deposit the lease of his house with B., as security for an advance of £150, for which A. had given B. a promissory note, payable on demand; & B. engaged not to call upon A. to pay the £150, or any part thereof, for two years, upon condition that the interest thereon should be duly paid half-yearly, that the rent should be paid agreeably to the covenants of the lease, & that A. should take of B. all the beer consumed upon the premises, & pay for it every twenty-eight days. The agreement then provided that, in case of failure on the part of A. to perform any or either of the above conditions, after fourteen days' notice, B. should be at liberty immediately to put the note in force, &, if not paid, with interest, to sell the lease; & that all expenses attending such sale, together with the principal & interest due on the note, should be deducted from the amount realised by such sale, as also any account that might be then due & owing for beer:—*Held:* the power of sale not having been exercised, on payment, or tender, of the principal & interest due on the note, A. or his assignee was entitled to maintain detinue for the lease; & B. could not set up a lien on it

Sect. 3.—By release of security or debt: Sub-sect. 3, D.; sub-sect. 4, A. & B.; sub-sect. 5, A.]

for a balance due on the beer account.—CHILTON *v.* CARRINGTON (1854), 15 C. B. 95; 3 C. L. R. 138; 24 L. J. C. P. 10; 24 L. T. O. S. 94; 1 Jur. N. S. 89; 3 W. R. 17; 139 E. R. 355.

Annotations:—**Reld.** *Re* Newton, *Ex p.* National Provincial Bank of England (1896), 12 T. L. R. 619. **Mentd.** Bank of New South Wales *v.* O'Connor (1889), 14 App. Cas. 273.

3493. —— Sum due on another mortgage—Where no right to tack.]—Defts. were the holders of two mtges., made by the corpn. of Brecon, upon their land. One was made before Municipal Corporations Act, 1835 (c. 76), & the other subsequently. This latter mtge. comprised in addition lands acquired under a local Act. Defts. brought an action to obtain payment of the money due on both mtges. The corpn. then paid into ct. the sum due on the mtge. made before Municipal Corporations Act, 1835 (c. 76). Defts., pltfs. in the action, took this money out of ct. & proceeded with the action upon the second mtge., & obtained a judgment. Defts. refused to reconvey the lands or deliver up the title deeds in the first mtge.; & upon a bill by the corpn.:—*Held:* (1) the first mtge. was satisfied before any judgment was obtained, & no right to tack had arisen; & (2) defts. must reconvey the lands & deliver up the title deeds to the corpn.—BRECON CORPN. *v.* SEYMOUR (1859), 26 Beav. 548; 28 L. J. Ch. 606; 5 Jur. N. S. 1069; 7 W. R. 380; 53 E. R. 1010.

3494. Mortgagee with notice of subsequent incumbrances—Right to detain title deeds—Until satisfied that incumbrances paid off.]—CORBETT *v.* NATIONAL PROVIDENT INSTITUTION, No. 3472, *ante.*

In cases of acceptance of composition by mortgagee.]—*See* Nos. 3445, 3446, *ante.*

SUB-SECT. 4.—STATUTORY JURISDICTION TO STAY PROCEEDINGS ON PAYMENT IN DISCHARGE.

A. Action for Possession.

See Mortgage Act, 1733 (c. 20), ss. 1, 3; C. L. P. Act, 1852 (c. 76), ss. 219, 220.

3495. Jurisdiction to restore possession on payment—Mortgagor not having appeared—Possession recovered against tenant to mortgagor.]—If a mtgee. recovers possession of the mtged. premises under a judgment in an undefended ejectment, the ct. has no jurisdiction to restore, on payment of the debt, interest, & costs, the possession to the mtgor., who has not appeared. But if the recovery is had against a tenant of the mtgor., the ct. will set aside the judgment, & let in the mtgor. to defend as landlord, that he may be in a condition to apply to the ct. to stay proceedings on the terms of the statute.—DOE d. TUBB *v.* ROE (1813), 4 Taunt. 887; 128 E. R. 581.

3496. Agreement by mortgagor to convey equity of redemption to mortgagee.]—The ct. will not stay the proceedings in an ejectment brought by a mtgee. against a mtgor. on the latter paying principal, interest & costs, if the latter has agreed to convey the equity of redemption to the mtgee.—GOODTITLE d. TAYSUM *v.* POPE (1797), 7 Term Rep. 185; 101 E. R. 923.

3497. Application for reconveyance & delivery of deeds—Claim by mortgagee disputing right to redeem.]—This ct. will not interfere under Mortgage Act, 1733 (c. 20), upon an application by the mtgor. to compel the mtgee. to reconvey the mtged. premises, where the right to redeem is disputed upon the affidavits.—GOODTITLE d. FISHER *v.* BISHOP (1827), 1 Y. & J. 344; 148 E. R. 703.

3498. —— —— What claim must show.]—GOODTITLE d. LEON *v.* LONSDOWN (1797), 3 Anst. 937; 145 E. R. 1087.

Annotation:—**Folld.** Doe d. Harrison *v.* Louch (1849), 18 L. J. Q. B. 278.

3499. —— —— ——.]—On an application by a mtgor. under Mortgage Act, 1733 (c. 20), s. 1, a notice under sect. 3, merely stating that the mtgee. insists that the mtgor. has no right to redeem, & that the premises are charged with other sums than those appearing on the face of the mtge., without showing on the face of it, or in the affidavit accompanying it, some reason why the mtgor. has no right to redeem, or what the other sums chargeable on the premises are, is insufficient.—DOE d. HARRISON *v.* LOUCH (1849), 6 Dow. & L. 270; 18 L. J. Q. B. 278; 13 L. T. O. S. 240; 14 Jur. 853.

3500. —— —— When claim may be made.]—On applications under Mortgage Act, 1733 (c. 20), s. 1, to stay proceedings in an action on a bond, securing the principal & interest payable on a mtge., if the mtgee. seeks to obtain interest for the interval between granting the rule & the actual payment of the principal into his hands, he must make his claim to it, at the time of discussing the rule, for he cannot afterwards sustain it.—JORDAN *v.* CHOWNS (1840), 8 Dowl. 709.

3501. —— —— ——.]—To a rule calling upon the mtgee., under Mortgage Act, 1733 (c. 20), s. 1, to show cause why, upon payment of principal, interest & costs, he should not reconvey the mtged. premises & deliver up deeds, etc., it is an answer that the mtgee. has delivered a notice in writing under sect. 3, that he disputes the right of the mtgor. to redeem; although the delivery of such notice has been since the rule was obtained.—FILBEE *v.* HOPKINS (1848), 6 Dow. & L. 264.

Annotation:—**N. F.** Doe d. Harrison *v.* Louth (1849), 18 L. J. Q. B. 278.

3502. —— —— What payment by mortgagor must include.]—Where by a mtge. deed, the principal sum was advanced by the mtgee. to the mtgor., for three years from the date of the deed, the interest to be payable quarterly, & the deed contained a proviso, that, if default should be made in payment of interest on any of the days appointed for the same, the mtgee. might sell the premises assigned:—the mtgor. having made default in the payment of one quarter's interest, the mtgee. brought ejectment, the ct. refused to stay the proceedings on payment of the arrears of interest, & costs, by the mtgor., as the case did not fall within the provisions of Mortgage Act, 1733 (c. 20), as the principal sum became payable on default of payment of the interest.—GOODTITLE d. GREEN *v.* NOTITLE (1826), 11 Moore, C. P. 491; 4 L. J. O. S. C. P. 187.

3503. —— —— ——.]—In ejectment by mtgee., the ct., or a judge, under the C. L. P. Act, 1852 (c. 76), can include in the condition of an order for stay of proceedings, the payment of the costs of abortive attempt at sale under a power.—DOWLE *v.* NEALE (1862), 10 W. R. 627.

3504. —— Must be made by party actually entitled to redeem—Defendant in action.]—A party applying for assistance of the ct., under Mortgage Act, 1733 (c. 20), to compel a mtgee. to reconvey the mtged. premises, must be the very party entitled to redeem, & also deft. in the ejectment, if such an action has been commenced. An authorised agent is not within the provisions of the statute.—DOE d. HURST *v.* CLIFTON (1836),

4 Ad. & El. 809; 2 Har. & W. 285; 6 L. J. K. B. 274; 111 E. R. 988.

B. Action on Personal Covenant.

See Mortgage Act, 1733 (c. 20), ss. 1, 3; C. L. P. Act, 1852 (c. 76), ss. 219, 220.

3505. Jurisdiction to order reconveyance & delivery of deeds.]—Rule granted for delivering up mtge. deeds on payment of debt, interest & costs, in an action of covenant.—ANON. (1818), 2 Chit. 264.

Annotation:—**Reld.** Smeeton *v.* Collier (1847), 17 L. J. Ex. 57.

3506. ——.]—A first mtgee. brought an action on the covenant in the mtge. deed, havig receiv ed notice from a second mtgee. not to deliver up the deeds. Mtgor. applied to the ct. to compel pltf., under Mortgage Act, 1733 (c. 20), to reconvey the premises upon payment of the principal, interest, & costs; & the ct. held it to be a case within statute, & made the order.—DIXON *v.* WIGRAM (1832), 2 Cr. & J. 613; 1 L. J. Ex. 233; 149 E. R. 258.

Annotation:—**Folld.** Smeeton *v.* Collier (1847), 1 Exch. 457.

3507. ——.]—An action of covenant on a mtge. deed is within Mortgage Act, 1733 (c. 20), & under that statute a judge at chambers has power to make an order for the delivering up of the deed.—SMEETON *v.* COLLIER (1847), 1 Exch. 457; 17 L. J. Ex. 57; 154 E. R. 194; *sub nom.* STREETON *v.* COLLIER, 2 New Pract. Cas. 463; 10 L. T. O. S. 227.

Annotations:—**Folld.** Smith *v.* Bell (1851), 17 L. T. O. S. 96. **Refd.** Sutton *v.* Rawlings (1849), 3 Exch. 407. **Mentd.** Clarke *v.* East India Co. (1848), 2 Saund. & C. 319; *Re* Davidson, *Ex p.* Davidson, [1899] 2 Q. B. 103; Cope *v.* Bennett, [1911] 2 Ch. 488.

3508. ——.]—SMITH *v.* BELL (1851), 17 L. T. O. S. 96.

SUB-SECT. 5.—MODE OF RECONVEYANCE.

A. Freeholds.

See Law of Property Act, 1925 (c. 20), ss. 76 (1) (F), 115 (1), (6).

3509. Mortgage by married woman—Reserving equity of redemption to husband & his heirs—Reconveyance to wife & her heirs.]—A wife agreed to join her husband in the mtge. of her real estate. She acknowledged the mtge. deed, which reserved the equity of redemption to the husband & his heirs:—*Held:* in the absence of any agreement to vary the estate, rights & interest of the wife, she had no intention of altering the descent, & the husband, on paying off the mtge., was not justified in taking a reconveyance of the real estate to himself & his heirs; & a reconveyance, by his heir-at-law, was directed to the wife & her heirs.—STANSFIELD *v.* HALLAM (1859), 29 L. J. Ch. 173; 1 L. T. 179; 5 Jur. N. S. 1334; 8 W. R. 34.

3510. Equity of redemption in settlement—Reconveyance to tenant for life—Subject to trusts of settlement.]—Where property, subject to a mtge., is settled, the tenant for life is entitled to redeem, & to have the legal estate conveyed to himself, but must hold the equity of redemption subject to the trusts of the settlement.

The same principle applies where the security is in the form of a trust for sale.

He, paying off the debt as tenant for life, would do so for his own benefit, & would be entitled to a reconveyance as in *Aynsly* v. *Reed*, No. 923, *ante*, under which he would hold the equity of redemption, subject to the trusts of the settlement (PAGE WOOD, V.-C.).—WICKS *v.* SCRIVENS (1860), 1 John. & H. 215; 70 E. R. 726.

Annotation:—**Reld.** Pearce *v.* Morris (1869), 5 Ch. App. 227.

3511. Change in title to equity of redemption—All interested parties concurring in deed—Mortgagor's right to insist on recitals—Incorrect recitals.]—A man cannot be required to execute a deed containing incorrect recitals. Where all the persons interested in an equity of redemption concur in the deed of reconveyance, the mtgee. cannot insist on having the dealings with the equity of redemption stated in the deed, or object to the deed because it contains no recitals whatever.—HARTLEY *v.* BURTON (1868), 3 Ch. App. 365; 16 W. R. 876, L. C.

3512. Reconveyance to person interested in equity of redemption—Reservation of subsisting equities.]—PEARCE *v.* MORRIS, No. 3471, *ante*.

3513. Married woman trustee—Reconveyance as feme sole—Trustee Act, 1893 (c. 53), s. 16.]—In a mtge. deed of freehold property executed only by the mtgees. the Christian name of one of the mtgees. was incorrect. After execution the incorrect name was erased & the correct name substituted therefor. The consideration for the mtge., being moneys advanced by trustees, was, subsequently to 1893, repaid to the sole surviving trustee, a married woman, who reconveyed the property to the mtgors. Upon a vendor & purchaser summons for a declaration that a good title had been shown to the property in question:—*Held:* the married woman on payment of the mtge. money became a bare trustee for the mtgors., & could therefore convey as a *feme sole* under above sect.—*Re* HOWGATE & OSBORN'S CONTRACT, [1902] 1 Ch. 451; 71 L. J. Ch. 279; 86 L. T. 180.

Annotation:—**Apld.** *Re* West & Hardy's Contract (1903), 52 W. R. 188.

3514. —— —— ——.]—Two trustees for sale of whom one was a lady sold land & next day took a mtge. for the purchase for a sum expressed to belong to them on a joint account. The lady having afterwards married she & her co-mtgee. transferred the mtge. & on a sale by a person deriving title under the transferees the purchaser objected that the deed of transfer had not been executed by the husband of the married woman or acknowledged by her. The vendor replied that being a mtgee. she could convey as a *feme sole*:—*Held:* the purchaser's requisition had been satisfactorily answered.—*Re* WEST & HARDY'S CONTRACT, [1904] 1 Ch. 145; 73 L. J. Ch. 91; 89 L. T. 579; 52 W. R. 188; 48 Sol. Jo. 100.

Reconveyances by building societies.] — *See* BUILDING SOCIETIES, Vol. VII., pp. 480–483, 484, Nos. 160–174, 181.

PART XIV. SECT. 3, SUB-SECT. 5.—A.

f. *Receipt.*]—*Held:* a receipt for 1*s.* in full of damages & costs, in an action in debt, founded upon the covenant in a mtge. did not operate as a reconveyance of the estate so as to defeat an ejectment brought subsequently upon the same security.—CARTER *v.* MCLAURIN (1859), 8 C. P. 460.—**CAN.**

g. *Parties to reconveyance.*]—A final order for foreclosure having been obtained, some time afterwards the mtgor. filed a bill to redeem, & the ct. had opened the foreclosure & granted redemption:—*Held:* on a motion by the mtgee. for payment out of ct. of the mtge. money, it was unnecessary for the wife of the mtgee. to join in the conveyance to the mtgor. to bar dower.—SIMPSON *v.* SIMPSON (1864), 1 Ch. Ch. 265.—**CAN.**

h. *Vesting order.*]—A mtgor., who has in the course of a foreclosure suit duly redeemed the property, is not obliged to accept a simple discharge of the mtge., but may, at his opinion, have a vesting order of the property.—ELLIS *v.* ELLIS (1863), 1 Ch. Ch. 257.—**CAN.**

k. ——.]—Where pltf., who was the mtgee. in fee of lands sold under the decree, had become the purchaser thereof, an order vesting the lands in pltf. as such purchaser, although acquiesced in by defts., was refused.—BOWEN *v.* FOX (1866), 1 Ch. Ch. 387.—**CAN.**

Sect. 3.—By release of security or debt: Sub-sect. 5, B., C., D., E. & F.; sub-sect. 6, A., B. & C. (a).]

B. Copyholds.

See, now, Law of Property Act, 1922 (c. 16), s. 128 (1), Sched. XII. (1) (*f*); Law of Property Act, 1925 (c. 20), s. 115.

See COPYHOLDS, Vol. XIII., pp. 114 *et seq.*

C. Leaseholds.

See Law of Property Act, 1925 (c. 20), ss. 5 (2), 115, 116, 207; Sched. I., Part VIII.

3515. Mortgage by sub-demise—Surrender by unstamped endorsement.]—Deft. produced a mtge. for years by deed from pltf.'s ancestor upon which was this indorsement: "Received Mrs. M. O. £500 on the within recited mtge. & all interest due to this day; & I do hereby release to the said M. O. & discharge the mtge. premises from the said term of five hundred years." On a case reserved:—*Held:* (1) these words amounted to a surrender of the term; such surrender might be by note in writing by Stat. of Frauds; (2) a note in writing was not required to be stamped.—FARMER d. EARL *v.* ROGERS (1755), 2 Wils. 26; Bull. N. P. 110; 95 E. R. 666.

Annotations:—As to (1) **Refd.** Doe d. Courtail *v.* Thomas (1829), 9 B. & C. 288; Doe d. Egremont *v.* Courtenay (1848), 11 Q. B. 702. *Generally,* **Refd.** Beck d. Fry *v.* Phillips (1772), 5 Burr. 2827; Hodges *v.* Drakeford (1805), 1 Bos. & P. N. R. 270.

3516. —— Necessity for surrender—Cetuis que trust not necessary parties.]—Testator by his will, after directing all his debts to be paid out of his estates & effects, & after charging his real & personal estate with the payment of an annuity to his wife, gave all his real estates to B. in fee simple, & directed that as soon as his son J. should attain twenty-one, B. should cause a just valuation to be made of testator's several estates, & that the same should be allotted into three separate shares & divided equally amongst his three children, J., P., & M., & testator directed that J. should have the first refusal of all his leasehold messuage, called X., or of the moiety or share of the T. estate & that his son P. should take such of the two estates as should remain after J. should have made his choice, & according to such choice made by his two sons, testator gave the same estates to each of them, their heirs & assigns for ever, or for & during all his estate & interest therein respectively. At the date of the will & death of testator, a satisfied mtge. term in the T. estate was outstanding in Y., the mtge. money & all interest having been paid to Y. by testator, during his lifetime:—*Held:* Y. was bound to execute a deed of surrender of the satisfied term to B. & the *cestuis que trust* were necessary parties thereto.—POOLE *v.* PASS (1839), 1 Beav. 600; 8 L. J. Ch. 305; 48 E. R. 1074.

Annotation:—**Mentd.** Turner *v.* Collins (1871), L. R. 12 Eq. 438.

3517. —— —— Second mortgagee paid off.]—A vendor's predecessor in title of leasehold property created two mtges. for all his unexpired term except the last day. The second mtge. was paid off during the continuance of the first mtge., & a receipt was given by the second mtgee.:—*Held:* Satisfied Terms Act, 1845 (c. 112), did not apply, & the purchaser was entitled to demand surrender by the second mtgee. before he completed.—*Re* MOORE & HULM'S CONTRACT, [1912] 2 Ch. 105; 81 L. J. Ch. 503; 106 L. T. 330; 56 Sol. Jo. 89.

See, now, Law of Property Act, 1925 (c. 20), s. 116.

D. Other Property.

3518. Stock—Mortgaged by joint mortgagors—Reassignment must be to all.]—G., a stockbroker, who was one of three trustees & acted as broker to the trust, proposed to his co-trustees to sell B. stock belonging to the trust & re-invest in N. E. stock. The three trustees then, on Jan. 27, 1882, executed a transfer of the B. stock for a nominal consideration to two persons who were officers of a bank of which G. was a customer, G. gave the transfer to the bank as security for a loan, by them to him & the transfer was registered. G., in Feb. 1882, paid off the loan & on Feb. 15, the bank transferred the stock to purchasers from G., & without giving any notice to G.'s co-trustees, allowed him to receive the purchase-money. He invested it in N. E. stock in his own name. In 1883 he sold the N. E. stock & misappropriated the proceeds. Shortly after the sale of the B. stock G. had given an account to his co-trustees showing the sale of B. stock & a re-investment in N. E. stock & in 1884 he rendered another account in which he represented the N. E. stock as still forming part of the trust funds. In 1885 he absconded. The co-trustees remembered hardly anything about the transaction, but admitted the genuineness of their signatures of the deed of transfer:—*Held:* the bank had occasioned the loss to the trust estate by allowing the purchase-money to come to the hands of G. who had no authority to receive it, & whom they had no sufficient reason to believing to have authority to receive it, & the bank must therefore make it good at the suit of the co-trustees, although the co-trustees had been negligent in not seeing that the N. E. stock was registered in the joint names of the trustees.—MAGNUS *v.* QUEENSLAND NATIONAL BANK (1888), 37 Ch. D. 466; 57 L. J. Ch. 413; 58 L. T. 248; 36 W. R. 577; 4 T. L. R. 248, C. A.

Annotation:—**Refd.** Thorne *v.* Heard, [1894] 1 Ch. 599.

3519. Loan of roubles—Subsequent fall in rate of exchange—Redemption on payment of principal & interests in paper roubles—& costs in English money.]—Pltfs., a British bank, obtained from defts., a Russian bank, on the security of certain bonds, a loan of 750,000 Russian roubles, in June 1914, when the currency was based on the gold rouble. At that time 750,000 Russian roubles represented £78,206, but subsequently they became almost valueless owing to the issue of paper currency uncovered by gold. In an action for redemption:—*Held:* the loan was repayable in paper roubles issued by the authority of the Russian Govt. & in use at the material date, & upon payment of the principal & interest in roubles & of the costs in English money pltfs. were entitled to redemption.—BRITISH BANK FOR FOREIGN TRADE, LTD. *v.* RUSSIAN COMMERCIAL & INDUSTRIAL BANK (1921), 38 T. L. R. 65.

Annotations:—**Apprvd.** *Re* Chesterman's Trusts, Mott *v.* Browning, [1923] 2 Ch. 466. **Distd.** Anderson *v.* Equitable Life Assce. Soc. of United States (1926), 134 L. T. 557.

See, generally, MONEY & MONEY LENDING, pp. 164 *et seq., ante.*

E. Satisfaction of Registered Charges.

See Land Registration Act, 1925 (c. 21), ss. 35, 46, 147; Land Registration Rules, 1925, rr. 151, 267; Land Charges Act, 1925 (c. 22), ss. 10 (8), 19 (1) (*b*); Land Charges Rules, 1925, r. 10.

PART XIV. SECT. 3, SUB-SECT. 5.—E. 1. *General rule.*]—A certificate of discharge is of no effect to revest the legal estate until registered.—*Re* MOORE (1878), 8 P. R. 471.—CAN. m. ——.]—In respect to discharges of mtges., what the Registry Act makes tantamount to a reconveyance is the certificate of discharge & the registra-

3520. Registered charge of underlease—Determination of underlease—Rectification of register.]—PANTLIN *v.* EVANS, [1911] W. N. 80.

F. Stamps.

See Stamp Act, 1891 (c. 39), Sched. I., "Mortgage etc.," "Receipt," Exemptions (11); *see, generally*, REVENUE.

3521. Receipt for all money secured—Not chargeable as a discharge.]—On an indenture securing redeemable debenture stock an instrument was indorsed, which was signed by the trustees for the debenture-holders, acknowledging that all the debenture stock secured by the within written indenture & all interest thereon had been redeemed, paid off, & satisfied:—*Held:* this was not a "discharge" within the meaning of that term in sub-heading 5 of the heading "Mortgage" in the schedule to Stamp Act, 1891 (c. 39), & it was therefore not chargeable with *ad valorem* duty, but it was merely a receipt, & being indorsed on a duly stamped instrument it was exempt from duty under the eleventh exemption to the heading "Receipt" in the same schedule.—FIRTH & SONS, LTD. *v.* INLAND REVENUE COMRS., [1904] 2 K. B. 205; 73 L. J. K. B. 632; 91 L. T. 138; 52 W. R. 622; 20 T. L. R. 447; 48 Sol. Jo. 460.

SUB-SECT. 6.—VESTING ORDER INSTEAD OF RECONVEYANCE.

A. Where Mortgagee an Infant.

See, now, Trustee Act, 1925 (c. 19), s. 46.

3522. Order vesting estate in devisees of equity of redemption—Subject to legacies charged.]—The legal estate being in the infant heir of a mtgee., the ct., on the petition of the devisees of the equity of redemption, ordered the estate to vest in them. *Re* ELLERTHORPE (1854), 2 Eq. Rep. 1146; 18 Jur. 669.

3523. Order vesting estate in executors—To reconvey to mortgagor.]—Mtgee. in fee of real estate having died intestate as to the mtged. premises, which descended on his death to his infant heir, the ct., upon petition by his exors., one of whom was a married woman, made, an order under Trustee Act, 1850 (c. 60), vesting the legal estate in petitioners, to such uses as they should appoint, & in default, to the use of petitioners in fee, subject to the equity of redemption, in order to enable them to reconvey to the mtgor. without the necessity of having the deed acknowledged by the married woman under Fines & Recoveries Act, 1833 (c. 74).—*Re* POWELL (1857), 4 K. & J. 338; 6 W. R. 136; 70 E. R. 141.

3524. Petition for appointment of person to convey—Not served on infant.]—A petition under Trustee Act, 1850 (c. 60), for the appointment of a person to convey in the place of an infant heir of deceased mtgee. need not to be served upon the infant.—*Re* WILLAN (1861), 9 W. R. 689.

B. Where Mortgagee a Lunatic or Person of Unsound Mind.

See LUNATICS, Vol. XXXIII., pp. 222, 239, Nos. 1311–1321, 1563.

C. Under Trustee Acts.

(a) In General.

See, now, Trustee Act, 1925 (c. 19), ss. 44, 50, 67 (1), 70, Sched. II.

3525. Jurisdiction to make vesting order.]—The ct. has jurisdiction to make a vesting order of the legal estate in mtged. lands where a transfer of the mtge. debt has been ordered by the ct., & it is doubtful whether the trustees of the debt have power to convey the legal estate.—*Re* HUGHES'S SETTLEMENT TRUSTS (1865), 2 Hem. & M. 695; 71 E. R. 633.

3526. —— Successive mortgages by sub-demise—Assignment of lessee's interest.]—Leases were

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tion of it, not the execution of the certificate merely.—*Re* MUSIC HALL BLOCK, DUMBLE *v.* MCINTOSH (1884), 8 O. R. 225.—**CAN.**

n. ——.]—A mtge. of a leasehold interest in land is effectually discharged & the mtgor.'s estate revested by the execution & registration of a certificate of discharge in the form prescribed by the Registry Act.—*Re* RISK, [1925] 1 D. L. R. 537; 56 O. L. R. 134.—**CAN.**

o. *Evidence of discharge.*]—*Semble:* the certificate of the registrar of the discharge of a mtge., indorsed on the mtge. deed, is a sufficient evidence of a reconveyance under the statute, without showing the execution of the discharge itself.—DOE d. CROOKSHANK *v.* HUMBERSTONE (1841), 6 O. S. 103.—**CAN.**

p. ——.]—Pltf. purchased at sheriff's sale deft.'s interest in certain lands, &, on ejectment brought in 1856, deft. produced a mtge. executed by one B., under whom he had gone into possession to secure repayment of £28 in Oct. 1846. This mtge. had been satisfied, as was proved by the mtgee., but no discharge had been registered:—*Held:* the jury should have been directed to presume a reconveyance, & pltf. should recover.—COLLINS *v.* DEMPSEY (1857), 14 U. C. R. 393.—**CAN.**

q. ——.]—*Held:* from the entry by the registrar the certificate, which was not produced, must be assumed to have been in proper form, & such entry had the force of a reconveyance.—LEE *v.* MORROW (1866), 25 U. C. R. 604.—**CAN.**

r. *Duty of registrar.*]—The registrar is bound to register or file a certificate of discharge of a portion of the lands contained in a mtge.—*Re* RIDOUT (1852), 2 C. P. 477.—**CAN.**

t. ——.]—*Re* RIDDELL (1907), 1 Sask. L. R. 24; 7 W. L. R. 301.—**CAN.**

a. —— *Discharge executed under power of attorney.*]—*Re* LAND TITLES ACT, *Re* REGISTRATION OF A POWER OF ATTORNEY (Sask.), [1918] 2 W. W. R. 947.—**CAN.**

b. *Omission in affidavit.*]—The registrar having recorded in certificate of discharge of mtge. under C. S. U. C., c. 89, upon an affidavit which did not state the place of execution, as required by the statute:—*Held:* though he should properly have refused to register it, yet being registered, it was effectual as a reconveyance of the legal estate to the mtgor.—MAGRATH *v.* TODD (1866), 26 U. C. R. 87.—**CAN.**

c. *Loss of mortgage deed—Protection on payment & registration of discharge.*]—MACAULEY *v.* BOYLE (1875), 25 C. P. 239.—**CAN.**

d. *Certificate by survivor of several mortgagees.*]—The registration of a certificate given by the survivor of several mtgees., upon payment in money of the mtge. debt, effectually discharges the mtge. & revests the legal estate.—DILKE *v.* DOUGLAS (1880), 5 A. R. 63.—**CAN.**

e. *Conveyance of equity on same day as registration of discharge.*]—The equity of redemption conveyed by a certain deed was subject to a mtge., a discharge of which was registered on the same day as the deed:—*Held:* the deed must be assumed to have been delivered before it was registered, & the discharge of the mtge. on registration operated as a reconveyance to the grantee.—IMPERIAL BANK OF CANADA *v.* METCALFE (1886), 11 O. R. 467.—**CAN.**

f. *Name in affidavit differing from that in mortgage.*]—A discharge of mtge. was signed by "Eliza" Switzer, whereas the mtge. purporting to be discharged was made to "Elizabeth" Switzer:—*Held:* there was no valid objection to the discharge, for the identity of the person signing was established by affidavit to the satisfaction of the registrar.—*Re* CLARKE & CHAMBERLAIN (1889), 18 O. R. 270.—**CAN.**

g. *Omission in certificate.*]—*Re* BILLS & SIMS, [1923] 3 D. L. R. 726; 53 O. L. R. 57.—**CAN.**

h. *Breach of statutory requirements—No intention to mislead.*]—Where a person entitled to receive mtge. money gave a statutory discharge therefor, not in conformity with all the requirements of Registry Act, 1914, but not calculated to mislead:—*Held:* to operate as a valid reconveyance.—*Re* WOOD & ROSENTHAL, [1923] 4 D. L. R. 1130; 52 O. L. R. 502.—**CAN.**

k. *Reconveyance from date of registration of discharge.*]—*Re* ROSS & COLCLOUGH (Ont.), [1925] 4 D. L. R. 424.—**CAN.**

PART XIV. SECT. 3, SUB-SECT. 5.—F.

l. *Partial reconveyance—Ad valorem duty does not apply.*]—MUNRO (M'KIMMIE'S TRUSTEES) *v.* INLAND REVENUE COMRS. (1895), 23 R. (Ct. of Sess.) 232.—**SCOT.**

Sect. 3.—*By release of security or debt: Sub-sect.* 6, *C.* (*a*), (*b*) *&* (*c*); *sub-sect.* 7. *Sect.* 4: *Sub-sects.* 1 *&* 2, *A.*]

granted to A. for certain terms of years. He subdemised to C. for the terms, less ten days. C. mortgaged to E. co. for securing money, & subdemised for the last-mentioned terms, less one day, with a power of sale, & covenanted to assign the last day of each term to a purchaser. The mtgees., E. co., sold to G., & assigned the mtge. terms. G. then bought of A. the improved ground rents, & took an assignment of the leases granted to him. C., the mtgor., being abroad, G. petitioned under the Trustee Act, 1850 (c. 60), that the ct. would declare the last day of each of the terms, created by the underlease to him, vested in petitioner; but the ct., dismissed the petition.—*Re* PROPERT'S PURCHASE (1853), 22 L. J. Ch. 948; *sub nom. Re* PROBERT'S ESTATE, 1 W. R. 237, L. JJ.

Annotation:—**Consd.** *Re* Carpenter (1854), Kay, 418.

3527. —— Joint mortgagee out of jurisdiction.]—The ct. has no jurisdiction under Trustee Act, 1850 (c. 60) to appoint a person to convey lands in mtge. for the estate therein of a joint mtgee. out of the jurisdiction of the ct.—*Re* OSBORN'S MORTGAGE TRUSTS (1871), L. R. 12 Eq. 392; 40 L. J. Ch. 706; 25 L. T. 151.

Annotation:—**Reld.** *Re* Barber's Mortgage Trusts (1888), 58 L. T. 303.

3528. —— —— Mortgagees also trustees.]—One of three joint mtgees., who were trustees, went abroad, & in his absence the mtge. was paid off, & by a deed, to which he, with the other trustees, was named a party, but which he never executed, the debt & security, except the legal estate outstanding in him, were vested in the transferee of the mtge. Afterwards a new trustee was by deed appointed a trustee in his place:—*Held:* the neglect or refusal of the old trustee to convey the outstanding legal estate brought the case within the Trustee Acts, & the ct. had jurisdiction under those Acts to vest in the transferee the outstanding legal estate.—*Re* WALKER'S MORTGAGE TRUSTS (1876), 3 Ch. D. 209.

3529. Appointment of person to convey—Refusal of mortgagee to reconvey.]—Where a mtgee. refuses, upon the payment off of the mtge. debt, to reconvey the mtged. property, the ct. may appoint a master to execute the reconveyance on his behalf.—HOLME *v.* FIELDSEND (1911), 55 Sol. Jo. 552.

Mortgagee an infant.]—*See* Sub-sect. 6, A., *ante.*

(*b*) *Where Heir-at-Law out of Jurisdiction or cannot be found.*

See, now, Trustee Act, 1925 (c. 19), ss. 44, 50, 70.

3530. Jurisdiction to make vesting order.]—The ct., under 1 Will. 4, c. 60, s. 8, has jurisdiction to appoint a person to reconvey mtged. premises, in the place of the heir of the mtgee., it not being known who is such heir.—*Re* WILLIAMS, *Ex p.* BIRD (1840), 9 Sim. 642; 9 L. J. Ch. 353; 4 Jur. 912; 59 E. R. 506.

3531. ——.]—Vesting order made in the exors. of deceased mtgee. in fee, whose heir-at-law was residing out of the jurisdiction.—*Re* LEA'S TRUST (1858), 6 W. R. 482.

3532. ——.]—Mtgee. in fee died intestate as to his real estate, & his heir was not known. The ct. has no authority under 1 Will. 4, c. 60, s. 8, to appoint a person to reconvey the estate to the party entitled to the equity of redemption on his payment of the mtge. money to the exor. of the mtgee.—*Re* GODDARD (1832), 1 My. & K. 25; 2 L. J. Ch. 16; 39 E. R. 590.

Annotations:—**Reld.** *Re* Newman (1834), 4 L. J. Ch. 124; *Re* Dearden (1835), 3 My. & K. 508; *Ex p.* Payne (1836), 6 Sim. 645.

3533. ——.]—In consideration of money lent, real estate was conveyed to the lender, his heirs & assigns, upon trust, in case the principal money & interest should be repaid by a given day, for the borrower, his heirs or assigns; but, in case default should be made, then upon trusts for sale; & the trusts of the purchase-money were declared to be for payment of the principal money, interest & costs, &, subject thereto for the borrower, "his exors., administrators or assigns." Default having been made:—*Held:* the trust of the surplus being for the borrower, "his exors., administrators or assigns," & not for him, "his heirs or assigns," the deed operated to convert the property as between his real & personal representatives. It was, therefore, more than "merely a security for money"—more, that is, than a "mtge," as defined by Trustee Act, 1850 (c. 60), s. 2, it was a deed of "trust" within the meaning of sect. 15 of the Act; & the lender having died intestate, & it being impossible to find his heir, the ct. had power to make a vesting order under that sect.—*Re* UNDERWOOD (1857), 3 K. & J. 745; 30 L. T. O. S. 90; 5 W. R. 866; 69 E. R. 1310.

Annotations:—**Folld.** *Re* Keeler's Mortgage Trust (1862), 1 New Rep. 44. **Reld.** *Re* Grange, Chadwick *v.* Grange, [1907] 1 Ch. 313.

3534. —— Mortgagee in possession before death.]—The ct. may, under the Trustee Act, 1850 (c. 60), s. 9, make an order vesting in the exors. of a deceased mtgee. in fee, who has died intestate as to trust estate, the legal estate outstanding in the heir-at-law out of the jurisdiction of the ct., though the mtgee. had before her death been in the receipt of the rents & profits of the mtged. property.—*Re* SKITTER'S MORTGAGE TRUST (1856), 4 W. R. 791.

(*c*) *Where No Heir-at-Law or Personal Representative.*

See, now, Trustee Act, 1925 (c. 19), ss. 44, 50, 70.

3535. Jurisdiction to make vesting order.]—Although 1 & 2 Vict. c. 69, s. 3, provides that 11 Geo. 4, & 1 Will. 4, c. 60, & 4 & 5 Will. 4, c. 23, shall not be construed to extend to any case of a person dying seised of any land by way of mtge., other than such as are in that Act expressly provided for, yet that sect. does not repeal any part of the two other Acts; &, therefore, the cases of a mtgee. dying, leaving an infant heir, or where it is uncertain whether he left an heir, are not affected by the first-mentioned Act.—*Re* WILSON'S ESTATE, *Re* GATHORNE (1838), 8 Sim. 392; 8 L. J. Ch. 46; 59 E. R. 156; *sub nom. Re* GAYTHORNE, 8 L. J. Ch. 45.

Annotation:—**Distd.** *Re* Williams, *Ex p.* Bird (1840), 9 Sim. 426.

3536. ——.]—M., mtgee. in fee, after directing payment of debts, etc., devised all her real & personal estate to B. upon certain trusts. M. was illegitimate, & had died without issue. The ct. made an order, vesting the legal estate in the mtged. premises in a purchaser, the money having been paid off.—*Re* MINCHIN'S ESTATE (1854), 2 W. R. 179.

3537. ——.]—Mtgee., having a power of sale upon non-payment of the money, with a trust to hand over the residue to the mtgor., entered into possession, & subsequently died, giving his general estate to his exor., but leaving no heir-at-law. The ct. made a vesting order under Trustee Act, 1850 (c. 60), s. 15.—*Re* KEELER'S MORTGAGE TRUST

(1862), 1 New Rep. 44; 32 L. J. Ch. 101; 9 Jur. N. S. 95; 11 W. R. 62.

3538. —— Mortgagee trustee of mortgage debt.]—Mtgee., who was trustee of the mtge. debt, devised & bequeathed his residuary, real, & personal estate to his wife, without referring to his trust estate. The mtge. was transferred by the extrix. of the original mtgee., & reconveyed by the transferee to the mtgors. on payment of the mtge. debt. On a sale by the mtgors. the purchasers took the exception that the extrix. had no legal estate, but that at the first mtgee.'s death the legal estate passed to his heir-at-law. The mtgors. presented a petition for a vesting order:—*Held:* the legal estate did not pass under the will, & vesting order granted.—*Re* SMITH'S ESTATE (1876), 4 Ch. D. 70; 35 L. T. 890; 25 W. R. 294.

3539. —— Uncertainty as to personal representative—Will disputed.]—Mtgee. of freehold land died, having made a will by which he appointed exors. The validity of the will was disputed by testator's widow, & an action to establish the will had been commenced in the Probate Div., but had not yet been tried. The mtge. debt had been paid:—*Held:* it was, within Trustee Act, 1893 (c. 53), s. 29 (*e*), uncertain who was the personal representative of deceased mtgee., & the ct. had jurisdiction to make an order vesting the mtged. land in the mtgor.—*Re* COOK'S MORTGAGE, [1895] 1 Ch. 700; 64 L. J. Ch. 624; 72 L. T. 388; 43 W. R. 461; 39 Sol. Jo. 331; 13 R. 391.

SUB-SECT. 7.—COSTS OF RECONVEYANCE.

See Part XVIII., *post.*

SECT. 4.—BY MERGER.

SUB-SECT. 1.—MERGER AT LAW.

See, now, Law of Property Act, 1925 (c. 20), s. 185.

3540. General rule.]—In all cases where the freehold comes to the term, there the term is extinguished, & therefore if a man mortgage his reversion to the lessee for years & after perform the condition, yet the lease for years is utterly extinguished (PERYAM, J.).—MOUNSON & WEST'S CASE (1588), Gouldsb. 92; 1 Leon. 132; 75 E. R. 1017.

3541. ——.]—A mtge. term was created in 1720, for one thousand years. The exors. of the mtgee. took an assignment of another mtge. term on same premises, created in 1725, for five hundred years, & assigned both the terms to the trustees of a lady who was entitled to them, under E.'s will:—*Held:* the term for one thousand years was merged in the reversionary term for five hundred years.—STEPHENS *v.* BRIDGES (1821), 6 Madd. 66; 56 E. R. 1015.

SUB-SECT. 2.—MERGER IN EQUITY.

A. In General.

See, generally, EQUITY, Vol. XX., pp. 503 *et seq.*; Law of Property Act, 1925 (c. 20), s. 185.

3542. General rule.]—A. devises certain premises, subject to a mtge. of £3,500, to his three daughters, to be divided equally; one dies; mtgee. bequeaths to the two survivors all the money due on the mtge. & the interest, so that it does not altogether exceed £4,000, & if it does not amount to £4,000, then to be made up; the other daughter dies leaving all her real & personal estate to the third:—*Held:* the charge was merged in the inheritance.—PRICE *v.* GIBSON (1762), 2 Eden, 115; 28 E. R. 840, L. C.

3543. ——.]—HOOD *v.* PHILLIPS, No. 3622, *post.*

3544. ——.]—A., on her father's death, became seised of real estates as his heir, & entitled under his marriage settlement to a sum which the trustees of the settlement had lent him on mtge. of the estates. Testatrix, by a deed executed shortly before her will, charged the estates & the sum secured on them with an annuity, & otherwise showed that she intended the mtge. to be kept on foot, for the purpose, at least, of securing the annuity. By her will she devised the estates, after the payment of her own debts, & after her father's affairs should have been settled, to B., & died intestate as to her residuary personal estate:—*Held:* as against her next of kin, the incumbrance created on the estate, by her father, must be considered to have merged in it.—SWABEY *v.* SWABEY (1846), 15 Sim. 106; 60 E. R. 557.

Annotation:—**Refd.** *Re* French-Brewster's Settlements, Walters *v.* French-Brewster, [1904] 1 Ch. 713.

3545. ——.]—SWINFEN *v.* SWINFEN (No. 3), No. 3620, *post.*

3546. ——.]—TYRWHITT *v.* TYRWHITT, No. 3617, *post.*

3547. —— Estate subject to executory devise.]—If a tenant of an estate, subject to an executory devise, pays off a charge upon the estate, & the executory devise afterwards takes effect, his exors. will be entitled to be repaid the amount of the charge.—DRINKWATER *v.* COMBE (1825), 2 Sim. & St. 340; 3 L. J. O. S. Ch. 178; 57 E. R. 376.

Annotations:—**Consd.** Astley *v.* Milles (1827), 1 Sim. 298. **Apld.** *Re* Pride, Shackell *v.* Colnett, [1891] 2 Ch. 135. **Refd.** Cole *v.* Stutely (1842), 6 Jur. 314.

3548. —— Title in dispute.]—Where a person who claims to be owner of an equity of redemption, but whose title to a share of the property is disputed in a pending action pays off the mtge. & takes a reconveyance, the ct. will presume an

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PART XIV. SECT. 4, SUB-SECT. 1.

m. *Whether applicable to land—Mortgaged under Land Transfer Act.*]—The legal doctrine of merger does not apply to land held under Land Transfer Act.—BEVAN *v.* DOBSON (1906), 26 N. Z. L. R. 69.—**N.Z.**

PART XIV. SECT. 4, SUB-SECT. 2.—A.

3542 i. *General rule.*]—WOODRUFF *v.* MILLS (1860), 20 U. C. R. 31.—**CAN.**

3542 ii. ——.]—CAMERON *v.* GIBSON (1889), 17 O. R. 233.—**CAN.**

3542 iii. ——.]—MACKLIN *v.* DOWLING (1890), 19 O. R. 441.—**CAN.**

3542 iv. ——.]—JAMES *v.* SMYTH (Man.), [1918] 3 W. W. R. 318.—**CAN.**

3542 v. ——.]—In the absence of express statutory declaration, the question whether or not there is a merger is a question of intention, express or implied.—ETHIER *v.* NOLLE, [1924] 2 D. L. R. 322; [1924] 1 W. W. R. 1133; 18 Sask. L. R. 213.—**CAN.**

3542 vi. ——.]—Whether a mtge., paid off, has been kept alive or extinguished, depends upon the intention of the parties.—MOHESH LAL *v.* MOHANT BAWAN DASS (1883), I. L. R. 9 Calc. 961; 13 C. L. R. 221; L. R. 10 Ind. App. 62.—**IND.**

3542 vii. ——.]—GANGADHARA *v.* SIVARAMA (1884), I. L. R. 8 Mad. 246.—**IND.**

3542 viii. ——.]—Where property subject to two mtges. is sold & the purchaser who undertook to pay off both the mtges. with the purchase money, discharges the prior mtge. only, he cannot, as against the subsequent mtgee. claim to stand in the shoes of the prior mtgee. His right to use the prior mtge. as a shield is based on a presumed intention to keep alive the prior mtge. for his own benefit & such presumption is rebutted when he undertakes to discharge both the mtges.—GOVINDASAMI TEVAN *v.* DORASAMI PILLAI (1910), I. L. R. 34 Mad. 119.—**IND.**

3542 ix. ——.]—*Re* LLOYD'S ESTATE, HILL, PETITIONER, [1903] 1 I. R. 144.—**IR.**

3542 x. ——.]—MCLEAN *v.* ELDER (1888), 7 N. Z. L. R. 48.—**N.Z.**

Sect. 4.—By merger: Sub-sect. 2, A., B. & C.]

intention to keep the mtge. alive against the share in dispute.

In 1813 hereditaments were mortgaged by A., & in 1850 the then owner devised them, subject to the mtge., to his six children including P. & S. P. acquired three of the six shares, & in 1859, S. conveyed her share to P. In 1862, S. commenced a suit to set aside her conveyance. When the suit was pending, a deed was executed, which was on the face of it a reconveyance to P., in consideration of his paying off the balance due on the mtge.; of five-sixths of the mtged. property & a transfer of the mtge. so far as it affected the sixth part, which he had not attempted to purchase. A decree was afterwards obtained in the suit setting aside the conveyance of the share of S.:—*Held:* the mtge. was kept alive as against the share of S.—*Re* PRIDE, SHACKELL *v.* COLNETT, [1891] 2 Ch. 135; 61 L. J. Ch. 9; 64 L. T. 768; 39 W. R. 471.

—— **Owner paying off prior charge only.**]—*See* Sub-sect. 3, *post*.

3549. —— **Exceptions to rule—Charge & estate not in same interest.**]—THORNE *v.* NEWMAN (1672), 2 Rep. Ch. 71; Cas. *temp.* Finch, 38; 21 E. R. 619, L. C.

Annotations:—**Refd.** Albemarle *v.* Bath (1693), 2 Freem. Ch. 193; Chambers *v.* Kingham (1878), 10 Ch. D. 743.

3550. —— ——.]—Where a charge upon land shall not be extinguished by its coming to the same person that is entitled to the land, by reason that the party has not the same interest in the land as he had in the charge upon it; when he has not the same interest in both, there shall be no extinguishment upon this account.—PRICE *v.* SEYS (1740), Barn. Ch. 117; 27 E. R. 578; *sub nom.* SEYS *v.* PRICE, 9 Mod. Rep. 217, L. C.

3551. —— ——.]—Pltf.'s counsel has said that the property was in mtge.; & that the payment off of the mtge. debt & the reconveyance of the mtged. property only operated as a release of the property from the charge. That might be true in a case where the mtge. covered only the same property which the devise of the equity of redemption has vested in the person who takes the conveyance; but where the mtgee. conveys a legal estate or an equitable estate in property, the equity of redemption in which is not vested in the person who takes the conveyance, the person who so takes the conveyance has a right larger than he would have had under a mere release (FRY, L.J.).—TAWS *v.* KNOWLES, [1891] 2 Q. B. 564; 60 L. J. Q. B. 641; 65 L. T. 124; 56 J. P. 68; 39 W. R. 675, C. A.

B. Mortgagor Discharging Prior Charge.

3552. General rule.]—A first mtgee. is *primâ facie* entitled to a judgment in a foreclosure action limiting only one period for redemption, both as against subsequent incumbrancers & the mtgor., & where there are conflicting claims as to priority between co-defts. the practice, as settled by *Bartlett* v. *Rees*, No. 3122, *ante*, is to grant only one period for redemption. Where, however, defts. have put in a defence or appeared at the bar, & have proved or offered to prove their incumbrances, & there is no question of priority between them, the ct. will at the request of the puisne incumbrancers, but not at the request of the mtgor., limit successive periods for redemption. A mtgor. has no right in himself to more than one period of six months to redeem. In a foreclosure action by the transferee of the first mtgee., the statement of claim alleged that defts. other than the mtgor. claimed to have some charge upon the mtged. premises subsequent to pltf.'s charge. None of defts., including the mtgor., put in a defence or appeared at the bar:—*Held:* pltf. was entitled to a foreclosure judgment on the pleadings, allowing one period for redemption as against all defts.

A mtgor. redeeming cannot stand in the mtgee.'s place against other incumbrancers (CHITTY, J.).—PLATT *v.* MENDEL (1884), 27 Ch. D. 246; 51 L. T. 424; 32 W. R. 918; *sub nom.* PLATT *v.* MENDEL, GURNEY *v.* CANTERBURY (VISCOUNTESS), 54 L. J. Ch. 1145.

Annotation:—**Refd.** Tufnell *v.* Nicholls (1887), 56 L. T. 152.

3553. Application of rule—To incumbrancers ranking pari passu.]—The principle established by *Otter* v. *Vaux* (*Lord*), No. 3554, *post*, a mtgor. who pays off an incumbrance created by himself cannot set it up against a subsequent incumbrancer or creditor, applies equally to a case where an existing incumbrancer or creditor ranks *pari passu* with the incumbrancer paid off.—*Re* TASKER (W.) & SONS, LTD., HOARE *v.* TASKER (W.) & SONS, LTD., [1905] 2 Ch. 587; 74 L. J. Ch. 643; 93 L. T. 195; 54 W. R. 65; 21 T. L. R. 736; 49 Sol. Jo. 700; 12 Mans. 302, C. A.

Annotations:—**Refd.** Manks *v.* Whiteley, [1912] 1 Ch. 735. **Mentd.** *Re* Perth Electric Tramways, Lyons *v.* Tramways Syndicate & Perth Electric Tramways, [1906] 2 Ch. 216; *Re* Russian Petroleum & Liquid Fuel Co., London Investment Trust *v.* Russian Petroleum & Liquid Fuel Co., [1907] 2 Ch. 540.

3554. Mortgagor purchasing on sale by first mortgagee—Estate not freed from second mortgage.]—Mtgor. having made two successive mtges. of his estate to different persons purchased the estate from the first mtgee. selling under a power of sale contained in his mtge.; the purchase-money was not sufficient to pay off the first mtge.:—*Held:* the mtgor. could not by this purchase defeat the title of the second mtgee.—OTTER *v.* VAUX (LORD) (1856), 6 De G. M. & G. 638; 26 L. J. Ch. 128; 29 L. T. O. S. 59; 3 Jur. N. S. 169; 5 W. R. 188; 43 E. R. 1381, L. C.

Annotations:—**Consd.** *Re* Tasker, Hoare *v.* Tasker, [1905] 2 Ch. 587; Whiteley *v.* Delaney, [1914] A. C. 132. **Refd.** Bevan *v.* Habgood (1860), 1 John. & H. 222; Adams *v.* Angell (1877), 5 Ch. D. 634; Grierson *v.* National Provincial Bank of England, [1913] 2 Ch. 18.

C. Purchaser of Equity of Redemption Discharging Mortgage.

3555. Whether intention to keep charge alive presumed—Notice of subsequent incumbrance.]—Purchaser having employed the vendor's agent who had notice of an incumbrance, charged with notice, notwithstanding the purchase was made under the sanction of the ct., & an infant was interested in it. Purchaser of an equity of redemption cannot set up a prior mtge. of his own, or which he has got in, against subsequent incumbrances of which he had notice.—TOULMIN *v.* STEERE (1817), 3 Mer. 210; 36 E. R. 81.

Annotations:—**Distd.** Squire *v.* Ford (1851), 9 Hare, 47; Otter *v.* Vaux (1856), 6 De G. M. & G. 638. **Consd.** Anderson *v.* Pignet (1872), 8 Ch. App. 180. **Distd.** Adams *v.* Angell (1877), 5 Ch. D. 634. **Consd.** Gokuldoss Gopaldoss *v.* Rambux Seochand (1884), L. R. 11 Ind. App. 126. **Distd.** Thorne *v.* Cann, [1895] A. C. 11; Liquidation Estates Purchase Co. *v.* Willoughby, [1898] A. C. 321. **Consd.** Whiteley *v.* Delaney, [1914] A. C. 132. **Refd.** Clarendon *v.* Barham (1842), 1 Y. & C. Ch. Cas. 688; Allen *v.* Wedgwood (1845), 4 L. T. O. S. 492; Watts *v.* Symes (1851), 1 De G. M. & G. 240; Wilkins *v.* Sibley (1863), 4 Giff. 442; Hayden *v.* Kirkpatrick (1865), 34 Beav. 645; Stevens *v.* Mid-Hants Ry., London Financial Assocn. *v.* Stevens (1873), 8 Ch. App. 1064; Crosbie-Hill *v.* Sayer, [1908] 1 Ch. 866. **Mentd.** Vane *v.* Vane (1872), 8 Ch. App. 388, n.; Russell *v.* Watts (1885), 10 App. Cas. 590.

3556. ——.]—SQUIRE *v.* FORD, No. 3562, *post.*

3557. ——.]—Where a mtgor. contracts to sell the fee simple of the mtged. estate free from incumbrances, the purchaser, with the concurrence of the mtgee. is entitled on procuring a discharge of the vendor from all liability in respect of the mtged. debt & bearing any extra expense occasioned by his demand, to require a conveyance of the equity of redemption, so as to keep the mtge. on foot.—COOPER *v.* CARTWRIGHT (1860), John. 679; 70 E. R. 592.

3558. ——.]—THORNE *v.* CANN, No. 3612, *post.*

3559. ——.]—LIQUIDATION ESTATES PURCHASE CO. *v.* WILLOUGHBY, No. 3613, *post.*

3560. ——.]—*Re* GIBBON, MOORE *v.* GIBBON, No. 3604, *post.*

3561. ——.]—Freehold property situated in Yorkshire was mortgaged by O. to A. to secure £300. Shortly after O. gave a second mtge. to pltf. M. Both mtges. were duly registered under the Yorkshire Registries Acts. O., being pressed by A. for payment, offered to sell the property to his daughter L. for £450, who accepted the offer conditionally on her being able to find some one to provide £300 to pay off A. She consulted W., a solr. & told him she had agreed to purchase the property & wanted some one to provide the £300 to A., & instructed him to carry through the transaction. W. mentioned the matter to F., who agreed to advance £300 on a first mtge. of the property, & W., having received the money from F., paid off A. & obtained from him the title deeds on F.'s behalf. W. acted for all parties except A. None of the parties except O. had any knowledge of the mtge. to M., & he did not disclose it. W. prepared three deeds by which (*a*) A. reconveyed the property to O., (*b*) O. conveyed the property to L., & (*c*) L. mortgaged the property to F. The deeds were executed three weeks after A. was paid off & the first two bore same date, & the third was dated a day after. M. brought an action against F., L., & O., claiming a declaration that on the execution of the reconveyance by A. his mtge. became a first charge on the property, & he was entitled to priority over F.—*Held:* the intention of the parties was that F. should have a first mtge. on the property, but, owing to a common mistake caused by O. concealing the mtge. to M., the deeds did not carry out the true bargain between the parties, & they could have been rectified on the application of F. & L.; by the payment of the £300 to A. & obtaining possession of the title deeds, F. became equitable transferee of A.'s first mtge., & the charge to M. ranked after that to F.

It is now quite plain that a purchase from a mtgor. & the first mtgee. can always, if he chooses, keep the first mtge. alive & so protect himself against subsequent incumbrances, whether he had notice of them or not (LORD HALDANE, C.).—WHITELEY *v.* DELANEY, [1914] A. C. 132; 83 L. J. Ch. 349; 110 L. T. 434; 58 Sol. Jo. 218, H. L.; *revsg.* S. C. *sub nom.* MANKS *v.* WHITELEY, [1912] 1 Ch. 735, C. A.

3562. Who is a purchaser—Trustees for creditors.]—By a deed conveying the real & personal estate of a debtor to trustees for the benefit of his creditors, the creditors executing the deed covenanted that it should operate & enure, & might be pleaded in bar, as a good & effectual release & discharge of all & all manner of actions, suits, bills, bonds, writings, obligations, debts, duties, judgments, extents, executions, claims, & demands, both at law & in equity, which they or any of them had or might have against the debtor or his estate or effects, for or by reason of all or any of the debts or engagements to them respectively due or owing by him; such covenant not to destroy any mtge., pledge, lien, or other specific security which any creditor possessed:—*Held:* (1) upon the construction of the entire deed, such general words had not the effect of releasing a judgment previously obtained by one of the creditors who executed the deed, so as to affect the priority of the creditor as between himself & a judgment creditor who was not a party to the deed, or so as to preclude the judgment creditor who executed the deed from enforcing the right which the judgment gave him as against the estate vested in the trustees.

A judgment creditor who had executed a deed, whereby the real & personal estate of the debtor were conveyed to trustees for the benefit of such of his creditors as should execute the deed, assigned his judgment to such trustees:—*Held:* (2) the trustees could not be considered as owners of the trust estate, so that the assignment by the judgment creditor would have the effect of merging the judgment; (3) the judgment creditor having assigned his judgment to the trustees of a creditors' deed, in trust for the benefit of the creditors who had executed the deed, of whom he was himself one, was entitled to sue on behalf of himself & all such other creditors, for the establishment of their rights in respect of the trust estate & the execution of the trusts.

(4) It would be going a monstrous length, to say, that the trustees for creditors under the original deed of Dec. 27, 1848, are to be considered as owners of the estate, to bring them within the principle of the case of *Toulmin* v. *Steere*, No. 3555, *ante* (TURNER, V.-C.).

(5) There is no doubt whatever, that the purchaser of an equity of redemption cannot set up against a second incumbrancer a mtge. which he has got in (TURNER, V.-C.).—SQUIRE *v.* FORD (1851), 9 Hare, 47; 20 L. J. Ch. 308; 17 L. T. O. S. 119; 15 Jur. 619; 68 E. R. 408.

Annotations:—Generally, **Reld.** Adams *v.* Angell (1877), 5 Ch. D. 634. **Mentd.** Fessard *v.* Mugnier (1865), 18 C. B. N. S. 286.

3563. —— **Trustee in bankruptcy.**]—Where on the bkpcy. or liquidation of a mtgor. a first mtgee. elects to give up his security altogether, & prove for the whole of his mtge. debt, the security so given up does not merge in the equity of redemption for the benefit of a second mtgee., but is available in the hands of the trustee in the bkpcy.

PART XIV. SECT. 4, SUB-SECT. 2.—C.

3556 i. *Whether intention to keep charge alive presumed.*]—Where two mtges. had been created on a leasehold interest in rectory lands, the equity of redemption in which was afterwards sold at sheriff's sale under common law process, & the purchaser paid off the prior mortgage:—*Held:* the purchaser, being bound to protect the mtgor. against both the incumbrances, was not at liberty to keep alive the prior mtge. as against the second mtge.—MCDONALD *v.* REYNOLDS (1868), 14 Gr. 691.—**CAN.**

3556 ii. ——.]—The purchaser of an equity of redemption in reference to immovable property situated in the Hyderabad Assigned Districts, paid off the first mtge. thereon with notice of a second mtge.:—*Held:* he must be assumed, according to the rule of justice, equity, & good conscience there applicable, to have intended to keep the first mtge. alive, & therefore he was entitled to stand in the place of the first mtgee. & to retain possession against the second mtgee. until repayment.—GOKULDOSS GOPALDOSS *v.* RAMBUX SEOCHAND (1884), L. R. 11 Ind. App. 126.—**IND.**

3556 iii. ——.]—It is now settled law that where in India there are several mtges. on a property, the owner of the property subject to the mtges. may, if he pays off an earlier charge, treat himself as buying it & stand in the same position as his vendor, or, to put it in another way, he may keep the incumbrance alive for his benefit & thus come in before a later mtgee.—MALIREDDI AYYAREDDI *v.* GOPALAKRISHNAYYA (1923), L. R. 51 Ind. App. 140.—**IND.**

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or liquidation for the benefit of the general creditors.—CRACKNALL *v.* JANSON (1877), 6 Ch. D. 735; 46 L. J. Ch. 652; 37 L. T. 118; 25 W. R. 904.

Annotation :—**Mentd.** *Re* Cross, *Ex p.* Payne (1879), 11 Ch. D. 539.

Person not personally liable discharging mortgage.]—*See* Sub-sect. 2, D., *post.*

D. Person Not Personally Liable Discharging Mortgage.

3564. By stranger—New mortgage taken.]—A deed was executed by a legal mtgee. of leaseholds, the exor. of the mtgor., & a new mtgee., whereby in consideration of the payment by the new mtgee. of the old mtge. debt, the discharge of which the old mtgee. thereby acknowledged, & in consideration of a further advance to the exor. of the mtgor. by the new mtgee., the old mtgee. & the exor. assigned the mtged. premises to the new mtgee., with a new covenant by the exor. of the mtgor. for payment of the aggregate sum, & a new proviso for redemption. The deed contained no assignment of the old mtge. debt, but the operative words extended in the usual way to all the right & title of the old mtgee. in the premises :—*Held :* the old mtge. was not extinguished as far as regarded priority over a subsequent incumbrance.—PHILLIPS *v.* GUTTERIDGE (1859), 4 De G. & J. 531; 45 E. R. 206, L. JJ.

Annotations :—**Consd.** Liquidation Estates Purchase Co. *v.* Willoughby, [1896] 1 Ch. 726. **Refd.** Lipscomb *v.* Lipscomb (1868), 38 L. J. Ch. 90; Crosbie-Hill *v.* Sayer, [1908] 1 Ch. 866; Manks *v.* Whiteley, [1912] 1 Ch. 735. **Mentd.** Foster *v.* Harvey (1863), 2 New Rep. 443; *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132.

3565. ——.]—Trustees of an equity of redemption were called upon by the mtgee. to pay off part of the mtge. debt. They, with the consent of the beneficiaries, borrowed £600 from third parties, who were trustees of another fund, & paid off the mtge. to that extent. The beneficiaries subsequently obtained an assignment of the equity of redemption, & the lenders now claimed against them a charge on the property for £600 & interest, & a declaration that the mtge. was kept alive in their favour to that extent. Interest had been paid to the lenders continuously since the advance :—*Held :* if the trustees of the equity of redemption had paid the £600 themselves, they would have been entitled to have the mtge. kept on foot for their benefit, & the lenders, who had paid it at their request, had a right to stand in their shoes.—PATTEN *v.* BOND (1889), 60 L. T. 583; 37 W. R. 373.

Annotations :—**Consd.** Butler *v.* Rice, [1910] 2 Ch. 277. **Refd.** Chetwynd *v.* Allen, [1899] 1 Ch. 353.

3566. ——.]—The statutory receipt given by a building society under Building Societies Act, 1874 (c. 42), s. 42, on payment off of a legal mtge. vests the legal estate in the person having the best right to call for a conveyance thereof. A third party who pays off a legal mtge. at the request of the mtgor. has *primâ facie* a better right than the mtgor. to call for a conveyance, & becomes, in default of evidence of intention to the contrary, entitled in equity to stand in the shoes of the mtgee. The mere fact that as part of the same transaction the mtgor. executes in favour of the third party a memorandum of equitable charge containing an agreement to give a legal mtge. when called upon does not abrogate this *primâ facie* right.

In 1902 D. mortgaged freeholds to a building society. In June, 1905, D.'s bankers, at his request, paid off the mtge. The building society delivered the title deeds other than the mtge. deed to the bank, & D. executed in favour of the bank a memorandum of equitable charge containing an agreement to execute a legal mtge. when called upon. Shortly afterwards the building society handed the mtge. deed to the bank, indorsed with the receipt authorised by Building Societies Act, 1874 (c. 42), s. 42. The receipt was dated the day of payment off, though in fact executed afterwards. In Nov. 1905, by means of forged title deeds, D. obtained an advance from defts.' predecessor in title, & executed what purported to be a legal mtge. of the property to him. In 1906, pltfs. paid off the moneys owing to the bank. D. executed a mtge. of the property to them, & the bank handed them the title deeds, but did not convey the legal estate to them. Pltfs. were in ignorance of the transaction with defts.' predecessor, & he was ignorant of the bank's claim when he advanced his money to D. :—*Held :* (1) the statutory receipt operated to vest the legal estate in the bank & (2) the bank's mtge. was still alive for the purpose of giving pltfs., as having the best right to call for the legal estate, priority over the incumbrance vested in defts.—CROSBIE-HILL *v.* SAYER, [1908] 1 Ch. 866; 77 L. J. Ch. 466; 99 L. T. 267; 24 T. L. R. 442.

Annotation :—Generally, **Refd.** Manks *v.* Whiteley, [1912] 1 Ch. 735.

3567. —— **Request by mortgagor immaterial.**]—If a stranger pays off a mtge. on an estate there is a presumption that he intends to keep the mtge. alive for his own benefit. The facts that the owner of the property, the mtgor. has not requested the stranger to make the payment, that the stranger intended to take a legal mtge. instead of an equitable charge, & that the stranger's mtge. was to be on only a part of the original mtged. property, are not material.—BUTLER *v.* RICE, [1910] 2 Ch. 277; 79 L. J. Ch. 652; 103 L. T. 94.

3568. By son expecting devise of absolute interest—Rebuttal of presumption by other dealings.]—A son paid off a mtge. upon an estate belonging to his father, the son being at the time expectant devisee of the absolute interest in the estate, though afterwards, by an alteration in his father's will, he became only tenant for life of the estate :—*Held :* from the dealings between the parties an agreement was to be inferred that the son paid off the mtge. debt in settlement of pecuniary transactions between himself & his father, & consequently the presumption that the son paid it off for his own benefit was rebutted, & he was not entitled to any lien upon the estate for what he so paid off.—CROW *v.* PETTINGELL (1869), 20 L. T. 342; 17 W. R. 562, L. JJ.

3569. By trustee in bankruptcy.]—A trustee in bkpcy. does not by purchasing from the first mtgee. of the bkpt. extinguish the first mtge., & make the second mtgee. the first incumbrancer on the estate. But such a purchase does not extinguish the right of the second mtgee. to redeem.—BELL *v.* SUNDERLAND BUILDING SOCIETY (1883), 24 Ch. D. 618; 53 L. J. Ch. 509; 49 L. T. 555.

Annotation :—**Refd.** Ledbrook *v.* Passman (1888), 57 L. J. Ch. 855.

3570. By puisne incumbrancer—Necessity to keep first mortgage alive.]—A. contracted for the

purchase of certain lands, which were subject to a first mtge. to M., & to a second mtge. to P.; one of the terms of the agreement being, that out of the purchase-money A. should retain in his hands the sum of £5,010 in order to pay off these incumbrances; & by indentures of lease & release, reciting the mtges., the estate was conveyed to him. Afterwards M., in consideration of £3,220 stated to have been paid to him by A., conveyed, by A.'s direction, the premises to G. in fee, & it was declared, that a trustee of an outstanding term should hold that term in trust for G., to attend the inheritance. By another indenture of the same date, & executed at the same time, reciting that W. had agreed to purchase of A. an annuity of £500 for £5,000, & that the £3,220 was in fact the money of W., & part of the £5,000, & was paid to M. by W.'s agent, at A.'s request; A., in consideration of the £3,220 & of £1,780, granted to W. an annuity of £500, to be issuing out of the lands; & G., by A.'s direction, demised the premises to a trustee for 500 years, upon trust, to secure the rentcharge:—*Held:* P. was now the first incumbrancer, & W. was not entitled, to the extent of the money paid to M., to have M.'s mtge. considered as still subsisting, & to have what might be payable in respect of it, applied from time to time in satisfaction of the arrears of his annuity.—PARRY *v.* WRIGHT (1828), 5 Russ. 142; 38 E. R. 981; *sub nom.* PARRY *v.* WRIGHT, PARRY *v.* PARRY, 6 L. J. O. S. Ch. 174, L. C.; *affg.* S. C. *sub nom.* PARRY *v.* PARRY, PARRY *v.* MADDOCKS (1823), 1 L. J. O. S. Ch. 161.

Annotations:—**Consd.** Squire *v.* Ford (1851), 9 Hare, 47. **Reld.** Searle *v.* Colt (1841), 1 Y. & C. Ch. Cas. 36; Stevens *v.* Mid-Hants Ry., London Financial Assocn. *v.* Stevens (1873), 8 Ch. App. 1064; Adams *v.* Angell (1877), 5 Ch. D. 634; Smithett *v.* Hesketh (1890), 44 Ch. D. 161.

3571. Annuity redeemed by mortgagee.]—In 1820, H. secured an annuity on trust funds, & in 1841, he, for a valuable consideration, assigned his interest in the same funds in trust to raise £1,100, & redeem the annuity, & hold the residue on trusts for his family. The trustees accordingly raised the £1,100 by mtge. & redeemed the annuity, & the trust funds were assigned to the mtgees., but no transfer was made of the annuity. The mtge. deed stated that the consideration to have been "for the repurchase & extinction of the annuity." The annuity had originally priority over certain claimants, but the deed of 1841 had not:—*Held:* to the extent of the moneys paid for the repurchase of the annuity, the mtgees. had priority over those claimants.—IRBY *v.* IRBY (No. 3) (1858), 25 Beav. 632; 32 L. T. O. S. 141; 4 Jur. N. S. 989; 6 W. R. 853; 53 E. R. 778.

Annotations:—**Apld.** *Re* Pain, Gustavson *v.* Haviland, [1919] 1 Ch. 38. **Mentd.** *Re* Carew, Carew *v.* Carew, [1896] 1 Ch. 527; *Re* Sewell, White *v.* Sewell, [1909] 1 Ch. 806.

3572. By assignee of beneficiary of trust fund.]—The claim of an assignee under an assignment by a beneficiary of an interest in a trust fund, the assignor not being a trustee of the fund & the assignment being duly notified to the trustee, has priority over a claim by the trustee against the assigned interest for a debt incurred by the assignor to the trustee since the assignment.—*Re* PAIN, GUSTAVSON *v.* HAVILAND, [1919] 1 Ch. 38; 87 L. J. Ch. 550; 119 L. T. 647; 63 Sol. Jo. 178.

Annotation:—**Mentd.** *Re* Jewell's Settlmt., Watts *v.* Public Trustee, [1919] 2 Ch. 161.

Purchaser of equity of redemption discharging mortgage.]—*See* Sub-sect. 2, C., *ante.*

See, also, No. 3639, *post.*

E. Mortgagee Purchasing Equity of Redemption.

3573. Whether prior charge kept alive—Question of intention.]—If a subsequent incumbrancer advance money, & it is part of his contract that he shall have an assignment of the prior incumbrance, then he is entitled to stand in the place of that incumbrancer whose debt is paid off by the money which he advances, & whose incumbrance he possesses to be assigned to himself (LORD COLLENHAM C.).—MACKENZIE *v.* GORDON (1839), 6 Cl. & Fin. 875; 7 E. R. 927, H. L.

3574. —— ——.]—After a decree in a foreclosure suit to which both the mtgor. & the first & second mtgees. were parties, pltf., the first mtgee., purchased the equity of redemption from the trustee in bkpcy. of the mtgor., & by the deed of assignment, in consideration of £1,380, the sum due on the first mtge. retained by the first mtgee. "in full satisfaction of" his debt, & of £20 paid to the trustee, making the purchase-money of £1,400, the trustee assigned the mtged. property to the first mtgee. "subject to the aforesaid claim" of the second mtgee. The value of the mtged. property did not exceed £1,380. The second mtgee. contended that the effect of this purchase was to extinguish the first mtge. debt, & to let in his own charge as a first incumbrance. A correspondence took place between the solrs. of the first mtgee. & the trustee at the time of the purchase:—*Held:* looking at the surrounding circumstances the conveyance sufficiently expressed

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n. *General rule.*]—If the mtgee. purchases the equity of redemption at sheriff's sale, the mtge. debt is extinguished.—MCPHELIM *v.* WELDON (1862), 5 All. 358.—**CAN.**

3573 i. *Whether prior charge kept alive—Question of intention.*]—*Re* VICTORIAN FARMERS' LOAN & AGENCY CO., LTD. (1897), 22 V. L. R. 629.—**AUS.**

3573 ii. —— ——.]—Where a mtgee. of lands buys up the equity of redemption, taking a conveyance to himself, his charge will merge or not, according to the bargain between the parties at the time of his obtaining the transfer.—FINLAYSON *v.* MILLS (1865), 11 Gr. 218.—**CAN.**

3573 iii. —— ——.]—ELLIOTT *v.* JAYNE (1865), 11 Gr. 412.—**CAN.**

3573 iv. —— ——.]—BARKER *v.* ECCLES (1870), 18 Gr. 440.—**CAN.**

3573 v. —— ——.]—HART *v.* MCQUESTEN (1875), 22 Gr. 133.—**CAN.**

3573 vi. —— ——.]—WEAVER *v.* VANDUSEN, WILLS *v.* AGERMAN (1880), 27 Gr. 477.—**CAN.**

3573 vii. —— ——.]—NORTH OF SCOTLAND MORTGAGE CO. *v.* GERMAN (1880), 31 C. P. 349.—**CAN.**

3573 viii. —— ——.]—NORTH OF SCOTLAND MORTGAGE CO. *v.* UDELL (1882), 46 U. C. R. 511.—**CAN.**

3573 ix. —— ——.]—MACDONALD *v.* BULLIVANT (1884), 10 A. R. 582.—**CAN.**

3573 x. —— ——.]—When the owner of an estate in fee pays off a charge, or the owner of a charge acquires the equity of redemption, the result is that the charge merges & lets in any subsequent incumbrance, unless an intention to keep the charge alive is expressed in some way, & the *onus* of proving such intention rests on the party contending that there has been no merger.—ST. JOHN'S CATHEDRAL (DEAN & CHAPTER) *v.* MACARTHUR (1893), 9 Man. L. R. 391.—**CAN.**

3573 xi. —— ——.]—A conveyance of the equity of redemption by a mtgor. to a mtgee. of lands does not constitute a discharge of the mtge. by merger, unless it is made to appear that such a result was intended by the parties.—*Re* MAJOR (1897), 5 B. C. R. 244.—**CAN.**

3573 xii. —— ——.]—Generally, slight evidence will suffice to show that the prior mtgee. intended to retain the benefit of his mtge. The fact that the mtge.-deed remains with the mtgee. who purchases, is evidence that he intends to retain the benefit of his mtge.—SHANTAPA *v.* BALAPA (1880), I. L. R. 6 Bom. 561.—**IND.**

3573 xiii. —— ——.]—A mtgee. purchasing the equity of redemption may indicate his intention to keep his charge upon the property alive otherwise than by express words.—MULCHAND KUBER *v.* LALLU TRIKAM (1882), I. L. R. 6 Bom. 404.—**IND.**

3573 xiv. —— ——.]—PURNAMAL CHUND *v.* VENKATA SUBBARAYULU (1897), I. L. R. 20 Mad. 486.—**IND.**

o. —— *Express contract to pay off charge.*]—The purchaser of an equity of redemption subject to a charge which is his own proper debt, or which he is under any contract, express or implied, to discharge, cannot keep such

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an intention to keep the first mtge. alive *Toulmin* v. *Steere*, No. 3555, *ante*, did not apply.—ADAMS *v.* ANGELL (1877), 5 Ch. D. 634; 46 L. J. Ch. 352; 36 L. T. 334, C. A.

Annotations:—**Consd.** *Re* Pride, Shackell *v.* Colnett, [1891] 2 Ch. 135; Minter *v.* Carr, [1894] 3 Ch. 498. **Apprvd.** Thorne *v.* Cann, [1895] A. C. 11. **Consd.** Liquidation Estates Purchase Co. *v.* Willoughby, [1898] A. C. 321. **Refd.** The Ripon City, [1898] P. 78; Ingle *v.* Vaughan-Jenkins (1900), 69 L. J. Ch. 618; Nicholas *v.* Ridley, [1904] 1 Ch. 192; Crosbie-Hill *v.* Sayer, [1908] 1 Ch. 866; Whiteley *v.* Delaney, [1914] A. C. 132.

3575. —— ——.]—The holder of a puisne mtge. on Whiteacre & Blackacre, against whom the holder of several prior mtges. on those properties has a subsisting right to consolidate, may, upon taking a transfer of a mesne incumbrance, not subject to consolidation, on Whiteacre, keep such incumbrance alive against the prior mtgee., & thus acquire the right to redeem Whiteacre without redeeming Blackacre.

The question whether the mesne incumbrance has been so kept alive on the transfer depends solely on the intention of the transferee.—MINTER *v.* CARR, [1894] 3 Ch. 498; 63 L. J. Ch. 705; 71 L. T. 526; 7 R. 558, C. A.

Annotation:—**Mentd.** Pledge *v.* White (1896), 74 L. T. 323.

3576. —— **Knowledge of subsequent incumbrances.**]—TOULMIN *v.* STEERE, No. 3555, *ante*.

3577. —— **Covenant to discharge other incumbrances.**]—A second mtgee. took a conveyance of the equity of redemption, in consideration of the debts due to himself & the other mtgees., which he thereby took upon himself & covenanted to pay:—*Held:* his debt was extinguished, &, therefore, in a foreclosure suit instituted against him, by the parties entitled to the first & third mtges., he was not entitled to be paid his debt, in priority to the third mtge.—BROWN *v.* STEAD (1832), 5 Sim. 535; 2 L. J. Ch. 45; 58 E. R. 439.

Annotation:—**Refd.** Squire *v.* Ford (1851), 9 Hare, 47.

3578. ——.]—A. made an equitable mtge. of certain premises to B., & he afterwards entered into an agreement to grant a lease of the premises to C., who had notice of the prior charge. A. became bkpt. before the lease was executed, & on the petition of B. an order in bkpcy. was made, under which the premises were sold, & B. became the purchaser, & retained the amount of his equitable mtge out of the purchase-money:—*Held:* on a bill filed by C. for specific performance of the agreement, B. having become the purchaser, & thereby united his equitable mtge. with the equity of redemption, was bound to perform the agreement.

No doubt, the interest of bkpt. might have been so sold as to keep the equitable mtge. of deft. distinct from the equity of redemption; but deft., by becoming the purchaser, has united those interests. . . . I am of opinion that they cannot be separated (LORD LANGDALE, M.R.).—SMITH *v.* PHILLIPS (1837), 1 Keen, 694; 6 L. J. Ch. 253; 48 E. R. 474.

3579. ——.]—A. & B. mortgaged their estate to C. Afterwards B. conveyed all his interest in the estate to A. in consideration of a second charge on the estate. A. afterwards sold & conveyed the equity of redemption to C. in consideration of the mtge. debt:—*Held:* C.'s first mtge. was not thereby extinguished as against B. so as to give B. priority over C.—HAYDEN *v.* KIRKPATRICK (1865), 34 Beav. 645; 13 L. T. 56; 11 Jur. N. S. 836; 13 W. R. 1010; 55 E. R. 784.

3580. ——.]—S. recovered judgment against a railway co., sued out an elegit, & delivered it to the sheriff, who found that the co. were possessed of the railway, which was in the occupation of another co. under a working agreement. The writ was duly registered. After this a scheme of arrangement was confirmed by the ct. which scheme authorised the co. to create certain amounts of debenture A. stock & debenture B. stock. Debenture A. stock was to be applied, first, in payment of the mtge. debentures of the co., & certain costs; the stock applied to those purposes having priority in payment of interest over the residue of that stock, which residue was to be applied in paying unpaid vendors of land. Debenture B. stock was to be applied in paying off debentures which were not mtges. on the undertaking, & other debts. The income of the co. was to be applied. (*a*) In paying rentcharges granted to vendors of land. (*b*) In payment of the interest on preferred debenture A. stock. (*c*) In payment of the interest on the residue of that stock. (*d*) In payment of interest on debenture B. stock. (*e*) In payment of dividends to shareholders:—*Held:* S. was not bound by the scheme, but as it did not lessen his rights, neither did it increase them; he therefore was not entitled to such priority as he claimed; but, subject to the rights of unpaid vendors, the income must, in the first place, to an amount equal to that of the principal, interest, & costs due to vendors of land who had accepted payment in A. debenture stock, & of the principal, interest, & costs due to holders of debenture mtges. issued before the filing of the sheriff's return, be applied according to the scheme.—STEVENS *v.* MID-HANTS RY. CO., LONDON FINANCIAL ASSOCN. *v.* STEVENS (1873), 8 Ch. App. 1064; 42 L. J. Ch. 694; 29 L. T. 318; 21 W. R. 858, C. A.

Annotations:—**Consd.** *Re* East & West India Dock Co. (1890), 44 Ch. D. 38; Thorne *v.* Cann, [1895] A. C. 11; Capital & Counties Bank *v.* Rhodes (1902), 71 L. J. Ch. 573. **Refd.** Adams *v.* Angell (1877), 5 Ch. D. 634; Whiteley *v.* Delaney, [1914] A. C. 132.

F. Charge acquired by Limited Owner.

(*a*) *Tenant for Life.*

3581. Becoming entitled to charge—No merger.]—A mtge. deed to secure advances made for payment of expenses incurred in obtaining & carrying into execution an inclosure Act is not rendered void by 41 Geo. 3, c. 109, s. 30, although it does not contain a proviso & covenant in the terms of that sect., if it contains nothing contrary thereto.

A. a married woman, being tenant for life of lands allotted & exchanged under an Inclosure Act, in 1810, mortgaged them for one thousand years to B. to secure £105 advanced by him to pay her share of the expenses of the inclosure. B. died in 1812, & the husband of A. was his exor. & one of his residuary legatees. The term passed to A.'s husband as exor., & he died in 1824. After the death of B. no interest was paid, & upon the death of A. the remainderman took possession. A.'s husband bequeathed all his property to A. & made her one of his exors., but she did not prove. In ejectment upon demises by the exor. of A. &

charge alive against a mesne incumbrance, which, by the terms of the contract of purchase, express or implied, the purchaser was also bound to discharge.—**BLAKE** *v.* BEATY, BEATY *v.* BLAKE (1855), 5 Gr. 359.—**CAN.**

p. *Validity of plea.*]—To an action upon covenant in a mtge. deft. pleaded that he had conveyed the equity of redemption to B., who conveyed it to the mtgee. in discharge of the debt:—*Held:* a good equitable plea.—FORREST *v.* GIBSON (1890), 6 Man. L. R. 612.—**CAN.**

3581 1. *Becoming entitled to charge—No merger.*]—REDINGTON *v.* REDINGTON (1809), 1 Ball & B. 131.—**IR.**

also by the exors. of A.'s husband:—*Held:* the term of one thousand years had not merged in A.'s estate for life, & Stat. Limitations did not apply.—DOE d. FRANCIS *v.* HARE (1850), 15 L. T. O. S. 203.

3582. —— —— Owner in fee subject to prior life interest.]—Testator, being the absolute beneficial owner of a trust fund, subject to his wife's interest therein if she should survive him, borrowed part of the fund from the trustees on the security of a mtge. of an estate of which he was seised in fee. He afterwards made his will, whereby he devised the real estate to his wife for life, with remainder to pltf. in fee; & bequeathed "all & every the shares & sums of money in the public funds, or upon Govt. or real securities," which he should die "possessed of, or in anywise entitled to," in trust for his wife for life, with remainder to pltf. for life, remainder to pltf.'s wife for life, remainder to pltf.'s children absolutely. The testator's wife survived:—*Held:* there was no merger of the mtge. debt in the real estate.—WILKES *v.* COLLIN (1869), L. R. 8 Eq. 338; 17 W. R. 879.

3583. Paying off charge—Charge kept alive.]—Where tenant for life pays off an incumbrance upon the estate, he shall be considered as a creditor for the money so paid, but where tenant in tail pays, it is in exoneration of the estate of which he may make himself absolute owner.—JONES *v.* MORGAN (1783), 1 Bro. C. C. 206; 28 E. R. 1086.

Annotations:—**Refd.** Burges *v.* Mawbey (1823), Turn. & R. 167; Astley *v.* Milles (1827), 1 Sim. 298; Cole *v.* Stutely (1842), 6 Jur. 314; Kensington *v.* Bouverie (1859), 7 H. L. Cas. 558. **Mentd.** Dodson *v.* Hay (1791), 3 Bro. C. C. 405; Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264; Wykham *v.* Wykham (1811), 18 Ves. 395; Roe d. Thong *v.* Bedford (1815), 4 M. & S. 362; Jervoise *v.* Northumberland (1820), 1 Jac. & W. 559; Mellish *v.* Mellish (1823), 3 Dow. & Ry. K. B. 804; Doe d. Bagnall *v.* Harvey (1825), 7 Dow. & Ry. K. B. 78; Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67; Douglas *v.* Congreve (1838), 1 Beav. 59; Eno *v.* Eno (1847), 6 Hare, 171; Evans *v.* Evans, [1892] 2 Ch. 173; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569.

3584. —— ——.]—(1) A charge not extinguished for the benefit of the estate, though satisfied by the tenant in tail, with the intention of extinguishing it, under the erroneous supposition that he was tenant in fee simple.

(2) If a tenant for life pays off a charge on the estate, *primâ facie* he is entitled to that charge for his own benefit with the qualification of having no interest during his life; If a tenant in tail, or in fee simple, pays off a charge, that payment is *primâ facie* presumed to be made in favour of the estate; but the presumption may be rebutted by evidence (LORD ELDON, C.).—BUCKINGHAMSHIRE (EARL) *v.* HOBART (1818), 3 Swan. 186; 36 E. R. 824, L. C.

Annotations:—*As to* (1) **Consd.** Clifford *v.* Clifford (1852), 9 Hare, 675. *As to* (2) **Consd.** Astley *v.* Milles (1827), 1 Sim. 298. **Refd.** Cole *v.* Stutely (1842), 6 Jur. 314; Grice *v.* Shaw (1852), 10 Hare, 76.

3585. —— ——.]—Tenant for life discharging an incumbrance upon the estate is presumed to have intended to keep the charge alive against the inheritance for his own benefit, & the absence of an assignment will not conclude him; but a similar presumption does not arise from the payment by a tenant for life of bond debts, which, even if assigned, only place him in the same position, as any other bond creditor.

Testator, being indebted by bond, devised certain real estate to his son for life, with remainder, subject to a term for the payment of legacies, to his grandson in tail, & died. Upwards of twenty years after the date of the latest of the bonds, the tenant for life & his assignee for value filed their bill against the tenant in tail & the legatees, alleging that the tenant for life had paid off the bonds, & seeking to stand in the shoes of the obligees as against the inheritance. The tenant in tail pleaded the Stat. Limitations, the other legatees did not:—*Held:* the payment of the bonds by the tenant for life did not constitute him an incumbrancer on the estate, & the bonds themselves, being more than twenty years old, the presumption was that they had been satisfied.

Semble: the plea of the Stat. Limitations, under the circumstances, by the tenant in tail, enured for the benefit of all defts.—MORLEY *v.* MORLEY (1855), 5 De G. M. & G. 610; 1 Jur. N. S. 1097; 4 W. R. 75; 43 E. R. 1007; *sub nom.* MORLEY *v.* MORLEY, HARLAND *v.* MORLEY, 25 L. J. Ch. 1, L. C.

Annotations:—**Consd.** *Re* Tasker, Hoare *v.* Tasker, [1905] 2 Ch. 587. **Mentd.** Roddam *v.* Morley (1856), 2 K. & J. 336; Lawton *v.* Ford (1866), L. R. 2 Eq. 97.

3586. —— —— Though ultimate fee in tenant for life.]—PITT *v.* PITT, No. 3621, *post.*

3587. —— —— Though parent of remaindermen.]—When a tenant for life pays off a mtge. on the estate, the fact that he is the parent of those entitled in remainder is not of itself sufficient to rebut the presumption that he intends to keep the charge alive for his own benefit.—*Re* HARVEY, HARVEY *v.* HOBDAY, [1896] 1 Ch. 137; 65 L. J. Ch. 370; 73 L. T. 613; 44 W. R. 242; 40 Sol. Jo. 157, C. A.

3588. —— Proof of intention.]—GIFFORD (LORD) *v.* FITZHARDINGE (LORD), No. 3589, *post.*

3589. —— Reconveyance absolutely discharged from mortgage—Proof of intention to keep charge alive.]—A reversionary interest in trust funds was mortgaged by the reversioner. He afterwards on his marriage assigned the same interest, subject to the mtge., to trustees, on trust for his wife for her life, with remainder to himself for his life, with remainders over. After the marriage he paid off the mtge. debt out of his own moneys, & the mtgee. executed a deed which purported to reconvey the mtged. property to him "absolutely discharged from" the mtge. debt & all claims under the mtge. deed. The solrs. who prepared the reconveyance were ignorant of the existence of the settlement. In an action by the reversioner, claiming to have the reconveyance set aside or rectified, he gave evidence that he did not intend to pay off the mtge. debt for the benefit of the settlement, but that he intended to keep the charge alive for his own benefit:—*Held:* notwithstanding the form of the reconveyance, pltf. was entitled to have the charge kept alive for his own benefit, & the sum secured by the mtge. constituted a charge on the property having priority over the settlement, & a declaration was made to that effect.—GIFFORD (LORD) *v.* FITZHARDINGE (LORD), [1899] 2 Ch. 32; 68 L. J. Ch. 529; 81 L. T. 106; 47 W. R. 618.

3590. —— Effect of lapse of time.]—MORLEY *v.* MORLEY, No. 3585, *ante.*

3591. —— Charge for succession duty.]—In 1864 J. purchased certain land in B., & on Aug. 4, 1864, conveyed this land to the trustees of the will of testator F. by way of mtge. On Sept. 7,

3588 i. *Paying off charge — Proof of intention.*]—LINDSAY *v.* WICKLOW (EARL) (1873), 7 I. R. Eq. 192.—IR.

3588 ii. —— ——.]—SMITH *v.* SMITH (1887), 19 L. R. Ir. 514.—IR.

q. *Property devised without mentioning charge — Matter of indifference whether charge kept alive—Charge extinguished.*]—*Re* TOPPIN'S ESTATE, [1915] 1 I. R. 330.—IR.

Sect. 4.—By merger: Sub-sect. 2, F. (a) & (b), & G. (a) & (b) i.]

1898, by an indenture made between J. of the one part, & E. of the other part, J. conveyed the said land in B. unto E. in fee simple subject to the payment of the principal moneys & interest secured by the indenture of mtge. of Aug. 4, 1864. By another indenture of same date, & made between the same parties, J. released unto E. his life estate & interest of the residuary estate of testator F. Succession duty had not been paid by E.:—*Held:* the mtge. debt of £400 had not become merged in the said land in B., but passed by the residuary bequest of the personal estate of E.—*Re* SIMMONS, DENNISON *v.* ORMAN (1902), 87 L. T. 594.

—— **Land tax.**]—*See* LAND TAX, Vol. XXX., p. 311, Nos. 112, 113.

3592. Paying interest in excess of rents.]—Tenant for life in possession, having power to charge the inheritance with £20,000 & interest for his own benefit, executed the power, & assigned the charge as part security for a larger sum. The rents received from the estate were insufficient to pay the interest, & the tenant for life paid to the assignees of the charge this interest out of other moneys of his own; but did so without giving any notice whatever to the remainderman of his intention to make the deficiency a charge on the inheritance. After the death of the tenant for life the remainderman claimed to redeem, & the assignees of the charge sought, as against the inheritance, to charge it with the amount of the deficiencies:—*Held:* they were not entitled to do so.—KENSINGTON (LORD) *v.* BOUVERIE (1859), 7 H. L. Cas. 557; 29 L. J. Ch. 537; 34 L. T. O. S. 16; 6 Jur. N. S. 105; 11 E. R. 222, H. L.

Annotations:—**Refd.** Mayer *v.* Murray (1878), 8 Ch. D. 424; Noyes *v.* Pollock (1886), 32 Ch. D. 53. **Mentd.** Howlin *v.* Sheppard (1870), 19 W. R. 253.

(b) *Tenant in Tail.*

3593. General rule—Payment of charge presumed for benefit of estate.]—JONES *v.* MORGAN, No. 3583, *ante*.

3594. —— ——.]—BUCKINGHAMSHIRE (EARL) *v.* HOBART, No. 3584, *ante*.

3595. Payment of charge—Under erroneous belief that he was absolute owner.]—BUCKINGHAMSHIRE (EARL) *v.* HOBART, No. 3584, *ante*.

3596. —— **Tenant in tail in remainder—Afterwards becoming entitled in possession—Assignment of mortgage term.**]—Tenant in tail in remainder, after estates to A. for life, & to his first & other sons in tail, pays off a mtge. during the life of the tenant for life, takes an assignment to himself of the mtge. term, & afterwards comes into possession of the estate, & dies without issue; the mtge. is a subsisting charge for the benefit of his personal estate, there being no act to show a contrary intention.—WIGSELL *v.* WIGSELL (1825), 2 Sim. & St. 364; 4 L. J. O. S. Ch. 84; 57 E. R. 385.

Annotations:—**Apld.** Horton *v.* Smith (1858), 4 K. & J. 624. **Refd.** Astley *v.* Milles (1827), 1 Sim. 298.

3597. —— —— —— ——.]—Tenant in tail in remainder expectant upon a preceding estate tail, purchased a mtge. on the estate & took an assignment to himself of the mtge. debt & of the term by which it was secured. He subsequently became entitled to the estate as tenant in tail in possession, & as such continued for six years in receipt of the rents; after which he died without barring the entail or doing any other act indicative of an intention as to whether the charge should merge:—*Held:* the charge was kept alive for the benefit of his personal representative.

Whatever discrepancy may exist between the earlier & the later authorities, it is clear, according to the latter, that in all cases of a tenant in tail in possession paying off a charge upon the estate, unless he indicates, at the time of making the payment, or at all events subsequently, an intention to the contrary, it will be assumed that he intended such payment for the benefit of the estate. But I am not aware of any case in which it has been determined that where a tenant in tail in remainder pays off a charge before he becomes entitled in possession to the estate, the charge shall sink for the benefit of the estate (PAGE WOOD, V.-C.).—HORTON *v.* SMITH (1858), 4 K. & J. 624; 27 L. J. Ch. 773; 6 W. R. 783; 70 E. R. 259.

3598. —— **Out of income—Before & after disentailment & resettlement.**]—In 1904 pltf. became entitled as tenant in tail to the family estates, which were subject to heavy incumbrances. With his consent a considerable part of the income was applied in the reduction of the charges. In Feb. 1909, pltf. came of age & disentailed & resettled the estate, becoming the first tenant for life. The same course as to payment off of incumbrances out of the income was continued:—*Held:* the presumption in favour of a limited owner who pays off incumbrances had not been rebutted, & the payments out of income were a charge on the inheritance in favour of the pltf.—WILLIAMS *v.* WILLIAMS-WYNN (1915), 84 L. J. Ch. 801; 113 L. T. 849.

Infant tenant in tail—Redemption of land tax.]—*See* LAND TAX, Vol. XXX., p. 308, No. 92.

G. *Rebuttal of Presumption in favour of or against Merger.*

(a) *Express Intention.*

3599. Express declaration prevents merger.]—A. mortgaged for five hundred years to B. Afterwards he mortgages in fee to pltf., & B. assigned his mtge. to deft., who advancing more money, took a conveyance of the inheritance, with an agreement that the five hundred years term should be kept on foot as an additional security, but the term was never assigned over to a third person. It was agreed, that if the term had been kept regularly on foot, deft. would have been in the care of a third mtgee. taking in the first incumbrance to protect himself by which he would have had the law on his side; whereas here the term was merged upon the grant of the inheritance, & therefore at law it would be with pltf., who had the first mtge. in fee:—*Held:* pltf.'s conveyance of the inheritance interposing between the term & deft.'s grant, the grant of deft. was void in law, the grantor having nothing in him, & the term could not be merged in a void grant of the inheritance, & deft. must be first paid his whole money.—HASKETT *v.* STRONG (1726), 2 Eq. Cas. Abr. 613; 2 Stra. 689; 22 E. R. 515.

3600. ——.]—By the settlement in question, the father had charged a sum of £5,000, owing by him to his sister A. S., upon the estate, &, subject thereto, had settled the estate upon himself for life, & then upon his daughter & her issue. He subsequently paid off the charge, & a deed was

3599 i. *Express declaration prevents merger.*]—*Re* CORK HARBOUR DOCKS & WAREHOUSE CO.'S ESTATE, LYONS & WRIGHT, PETITIONERS (1885), 17 L. R. Ir. 515.—IR.

executed by the settlor & the trustees of the settlement, by which it was declared that the trustees should hold the property to secure payment of the said £5,000 to the settlor, as part of his personal estate, as it was secured by the settlement to the said A. S. :—*Held :* the settlor had power to keep alive the charge, & the charge was still subsisting, & passed under a residuary bequest contained in the will of the settlor.—JAMESON *v.* STEIN (1855), 21 Beav. 5 ; 25 L. J. Ch. 41 ; 25 L. T. O. S. 300 ; 52 E. R. 759.

3601. ——.]—By a settlement dated in 1821 copyhold lands, which had been conditionally surrendered for securing certain mtges., were settled by testator, subject to the mtges., he at the same time covenanting to pay off same ; & there was a proviso, that as between testator, his heirs, exors., & administrators, & the persons entitled under the settlement, the lands were to be the primary fund for payment of the same mtge. debts. In 1826 testator paid off the debts out of his own moneys, & satisfaction was duly entered on the court rolls of the conditional surrender. In 1831 the lands were, under a power in the first settlement, resettled by testator & his wife, but no notice was taken of the fact of repayment of the mtges. By his will testator directed all his debts, etc. to be paid out of the personalty only :—*Held :* the amount of the mtge. debts was to be considered as kept on foot as part of testator's personal estate.—PEARS *v.* WEIGHTMAN (1856), 2 Jur. N. S. 586.

3602. —— **Conveyance to trustee.**] — Mtgee. purchasing an equity of redemption, preserves his mtge. unmerged by taking a conveyance to a trustee, with a declaration of his intention to that effect.—BAILEY *v.* RICHARDSON (1852), 9 Hare, 734 ; 68 E. R. 711.

Annotations :—**Mentd.** Barnhart *v.* Greenshields (1853), 9 Moo. P. C. C. 18 ; Knight *v.* Bowyer (1858), 2 De G. & J. 421 ; Hunt *v.* Luck, [1902] 1 Ch. 428 ; Green *v.* Rheinberg (1911), 104 L. T. 149.

3603. —— **Declaration made before union of charge & estate.**]—TYRWHITT *v.* TYRWHITT, No. 3617, *post.*

3604. —— **Declaration that charge to be kept alive—For protection of mortgagee his heirs & assigns.**]—Although a mtgee., who purchases the equity of redemption in the property, may by a declaration keep the charge alive, the declaration cannot have the effect of converting the living charge into real property & making it descend to his heirs in the event of his dying intestate ; even though the declaration is to the effect that the charge is to be kept alive as a protection to the mtgee., his heirs & assigns, against subsequent incumbrancers, if any such there be, but for no other purpose.

In 1866 A. mortgaged freeholds to D. in fee. In 1867 D. charged his mtge. debt & created a term of 1,000 years to secure the charge. In 1868, D. foreclosed A., & between 1870 & 1872 mortgaged the fee to G. to secure sums amounting to £5,411. In 1872 D. by his marriage settlement, also charged the fee with £5,000, which sum, in the events which happened, became held in trust for him. In 1874 D.'s equity of redemption under his mtges. of 1870 to 1872 & his interest in the £5,000 were conveyed to G. subject to all existing charges & with a declaration against merger. In 1900 G. took a transfer of the charge, then reduced to £9,800, & term of years created by the mtge. of 1867 with a declaration against merger, & in 1902 he deposited the deeds of 1866, 1867 & 1900 with a memorandum of deposit with M. by way of equitable mtge. On G.'s death, intestate, the question arose between his real & personal representatives whether the above-mentioned three charges of £9,800, £5,411 & £5,000 or any of them had merged in the fee :—*Held :* the charges of £5,411 & £5,000 had merged in the fee, for that it would be a fraud on M. to keep them alive against him in favour of G. his mtgor.—*Re* GIBBON, MOORE *v.* GIBBON, [1909] 1 Ch. 367 ; 78 L. J. Ch. 264 ; 100 L. T. 231 ; 53 Sol. Jo. 177.

(*b*) *Implied Intention of Absolute Owner.*

i. *Benefit of Owner.*

See EQUITY, Vol. XX., pp. 510, 511, NOS. 2383–2402.

3605. Intention presumed from what is beneficial to owner.]—GWILLIM *v.* HOLLAND (1741), *cited in* 18 Ves. p. 393 ; 34 E. R. 366, L. C.

Annotation :—**Apld.** Forbes *v.* Moffatt (1811), 18 Ves. 384.

3606. ——.]—Where an old mtge. term of one thousand years, created in 1727, was recognised in a marriage settlement of the owner of the inheritance in 1751, by which a sum was appropriated to its discharge ; no further notice was had of it till 1802 ; when a deed, to which the then owner of the inheritance & the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others to secure a mtge. :—*Held :* it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it.—DOE d. GRAHAM *v.* SCOTT (1809), 11 East, 478 ; 103 E. R. 1088.

Annotation :—**Reld.** Doe d. Burdett *v.* Wrighte (1819), 2 B. & Ald. 710.

3607. ——.]—Mtge. not merged by union with the fee : the actual intention, not established by the acts of the party, presumed from the greater advantage against merger in favour of the personal representative.

The question is upon the intention, actual or presumed, & the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate ; & where this is the case, it will be held to sink, unless something shall have been done by him to keep it on foot (GRANT, M.R.).

Where no intention is expressed, or the party is incapable of expressing any, the ct. considers what is most advantageous to him (GRANT, M.R.).

PART XIV. SECT. 4, SUB-SECT. 2.—G. (b) i.

3605 i. *Intention presumed from what is beneficial to owner.*]—CROAKER & HEYDON *v.* BANK OF NEW SOUTH WALES (1889), 10 N. S. W. Eq. 195 ; 6 N. S. W. W. N. 53.—**AUS.**

3605 ii. ——.]—EMMONS *v.* CROOKS (1850), 1 Gr. 159.—**CAN.**

3605 iii. ——.]—CAMPBELL *v.* SPURGEON (1878), 29 C. P. 86.—**CAN.**

3605 iv. ——.] — The question of interest governs merger in the absence of express intention.—MACLENNAN *v.* GRAY (1888), 16 O. R. 321.—**CAN.**

3605 v. ——.]—REEVES *v.* KONSCHUH (1909), 10 W. L. R. 680 ; 2 Sask. L. R. 125.—**CAN.**

3605 vi. ——.]—GOPAL CHANDER SREEMANY *v.* HEREMBO CHUNDER HOLDER (1889), I. L. R. 16 Calc. 523.—**IND.**

3605 vii. ——.] — Where a mtgee. pays off prior incumbrances on the mtged. property, it is to be presumed that he does so with the intention of keeping these incumbrances alive & using them as a shield should occasion arise.—GUR NARAIN *v.* SHADI LAL (1911), I. L. R. 34 All. 102.—**IND.**

3605 viii. ——.] — If it is to the advantage of the person paying that the security should be kept alive, the law will presume that he intended to keep it alive.—MAHALAKSHMAMMAL *v.* SRIMAN MADHWA SIDHANTA UNNAHINI NIDHI, LTD. (1912), I. L. R. 35 Mad. 642.—**IND.**

3605 ix. ——.]—*Re* NUNN'S ESTATE (1888), 23 L. R. Ir. 286.—**IR.**

3605 x. ——.]—*Re* GODLEY'S ESTATE, [1896] 1 I. R. 45.—**IR.**

Sect. 4.—By merger: Sub-sect. 2, G. (b) i., ii. & iii.]

—FORBES *v.* MOFFATT, MOFFATT *v.* HAMMOND (1811), 18 Ves. 384; 34 E. R. 362.

Annotations:—**Apld.** Clarendon *v.* Barham (1842), 1 Y. & C. Ch. Cas. 688; Davis *v.* Barrett (1851), 14 Beav. 542. **Consd.** Grice *v.* Shaw (1852), 10 Hare, 76; Horton *v.* Smith (1858), 4 K. & J. 624; Richards *v.* Richards (1860), John. 754. **Refd.** Cole *v.* Stutely (1842), 6 Jur. 314; Faulkner *v.* Daniel (1843), 3 Hare, 199; Byam *v.* Sutton (1854), 19 Beav. 556; Johnson *v.* Webster (1854), 4 De G. M. & G. 474; Swinfen *v.* Swinfen (No. 3) (1860), 29 Beav. 199; Patten *v.* Bond (1889), 60 L. T. 583; *Re* French-Brewster's Settlmts., Walters *v.* French-Brewster, [1904] 1 Ch. 713; Whiteley *v.* Delaney, [1914] A. C. 132. **Mentd.** Graves *v.* Hicks (1833), 6 Sim. 391; Keogh *v.* Keogh (1874), 22 W. R. 508; Ingle *v.* Vaughan-Jenkins (1900), 69 L. J. Ch. 618.

3608. ——.]—By a marriage settlement, £20,000, the fortune of the wife, was assigned to trustees upon trust, subject to life interests of the husband & wife, as to one moiety for the eldest son of the marriage, & as to the other moiety for the younger children. By the same settlement, a certain plantation in Jamaica, of which the husband was seised in fee simple, was conveyed to the use of trustees for a term of five hundred years, upon trust, if the husband should so appoint, to raise £10,000 for his absolute use, & subject to such term, & to the life interests of husband & wife, to trustees for one thousand years, upon trust to raise £20.000 for the eldest son, £10,000 for the younger children, & again £10,000 for the eldest son. The settlement contained a proviso that the portions should be raised according to their priority, as stated in the settlement. Soon after the marriage the husband exercised his right of raising £10,000 for his own use, & for that purpose the trustees of the five hundred years' term borrowed of the trustees of the wife's fortune £10,000, & executed to the latter a mtge. of the premises comprised in the five hundred years' term. The husband & wife died, leaving five children of the marriage; the husband having by his will, after directing payment of his debts, & devising certain property not situated in Jamaica, devised all his residuary real & personal property to his eldest son J., & appointed him his exor. Upon the death of testator, J. proved the will, acted as exor., & entered into possession of the estates in Jamaica, of which he kept possession, paying the interest of the younger children's fortunes, until 1837, when he became a lunatic, shortly after which he died intestate & unmarried, leaving the four younger children surviving him, of whom W. was his heir at law. No arrangement had ever been entered into amongst the children relative to the charges in the settlement, nor was there any strong evidence of the intentions of J. as to the extinguishment of those charges to which he was entitled:—*Held:* under the foregoing circumstances, it was most for the benefit of J. that his charges on the Jamaica estate should be considered as not having been extinguished in the inheritance, & consequently they were not extinguished.—CLARENDON (EARL) *v.* BARHAM (1842), 1 Y. & C. Ch. Cas. 688; 62 E. R. 1073; *sub nom.* CLARENDON (EARL) *v.* DE CLIFFORD (DOWAGER LADY), 6 Jur. 962.

Annotations:—**Apld.** Davis *v.* Barrett (1851), 14 Beav. 542. **Consd.** Grice *v.* Shaw (1852), 10 Hare, 76. **Refd.** Byam *v.* Sutton (1854), 19 Beav. 556; Johnson *v.* Webster (1854), 4 De G. M. & G. 474. **Mentd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1; Hickling *v.* Boyer (1851), 3 Mac. & G. 635; Bond *v.* England (1855), 2 K. & J. 44; Swainson *v.* Swainson (1856), 6 De G. M. & G. 648; Swainson *v.* Swainson (1858), 4 Jur. N. S. 1011; Richards *v.* Richards (1860), John. 754; Ingle *v.* Vaughan-Jenkins (1900), 69 L. J. Ch. 618.

3609. ——.]—Merger of a charge in the inheritance is not to be assumed, if it would be contrary to the interest of the owner of the estate & charge.—DAVIS *v.* BARRETT (1851), 14 Beav. 542; 51 E. R. 394.

Annotations:—**Refd.** Johnson *v.* Webster (1854), 4 De G. M. & G. 474; Richards *v.* Richards (1860), John. 754. **Mentd.** Nelson *v.* Booth (1857), 5 W. R. 722; Kirkwood *v.* Thompson (1865), 5 New Rep. 445.

3610. ——.]—SWINFEN *v.* SWINFEN (No. 3), No. 3620, *post.*

3611. ——.]—TYRWHITT *v.* TYRWHITT, No. 3617, *post.*

3612. ——.]—Where the owner of an equity of redemption pays off a mtgee. & takes an assignment of the mtge., & the documents or circumstances show an intention to keep alive the security, it is not extinguished but enures for the benefit of the owner of the equity of redemption.

Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished & as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, & you may presume an intention from considering whether it is or is not for his benefit that this charge should be kept on foot (LORD MACNAGHTEN).—THORNE *v.* CANN, [1895] A. C. 11; 64 L. J. Ch. 1; 71 L. T. 852; 11 R. 67, H. L.

Annotations:—**Consd.** Crosbie-Hill *v.* Sayer, [1908] 1 Ch. 866. **Refd.** Liquidation Estates Purchase Co. *v.* Willoughby, [1896] 1 Ch. 726; The Ripon City, [1898] P. 78; Capital & Counties Bank *v.* Rhodes, [1903] 1 Ch. 631; *Re* Tasker, Hoare *v.* Tasker, [1905] 2 Ch. 587; Whiteley *v.* Delaney, [1914] A. C. 132. **Mentd.** Thellusson *v.* Liddard, [1900] 2 Ch. 635; *Re* Routledge, Hummel *v.* Routledge, [1904] 2 Ch. 474.

3613. ——.]—The purchaser of an equity of redemption took an assignment of a charge upon the property & paid off the incumbrancer. There being no evidence in the deed or the circumstances of any intention to extinguish the charge & it being for the purchaser's benefit to keep it alive:—*Held:* the charge was not extinguished.—LIQUIDATION ESTATES PURCHASE CO. *v.* WILLOUGHBY, [1898] A. C. 321; 67 L. J. Ch. 251; 78 L. T. 329; 46 W. R. 589; 14 T. L. R. 295, H. L.

Annotations:—**Consd.** Crosbie-Hill *v.* Sayer, [1908] 1 Ch. 866. **Refd.** *Re* Tasker, Hoare *v.* Tasker, [1905] 2 Ch. 587; Manks *v.* Whiteley, [1912] 1 Ch. 735. **Mentd.** *Re* Routledge, Hummel *v.* Routledge (1904), 53 W. R. 44.

3614. ——.]—By an indenture of lease dated Aug. 20, 1880, W. demised certain property to M. for a term of ninety five years at the rent of £222 5*s.* 6*d.* By a mtge. dated June 24, 1881, M. demised the term, less three days, at a peppercorn rent to H. to secure £2,000 & further advances. £8,000 was now due on the security. M. procured a conveyance of the fee on Mar. 27, 1882, & in 1885 sold to F., the conveyance being expressed to be subject to the lease of Aug. 20, 1880. In July, 1902, M. became bkpt., his trustee disclaimed the lease, & on May 5, 1903, an order was made by the registrar of the Warwick county ct. that H.'s representatives should be excluded from all interest in the lease, & that same should be vested in a purchaser from F., unless H.'s representatives declared their option to accept a vesting order of the lease. H.'s representatives did not appeal from the order in bkpcy., but now asked (*a*) a declaration that the term created by the lease of Aug. 20, 1880, subject to the sub-term created by the mtge. of June 24, 1881, became merged & extinguished on the conveyance of the fee to M.; & (*b*) a declaration that H.'s representatives were entitled to the premises for the residue of the term created by the mtge., subject only to a peppercorn rent & the equity of redemption:—*Held:*

even if there were no estoppel, there was no merger, as it was for the benefit of M. & his intention to keep the term subsisting.—LEA *v.* THURSBY, [1904] 2 Ch. 57; 73 L. J. Ch. 518; 90 L. T. 667; 20 T. L. R. 470; 11 Mans. 151.

Annotation :—**Refd.** *Re* Fletcher, Reading *v.* Fletcher, [1917] 1 Ch. 339.

3615. ——.]—*Re* GIBBON, MOORE *v.* GIBBON, No. 3604, *ante*.

ii. *Subsequent Dealings with Property Charged.*

3616. General rule.] — SWINFEN *v.* SWINFEN (No. 3), No. 3620, *post*.

3617. Only consistent with charge being kept on foot.]—Where a charge on an estate becomes vested absolutely in the owner of the inheritance of the estate, the three tests usually applied for ascertaining whether the charge has merged are : (*a*) whether there has been an actual expression of intention to that effect; (*b*) whether the acts done by the owner of the estates are only consistent with the charge being kept on foot; & (*c*) whether it is for the interest of the owner that the charge should not merge in the inheritance.

A fund which was held in trust for A. for life, with remainder to B. absolutely, was lent by the trustees, B. & C., to B., on mtge. of his fee simple estates. By the mtge. deed, the trustees declared that they would hold the fund after the decease of A. for " B., his exors., administrators & assigns, for his & their absolute benefit." B. survived A. & died :—*Held :* this was not a sufficient indication of a contrary intention to prevent the merger of the charge in the inheritance.

Three tests are usually applied for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance, at the time when he become entitled to the absolute interest of the charge. First, any actual expression of that intention; secondly, where the form & character of the acts done are only consistent with keeping the charge on foot; & thirdly, such an intention may be presumed, when, though a total silence in all other respects pervades the matter, it appears that it is for the interest of the owner of the charge that it should not merge in the inheritance (ROMILLY, M.R.).—TYRWHITT *v.* TYRWHITT (1863), 32 Beav. 244; 1 New Rep. 458; 32 L. J. Ch. 553; 8 L. T. 140; 9 Jur. N. S. 346; 11 W. R. 409; 55 E. R. 96.

3618. Not referring to charge—Mortgage in fee—Subsequent will not referring to charge.] — A. devised his real estates to B. in fee, charged with £1,000, which he gave to B. in trust to be laid out for the separate use of C., his sister, for her life, &, after her decease, as she should by her will appoint, &, in default of appointment, to be retained by B. B. devised the estates to trustees in trust for C. & D. as tenants in common in fee, subject to his debts, etc.; & by a codicil he directed his personal estate to be first applied in payment of his debts, legacies, etc. After B.'s death, the trustees conveyed the estates to C. & D. as tenants in common in fee, subject to the £1,000, & other incumbrances. C. & D. having agreed to make partition, one moiety of the estates was conveyed to C., in fee, subject to a term for indemnifying D. from the £1,000, & the other moiety was conveyed to D. in fee. C. afterwards mortgaged her moiety in fee; & by her will, without referring to the £1,000, disposed of her personal estate in general terms :—*Held :* the £1,000 was merged.—TYLER *v.* LAKE (1831), 4 Sim. 351; 58 E. R. 131.

Annotation :—**Apld.** *Re* Gibbon, Moore *v.* Gibbon, [1909] 1 Ch. 367.

3619. —— **Devise of fee.**]—A party who would become entitled to an estate, in the event of the death of certain persons without issue, paid off some mtges. to which the estate was subject, & had them assigned to trustees, in trust for himself. He afterwards became absolutely entitled to the estate in possession, & being in possession of it, devised all his estates by his will, without in any way referring to the incumbrances on this estate :—*Held :* under the circumstances of the case, the incumbrances were no longer subsisting. — SELSEY (LORD) *v.* LAKE (LORD) (1839), 1 Beav. 146; 8 L. J. Ch. 233; 48 E. R. 895.

Annotation :—**Refd.** *Re* Sharp, Maddison *v.* Gill, [1908 1 Ch. 372.

3620. —— ——.]—When the owner of an estate in fee simple becomes entitled to a charge on that estate, *primâ facie* the charge, in equity at least, merges in the inheritance unless the owner of the estate does some act to keep it alive, or unless, from the circumstances of the case, it would be for his interest that it should continue to be a subsisting charge.

Devise by the owner in fee without mentioning a charge on it to which he was absolutely entitled, held to be some indication of his intention to merge it. Testator was owner in fee of an estate on which there was a charge of £6,000 to which he was absolutely entitled, & a subsequent charge of a jointure in favour of B. Testator devised the estate in fee to B. :—*Held :* she took discharged of the mtge.—SWINFEN *v.* SWINFEN (No. 3) (1860), 29 Beav. 199; 4 L. T. 194; 7 Jur. N. S. 89; 9 W. R. 175; 54 E. R. 603.

Annotations :—**Refd.** Keogh *v.* Keogh (1874), 22 W. R. 508. **Mentd.** Northey *v.* Paxton (1888), 60 L. T. 30.

3621. —— **Devise for life—Charge vested in trustee for owner.**]—(1) A mtge. on an estate was paid off by a party having a life interest, with an ultimate remainder to himself in fee, & having power to appoint to his wife for her life, which he afterwards exercised. The debt & a mtge. term were assigned to a trustee for him, who executed a declaration of trust :—*Held :* the debt had been kept alive for his benefit.

(2) A mtge. created on an estate for the payment of the greater part of the purchase-money, was afterwards paid off by the owner in fee & assigned to a trustee for him. He afterwards, by will, devised a life interest in all his real property to his wife, & subject thereto, devised the same upon trust for other persons :—*Held :* this charge was merged in the inheritance.—PITT *v.* PITT (1856), 22 Beav. 294; 27 L. T. O. S. 257; 2 Jur. N. S. 1010; 52 E. R. 1121.

iii. *Transfer of Charge to Trustee.*

3622. General rule.]—Where the same person becomes absolutely entitled to an estate & a sum of money charged upon it, the charge will be deemed extinguished, unless it appears that the owner intended otherwise.

For the purpose of showing the intention, evidence direct & presumptive may be resorted to. A transfer to a trustee must be considered as one of the grounds rebutting the presumption of merger; but does not amount to decisive evidence against the presumption.

Sect. 4.—By merger: Sub-sect. 2, G. (b) iii. & iv., (c) & (d); sub-sect. 3, A. & B.]

A., the owner in fee of an estate, paid off a mtge. in fee existing on it, which in 1807 was transferred to a trustee, in trust for A., her "heirs, exors., administrators, & assigns, respectively"; & the trustee convenanted to convey to A., her heirs or assigns, or unto such other person or persons, & in such manner & form as A., her heirs, exors., administrators, or assigns should direct. A. devised the estate to a trustee to pay certain specified legacies, & subject thereto, she devised it to C. in fee, & upon or for no other use, trust, intent, or purpose whatsoever." A. died in 1832:—*Held:* the mtge. had merged.

The presumption being, that when the owner of an estate pays off a charge, he does it for the relief of the estate, a contemporaneous transfer of the charge to a trustee must be considered as one of the grounds upon which the presumption may be rebutted; but no instance has been cited in which such a transfer has of itself been held to be decisive evidence against the presumption, & I am of opinion that it ought not to be so (LORD LANGDALE, M.R.).—HOOD *v.* PHILLIPS (1841), 3 Beav. 513; 49 E. R. 202.

Annotations:—**Folld.** Pitt *v.* Pitt (1856), 22 Beav. 294. **Reld.** *Re* Tasker, Hoare *v.* Tasker, [1905] 2 Ch. 587.

3623. Subsequent devise for life.]—PITT *v.* PITT, No. 3621, *ante.*

iv. *Other Acts of Owner.*

3624. Devise & bequest by mortgagor of all real & personal estate to mortgagee—Mortgagee retaining part of debt out of personalty—Devise by mortgagee with liabilities.]—A., the owner of a freehold estate, subject to a mtge. in fee to secure £1,300, devised & bequeathed his real & personal estate to B. the mtgee. B., in his residuary account, stated that he had retained £467, out of the personal estate, towards payment of his mtge. debt. Afterwards, B. devised the property to three relatives of A., "provided they undertake to receive the same with all the liabilities attaching thereunto":—*Held:* (1) under the circumstances, the mtge. had not merged in the fee; (2) the three took the estate subject to the payment of the balance of the mtge. debt.—HATCH *v.* SKELTON (1855), 20 Beav. 453; 52 E. R. 678.

3625. Devise subject to mortgage—Mortgagor appointed executor & residuary legatee of mortgagee—Nonpayment of interest after mortgagees death—Deeds in hands of mortgagor.]—By his will dated Aug. 5, 1919, testator devised his lands in Herts unto & to the use of trustees upon trust for sale as therein mentioned & to hold the proceeds of sale "upon trust to pay the costs of such sale & to discharge & repay all mtge. debts secured on the said estate," & then subject to certain other payments upon trust to pay the net proceeds of sale to his brother. By a codicil dated Sept. 7, 1920, testator, after making certain devises & bequests not material to be stated, confirmed his will. Part of the property in Herts had been charged by testator's predecessor in favour of M. G. to secure a loan of £2,500 by a deposit of title deeds coupled with a memorandum undertaking to execute a legal mtge. when required to do so. Testator had himself also charged another part of the estate to M. G. to secure a loan of £5,000 by a deposit of title deeds & an agreement by which he agreed to repay the principal money & interest & also agreed to execute a legal mtge. when required to do so. By her will dated Nov. 11, 1919, M. G., who died without either of the equitable mtges. having been paid off, appointed testator & another her exors. & residuary legatees. The will was duly proved by both exors. on Aug. 27, 1920, & testator died on Sept. 18, 1920. There was evidence that testator's share in the residue of M. G.'s estate would exceed the two principal sums, but that the estate had not been fully administered at the death of testator. The title deeds deposited to secure the loan of £2,500 were after testator's death found amongst his papers. The other title deeds were in the hands of M. G.'s solrs. No interest had been paid on the mtges. since M. G.'s death, but it had been regularly paid by testator up to then:—*Held:* the result of testator being the mtgee.'s exor. was that he had to be treated as having in his hands on the mtgee.'s death the amount owing on the mtges. as part of her estate, but on the evidence he must be treated as having intended to discharge them out of his share of the mtgee.'s estate. The charges were therefore no longer subsisting at the date of his death.—*Re* GREG, FORDHAM *v.* GREG, [1921] 2 Ch. 243; 91 L. J. Ch. 48; 125 L. T. 825.

(c) *Incapacity of Owner.*

Infant owner.]—*See* EQUITY, Vol. XX., p. 509, Nos. 2367–2370.

Lunatic owner.]—*See* EQUITY, Vol. XX., pp. 509, 510, Nos. 2371, 2372.

(d) *Evidence.*

3626. Proof of intention—By correspondence between solicitors.]—After a decree in a foreclosure suit to which both the mtgor. & the first & second mtgees. were parties, the pltf., the first mtgee., purchased the equity of redemption from the trustee in bkpcy. of the mtgor., & by the deed of assignment, in consideration of £1,380, the sum due on the first mtge., retained by the first mtgee. "in full satisfaction" of his debt, & of £20 paid to the trustee, making the purchase-money of £1,400, the trustee assigned the mtged. property to the first mtgee., "subject to the aforesaid claim" of the second mtgee. The value of the mtged. property did not exceed £1,380. The second mtgee. contended that the effect of this purchase was to extinguish the first mtge. debt, & to let in his own charge as a first incumbrance. A correspondence took place between the solrs. of the first mtgee. & the trustee at the time of the purchase:—*Held:* the question being one of intention, a correspondence between the solrs. of the first mtgee. & the trustee in bkpcy. at the time of the purchase, was admissible in evidence, on the question whether it was intended to keep the first mtge. alive.—ADAMS *v.* ANGELL (1876), 5 Ch. D. 634; 46 L. J. Ch. 54; 25 W. R. 139; *affd.* on other grounds (1877), 5 Ch. D. 644, C. A.

Annotations:—**Reld.** *Re* Pride, Shackell *v.* Colnett, [1891] 2 Ch. 135; Minter *v.* Carr, [1894] 3 Ch. 498; Thorne *v.* Cann, [1895] A. C. 11; Liquidation Estates Purchase Co. *v.* Willoughby, [1898] A. C. 321; The Ripon City, [1898] P. 78; Ingle *v.* Vaughan-Jenkins (1900), 69 L. J. Ch. 618; Nicholas *v.* Ridley, [1904] 1 Ch. 192; Crosbie-Hill *v.* Sayer, [1908] 1 Ch. 866; Whiteley *v.* Delaney, [1914] A. C. 132.

SUB-SECT. 3.—MERGER OF LOWER IN HIGHER SECURITY.

A. In General.

3627. General rule.]—It is a general rule of law, that a party by taking or acquiring a security of

r. *Release—Strong evidence negativing intention—To keep charge alive.*]—BUCKLEY *v.* WILSON (1861), 8 Gr. 566.—CAN.

a higher nature in legal operation than the one he already possesses, merges & extinguishes his legal remedies upon the minor security or cause of action, that is to say the taking a bond or covenant or the acquiring a judgment for a simple contract debt merges & extinguishes the simple contract (LORD TURNER, C.).—OWEN *v.* HOMAN (1851), 3 Mac. & G. 378; 20 L. J. Ch. 314; 18 L. T. O. S. 45; 15 Jur. 339; 42 E. R. 307, L. C.; *affd.* on other grounds (1853), 4 H. L. Cas. 997, H. L.

Annotations:—**Mentd.** Newton *v.* Chorlton (1853), 2 Drew. 333; North British Insce. *v.* Lloyd (1854), 10 Exch. 523; Davies *v.* Stainbank (1855), 6 De G. M. & G. 679; Price *v.* Barker (1855), 24 L. J. Q. B. 130; Gardner *v.* Chapman (1860), 6 Jur. N. S. 1254; General Steam Navigation Co. *v.* Rolt (1860), 6 C B. N. S. 550; Way *v.* Hearn (1862), 11 C. B. N. S. 774; Lee *v.* Jones (1864), 17 C. B. N. S. 482; Bateson *v.* Gosling (1871), L. R. 7 C. P. 9; Oriental Financial Corpn. *v.* Overend, Gurney (1871), 7 Ch. App. 142; Muir *v.* Crawford (1875), L. R. 2 Sc. & Div. 456; Duncan, Fox *v.* North & South Wales Bank (1880), 6 App. Cas. 1; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32; Nicholas *v.* Ridley, [1904] 1 Ch. 192; Viola *v.* Anglo-American Cold Storage Co., [1912] 2 Ch. 305.

3628. ——.]—Pltfs. lent M. £650 on the security of a mtge. of certain property, with a covenant by M. to repay the £650, with interest at 5 per cent., on June 22, 1864; & as the mtge. was not a sufficient security for more than £500, the loan was made on the further security of the promissory note of M. & two sureties for £150, payable on demand, with interest at 4½ per cent The promissory note, which it was agreed between pltfs. & M. should be a collateral security to the mtge. deed, was made & given to pltfs. on Dec. 7, 1863, when £150, part of the loan, was advanced to M.; but the mtge. deed was not executed until Dec. 22, 1863. The deed contained no reference to the note, & the sureties who signed the note were not parties to the deed:—*Held:* the debt secured by the note did not merge in the deed, &, though the remedy on the covenant could not be enforced before June 22, 1864, time was not given to M. so as to discharge the liability of the sureties on the note.—BOALER *v.* MAYOR (1865), 19 C. B. N. S. 76; 34 L. J. C. P. 230; 12 L. T. 457; 11 Jur. N. S. 565; 13 W. R. 775; 144 E. R. 714.

Annotations:—**Refd.** Stamps Comr. *v.* Hope, [1891] A. C. 476; Westmoreland Green & Blue Slate Co. *v.* Feilden, [1891] 3 Ch. 15.

3629. Mortgage for part of debt—Not merged in subsequent mortgage for whole debt.]—Creditor having a mtge. on the funds of his debtor for part of his debt, does not necessarily surrender that mtge. or lower its priority, by taking a subsequent mtge. on the same funds for the whole of the debt.

A., a creditor, having a security for his debt upon funds of debtor, takes afterwards, either alone, but on behalf of himself & B. another creditor of the same debtor, or jointly with B., a security for both debts on the same funds which were the subject of A.'s separate security. A. does not thereby necessarily relinquish the separate security or alter its precedence.—MILN *v.* WALTON (1843), 2 Y. & C. Ch. Cas. 354; 7 Jur. 892; 63 E. R. 156.

B. Mortgage to Secure Existing Debt.

3630. Specialty liability not co-extensive with simple contract liability—Joint & several promissory note—Mortgage by one of the makers.]—Where B., being indebted to A., procured C. to join with him in giving a joint & several promissory note for the amount, & afterwards having become further indebted, & being pressed by A. for further security, by deed, reciting the debt, & that for a part a note had been given by him (B.) & C., & that A. having demanded payment of the debt, B. had requested him to accept a further security, assigned to A. all his household goods, etc., as a further security, with a proviso, that he should not be deprived of the possession of the property assigned until after three days' notice:—*Held:* this deed did not extinguish or suspend the remedy on the note, but that A. might, notwithstanding the deed, sue C. at any time.—TWOPENNY *v.* YOUNG (1824), 3 B. & C. 208; 5 Dow. & Ry. K. B. 259; 107 E. R. 711.

Annotations:—**Apld.** Ansell *v.* Baker (1850), 15 Q. B. 20. **Refd.** *Re* Barrow & Geddes, *Ex p.* Christy (1832), 2 Deac. & Ch. 155; Price *v.* Moulton (1851), 10 C. B. 561; Stamps Comr. *v.* Hope, [1891] A. C. 476. **Mentd.** Bell *v.* Banks (1841), 3 Man. & G. 258; *Re* Keasley, *Ex p.* Pennell (1841), 2 Mont. D. & De G. 273; Owen *v.* Homan (1851), 3 Mac. & G. 378; Newton *v.* Chorlton (1853), 10 Hare, 646; Bingham *v.* Corbitt (1863), 11 W. R. 232; Oriental Financial Corpn. *v.* Overend, Gurney (1871), 7 Ch. App. 145, n.; Westmoreland Green & Blue Slate Co. *v.* Fielden (1891), 65 L. T. 428.

3631. —— —— ——.]—If one of two makers of a joint & several promissory note gives the holder a deed of mtge. to secure the amount, with a covenant to pay it, the other maker is not thereby discharged; for the remedy on the specialty is not co-extensive with the remedy on the note.—ANSELL *v.* BAKER (1850), 15 Q. B. 20; 15 L. T. O. S. 559; 117 E. R. 365.

Annotations:—**Apld.** Sharpe *v.* Gibbs (1864), 16 C. B. N. S. 527; Boaler *v.* Mayor (1865), 19 C. B. N. S. 76. **Mentd.** Westmoreland Green & Blue Slate Co. *v.* Feilden, [1891] 3 Ch. 15.

3632. —— **Mortgage by two of three debtors.**]—Three persons were owners of some property, & they employed pltf. to let it for them, & two of them executed a mtge. deed securing to him the amount of his bill; in an action of *assumpsit* against the three for the amount of the bill:—*Held:* the action would lie, as the specialty liability not being co-extensive with the simple contract liability, the latter was not merged in the former.—SHARPE *v.* GIBBS (1864), 16 C. B. N. S. 527; 12 W. R. 711; 143 E. R. 1234.

Annotation:—**Apld.** Boaler *v.* Mayor (1865), 19 C. B. N. S. 76.

3633. Question of intention—Deposit of underlease as security—Subsequent deposit of head lease to secure further advance.]—Bkpt. being the lessee under a lease for forty-six years subject to a former lease for twenty years deposited it by way of equitable mtge. He afterwards purchased the remainder of the term granted by the first lease, & deposited that lease also with the same parties for securing a further sum:—*Held:* the first lease was not under these circumstances merged in the second, & the depositaries were good equitable mtgees. under both deposits.

Merger & extinguishment are now considered as matter of intention (SIR JOHN CROSS).—*Re* DIX, *Ex p.* WHITBREAD (1841), 2 Mont. D. & De G. 415, Ct. of R.

3634. Presumed intention—Bill of sale securing sum secured by earlier bill of sale & further advance.]—At the time when a bill of sale was executed, the mtgee. had notice of an act of

PART XIV. SECT. 4, SUB-SECT. 3.—B.

t. *General rule.*]—There is no merger of a simple contract debt in a higher security, if such security is merely collateral, & the remedy is left on the simple contract debt.—WENBOURNE *v.* J. I. CASE THRESHING MACHINE CO. (Alta.), [1917] 2 W. W. R. 150; 34 D. L. R. 363.—**CAN.**

a. *Promissory note into mortgage.*]—FAIRMAN *v.* MAYBEE (1858), 7 C. P. 467.—**CAN.**

b. ——.]—BANK OF UPPER CANADA *v.* BARTLETT & O'HARE (1862), 12 C. P. 238.—**CAN.**

c. ——.]—GORE BANK *v.* MCWHIRTER (1868), 18 C. P. 293.—**CAN.**

d. ——.]—NORTHERN CROWN BANK *v.* ELFORD & CORNISH, [1917] 2 W. W. R. 109; 10 Sask. L. R. 96; 34 D. L. R. 280.—**CAN.**

Sect. 4.—By merger: Sub-sect. 3, B., C. & D. Part XV.]

bkpcy. committed by the mtgor., upon which he was afterwards adjudicated a bkpt. The money secured by the deed consisted in part of a sum paid by the mtgee. in discharge of the claim of the holder of two prior registered bills of sale executed before the act of bkpcy. was committed. The old bills of sale were not transferred to the new mtgee., & satisfaction of them was entered up. The new bill of sale was registered:—*Held:* the new bill of sale was valid as against the trustee in the bkpcy. to the extent of the sum paid to the prior mtgee.—*Re* JAMES, *Ex p.* HARRIS (1874), L. R. 19 Eq. 253; 44 L. J. Bcy. 31; 31 L. T. 621; 23 W. R. 536.

See, also, BONDS, Vol. VII., pp. 192 *et seq.*, CONTRACT, Vol. XII., pp. 515 *et seq.*

C. Effect of Judgment for Mortgage Debt.

3635. Judgment obtained on covenant—Mortgage security still available.]—A mtgee., who recovers judgment upon his bond or covenant, cannot, so long as the judgment remains in force, sue his debtor upon the same bond or covenant, but he does not thereby lose his collateral security (WIGRAM, V.-C.).—LLOYD *v.* MASON (1845), 4 Hare, 132; 14 L. J. Ch. 257; 9 Jur. 772; 67 E. R. 590.

Annotations:—**Mentd.** Morgan *v.* Taylor (1859), 5 C. B. N. S. 653; O'Brien *v.* Lewis (1863), 3 De G. J. & Sm. 606.

——— ———.]—*See, further,* JUDGMENTS, Vol. XXX., pp. 164–165, Nos. 334, 336–338.

3636. ——— ———.]—Costs & expenses properly incurred by a mtgee. in relation to the mtged. property, & which the mtgor. will be compelled to pay as a condition of being allowed to redeem the property, do not constitute a debt in respect of which an action can be maintained by the mtgee. against the mtgor.

No doubt if the debtor in his character of mtgor. claimed to redeem the mtge., the ct. would not grant him that which originally was an indulgence, a departure from the strict tenor & his legal right, without imposing upon him the condition of paying the mtgee., not only the debt which he had contracted to pay by his covenant but any expenses which had been properly incurred by the mtgee. in her position as such. But that is an entirely different thing from saying that an action of debt could be maintained by the mtgee. against the mtgor. for those expenses (COTTON, L.J.).—*Re* SNEYD, *Ex p.* FEWINGS (1883), 25 Ch. D. 338; 53 L. J. Ch. 545; 50 L. T. 109; 32 W. R. 352, C. A.; *revsg.* S. C. *sub nom. Re* SNEYD, *Ex p.* OXFORD (BP.), 52 L. J. Ch. 724.

Annotations:—**Consd.** Wales *v.* Carr, [1902] 1 Ch. 860. **Refd.** Arbuthnot *v.* Bunsilall (1890), 62 L. T. 234; Faber *v.* Lathom (1897), 77 L. T. 168; Economic Life Assce. Soc. *v.* Usborne, [1902] A. C. 147.

D. Effect of Legal Mortgage on Equitable Charge.

3637. Void legal mortgage—Equitable mortgage revived.]—An equitable mtge., with agreement for legal mtge. Then an act of bkpcy.; then a legal mtge.:—*Held:* legal mtge. invalid, but that equitable mtge. was not merged, but revived.—*Re* EMERY, *Ex p.* HARVEY (1839), Mont. & Ch. 261; 3 Deac. 547; 4 Deac. 52, Ct. of R.

3638. Deposit of policy as security for costs—Subsequent mortgage of policy for advances only.]—A solr. took a deposit of a policy of assurance from a client to secure costs, but without a memorandum to that effect. Subsequently a mtge. was executed, assigning the policy as a security for sums already advanced & thereafter to be advanced, but it made no mention of the costs:—*Held:* the deposit for costs merged in the subsequent mtge., & after the payment of the sums advanced by way of loan the solr. had no further lien on the proceeds of the policy.—VAUGHAN *v.* VANDERSTEGEN (1854), 2 Drew. 289; 61 E. R. 730; *sub nom.* VAUGHAN *v.* VANDERSTEGEN, *Re* ANNESLEY, 2 Eq. Rep. 1257; 23 L. T. O. S. 328.

Annotation:—**Mentd.** London Chartered Bank of Australia *v.* Lemprière (1873), L. R. 4 P. C. 572.

3639. Loan to pay off legal mortgage—Secured by equitable mortgage.]—C. held two properties, one, The Cedars, as trustee for his wife, pltf., & the other, the Riding School, in his own right. These properties were, with the consent of his wife, mortgaged to T. for £2,000. Afterwards C. came to M., & without disclosing the above facts, borrowed £1,200 from him on the representation that he would with it pay off a mtge. of that amount on The Cedars & transfer the mtge. to M. M. advanced the £1,200 & with £1,000 of it C. paid off half of his principal to T. In Jan. 1893, C. informed M. that the £1,200 did not entirely pay off T.'s charge, & C. on same day executed an equitable mtge. on The Cedars to M. to secure the £1,200, merely reciting that the £1,200 had been advanced to enable C. to pay off a then existing mtge.:—*Held:* the charge on The Cedars & the Riding School was kept alive in equity in favour of M. to the extent of £1,000 in so far as that could be done without prejudicing the rights of T. or pltf.; & that M. did not lose this charge by taking the equitable mtge. for £1,200, there being thereby no release or extinguishment of the prior charge, & no merger of the securities, neither the debts secured nor the securities being identical, nor the remedies given by them co-extensive.—CHETWYND *v.* ALLEN, [1899] 1 Ch. 353; 68 L. J. Ch. 160; 80 L. T. 110; 47 W. R. 200; 43 Sol. Jo. 140.

Annotation:—**Apld.** Butler *v.* Rice, [1910] 2 Ch. 277.

3640. Charges kept alive to preserve priority.]—CROSBIE-HILL *v.* SAYER, No. 3566, *ante.*

Part XV.—Avoidance of Mortgages.

Bankruptcy of mortgagor.]—*See* BANKRUPTCY, Vols. IV., V., pp. 53, 56–69, 878, Nos. 444, 480–584, 7293.

Bargains with expectant heirs.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 270, 275, 276, 277, 278, Nos. 948, 990–1004, 1011–1023, 1028–1030, 1034, 1035.

Circumstances arising from relationship of parties —Parent & child.]—*See* CONTRACT, Vol. XII., p. 103, No. 629.

—— **Husband & wife.**]—*See* HUSBAND & WIFE, Vol. XXVII., p. 168, Nos. 1368, 1369.

—— **Infant & guardian.**]—*See* INFANTS, Vol. XXVIII., p. 194, No. 528.

—— **Solicitor & client.**]—*See* SOLICITORS.

Immoral consideration.]—*See* CONTRACT, Vol. XII., p. 277, No. 2273.

3641. Fraud—Want of consideration.]—A solr., A., was intrusted by a client, B., with money to be lent on mtge.; A. appropriated it to his own use, & afterwards, being pressed by B., obtained from another client, C., fraudulently, & without consideration, mtges. of equitable estates belonging to C., which he handed over to B. A. soon after became bkpt., & nearly three years afterwards C. discovered, for the first time, the nature of the transaction between A. & B., whereupon he filed a bill against the latter to be relieved from the mtges.:—*Held:* he was entitled to the relief sought & his claim had not been barred by acquiescence or confirmation whilst he was ignorant of the facts constituting his equity.—WALL *v.* COCKERELL (1863), 10 H. L. Cas. 229; 1 New Rep. 486; 32 L. J. Ch. 276; 8 L. T. 1; 9 Jur. N. S. 447; 11 W. R. 442; 11 E. R. 1013, H. L.

Annotations:—**Distd.** London Freehold & Leasehold Property Co. *v.* Suffield, [1897] 2 Ch. 608. **Refd.** Spaight *v.* Cowne, Edwards *v.* Spaight (1863), 1 Hem. & M. 359; Mollett *v.* Robinson (1870), L. R. 5 C. P. 646.

3642. Misrepresentation—Fraud.]—Pltf. relying upon a false representation of her solr. that it was necessary to raise money to pay off an old mtge. on her sister's estate, & that she herself would not incur any liability by so doing, executed a mtge. of her estate in favour of deft. The solr. applied the mtge. money for his own purposes, & the fraudulent nature of the transaction was not discovered until his death:—*Held:* the mtge. must be set aside.—LEE *v.* ANGAS (1866), 7 Ch. App. 79, n.; 15 L. T. 380; 15 W. R. 119; *affd.* (1868), 7 Ch. App. 80, n., L. JJ.

3643. —— —— **Registered title.**]—A son who was heir-at-law to his father, who was one of the exors. & trustees of his father's will, though he had not proved the will, & whose Christian names & description were identical with those of his father, after his father's death, executed mtges. of freehold & leasehold property of the father & applied the mtge. money to his own purposes. He handed over the title deeds to the mtgees. The transaction took place without the knowledge of his mother & sister, who were co-trustees & co-extrices. with him, & who had proved the will. The will had not been registered in the Middlesex Registry, though the property was situate in that county. The mtge. deeds were registered. They purported to the executed by the absolute owner of the property, & the solr. who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solr. searched the Middlesex Registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, & the mother & sister, as trustees of the father's will, brought an action against the mtgees., claiming a declaration that the mtges. were void against them, & delivery up of the title deeds. The other beneficiaries under the will were made defts.:—*Held:* the son in executing the mtge. deeds was personating his father; the deeds were forgeries & passed nothing to the mtgees., except the son's beneficial interest under the father's will; & the mtgees. could obtain no title by virtue of Middlesex Registry Act, 1708

PART XV.

e. *Circumstances arising from relationship of parties—Husband & wife.*]—SMITH *v.* DOLL (1911), 16 W. L. R. 471; 3 Alta. L. R. 383.—**CAN.**

f. —— ——.]—ROYAL TRUST CO. *v.* LLOYD (1915), 32 W. L. R. 354; 9 W. W. R. 122; 25 D. L. R. 802.—**CAN.**

g. —— ——.]—A wife at the request of her husband executed a mtge. in favour of a bank in order to relieve the husband *from pressure by the bank* for payment of a debt. The evidence disclosed that there was no undue influence exercised by the husband, but she signed the instrument without obtaining any independent advice. In an action to set aside the mtge.:—*Held:* a mtge. executed in the circumstances was binding upon the maker.—SIMMONS *v.* ROYAL BANK OF CANADA (1915), 33 W. L. R. 363; 22 B. C. R. 369.—**CAN.**

h. —— *Duress.*]—A person having been arrested on a charge of obtaining money under false pretences, agreed, in presence of the magistrates who had issued the warrant, to execute a mtge. on his farm to secure the amount, whereupon he was discharged, & he, with complainant, went & gave instructions for the conveyance, which he subsequently executed. The ct., under the circumstances, refused to set aside the mtge. as obtained by *duress*.—BODDY *v.* FINLEY (1862), 9 Gr. 162.—**CAN.**

k. —— *Intoxication.*]—Pltf. gave deft. a mtge. & subsequently executed a conveyance to him of the equity of redemption. Pltf. asserted that the conveyance was obtained from him by fraud & while intoxicated through drink supplied to him by the deft., at his, deft.'s, hotel:—*Held:* the evidence did not establish the fraud charged.—MCILROY *v.* DAVIS (1884), 1 Man. L. R. 53.—**CAN.**

l. —— *Mortgage by mortgagor & his wife & son.*]—*Held:* deft. had failed to discharge the *onus* on him of proving that the contracts which he alleged, & which were contrary to the face of the documents, were fully & intelligently explained to & understood by pltfs. Even if they had been strangers in blood to the principal mtgor. they would have been entitled to such explanation, & as they were *in fact* his wife & unemancipated child they were much more so entitled. Judgment was given setting aside the applts.' mtges. —SCHWARTZ *v.* GUERIN (Alta.), [1922] 2 W. W. R. 145; 65 D. L. R. 415.—**CAN.**

3642 i. *Misrepresentation—Fraud.*]—MULHOLLAND *v.* MORLEY (1870), 17 Gr. 293.—**CAN.**

3642 ii. —— ——.] — PRINCE *v.* TRACEY (Man.) (1913), 25 W. L. R. 412.—**CAN.**

3642 iii. —— ——.]—Deft. executed a mtge. to M. to secure the cash instalment of an agreement for purchase of certain land from parties for whom M. purported to act as agent without authority, which purchase deft. understood to be conditional upon the sale, which was never effected, of certain land of deft. by M. The ct. held that the transaction was in essence a fraudulent scheme by M.:—*Held:* the mtge. was null & void even in the hands of a *bond fide* assignee for value.—JACOBSON *v.* WILLIAMS (Alta.), [1919] 2 W. W. R. 891; 48 D. L. R. 51.—**CAN.**

m. —— *Second mortgage represented to be first.*]—Deft. owing pltf. no bills & notes, executed to him a mtge. for the amount, which pltf. accepted on deft.'s representation that it was a first claim on the land, but on searching at once he found a prior incumbrance, & told deft. he would not accept the mtge.:—*Held:* pltf. could not thereupon sue on the original cause of action, but should at least have tendered a reconveyance.—ADAMS *v.* NELSON (1862), 22 U. C. R. 199.—**CAN.**

n. *Insolvency of mortgagor.*]—In proceedings to set aside an equitable mtge. on the ground of the insolvency of the mtgor. at the time of the mtge., the fact of the insolvency must be

(c. 20).—*Re* COOPER, COOPER *v.* VESEY (1882), 20 Ch. D. 611; 51 L. J. Ch. 862; 47 L. T. 89; 30 W. R. 648, C. A.

Annotations :—**Consd.** Manners *v.* Mew (1885), 29 Ch. D. 725. **Apld.** *Re* de Leeuw, Jakens *v.* Central Advance & Discount Corpn., [1922] 2 Ch. 540. **Refd.** Brocklesby *v.* Temperance Bldg. Soc. (1893), 3 Ch. 130; *Re* Ingham, Jones *v.* Ingham, [1893] 1 Ch. 352.

3644. —— —— **Estoppel of mortgagor.**]—Two trustees advanced money on a mtge. of realty. S., one of the trustees, paid the money to E., a solr., who produced to him the mtge. deed executed by K. as the mtgor. The deed, which contained the usual receipt for the money in the body of it, was handed over by E. to S., who retained it. K., who was not a man of much education, & employed E. from time to time in relation to his property, & had implicit confidence in E., had signed the deed on his advice, but did not know that it was a mtge. & had not instructed E. to obtain a mtge. E. misappropriated the money & absconded. On discovery of the fraud K. brought an action against the trustees to set aside the mtge. :—*Held :* under the circumstances K. was estopped by his conduct from denying that the mortgage was valid, & E. had authority to receive the mtge. money.—KING *v.* SMITH, [1900] 2 Ch. 425; 69 L. J. Ch. 598; 82 L. T. 815; 16 T. L. R. 410.

Annotation :—**Refd.** Howatson *v.* Webb, [1907] 1 Ch. 537.

3645. —— **By conduct.**]—W. was solr. & banker of pltf. co., & was also its managing director, & as banker & manager he kept the co.'s accounts. He was also one of the four trustees of a settlement & solr. to the trust. In 1892 W., as solr. to the settlement trustees, received £9,000, part of the trust funds, & paid it into his own account at his private bank pending re-investment. Subsequently, on W.'s advice, the directors of the co. resolved to replace certain existing mtges. of their property by one mtge. at a lower rate of interest, leaving the mode of raising the money entirely to W. W. then, without the knowledge of the directors, made an entry in his ledger purporting to transfer the £9,000 to the credit of the " mtge. account " of the co., & he also prepared a mtge. by the co. to himself & his co-trustees to secure the £9,000, with interest, on the co.'s property. At a meeting of the directors in June, 1893, W. produced the mtge. engrossed for execution, & it was then & there sealed with the co.'s seal & signed by two directors as well as by the co.'s secretary, a clerk of W.'s, but no cash actually passed, as the directors knew. The deed was then given to or left with W., who kept it in his own possession, & wrote to one of his co-trustees informing him of the mtge. investment of the £9,000. The deed was not entered on the co.'s register of mtges. In 1895 W. absconded & was adjudicated bkpt., when it was discovered that he had misappropriated the £9,000.

In an action by a co. to set aside a mtge. on the grounds (*a*) that the mtge. was only an escrow & not intended to become operative as a complete deed until the money was paid to the mtgors.; & (*b*) that the mtgees. never gave & that the co. never got the mtge. consideration :—*Held :* the mtge. was valid & binding on the co., for it was sealed & delivered by the co. to W. as a perfect deed & immediately operative, & was not merely an escrow; & the co. had by their conduct enabled W. as their manager & banker to represent to the mtgees., that their, the mtgees.', money was invested on the security of the co.'s property.—LONDON FREEHOLD & LEASEHOLD PROPERTY CO. *v.* SUFFIELD, [1897] 2 Ch. 608; 66 L. J. Ch. 790; 77 L. T. 445; 46 W. R. 102; 14 T. L. R. 8; 42 Sol. Jo. 11, C. A.

3646. —— **As to nature & contents—Plea of non est factum.**]—W., who was formerly a managing clerk to H., a solr., was his nominee & trustee in respect of certain building speculations on land at E. belonging to H. W. left H.'s employment & was shortly afterwards requested by H. to execute certain deeds transferring the E. property, which he did. One of the deeds signed by W. was a mtge. between him & P. This mtge. was subsequently transferred to A., who sued W. to recover payment of the principal & interest which he as mtgor. had covenanted to pay in the usual form. W. set up a plea of *non est factum*, the deed having been signed under a misrepresentation as to its nature & contents :—*Held :* W. executed the deed knowing it purported to deal with the property, & therefore it was not sufficient for him, in order to support a plea of *non est factum*, to show that a misrepresentation was made to him as to its contents.—HOWATSON *v.* WEBB, [1908] 1 Ch. 1; 77 L. J. Ch. 32; 97 L. T. 730; 52 Sol. Jo. 11, C. A.; *affg.*, [1907] 1 Ch. 537.

Annotations :—**Distd.** Bagot *v.* Chapman, [1907] 2 Ch. 222. **Mentd.** Carlisle & Cumberland Banking Co. *v.* Bragg, [1911] 1 K. B. 489; Browne *v.* Lewis (1916), 86 L. J. K. B. 326.

3647. —— —— ——.]—A married woman entitled to a reversionary interest was induced by her husband to execute a document which he represented to be a power of attorney enabling him to raise money at some future time. It was in fact a mtge. of a reversionary interest to which she was entitled for £12,000 containing a personal covenant for payment by the wife. The wife knew that if her husband did eventually raise money under the document it would be raised out of her reversionary interest. She did not intend to create a present charge or incur any personal liability. The mtgees. brought this action against the husband & wife for foreclosure & judgment in their covenants. The wife pleaded, among other defences, *non est factum* :—*Held :* the husband's misrepresentation was as to the nature & character of the deed, & the plea was good as to the whole deed, & even if the charge on the wife's reversionary interest were valid, the defence ought to prevail

proved by legal evidence, & in case of doubt the mtgee. is entitled to an issue.—JONES *v.* MACKENZIE (1859), 7 W. R. 717.—**AUS.**

o. *Insolvency of surety.*]—COMMERCIAL BANK *v.* POORE (1858), 6 Gr. 514.—**CAN.**

p. *Who may avoid.*]—*Held :* where lands subject to a mtge. were sold by the sheriff under execution in a suit against the exors. of the mtgor., & conveyed by the sheriff to the purchaser in Oct. 1858, this sale was validated by 27 Vict. c. 13, & the heirs of the mtgor. could not impeach the same.—MCEVOY *v.* CLUNE (1874), 21 Gr. 515.—**CAN.**

q. *Mortgage impeached by judgment creditor—Proof of amount due.*]—ELLIOTT *v.* HUNTER (1876), 24 Gr. 430.—**CAN.**

r. *Consideration—Illegality—Betting.*]—Question as to legality of mortgage given to secure debt incurred by betting on horse race, no evidence being given that horse racing was illegal in State of Maine, nor evidence given as to construction of statute by the ct. :—*Held :* the sheriff, in the absence of any such evidence, was wrong in directing the jury that the mtge. given was void.—BAILEY *v.* MCDUFFEE (1878), 18 N. B. R. (2 P. & B.) 26.—**CAN.**

t. —— —— *Stifling prosecution.*]—Where it was shown that the wife of a person against whom criminal charges were about to be instituted, executed a mtge. on her lands in order to prevent such charges being proceeded with, the ct. refused to enforce payment of the security, & dismissed a bill filed by the mtgees. for that purpose.—WATTS *v.* MITCHELL (1879), 26 Gr. 570.—**CAN.**

a. —— *Failure of.*]—AYLESWORTH *v.* LEE (Sask.) (1912), 21 W. L. R. 48; 3 D. L. R. 286.—**CAN.**

b. *No proof of signature of mortgage.*]—MITCHELL *v.* STRATHY (1880), 28 Gr. 80.—**CAN.**

as to her covenant to pay principal & interest.—BAGOT *v.* CHAPMAN, [1907] 2 Ch. 222 ; 76 L. J. Ch. 523 ; 23 T. L. R. 562.

Annotation :—**Reld.** Howatson *v.* Webb, [1908] 1 Ch. 1.

——.]—*See, generally,* MISREPRESENTATION & FRAUD, pp. 1 *et seq., ante.*

3648. Deed delivered only as escrow.]—LONDON FREEHOLD & LEASEHOLD PROPERTY CO. *v.* SUFFIELD, No. 3645, *ante.*

——.]—*See, generally,* DEEDS, Vol. XVII., pp. 211–213, Nos. 239–251.

Unregistered money-lender as mortgagee.]—*See* MONEY & MONEY-LENDING, p. 205, No. 304, *ante.*

Part XVI.—Accounts.

SECT. 1.—GENERAL ACCOUNTS.

SUB-SECT. 1.—IN GENERAL.

3649. Necessity for—In action for redemption.]—P. being indebted to H., assigned to him certain leaseholds, reserving a power to repurchase by a certain day, on three months' notice, & payment of what should be found due after deducting rents & sale moneys received by H. in the interval ; & it was stipulated that time should be of the essence of the contract, & that the transaction should be taken as a sale, not a mtge. P. gave notice of repurchase, & demanded an account, which was at first refused, & when delivered was imperfect. Without having made tender, he filed his bill on the day before that on which the right of repurchase would, under the terms of the arrangement, expire, praying for an account & reconveyance. Demurrer for want of equity overruled, on the ground that an account was a necessary part of the transaction.—PONSFORD *v.* HANKEY & HARRISON (1861), 2 Giff. 604 ; 5 L. T. 172 ; 7 Jur. N. S. 938 ; 9 W. R. 358 ; 66 E. R. 253 ; *affd.*, 3 De G. F. & J. 544, L. JJ.

3650. What is credited to mortgagor—Not amount expended in preserving property.]—As a general rule a mtgor. can have no lien on the property mortgaged for money expended in preserving the property ; but money so expended enures for the benefit of the mtgee.—NORRIS *v.* CALEDONIAN INSURANCE CO. (1869), L. R. 8 Eq. 127 ; 38 L. J. Ch. 721 ; 20 L. T. 939 ; 17 W. R. 954.

Annotation :—**Reld.** *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552.

What is debited to mortgagor.]—*See* Sub-sect. 4, *post.*

3651. Effect of acquiescence by mortgagor—Accounts corrected by mortgagee in own favour.]—Where an account was made out by a mtgor., & corrected by the mtgee. in his own favour, & returned to the mtgor., & nothing more done by either party for many years, it was held that the parties were bound by acquiescence in the accounts.—BONDS *v.* SLYMAN (1847), 8 L. T. O. S. 357, L. C.

3652. Account of arrears of rents & profits—Right of mortgagee—Where receiver appointed—Not after death of mortgagor.]—Mtgee. of an estate over which there is a receiver omitting to take the necessary steps for the satisfaction of his debt & interest during the life of the mtgor., is not entitled to a retrospective account of rents & profits after the death of the latter.—FLIGHT *v.* CAMAC (1856), 25 L. J. Ch. 654 ; 4 W. R. 664, L. C.

Annotation :—**Reld.** *Re* Hoare, Hoare *v.* Owen (1892), 67 L. T. 45.

3653. —— Liability of mortgagee—Mortgage of life interest—Notice of forfeiture.]—A., the equitable tenant for life of Blackacre, joined with his trustee in mortgaging his interest to B. A.'s life interest was liable, under the instrument by which it was created, to cesser in the event of his alienation, but B. had no notice, when he took his security, of the clause of forfeiture. Many years afterwards the persons entitled in remainder in the event of the cesser of A.'s life interest, filed a bill to assert their rights, & recover possession of the property : —*Held :* the account of rents & profits ought to be carried back as against A., & his trustee to the time when pltfs.' right accrued, but as to B., only to the time when he first received notice of the clause of forfeiture ; & an inquiry was directed for that purpose.—HENNESSEY *v.* BRAY (1863), 33 Beav. 96 ; 9 L. T. 41 ; 9 Jur. N. S. 1065 ; 11 W. R. 1053 ; 55 E. R. 302.

3654. Account taken at instance of second mortgagee—To be taken as at instance of mortgagor.]—(1) In a redemption action by a second mtgee. against the first mtgee., the account to be taken at the instance of the second mtgee. must be taken in all respects as though it were being taken at the instance of the mtgor. himself, & the second mtgee. may assert such equity as the mtgor. himself might have had to exclude any particular item from the account.

(2) The amount stated in the mtge. deed to be advanced is never conclusive (KAY, J.).—MAINLAND *v.* UPJOHN (1889), 41 Ch. D. 126 ; 58 L. J. Ch. 361 ; 60 L. T. 614 ; 37 W. R. 411.

Annotations :—*As to* (1) **Consd.** The Benwell Tower (1895), 72 L. T. 664. *Generally,* **Reld.** Field *v.* Hopkins (1890), 59 L. J. Ch. 174 ; Eyre *v.* Wynn-Mackenzie, [1894] 1 Ch. 218 ; Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307 ; Santley *v.* Wilde, [1899] 2 Ch. 474 ; Rice *v.* Noakes, [1900] 2 Ch. 445 ; Carritt *v.* Bradley, [1901] 2 K. B. 550 ; Cheese *v.* Keen, [1908] 1 Ch. 245.

3655. Mortgage by joint lessee—Rights of mortgagee against co-lessees.]—Mtgee. of the share of a joint lessee in a colliery is entitled in equity to call the co-lessees to account for the rents & profits,

PART XVI. SECT. 1, SUB-SECT. 1.

c. Mortgage money re-advanced—After part payment—Mortgagor estopped from proving payment—Of any portion of original sum advanced.]—INGLIS *v.* GILCHRIST (1863), 10 Gr. 301.—**CAN.**

d. New accounts—When ordered.]—GILMOUR *v.* O'BRIEN (1864), 1 Ch. Ch. 244.—**CAN.**

e. Compensation awarded to mortgagee—Must be brought into account.]—A mtgee. of land, part of which was taken by a railway co., was offered £100 as compensation for the land so taken, which he refused, & the matter having been referred to arbn. £30 only was awarded. On a bill filed to redeem :—*Held :* in the circumstances, he was chargeable only with the sum awarded.—GUNN *v.* MCDONALD (1865), 11 Gr. 140.—**CAN.**

f. When account ordered—Against mortgagor.]—Where a wrong lot was mtged. through error, the mtgor. owning only the land intended to be embraced in it, & having no title to that actually conveyed, & he subsequently sold the land to which he had the title : —*Held :* he must account for the proceeds of the sale not exceeding the mtge. money secured, with the interest & costs.—LUNDY *v.* MCKAMIS (1865), 11 Gr. 578.—**CAN.**

g. Payment of rent to mortgagee—Liability to account to assignee of equity.]—GILMOUR *v.* ROE (1874), 21 Gr. 284.—**CAN.**

h. Right of mortgagor—To detailed statement of amount owing.]—Where a

Sect. 1.—*General accounts: Sub-sects.* 1, 2 & 3.]

& has exactly the same remedies against them as the original lessee had.—BENTLEY *v.* BATES (1840), 4 Y. & C. Ex. 182; 9 L. J. Ex. Eq. 30; 4 Jur. 552; 160 E. R. 971.

Annotations:—**Refd.** Redmayne *v.* Forster (1866), 35 L. J. Ch. 847; Dodds *v.* Preston (1888), 59 L. T. 718. **Mentd.** Roberts *v.* Eberhardt (1853), Kay, 148; Adair *v.* New River Co. & Metropolitan Water Board (1908), 25 T. L. R. 193.

3656. Mortgage of share in patent—Liability of mortgagee to account for profits—When no royalties received.]—R., who was assignee of a moiety of a patent, & claimed to be owner of the other moiety by purchase from a mtgee. of S., the owner of that moiety, made machines according to the patent, & sold them at a profit, but did not grant licences or receive royalties. S. brought his action to impeach the sale & to redeem. At the trial it was admitted that the sale of the second moiety to R. was bad, & that he could only be treated as transferee of the mtge. By consent judgment was given, directing (*a*) an account of what was due on the mtge.; (*b*) an account of profits "come to the hands of R., as such mtgee. as aforesaid." R. filed an affidavit stating that he had worked the patent in the exercise of his rights as co-owner, & submitted that the profits he had made were not received by him as mtged., & that he was not liable to account for them:—*Held:* as R. had not received royalties, & the profits which he had made were derived only from his using the patents, which as co-owner he was entitled to do, they were not profits received by him as mtgee.; & he was not liable to account for them.—STEERS *v.* ROGERS, [1892] 2 Ch. 13; 61 L. J. Ch. 676; 66 L. T. 502; 36 Sol. Jo. 306, C. A.; *affd.*, [1893] A. C. 232, H. L.

Annotations:—**Mentd.** Heyl-Dia *v.* Edmunds (1899), 81 L. T. 579; National Soc. for Distribution of Electricity by Secondary Generators *v.* Gibbs, [1899] 2 Ch. 289; Edwards *v.* Picard, [1909] 2 K. B. 903; *Re* Heath's Patent (1912), 56 Sol. Jo. 538; Diamond Coal Cutting Co. *v.* Mining Appliances Co. (1915), 85 L. J. Ch. 232.

3657. Mortgage of share in partnership—Right of mortgagee to account of share of partnership assets—On dissolution of partnership.]—A partner mortgaged his share in the partnership assets with the knowledge of the other partner:—*Held:* the mtgor. could not, on the dissolution of the partnership, sell his share to the other partner for a fixed sum without the consent of the mtgee., who was entitled to an account of the share of the partnership assets to which the mtgor. was actually entitled.—WATTS *v.* DRISCOLL, [1901] 1 Ch. 294; 70 L. J. Ch. 157; 84 L. T. 97; 49 W. R. 146; 17 T. L. R. 101; 45 Sol. Jo. 98, C. A.

——.]—*See, generally,* PARTNERSHIP.

SUB-SECT. 2.—ON WHOM BINDING.

3658. Subsequent incumbrancers—In absence of fraud or collusion.]—Mtgee. bound by the account between the first mtgee. & mtgor.—NEEDLER *v.* DEEBLE (1677), 1 Cas. in Ch. 299; 22 E. R. 810, L. C.

3659. ——.]—WILLIAMS *v.* DAY (1680), 2 Cas. in Ch. 32; 22 E. R. 832, L. C.

Annotations:—**Mentd.** Bernard's Case (1716), Prec. Ch. 454; Aston *v.* Aston (1749), 1 Ves. Sen. 264.

3660. ——.]—In a suit against a first mtgee. & mtgor., the first mtgee. refused to set out the accounts between himself & the mtgor. on the ground that they had been taken in a previous suit, & pltf., who claimed under mtgor. was bound by them:—*Held:* the rule under which deft. who submits to answer, must answer fully, applied; & deft. must set out the accounts.—WOOD *v.* SURR (1853), 1 W. R. 189.

3661. Heir of mortgager.]—Mtgor. brings a bill to redeem, obtains a decree for an account, etc., in the usual manner, & the account is accordingly taken by the master. Before any further proceedings, pltf. dies, & his infant son & heir revives & carries on the suit:—*Held:* he is bound by the account already taken; but he shall be at liberty to surcharge & falsify it if he can.—BADHAM *v.* ODELL (1742), 4 Bro. Parl. Cas. 349; 2 E. R. 237, H. L.

3662. Specific legatee of mortgagee.]—Specific devisee of a mtge. is not bound by an account settled between the representatives of the mtgor. & those of the mtgee.—LANGLEY *v.* OXFORD (EARL) (1743), Amb. 17; 27 E. R. 9, L. C.

3663. Assignee of mortgage—Assignment without consent of mortgagor.]—(1) Assignment of a mtge. without the privity of the mtgor.; the assignee takes subject to the account between the mtgor. & the mtgee.

(2) A settled account between attorney & client opened upon general allegation by the client of error, admitted; though no specific errors were pointed out.

(3) As between mtgee. & persons claiming under him, without the privity of the mtgor. they cannot add to what is due, settle the account, or turn interest into principle.—MATTHEWS *v.* WALLWYN (1798), 4 Ves. 118; 31 E. R. 62, L. C.

Annotations:—*As to* (1) **Refd.** Jones *v.* Gibbons (1804), 9 Ves. 407; Mangles *v.* Dixon (1852), 3 H. L. Cas. 702; *Re* Richards, Humber *v.* Richards (1890), 59 L. J. Ch. 728; Dixon *v.* Winch, [1900] 1 Ch. 736; Turner *v.* Smith [1901] 1 Ch. 213; De Lisle *v.* Union Bank of Scotland, [1914] 1 Ch. 22. *As to* (2) **Refd.** Cheese *v.* Keen, [1908] 1 Ch. 245. *Generally,* **Refd.** *Re* Daintry, & Ryle, *Re* Ravenscroft, *Ex p.* Arkwright (1843), 3 Mont. D. & De G. 129; Wheatley *v.* Bastow (1855), 7 De G. M. & G. 261; Withington *v.* Tate (1869), 17 W. R. 559; Bickerton *v.* Walker (1885), 34 W. R. 141.

3664. —— —— **Though assignee gets legal estate.**]—Where a man takes an assignment of a mtge. & gets the legal estate; even in that case he has not done sufficient for his perfect security to take it without having communication with & obtaining the concurrence of, the mtgor.; for, whatever be the state of the account, although he gets a transfer of the legal estate he is bound by the state of the account (LORD ST. LEONARDS, C.). —MANGLES *v.* DIXON (1852), 3 H. L. Cas. 702; 19 L. T. O. S. 260; 10 E. R. 278, H. L.

Annotations:—**Refd.** Higgs *v.* Assam Tea Co. (1869), L. R. 4 Exch. 387; Rodger *v.* Comptoir D'Escompte de Paris (1869), L. R. 2 P. C. 393; Leask *v.* Scott (1877), 2 Q. B. D. 376; Watts *v.* Driscoll, [1901] 1 Ch. 294. **Mentd.** Rolt

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suit has been commenced for foreclosure of a mtge., deft. offering to pay the amount due, is entitled to be furnished with a detailed statement of the amount of principal, interest & costs.—SMITH, ETC. (EXECUTORS) *v.* CORMIER (1886), 25 N. B. R. 487.—**CAN.**

k. —— ——.]—The assignee of a mtge. obtained a release of the equity of redemption which he sold for a sum considerably in excess of his claim against the assignor. In a suit to foreclose:—*Held:* he was bound to account for the proceeds of such sale.—MCLEAN *v.* WILKINS (1887), 14 S. C. R. 22.—**CAN.**

l. *Account taken at instance of second mortgagee.*]—STROTHERS *v.* BARROWMAN (1917), 38 O. L. R. 12.—**CAN.**

PART XVI. SECT. 1, SUB-SECT. 2.

m. *Assignee of mortgage.*]—An assignee of a mtge. takes it subject to the actual state of the accounts between the mtgor. & mtgee.—LONDON LOAN CO. *v.* MANLEY (1896), 26 S. C. R. 443.—**CAN.**

n. ——.]—A sum was reported due for arrears of an incumbrance in a suit in which insolvent, but not his assignee, was deft. Insolvent afterwards procured from the assignee a reassignment. In a subsequent suit respecting the incumbrance:—*Held:*

v. White (1862), 3 De G. J. & Sm. 360; Watson *v.* Mid Wales Ry. (1867), L. R. 2 C. P. 593; Stoddart *v.* Union Trust (1911), 81 L. J. K. B. 140.

3665. Co-defendants in redemption action.]—In a suit by the heir of the mtgor., against different classes of mtgees. & incumbrancers on the estate, some of whom were in possession, a decree for redemption was made, under which certain of defts. were declared entitled to a lien on the estate, & the accounts were directed to be taken, & upon pltf. paying to defts., the incumbrancers, what should be found due to them respectively, within the time thereby limited, they were ordered to convey the estates to pltf.; but in default of pltf. making such payment, his bill was ordered to be dismissed with costs. In a supplemental suit, brought by some of defts. to the original suit against pltf. & the other defts., a decree for carrying on the accounts was made:—*Held:* pltfs. in the supplemental suit, who were incumbrancers subsequent to other defts., were not entitled, under the decree, to exhibit interrogatories for the examination of their co-defts. in the original suit, the prior incumbrancers, who were mtgees. in possession, as to their receipts in respect of the mtged. premises, such examination not being necessary for the purposes of the suit.—COTTINGHAM *v.* SHREWSBURY (EARL) (1843), 3 Hare, 627; 15 L. J. Ch. 441; 67 E. R. 530; *affd.* (1846), 15 L. J. Ch. 445, L. C.

Annotations:—**Refd.** Pelly *v.* Wathen (1849), 7 Hare, 351. **Mentd.** Lennard *v.* Curzon (1847), 1 De G. & Sm. 350.

3666. Account between mortgagee & transferee of mortgage—Not binding on mortgagor.]—MACCLESFIELD (EARL) *v.* FITTON (1683), 1 Vern. 168; 23 E. R. 392.

Res judicata.]—*See* ESTOPPEL, Vol. XXI., p. 116, No. 247.

SUB-SECT. 3.—APPLICATION OF MONEY RECEIVED BY MORTGAGEE.

3667. General rule—Money received by virtue of security—To be applied thereto.]—It may well be that an incumbrancer is bound to apply what he receives by virtue of his security to the security by virtue of which he receives it (TURNER, L.J.).—KNIGHT *v.* BOWYER (1859), 4 De G. & J. 619; 45 E. R. 241, L. JJ.

3668. Profits by widow of mortgagee as owner—Not applied in satisfaction of mortgage.]—SMITH *v.* HANBURY (1672), Nels. 70; 3 Rep. Ch. 82; 21 E. R. 792.

3669. Receipts after order for account—To be brought into account.]—In decrees against a mtgee. on a bill for redemption, or against an exor. to account, it is the course of the ct. to direct it without future words; & yet if the person decreed to account receive any thing subsequent to the decree, it is inquirable before the master, & they must bring such sums to account.—BULSTRODE *v.* BRADLEY (1747), 3 Atk. 582; 26 E. R. 1136, L. C.

3670. —— ——.]—OXENHAM *v.* ELLIS, No. 3780, *post.*

3671. —— ——.]—Between the date of the certificate of the chief clerk, under a foreclosure judgment, finding the amount due from the mtgors., & the day fixed for redemption, rents of the mtged. property were received by a receiver appointed in the action at the instance of the mtgees.

The mtgees., after the day for redemption had passed, applied that the order for foreclosure might be made absolute, & that the receiver might be discharged without passing his accounts, & might be ordered to pay the money in his hands to them:—*Held:* the mtgees. having verified the amount received by the receiver at any time before the application to the Ct. of Appeal, the receipt of rent by the receiver was equivalent to a receipt by the mtgees., & the mtgors. must have one calendar month from the date of the judgment of the Ct. of Appeal in which they should be at liberty to redeem on payment after deduction of the amounts received by the receiver; the receiver, on paying the amounts in his hands to the mtgees., should be discharged without passing his accounts; the mtgees. must forego their claim to interest from the day of the judgment on appeal, & the receiver must make an affidavit showing that he had received no further sum.—JENNER-FUST *v.* NEEDHAM (1886), 32 Ch. D. 582; 55 L. J. Ch. 629; 55 L. T. 37; 34 W. R. 709, C. A.

Annotations:—**Distd.** Coleman *v.* Llewellin (1886), 34 Ch. D. 143. **Foll.** Peat *v.* Nicholson (1886), 54 L. T. 569. **Distd.** Ingham *v.* Sutherland (1890), 63 L. T. 614. **Apld.** Ross Improvement Comrs. *v.* Usborne, [1890] W. N. 92; Cheston *v.* Wells (1893), 62 L. J. Ch. 468. **Refd.** National Permanent Mutual Benefit Bldg. Soc. *v.* Raper, [1892] 1 Ch. 54.

3672. Mortgagor indebted to mortgagee on account other than mortgage—Appropriation of payments to non-mortgage account.]—A person, having purchased an estate for the purpose of building upon it, mortgaged it to a joint stock banking co. with whom he dealt, to secure sums then due, & all sums thereafter to become due from him to them, on any banking or other account whatever, "so as the whole amount of principal moneys to be ultimately recovered or recoverable by virtue of that security, should not exceed the sum of £5,800, together with interest." By the mtge. deed a power of sale was given to the co. The mtgor. built three houses on the land, which were successively sold to different purchasers. The purchase-moneys were not paid to the mtgor., but to the co., who gave the mtgor. credit for them in his account:—*Held:* these sums were recovered by the co. by virtue of the mtge. security, &, so far as they were applicable as principal moneys, must be considered as received by them in discharge of the sum of £5,800, & not merely on the general account between them & the mtgor.—JOHNSON *v.* BOURNE (1843), 2 Y. & C. Ch. Cas. 268; 7 Jur. 642; 63 E. R. 118.

Annotation:—**Refd.** Hopkinson *v.* Rolt (1861), 9 H. L. Cas. 514.

3673. —— ——.]—B., an equitable mtgee., lent the title deeds to C., the mtgor., to enable him to arrange a sale of the property. C. was indebted to B., both on the mtge. & on a trade account. C. paid to B. a part of the produce of the sale; but there was no evidence of his having made any express appropriation of that payment:—*Held:* it must be understood that the payment was made

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he was bound by the former account.—BYRNE *v.* CAREW (LORD) (1849), 13 I. Eq. R. 1.—**IR.**

o. *Puisne mortgagee.*]—DICK *v.* BUTLER (1827), 1 Mol. 42.—**IR.**

PART XVI. SECT. 1, SUB-SECT. 3.

p. *Right to account—Puisne incumbrancer.*]—The owner of land mtged. the same, & in pursuance of a covenant in the deed, insured the buildings on the land. The policy provided that the loss, if any, should be paid to the mtgees. The buildings were shortly afterwards destroyed by fire, & the insurance moneys paid to the mtgees., who assigned the mtge. to trustees of the insurance co., & they thereupon proceeded to foreclose. On appeal by a puisne incumbrancer from the report of the master:—*Held:* pltfs. were not bound to give credit for the amount paid to the mtgees.—WESTMACOTT *v.* HANLEY (1875), 22 Gr. 382.—**CAN.**

q. —— *Judgment creditor.*]—Where one having obtained an assignment of a judgment against a mtgor. brought an action in his own name against the mtgee., who had sold under the power of sale, to make him account for certain surplus moneys left in his hands after

Sect. 1.—*General accounts: Sub-secs.* 3 & 4, *A. & B.*]

on the mtge. account, & B. had no right to appropriate it to the trade account.—YOUNG *v.* ENGLISH (1843), 7 Beav. 10; 13 L. J. Ch. 76; 49 E. R. 965.

3674. —— ——.]—K. & co. accepted bills for L. & co., & L. & co. mortgaged to K. & co. an estate in Guiana to secure a cash credit, granted by K. & co. to the extent of 75,000 dollars. There was a general current account between the two firms. K. & co. & L. & co. each became insolvent:—*Held:* under the circumstances the mtge. was a security for money advanced to meet the bills; & the holders of the bills were entitled to the benefit of the mtge. securities, & to have the money received from the mtge. security applied in payment of the bills.—CITY BANK *v.* LUCKIE (1870), 5 Ch. App. 773; 23 L. T. 376; 18 W. R. 1181, L. C.

Appropriation of payments.]—*See* CONTRACT, Vol. XII., pp. 474 *et seq.*

3675. Mortgage by solicitor for client on supposed insufficient security—Payment of dividend out of solicitor's estate—Security subsequently proving sufficient—Refund of dividend to solicitor's estate.]—A solr. invested the money of one of his clients without his knowledge on an improper mtge. security. The client, believing the security to be insufficient, proved against the estate of a partner of the solr., which was being administered in Chancery, for the whole amount of the debt, &, under a compromise, received a dividend out of the estate. Afterwards it turned out that the security was sufficient to pay the client in full:—*Held:* the dividend must be repaid to the solr.'s estate, & did not enure for the benefit of the subsequent incumbrancers on the mtged. property.—SAWYER *v.* GOODWIN (1875), 1 Ch. D. 351; 45 L. J. Ch. 289; 34 L. T. 635; 40 J. P. 228; 24 W. R. 493, C. A.

Annotation:—**Apld.** *Re* Partington, Partington *v.* Allen (1887), 57 L. T. 654.

Mortgage to building society.]—*See* BUILDING SOCIETIES, Vol. VII., p. 479, Nos. 151, 152.

SUB-SECT. 4.—WHAT MAY BE ALLOWED TO MORTGAGEE.

A. In General.

3676. General rule.]—An equitable mtgee. is not entitled to have out of the estate his costs of an unsuccessful attempt to defend an action at law for recovery of the mtged. premises.

This ct., in settling the account between mtgor. & mtgee., will give to the latter all that his contract, or the legal or equitable consequences of it, entitle him to receive, & all the costs properly incurred in ascertaining or defending such rights, whether at law, or in equity. But even as to costs in equity this ct. exercises a discretion, & refuses him his costs if his conduct has been improper; &, in some cases, orders him to pay them (LORD COTTENHAM, C.).—DRYDEN *v.* FROST (1838), 3 My. & Cr. 670; 8 L. J. Ch. 235; 2 Jur. 1030; 40 E. R. 1084, L. C.

Annotations:—**Consd.** National Provincial Bank of England *v.* Games (1886), 31 Ch. D. 582. **Distd.** Wales *v.* Carr, [1902] 1 Ch. 860. **Refd.** Woods *v.* Woods (1840), 12 Jur. 994; Hewitt *v.* Loosemore (1851), 9 Hare, 449; Wilkes *v.* Saunion (1877), 7 Ch. D. 188. **Mentd.** Watson *v.* Allcock (1853), 4 De G. M. & G. 242.

3677. Any money paid to preserve property.]—*Re* LESLIE, LESLIE *v.* FRENCH, No. 3698, *post.*

3678. All proper charges & expenses.]—(1) It is well settled that . . . the mtgor., if he desires to redeem the mtged. property, must pay (*a*) the principal debts; (*b*) the interest thereon; (*c*) all proper costs, charges, & expenses incurred by the mtgee. in relation to the mtge. debt or the mtge. security; (*d*) the cost of litigation properly undertaken by the mtgee. in reference to the mtge. debt or security; (*e*) the mtgee.'s costs of the redemption action (FRY, L.J.).

(2) Mtgee. who had entered into possession of the mtged. property would be entitled to charge the commission of a receiver for receiving the rents; but, if he chose to collect the rents himself, he could not make any charge for so doing (FRY, L.J.).—*Re* WALLIS, *Ex p.* LICKORISH (1890), 25 Q. B. D. 176; 59 L. J. Q. B. 500; 62 L. T. 674; 38 W. R. 482; 6 T. L. R. 291; 7 Morr. 148, C. A.

Annotations:—*As to* (1) **Apld.** Stone *v.* Lickorish, [1891] 2 Ch. 363. *As to* (2) **Consd.** *Re* Doody, Fisher *v.* Doody, Hibbert *v.* Lloyd, [1893] 1 Ch. 129. **Refd.** Eyre *v.* Wynn-Mackenzie, [1894] 1 Ch. 218.

3679. Renewal of lease.]—Mtgee. for lives cannot compel mtgor. to fill them up as they drop, but may do it himself, & add the expense to the mtge. money.—LUCAN *v.* MERTINS (1743), 1 Wils. 34; 95 E. R. 477, L. C.

3680. ——.]—BISHOP *v.* MANTELL (1807), 3 Seton's Judgments & Orders, 7th ed. 1886.

3681. Redemption of land tax—Mortgagor bound to elect.]—KNOWLES *v.* CHAPMAN (1815), 3 Seton's Judgments & Orders, 7th ed. 1905.

3682. Fines of copyholds.]—FARROW *v.* VIPAN (1836), Donnelly, 48; 47 E. R. 218.

3683. Costs of transfer of mortgage—When interest not in arrear—Transfer without notice to mortgagor.]—When the interest of a mtge. is regularly paid, & the mtgor. has never been called on to discharge the principal, the costs of a transfer of the mtge., made by the mtgee. without any communication with the mtgor., are not properly chargeable against him.—*Re* RADCLIFFE (1856), 22 Beav. 201; 27 L. T. O. S. 61; 2 Jur. N. S. 387; 52 E. R. 1085.

3684. Costs of valuation—By auctioneer mortgagee.]—A deed of mtge. & further charge contained a recital that the mtgees., who were a solr. & an auctioneer, had taken transfers of certain mtge. debts at the request of the mtgors., & on the terms that they should advance the money therefor, & "should be entitled to make the same charges & receive the same remuneration respectively for all business done by them respectively in & about these presents as they would have been entitled to make & receive if they had not been mtgees."; & the mtgors. covenanted to pay the existing mtge. debts, together with a further advance, & also "every other sum which may hereafter be advanced or paid by the mtgees., or either of them, to or become owing to them or him by the mtgors., or either of them; & the mtgors. charged the mtged. property with the aggregate of the mtge.

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such sale:—*Held:* pltf. was entitled so to sue.—HARPER *v.* CULBERT (1881), 5 O. R. 152.—**CAN.**

r. *Fraudulent acquisition of equity—Liability to account on sale.*]—WILKINS *v.* MCLEAN (1887), 14 S. C. R. 22.—**CAN.**

PART XVI. SECT. 1, SUB-SECT. 4.—A.

3677 i. *Any money paid to preserve property.*]—TRIMLESTON (LORD) *v.* HAMILL (1810), 1 Ball & B. 377.—**IR.**

3678 i. *All proper charges & expenses.*]—Where money is lent on securities of a speculative or unsatisfactory nature, bonuses or commissions deducted by the lender at the time of the advance, together with bonuses or commissions charged & agreed to for an extension of time, & which form part of the consideration of the mtge. security, are properly chargeable in an accounting between borrower & lender, provided they were made part of the contract.—GARDINER *v.* MUNRO (1896), 28 O. R. 375.—**CAN.**

3679 i. *Renewal of lease.*]—HAMILTON *v.* DENNY (1809), 1 Ball & B. 199.—**IR.**

t. *Surety's right to account—& to insist on sale—Before being called upon*

debts & further advance, & with any other sum as aforesaid. The mtge. money was advanced by the mtgees. as trustees, & prior to the mtge., which was prepared by the solr. mtgee., a valuation of the property was made by the auctioneer mtgee. on the instructions of the solr. The mtgees. afterwards entered into possession:—*Held:* in taking the mtgees.' accounts in a foreclosure action the following charges ought to be disallowed: the costs of an order, made subsequent to the mtge., appointing trustees under Settled Land Act, 1882 (c. 35), for the purpose of leasing part of the mtged. property; costs incurred by one of the mtgors. to the solr. mtgee. as her solr., subsequently to the mtge. & in matters unconnected with it; a fee paid by the solr. mtgee. to the auctioneer mtgee. for his valuation; the ct. holding that the recital & covenant, read together, did not cover any of these charges.—FIELD *v.* HOPKINS (1890), 44 Ch. D. 524; 62 L. T. 774, C. A.

Annotations:—**Retd.** *Re* Wallis, *Ex p.* Lickorish (1890), 25 Q. B. D. 176; Eyre *v.* Wynn-Mackenzie, [1894] 1 Ch. 218; Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307. **Mentd.** *Re* Gray, [1901] 1 Ch. 239.

3685. —— On bankruptcy of guarantors of mortgage debt—Express provision in guarantee.]—Where a guarantee society contracted to pay the principal & interest due on a mtge. on the mtgor. making default in payment thereof, it was held that the guarantee society did not contract to indemnify the policy-holder against any loss under her security, & accordingly, that in the winding-up of the guarantee society the costs of valuing her security & proving her claim came under the heading of mtgee.'s costs or costs of proof, & must be disallowed because under the winding-up rules creditors are not entitled to the costs of proving their claim.—*Re* LAW GUARANTEE TRUST & ACCIDENT SOCIETY, LTD. (1913), 108 L. T. 830; 57 Sol. Jo. 628.

3686. Advances for maintenance of live stock.]—A. gave his acceptance to B. for £18,700, payable, six months after date, on Feb. 5, 1867, & it was discounted by the Bank of C. A. mortgaged a station & also mortgaged the stock upon it to B. to secure the repayment of £18,700, with interest at 12½ per cent., on the day above mentioned, & to secure the payment of any bill which the mtgee. might receive, take, make, or indorse by way of renewal or in substitution for the acceptance, or on account of all or any part of the sum therein mentioned, or on any other account incidental thereto. It was also stipulated in the mtge. of the stock that if default should be made in payment by the mtgor. of the licence fees, or rent, charges, fines, penalties & other charges which should become payable in respect of the station or run, or the stock thereon, or in relation thereto, the mtgee. might pay it, & the run, stock, etc., should be chargeable therewith. The bill was renewed from time to time, B. paying the discounts to the bank on A.'s behalf, & debiting A. with the amount in an account current rendered to A., in which he charged A. with interest & mercantile commissions:—*Held:* (1) notwithstanding this mode of keeping the accounts, the amount of the advances for discounts was secured by the mtge.; (2) advances for payment of Govt. rent due & for scab licences for sheep might be charged to the mtgee., but sheep-wash could not.—FENTON *v.* BLACKWOOD (1874), L. R. 5 P. C. 167; 22 W. R. 562, P. C.

3687. Advances for carrying on business—Company mortgagor in liquidation—Whether payable in priority to debenture holders.]—Under agreements made between a co. & G., from whom the co. had previously bought its works, G. was to advance money to the co., & all moneys due to the co. were to be received by G., who was to apply these moneys & also the money to be advanced by him in paying wages & salries & other outgoings for the business of the co., & subject thereto was to repay himself. An order was made for winding up the co., under which G. & the liquidators, with the sanction of the Vice-Chancellor, made an agreement for an advance by G. of further sums on similar terms. G. advanced money for the payment of rent, rates, wages, & outgoings; a large balance remained due to him. The leasehold property, machinery, & plant of the co. were sold by the liquidators:—*Held:* the costs of carrying on the business were not payable out of the mtged. property in priority to debentures as costs of preservation, & subject to the costs of realising the property, the fund belonged to the debenture holders in priority to the claims of G. or the liquidators for the costs so incurred.—*Re* REGENT'S CANAL IRONWORKS CO., *Ex p.* GRISSELL (1875), 3 Ch. D. 411, C. A.

Annotations:—**Consd.** Hand *v.* Blow, [1901] 2 Ch. 721. **Retd.** *Re* Staffordshire Gas & Coke Co., [1893] 3 Ch. 523. **Mentd.** *Re* General South American Co. (1876), 34 L. T. 202; *Re* New City Constitutional Club Co., *Ex p.* Purssell (1887), 34 Ch. D. 646; *Re* Ormerod, Grierson, [1890] W. N. 217; Securities & Properties Corpn. *v.* Brighton Alhambra (1893), 62 L. J. Ch. 566; Davy *v.* Scarth, [1906] 1 Ch. 55.

3688. Costs of leasing part of property—Appointment of trustees.]—FIELD *v.* HOPKINS, No. 3684, *ante*.

Interest.]—*See* Part XVII., *post*.

Costs.]—*See* Part XVIII., *post*.

Expenses of mortgagee in possession.] — *See* Sect. 2, sub-sect. 4, *post*.

B. Repairs and Improvements.

3689. Cost of repairs—Not when carried out by receiver—Without authority of mortgagee.]—First mtgees. of leasehold premises, acting under the powers of Conveyancing & Law of Property Act, 1881 (c. 41), appointed as receiver the manager of a guarantee society which had guaranteed them against loss on their mtge. The mtgors. were under covenant with their lessor to keep the premises in repair, & were under covenant with the first mtgees. to observe the covenants of the lease. The premises being out of repair, the receiver put them into repair, & paid the cost out of moneys found by the society. These repairs were not authorised in writing by the first mtgees., & the cost of them was in excess of the rents & profits in the hands of the receiver. In an action for foreclosure by the first mtgees. against the second mtgee. & the mtgors.:—*Held:* in taking the account of what was due to the first mtgees. under their security, the cost of these repairs, assuming them to be necessary & proper, ought not to be allowed, whether such cost was to be treated as a payment by the receiver or by the first mtgees. themselves.—WHITE *v.* METCALF, [1903] 2 Ch. 567; 72 L. J. Ch. 712; 89 L. T. 164; 52 W. R. 280.

—*To pay any further amounts.*]—TEETER *v.* ST. JOHN (1863), 10 Gr. 85.—CAN.

a. *Advances to prevent eviction.*]—HILL *v.* BROWNE (1844), 6 I. Eq. R. 403; Drury *temp.* Sug. 426.—IR.

PART XVI. SECT. 1, SUB-SECT. 4.—B.

b. *Cost of repairs.*]—COMPTON *v.* POPE (1861), 1 P. E. I. 181.—CAN.

c. *Improvements—Brick dwelling.*]—HARRISON *v.* JONES (1863), 10 Gr. 99.—CAN.

d. ——.]—MCLAREN *v.* FRASER (1870), 17 Gr. 567.—CAN.

Sect. 1.—*General accounts: Sub-sect.* 4, *B.. C. & D.*

When mortgagee in possession.]—*See* Sect. 2 sub-sect. 4, B., *post.*

C. Insurance Premiums.

See Law of Property Act, 1925 (c. 20), ss. 101, 108.

3690. Allowances made for premiums.]—MARSHALL *v.* NUNN (1853), 3 Seton's Judgments & Orders, 7th ed. 1885.

3691. ——.]—BATES *v.* JOHNSON (1859), 3 Seton's Judgments & Orders, 7th ed. 1885.

3692. Life insurance premiums—Where express provision in mortgage deed—Failure of mortgagor to pay—Effect of limit of amount payable on mortgage.]—In a mtge. security, H. covenanted with C. & co. to pay the principal sum £6,648 3*s.* 4*d.* & interest thereon at 5 per cent., etc., & that he would pay during the life of R. the premiums on three policies of insurance, & that in case of default it should be lawful for C. & co. to pay any sums requisite for keeping on foot or renewing the policies, & it was further agreed, that the sums that should be so advanced should be charged upon the mtged. premises, & carry interest at 5 per cent., & be raised in like manner as the other moneys thereby secured: provided, that the total amount of the moneys secured & to be ultimately recoverable by virtue of the mtge. security, exclusive of the sums of £3,000 & £2,000 secured by bonds, being part of the said principal sum, in respect whereof the proper *ad valorem* stamp duties had been already paid, should not exceed the sum of £3,000; the stamp impressed on the mtge. security covered only the sum of £8,000:—*Held:* the master was correct in finding the amount due to the mtgees. to consist of the principal sum originally advanced, & a further sum, being the amount of moneys advanced in payment of certain only of the premiums due on the three policies of assurance, altogether amounting to the sum of £8,000, & also of the further sums of £3,417 17*s.* 7*d.* & £497 14*s.* 6*d.*, being interest due respectively on the original principal sums of £6,648 3*s.* 4*d.* & £1,351 16*s.* 8*d.*, the amount paid in respect of such premiums.—RICHARDS *v.* MACCLESFORD, COCKS *v.* EDWARDS (1841), 10 L. J. Ch. 329, L. C.

3693. —— —— ——.]—A tenant for life, with remainder to his first & other sons by his then wife in tail male, remainder to himself in fee, being desirous of raising a sum of £12,500 on the security of his estate, applied to a life assurance society, & a deed of mtge. was entered into between the mtgor. of the one part & four persons of the other who were trustees of the society, but were not so named in the mtge. deed. The deed recited that there was no probability of the mtgor. having issue by his then wife, & recited that a policy of assurance in the said society had been effected, whereby three directors of the co. assured to the said four persons, trustees, the sum of £13,000 in case of the death of the mtgor. leaving male issue by his then wife, & in case the mtgor. should keep up the annual premium regularly. The deed then witnessed that, in consideration of £12,500 the life estate, & also the reversion of the mtgor., were conveyed to the four trustees by way of mtge.; & it was provided that, in case the mtgor. should neglect or refuse to pay the premiums, it should be lawful for the mtgees. to pay them, & that all such sums so paid by them should be charged on the hereditaments thereby conveyed. Another mtge. was made shortly after between the same parties by way of further charge, accompanied by a similar policy. The mtgor. paid the premiums on the policies for about four years; the directors then reduced the amount of the premiums & he continued to pay the reduced amount for three years longer. He then ceased to pay the premiums altogether. The co. debited his account in their books with the annual amounts, & added them to their mtge. debt. The mtgor. died without leaving issue male, & on taking the accounts in a mtgees.' suit against the estate, the chief clerk disallowed to the assurance co. the amounts with which they had debited the estate on account of the premiums:—*Held:* the co. were entitled, by the terms of the mtge. deed to be allowed the sums with which they had so debited the mtgor.'s estate.—FITZWILLIAM (EARL) *v.* PRICE (1858), 31 L. T. O. S. 389; 4 Jur. N. S. 889.

3694. —— —— —— **Right to recover by action.**]—Deft. by deed of mtge. reciting a loan of £12,500 by pltfs. to deft. upon the security of a demise of deft.'s life-interest in certain property & a conveyance of a reversion in fee, & also by a policy for £13,000 in the Norwich Union Life Assurance Office, payable within three months after the death of deft. "in case he should leave issue male by his then present wife living at his death," deft. covenanted that he would "from time to time during his natural life, & so long as the said sum of £12,500, or any part thereof, or any interest for the same, should remain due & owing on the said security, continue & keep on foot the benefit of the said recited policy of assurance, & pay or cause to be paid the yearly & other premiums, etc., & would not permit or suffer or do any act whereby the said policy might be forfeited or vacated," etc. The deed also contained a proviso, that, in case deft. should neglect to pay the premiums, it should be lawful for pltfs. to pay the same, & to charge the payments so made upon the hereditaments thereby charged. The deed contained no covenant by deft. to repay pltfs. the sums they might pay to keep the policy alive. Deft. paid the interest & premiums regularly down to the year 1848, but since that time, there being then no possibility of his having any issue by his then wife, he had discontinued to pay the premiums. The annual premiums accruing up to the present time were placed to the credit of the office in an account kept by them, called their "Policy Premium Account," & regularly debited year by year by the office in the mtge. account of deft., according to the practice of the office, but deft. had no notice of this course of dealing. Pltfs. having brought an action against deft. upon his covenant for payment of the premiums, deft. pleaded payment of 1*s.* into court. Upon a special case stating these facts:—*Held:* assuming pltfs. to have paid the premiums, they were not entitled to more than nominal damages. *Semble:* the course of dealing stated did not amount to evidence that they had paid them.—BROWNE *v.* PRICE 1858), 4 C. B. N. S. 598; 27 L. J. C. P. 290; 31

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3690 i. *Allowances made for premiums.*]—Under the head of "just allowances," the master may on taking the account of subsequent interest, & taxing subsequent costs on a first or subsequent foreclosure, allow a sum paid for insurance since the last foreclosure.—BETHUNE *v.* CALCUTT (1853), 3 Gr. 648.—CAN.

3690 ii. ——.]—ENGLISH & SCOTTISH INVESTMENT CO. *v.* GRAY (1879), 8 P. R. 199.—CAN.

e. —— *Whether credit need be given.*]—A mtgee. insuring the mtged. premises out of his own funds is entitled to receive the amount of the policy in the event of loss for his own benefit, without giving credit therefor upon the mtge.—RUSSELL *v.* ROBERTSON (1859), 1 Ch. Ch. 72.—CAN.

L. T. O. S. 248 ; 4 Jur. N. S. 882 ; 6 W. R. 721 ; 140 E. R. 1225.

3695. —— —— Whether commission to insurance agent included.]—Pltf. mortgaged her life interest in a fund to defts., it being part of the agreement that a policy should be effected on her life, & the premiums be secured on the mtged. property. In an action for redemption the chief clerk found that £173 19*s.* 1*d.*, "premiums paid on policies," was due from pltf. to defts. L., a solr. & agent to all the parties, paid the premiums to the insurance offices, receiving from them 5 per cent. commission. On summons to vary the chief clerk's certificate by the amount of the commission, on the ground that the "premiums paid on policies" only amounted to £165 5*s.* 0*d.* :—*Held :* after the premiums had been paid to the insurance offices, the mtgor. had no interest in them. The insurance offices received the premiums, & paid the commission out of them to their own agent.—LEETE *v.* WALLACE (1888), 58 L. T. 577.

3696. —— Insurance company mortgagees—Extra premiums.]—By an indenture dated Nov. 14, 1837, in consideration of a sum of £6,800 advanced by an assurance co., G. covenanted to pay to the co. an annuity of £800 during his life, & he further assigned his interest in certain sums of stock to secure payment of the same. G. further covenanted that in case the co. should, at any time thereafter, insure any sum or sums of money not exceeding £6,800 on the life of G. & should pay any additional insurance by reason of G. going beyond the seas, he, G., would pay to the co. all such sum & sums of money as shall be advanced by them as & for an additional premium in respect of his going abroad, etc. : & that all & every the sums so advanced should be a charge upon the premises thereinbefore assigned. In the year 1842 G. went to reside abroad. In Jan. 1842, when he was about to embark, one year's additional premium was paid to the co., upon the understanding from an officer of the co. that the co. had paid, or would immediately have to pay, an additional premium to that amount. The co., however, effected no insurance except with itself. This was done by means of a policy dated in 1837, & executed in the same form as all other policies, whereby in consideration of an annuity of £329 *per annum* to be paid during the life of G., the sum of £6,800 was assured to be paid to one branch of the co. by another branch of the same co. A further sum of £958 was insured on the life of G. by a policy effected by one branch of the co. with another branch of the same co. in Nov. 1839. The co. claimed the annual payments of the additional premiums, which they alleged had been advanced by them from 1843 to 1855, when G. returned to Europe :—*Held :* the co. were not entitled to charge for alleged payments in respect of policies effected by one branch of their office with another branch of the same office.—GREY *v.* ELLISON (1856), 1 Giff. 438 ; 25 L. J. Ch. 666 ; 27 L. T. O. S. 165 ; 2 Jur. N. S. 511 ; 4 W. R. 497 ; 65 E. R. 990.

Annotation :—**Consd.** Fitzwilliam *v.* Price (1858), 31 L. T. O. S. 389.

3697. —— Right to payment on death of assured.]—By a marriage settlement a policy of assurance on the life of C. was assigned to trustees for the benefit of the wife, for her separate use, for life, & after her death as she should appoint. The husband covenanted that he would pay the premiums, & in default the trustees were authorised to apply the income for that purpose. Subsequently, the wife appointed the reversion in the policy by way of mtge. to secure sums of money advanced to her, with interest at 5 per cent. The husband & the trustees refused to pay the premiums, & they were paid by the mtgees. On the death of C. the mtgees. claimed to be repaid out of the policy moneys the sums they had advanced for keeping the policy on foot, with interest at 5 per cent. :—*Held :* they were entitled to immediate payment of the premiums paid by them, with interest at 4 per cent., & to a charge for the remaining 1 per cent. upon the reversion of the policy moneys.—GILL *v.* DOWNING (1874), L. R. 17 Eq. 316 ; 30 L. T. 157 ; 22 W. R. 360.

Annotations :—**Expld.** Falcke *v.* Scottish Imperial Insce. (1886), 34 Ch. D. 234. **Refd.** *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552.

3698. —— Right to add to security.]—When a person, not the sole beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to a lien on the policy or its proceeds in the following case. By reason of the right of a mtgee. to add to his charge any money paid by him to preserve the property.—*Re* LESLIE, LESLIE *v.* FRENCH (1883), 23 Ch. 552 ; 52 L. J. Ch. 762 ; 48 L. T. 564 ; 31 W. R. 561.

Annotations :—**Consd.** *Re* Winchilsea's Policy Trusts (1888), 39 Ch. D. 168 ; Strutt *v.* Tippett (1890), 62 L. T. 475. **Apld.** *Re* Jones' Settlement, Stunt *v.* Jones, [1915] 1 Ch. 373. **Refd.** Falcke *v.* Scottish Imperial Insce. (1886), 34 Ch. D. 234 ; The Ripon City, [1898] P. 78 ; *Re* Fitzgerald, Surman *v.* Fitzgerald (1904), 90 L. T. 266 ; *Re* Pearce, [1909] 2 Ch. 492. **Mentd.** Leigh *v.* Dickson (1883), 12 Q. B. D. 194 ; Kenrick *v.* Mountsteven (1899), 48 W. R. 141 ; *Re* McKerrell, McKerrell *v.* Gowans (1912), 82 L. J. Ch. 22 ; *Re* Phillips, [1914] 2 K. B. 689 ; *Re* Stokes, *Ex p.* Mollish, [1919] 2 K. B. 256.

3699. —— —— Effect of covenant of mortgagee to pay.]—An employee was indebted to his firm, & by way of security for the debt he assigned a life policy to a member of the firm, in which assignment the mtgee. convenanted to pay the premiums on the policy with a proviso that the premiums so paid were to be debited to the mtgor. in the books of the business :—*Held :* the covenant by the mtgee. to pay the premiums did not deprive him of the right to add the premiums to the debt.—SHAW *v.* SCOTTISH WIDOWS' FUND ASSURANCE SOCIETY (1917), 87 L. J. Ch. 76 ; 117 L. T. 697.

Fire insurance premiums—Right to add to security.]—*See* INSURANCE, Vol. XXIX., p. 312, Nos. 2573–2577.

D. Expenses of Sale.

3700. Sale by equitable mortgagee—Bankruptcy of mortgagor.]—The clerk of a creditor claiming as equitable mtgee. drew up & signed the memorandum accompanying the deposit of a lease by the bkpt. ; but it was not signed by the bkpt. himself, nor was it alleged that the clerk was authorised by the bkpt. to draw up such memorandum, or that it was ever shown to the bkpt. :—*Held :* under these circumstances, the equitable mtgee. was not entitled to the costs of the sale.—*Re* MILLS, *Ex p.* REID (1832), 1 Deac. & Ch. 250, Ct. of R.

3701. Abortive sale.]—7 Geo. 2, c. 20, s. 1, which enables a mtgor., after action brought, to obtain a reconveyance of the property upon payment of the principal, interest, & costs of suit,

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3701 i. *Abortive sale.*]—An action of ejectment by a mtgee. against a mtgor. will only be stayed upon payment of the costs of an abortive sale under the mtge.—TRUST & LOAN CO. *v.* MCGILLVRAY (1878), 7 P. R. 318.—**CAN.**

3701 ii. ——.]—Where a mtgee. had offered property for sale under a power of sale, & the sale proved abortive, he was entitled to the costs, the attempt to sell having been *bonâ fide*.—

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applies only to cases in which the mtgee. is not in possession, & in which he has not attempted to exercise the right of sale.

Where a mtgee., in pursuance of a power of sale, attempted to dispose of the property, but without success, the ct. refused to compel him to reconvey the premises & deliver up the deeds, except on payment of the costs of the abortive attempt at sale, & of showing cause against the rule.—SUTTON *v.* RAWLINGS (1849), 3 Exch. 407; 6 Dow. & L. 673; 18 L. J. Ex. 249; 12 L. T. O. S. 426.

Annotation:—**Folld.** Dowle *v.* Neale (1862), 10 W. R. 627.

3702. —— Effect of negligence of mortgagee—Payment by cheque.]—(1) On a sale by auction on behalf of a mtgee., in exercise of the power of sale contained in his mtge. deed, the acceptance by the auctioneer, on behalf of the vendor & with his concurrence, of a cheque, which was dishonoured on presentation, in lieu of cash for the deposit is not, having regard to the common practice at sales by auction, unreasonable, & is not such an act of negligence on the part of the mtgee. as to deprive him of his right to the costs of the abortive sale.

(2) [In] an action which, like this, combines the double form of an action on the covenant & an action for foreclosure . . . I think that the proper course . . . will be that the costs should be limited to those which would have been properly incurred had the action been one on the covenant only (BAGGALLAY, L.J.).—FARRER *v.* LACY, HARTLAND & Co. (1885), 31 Ch. D. 42; 55 L. J. Ch. 149; 53 L. T. 515; 34 W. R. 22; 2 T. L. R. 11, C. A.

Annotations:—*As to* (2) **Folld.** Bissett *v.* Jones (1886), 32 Ch. D. 635; Jones *v.* Harris (1887), 55 L. T. 884; Faithfull *v.* Woodley (1889), 43 Ch. D. 287. *Generally*, **Refd.** Instone *v.* Elmslie (1886), 54 L. T. 730; Poulett *v.* Hill, [1893] 1 Ch. 277; Powell *v.* Brodhurst, [1901] 2 Ch. 160; Williams *v.* Hunt, [1905] 1 K. B. 512; White & Pill *v.* Stennings, [1911] 2 K. B. 418.

3703. Sale by auctioneer mortgagee.] — The mtgee. having been employed by the mtgor. as auctioneer in several attempted sales before his power arose, & also having paid money on the mtgor.'s account:—*Held:* he was not entitled under the decree to have an account of his costs incurred in respect of such sales, & of the moneys so paid by him.—THOMPSON *v.* RUMBALL (1839), 3 Jur. 53.

—.]—*See* AUCTION & AUCTIONEERS, Vol. III., p. 32, NOS. 233–235.

Sale by solicitor mortgagee.]—*See* SOLICITORS.

Sale of ship.]—*See* SHIPPING.

Amount recoverable—Sale by auction.]—*See* AUCTION & AUCTIONEERS, Vol. III., p. 33, No. 239.

Application of proceeds of sale generally.]—*See* Part XIII., Sect. 2, sub-sect. 10, *ante*.

E. Interest on Expenses.

See Part XVII., Sect. 2, *post*.

SUB-SECT. 5.—PROOF OF DEBT.

See, generally, EVIDENCE, Vol. XXII., pp. 191 *et seq.*

3704. Whether receipt in mortgage deed sufficient.]—GODDARD *v.* COMPLIN (1669), 1 Cas. in Ch. 119; 22 E. R. 722.

Annotation:—**Mentd.** Hart *v.* Middlehurst (1746), 3 Atk. 371.

3705. —— Fraud.]—A bond or mtge. is *primâ facie* a good evidence of a debt; but in case fraud appears, the obligee, etc., ought to prove actual payment.—PIDDOCK *v.* BROWN (1734), 3 P. Wms. 288; 24 E. R. 1069, L. C.

3706. —— Not conclusive.]—MAINLAND *v.* UPJOHN, No. 3654, *ante*.

3707. —— Foreclosure by third mortgagee against second—After purchase of first mortgage.]—Third mtgee. buys in the first, & brings bill to foreclose the second. He need not prove the money actually lent on the third mtge., the producing an acquittance being sufficient.—HOLT *v.* MILL (1692), 2 Vern. 279; 23 E. R. 781.

3708. —— Parties in fiduciary relationship.]—LEWES *v.* MORGAN, No. 3723, *post*.

—.]—*See* DEEDS, Vol. XVII., pp. 370–373, Nos. 1807–1832.

3709. Deposit of deeds subsequent to debt—Whether evidence of security—Where subsequent advances.]—In a case of doubt, & where there is no memorandum in writing accompanying the deposit of deeds, the ct. leans against the deposit, as a security for an antecedent debt, though it favours it, in regard to subsequent advances.—*Re* COWDEROY, *Ex p.* MARTIN (1835), 4 Deac. & Ch. 457; 2 Mont. & A. 243; 4 L. J. Bcy. 85, Ct. of R.

3710. Running security—Admissions of mortgagor.]—Bond & mtge. given by an only son to his father:—*Held:* in the circumstances of the case to be a running security for advances actually made, & not a security for the precise amount expressed in the instruments, & there being no evidence against the son as to the amount of the actual advances, he was charged in that respect to the extent of his admissions only—MELLAND *v.* GRAY (1843), 2 Y. & C. Ch. Cas. 199; 63 E. R. 87.

SUB-SECT. 6.—RIGHT TO SET-OFF.

3711. Right of mortgagee—Debt due to mortgagor.]—A. executed a mtge. in favour of his bankers, M. & B., to secure any balance which might at any time be due upon his banking account, either to them or to the persons who should for the time being constitute the banking firm. A. became indebted on his account with M. & B., & also, after B.'s death, with M. & D., & in 1838, the balance on his account exceeded £3,000, when the banking business, with all debts & securities due to or held by the firm, was assigned to pltfs. They afterwards employed A., & became indebted to him for work & materials. A. became bkpt.; & the property comprised in the mtge. was not sufficient to pay the balance due from A., after paying off several prior incumbrances, the amount of which had not yet been ascertained:—*Held:* pltfs. were entitled to set off the debt due from them to A., against the balance due from A. to the banking firm.—CLARK *v.* CORT (1840), Cr. & Ph. 154; 10 L. J. Ch. 113; 41 E. R. 449, L. C.

Annotations:—**Consd.** Hunt *v.* Jessel (1854), 18 Beav. 100. **Apld.** Alcoy & Gandia Ry. & Harbour Co. *v.* Greenhill

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CAMERON *v.* MCILROY (1884), 1 Man. L. R. 242.—**CAN.**

3701 iii. ——.]—Mtged. property sold under a power of sale, default having arisen, was bid in by an agent of the mtgee., & subsequently conveyed by him to the mtgee. In a suit for redemption:—*Held:* the mtgee. was entitled to be paid the costs of the abortive sale, except an amount charged for the conveyance.—PATCHELL *v.* COLONIAL INVESTMENT & LOAN CO. (1907), 2 E. L. R. 417; 3 N. B. Eq. Rep. 429.—**CAN.**

l. Under statutory mortgage.]—BEATTY *v.* O'CONNOR (1884), 5 O. R. 731.—**CAN.**

g. Release of claim—Of second mortgagee.]—LAWS *v.* TORONTO GENERAL TRUSTS CORPN. (1904), 8 O. L. R. 522; 4 O. W. R. 164; 24 C. L. T. 395.—**CAN.**

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h. Right of mortgagor—To set off value of crops—Crops taken by lessee of

(1897), 76 L. T. 542. **Refd.** Dodd *v.* Lydall, Lydall *v.* Dodd (1842), 1 Hare, 333; Cochrane *v.* Green (1860), 9 C. B. N. S. 448; *Re* Agra & Masterman's Bank, *Ex p.* Anderson (1866), 36 L. J. Ch. 73; Middleton *v.* Pollock, *Ex p.* Nugee (1875), L. R. 20 Eq. 29; Thornton *v.* Maynard (1875), L. R. 10 C. P. 695.

3712. Right of mortgagor—General rule.]—In taking the accounts between mtgor. & mtgee., whether in a foreclosure or in a redemption suit, the mtgor. is entitled to the benefit of set-off.—*Re* AGRA & MASTERMAN'S BANK, ANDERSON'S CASE (1866), L. R. 3 Eq. 337; 36 L. J. Ch. 73; 15 W. R. 246.

Annotation :—**Refd.** Mersey Steel & Iron Co. *v.* Naylor (1882), 9 Q. B. D. 648.

3713. —— Damages for breach of covenant in lease.]—BRANDLING *v.* OWEN (1704), 2 Vern. 462; 23 E. R. 896.

SUB-SECT. 7.—RE-OPENING ACCOUNTS.

A. In General

See, generally, EQUITY, Vol. XX., pp. 271-277, Nos. 310-369.

3714. On what ground re-opened—Particular errors to be alleged.]—Jointure made of an equity of redemption; the husband becomes a bkpt., & the assignees of the comrs. state an account with the mtgee. If the jointress will be relieved against this account, she ought in her bill to assign particular errors; but leave given to amend the bill.—KNIGHT *v.* BAMPFEILD (1683), 1 Vern. 179; 23 E. R. 399.

Annotation :—**Refd.** Bourke *v.* Bridgeman (1729), 1 Barn. K. B. 272.

3715. —— ——.]—Bill to open a settled account must state specific errors.—TAYLOR *v.* HAYLIN (1788), 2 Bro. C. C. 310; 1 Cox, Eq. Cas. 435; 29 E. R. 170.

Annotations :—**Refd.** Gething *v.* Keighley (1878), 9 Ch. D. 547; Yourell *v.* Hibernian Bank, [1918] A. C. 372.

3716. —— ——.]—(1) An assignee of a mtge., in general cases, takes it entirely at his own risk as to what is due from the mtgor. to the mtgee., but if the mtgor. makes no objection to the demand for a length of time, & deals with the assignee of the mtge. without objecting to the account of the original mtgee., he cannot have a decree to surcharge & falsify against that assignee, but must resort for redress to the original mtgee.

(2) Accounts settled & signed cannot be falsified except for error; but if error be manifest, the ct. will correct it, notwithstanding any stipulation between the parties. Error must be specifically charged in the bill, & proved; otherwise the ct. will not open an account.

(3) A mtgee. cannot have profit, by way of commission, for receiving the produce of the mtged. estate.—CHAMBERS *v.* GOLDWIN (1804), 9 Ves. 254; 1 Smith, K. B. 252; 32 E. R. 600, L. C.

Annotations :—*As to* (2) **Refd.** Quarrell *v.* Beckford (1807), 13 Ves. 377; Faulkner *v.* Daniel (1843), 3 Hare, 199; Blagrave *v.* Routh (1856), 2 K. & J. 509. *As to* (3) **Consd.** Forrest *v.* Elwes (1816), 2 Mer. 68. **Distd.** Sayers *v.* Whitfield (1829), 1 Knapp, 133. **Consd.** Leith *v.* Irvine (1833), 1 My. & K. 277; Mainland *v.* Upjohn (1889), 41 Ch. D. 126. **Refd.** Eyre *v.* Hughes (1876), 2 Ch. D. 148; Ward *v.* Sharp (1884), 53 L. J. Ch. 313; Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. *Generally,* **Mentd.** Denton *v.* Davy (1836), 1 Moo. P. C. C. 15; Robertson *v.* Norris (1858), 1 Giff. 421; Warner *v.* Jacob (1882), 46 L. T. 656; British South Africa Co. *v.* De Beers Consolidated Mines (1910), 80 L. J. Ch. 65; *Re* Morris, Mayhew *v.* Halton, [1921] 1 Ch. 172.

3717. —— ——.]—The rule in equity is, that if a party seeks to open a settled account so as to surcharge & falsify it, he must in his bill specifically charge at least one definite & important error, & support that charge with evidence confirming it as laid.—PARKINSON *v.* HANBURY (1867), L. R. 2 H. L. 1; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642, H. L.

Annotations :—**Refd.** Kirkwood *v.* Thompson (1865), 2 Hem. & M. 392; White *v.* Ahrens (1884), 26 Ch. D. 717; Sachs *v.* Speilman (1887), 37 Ch. D. 295; *Re* Colnbrook Chemical & Explosives Co., A.-G. *v.* The Co., [1923] 2 Ch. 289. **Mentd.** Shaw *v.* Bunny (1865), 2 De G. J. & Sm. 468; Leitch *v.* Abbott (1886), 31 Ch. D. 374; Hatten *v.* Russell (1888), 38 Ch. D. 334; Selwyn *v.* Garfit (1888), 38 Ch. D. 273; Bailey *v.* Barnes, [1894] 1 Ch. 25; Gaskell *v.* Gosling, [1896] 1 Q. B. 669.

3718. —— Fraud.]—On the ground of fraud a general account was decreed; & the securities to stand only for the balance; though the vouchers had been destroyed by general consent.—WHARTON *v.* MAY (1799), 5 Ves. 27; 31 E. R. 454, L. C.

Annotations :—**Refd.** Curling *v.* Townshend (1816), 19 Ves. 628; Bernal *v.* Donegal (1827), 1 Bli. N. S. 594. **Mentd.** Bernal *v.* Donegal (1815), 3 Dow. 133; Portarlington *v.* Soulby (1834), 3 My. & K. 104.

3719. —— Mistake.]—In the absence of special agreement simple interest only can be charged in a mtge. account. Where such mtge. account had been settled on the footing of compound interest with half-yearly rests, both parties wrongly understanding the mtge. deed to require the same: —*Held:* such settled account might be re-opened. —DANIELL *v.* SINCLAIR (1881), 6 App. Cas. 181; 50 L. J. P. C. 50; 44 L. T. 257; 29 W. R. 569, P. C.

Annotations :—**Distd.** Yourell *v.* Hibernian Bank, [1918] A. C. 372. **Refd.** Ward *v.* Sharp (1884), 53 L. J. Ch. 313; *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648.

—— —— **Mortgage to building society.**]—*See* BUILDING SOCIETIES, Vol. VII., p. 483, No. 173.

3720. Leave to surcharge & falsify—Mortgagor not confined to mistakes in fact.]—A party who is at liberty to surcharge & falsify, is not merely confined to errors in fact, but may take advantage of errors in law.—ROBERTS *v.* KUSSIN (1740), 2 Atk. 112; Barn. Ch. 259; 26 E. R. 470, L. C.

Annotations :—**Mentd.** Gibbon *v.* Gibbon (1853), 13 C. B. 205; *Re* Robson, Robson *v.* Hamilton, [1891] 2 Ch. 559.

3721. —— Whether granted against assignee of mortgage—Effect of acquiescence in mortgagee's accounts.]—CHAMBERS *v.* GOLDWIN, No. 3716, *ante.*

B. Parties in Fiduciary Relationship.

3722. Solicitor & client—General allegations of error.]—MATTHEWS *v.* WALLWYN, No. 3663, *ante.*

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mortgagee.]—MOORE *v.* MERRITT (1858), 6 Gr. 550.—**CAN.**

k. —— *Goods supplied to mortgagee—After assignment to co-mortgagee.*]—Where two persons were mtgees., & one assigned his interest to the other, the mtgor. was allowed credit, as against the assignee, for goods delivered to the assignor, until notice of the assignment.—GALBRAITH *v.* MORRISON (1860), 8 Gr. 289.—**CAN.**

PART XVI. SECT. 1, SUB-SECT. 7.—A.

1. *On what ground re-opened—Agreement to discharge mortgage—Failure of action to enforce.*]—Where, after an order *nisi* in a mtge. action deft. is permitted to bring an action to enforce an alleged agreement to discharge the mtge., & fails thereon, pltf. is entitled to have the accounts, in the mtge. action opened up & to an allowance therein of the costs in the other action. —DILLABOUGH *v.* DELANEY (Sask.), [1918] 1 W. W. R. 795.—**CAN.**

PART XVI. SECT. 1, SUB-SECT. 7.—B.

3722 i. *Solicitor & client—General allegations of error.*]—In ordinary cases the rule is, that the establishment of one mistake is sufficient to induce the ct. to give a decree entitling the party to surcharge & falsify an account. But where the relation of attorney & client subsists, the ordinary rule does not prevail, for there, though the party only alleges generally that the accounts, as settled, are erroneous, the ct. will, if sufficient cause be shown, make a decree opening those accounts.—LAWLESS *v.* MANSFIELD, MANSFIELD *v.* LAWLESS (1841), 1 Dr. & War. 557.—**IR.**

Sect. 1.—*General accounts: Sub-sect.* 7, *B. Sect.* 2 *Sub-sect.* 1, *A., B. & C.*]

3723. —— Balance in favour of solicitor.]—(1) Settlement of accounts between attorney & client, not conclusive; the nature of their connection, excepting their accounts from the operation of the general rule in equity. Therefore accounts settled & signed, & where vouchers are delivered up, & a note given for the balance, will be re-opened at a very considerable distance of time after such settlement, where the parties stand in the relative situation to each other of attorney & client, agent & principal; & where the balance is in favour of the former under the peculiar circumstances affecting this case.

(2) Now, I apprehend, that, in the dealings & transactions of parties of this description, & when an account of those dealings & transactions has been ordered to be taken by the ct., a person standing in the situation of solr., agent, general manager, & director, & having [the management of] the whole concerns of the other party, & having made such other party execute instruments of this sort, which are therefore liable to suspicion, it becomes necessary not merely to rely on the instruments themselves, but to show that the advances were actually made (LORD REDESDALE). —LEWES *v.* MORGAN (1817), 5 Price, 42; 146 E. R. 530, H. L.

Annotations:—*As to* (2) **Apld.** Hiles *v.* Moore (1848), 17 L. J. Ch. 385; Gresley *v.* Mousley (1862), 3 De G. F. & J. 433. **Refd.** Bateman *v.* Hunt, [1904] 2 K. B. 530. *Generally*, **Refd.** Blagrave *v.* Routh (1856), 2 K. & J. 509; Cheese *v.* Keen, [1908] 1 Ch. 245. **Mentd.** Hare *v.* Bruford (1824), 13 Price, 277.

3724. ——.]—J. had been W.'s solr., & his agent in obtaining money on mtges. & otherwise, & also receiver of the rents of his estates; on a bill filed by W. against him & the mtgees., a decree was made for a general account against J. & for the taxation of his bills of costs, notwithstanding there were settled accounts, signed by W. & securities given by him, & the vouchers delivered up to him. —MORGAN *v.* EVANS (1834), 8 Bli. N. S. 777; 3 Cl. & Fin. 159; 5 E. R. 1132, H. L.

Annotations:—**Refd.** Booth *v.* Leicester (1838), 3 My. & Cr. 459; Blagrave *v.* Routh (1856), 2 K. & J. 509. **Mentd.** Birch *v.* Joy (1852), 3 H. L. Cas. 563; Shedden *v.* A.-G. (1860), 30 L. J. P. M. & A. 217.

3725. —— No independent advice—Misrepresentation as to identity of mortgagee.]—Accounts between a mtgee. & mtgor. in the position of solr. & client, although stated & signed more than thirty years ago, were opened on the grounds that the client had no independent advice & signed without examination or explanation, that the accounts contained improper charges, & that a third person was represented to be the mtgee.—WARD *v.* SHARP (1884), 53 L. J. Ch. 313; 50 L. T. 557; 32 W. R. 584.

3726. —— ——.]—K. was a builder, & from 1883 to 1904 employed C. as his solr., who financed him in numerous transactions. No bills of costs were delivered, but from time to time accounts were stated between them, & the amount due for loans, interest & costs were agreed, & C. took mtges. for the agreed amounts. By 1904 all the mtges., except two, had been paid off, either by sales or by K. paying off & taking reconveyances of the mtges., & on each occasion the amount due was agreed. In 1905 C. died, & in 1906 his exors. brought an action against K. to enforce the two subsisting mtges. K. counterclaimed for an account of all the transactions & dealings between himself & C. from 1883, alleging, as the fact was, that he had had no independent advice, & in some of the settled accounts he proved errors in respect of interest, & that he had been charged profit costs prior to 58 & 59 Vict. c. 25:—*Held:* K. was entitled to open all the accounts & to tax, surcharge & falsify, & his right was not barred by Stat. Limitations, although all the settled accounts but one had been agreed more than six years before the date of his counter-claim.—CHEESE *v.* KEEN, [1908] 1 Ch. 245; 77 L. J. Ch. 163; 98 L. T. 316; 24 T. L. R. 138.

3727. —— Effect of acquiescence.]—General rule, that a mtgee. shall not charge for receiving the rents personally; though he may have a receiver at the expense of the mtgor. Liberty was therefore given to surcharge & falsify an account settled, with that allowance; acquiescence having no effect; the mtgee. being the attorney of the mtgor.—LANGSTAFFE *v.* FENWICK, FENWICK *v.* LANGSTAFFE (1805), 10 Ves. 405; 32 E. R. 902.

Annotations:—**Consd.** Barrett *v.* Hartley (1866), L. R. 2 Eq. 789. **Refd.** Sayers *v.* Whitfield (1829), 1 Knapp, 133.

3728. —— ——.]—A client executed a mtge. to his solr. for a specified sum, being the amount at which past costs in a suit had been estimated, without the bills having been delivered, the solr. undertaking to deliver the bills by a certain time, which he did. Four years afterwards the client changed his solr. & obtained an order for taxation of subsequent costs, but declined the offer of the solr. to have the costs secured by the mtge. included in the taxation, & obtained the order without prejudice to any question as to those costs. Two years afterwards the client filed a bill against the solr., to have the latter costs investigated & the account between the parties re-opened, but did not allege any specific overcharge or error:—*Held:* the suit was precluded by length of time & acquiescence.—BLAGRAVE *v.* ROUTH (1856), 8 De G. M. & G. 620; 26 L. J. Ch. 86; 28 L. T. O. S. 111; 3 Jur. N. S. 399; 5 W. R. 95; 44 E. R. 529, L. JJ.

Annotations:—**Refd.** Morgan *v.* Higgins (1859), 1 Giff. 270; Eyre *v.* Wynn-Mackenzie, [1894] 1 Ch. 218. **Mentd.** Watson *v.* Rodwell (1878), 7 Ch. D. 625; Ward *v.* Sharp (1884), 50 L. T. 557.

3729. Principal & agent.]—LEWES *v.* MORGAN, No. 3723, *ante*.

-.]—*See, generally*, AGENCY, Vol. I., pp. 445–447, NOS. 1351–1360.

SECT. 2.—ACCOUNTS BY MORTGAGEE IN POSSESSION.

SUB-SECT. 1.—LIABILITY TO ACCOUNT.

A. In General.

3730. Liability to account from the beginning.]—TALBOT *v.* BRADDILL (1683), 1 Vern. 183; 23 R. 402.

Annotation:—**Refd.** Cowdry *v.* Day (1859), 1 L. T. 88.

3731. Mortgagee acting through agent—Account of sums received from agent not sufficient.]—Defts. had by the judgment in the action been held to be mtgees. in possession of certain mtged. estates, & the usual accounts & inquiries as against mtgees. in possession were directed. Defts. brought in an account purporting to show their receipts in respect of the rents & profits of the mtged. estates, but which in fact only showed certain lump sums received by them from B., then deceased, their agent. On motion by the pltf. for a further & better account:—*Held:* defts. were bound to render the further account, for the receipts of B. were as between pltf. & defts. the receipts of defts.; defts. were bound to deliver an account showing not only what they had received from B. but what

he had received from the tenants, & it was a question not of technicality but of substance, for without the knowledge derived from such an account pltf. would be unable to proceed on the inquiry as to wilful default, which was a matter of surcharge, & the death of deft.'s agent could not excuse defts. from this liability.—NOYES *v.* POLLOCK (1885), 30 Ch. D. 336; 55 L. J. Ch. 54; 53 L. T. 430; 33 W. R. 787, C. A.

3732. Effect of purchase by mortgagee.]—To a bill by the devisees of the equity of redemption of a plantation in the West Indies, against parties alleged to be mtgees., praying an account & reconveyance defts. pleaded, that judgment had been obtained against exors. of testator in the colony, & execution issued, under which the plantation had been sold to defts., & averred, that the proceedings, etc., were in conformity with, & according to, the due course of law in the said island. The ct. allowed the plea.—VERCHILD *v.* PAULL (1836), 1 Keen, 87; 5 L. J. Ch. 284; 48 E. R. 239.

3733. Mortgagee must be in possession as mortgagee.]—He [mtgee.] was . . . made to account not only for what he actually received, but for what he might without wilful default have received. . . . It follows . . . that cts. of Equity were very slow to decide that possession had been taken & would not do so unless satisfied that the mtgee. in possession took possession in his capacity of mtgee. without any reasonable ground for believing himself to hold in any other capacity (RIGBY, L.J.).—GASKELL *v.* GOSLING, [1896] 1 Q. B. 669; 65 L. J. Q. B. 435; 74 L. T. 674; 12 T. L. R. 335, C. A.; *revsd.* on other grounds, *sub nom.* GOSLING *v.* GASKELL, [1897] A. C. 575, H. L.

Annotations:—**Mentd.** Paterson *v.* Gas Light & Coke Co. (1896), 74 L. T. 640; *Re* Hale, Lilley *v.* Foad (1899), 68 L. J. Ch. 517; Robinson Printing Co. *v.* Chic, [1905] 2 Ch. 123; Deyes *v.* Wood, [1911] 1 K. B. 806; Thomas *v.* Todd, [1926] 2 K. B. 511.

B. After Assignment.

3734. Whether mortgagee remains liable—General rule.]—A mtgee. in possession assigned the mtged. premises to the son of the mtgor., a woman, upon an account stated & payment of the amount due to him; in a suit for redemption by the mtgor. against the mtgee. & her son, the mtgor. insisted that the assignment was a breach of trust:—*Held:* the mtgee. must account for all the profits both before & after the assignment, & reconvey or procure reconveyance to the mtgor.—VENABLES *v.* FOYLE (1661), Nels. 60; 1 Cas. in Ch. 2; Freem. Ch. 152; 1 Rep. Ch. 178; 21 E. R. 789.

3735. —— ——.]—A. mortgaged leaseholds to B., who entered into possession, received the rents, & sold a part under a power. A. afterwards mortgaged the equity of redemption to C., & A. & B. then assigned the premises & mtge. debt to D. In a foreclosure suit by C.:—*Held:* B. might be called upon to account for the rents & purchase-moneys received by him.—HINDE *v.* BLAKE (1841), 11 L. J. Ch. 26.

Annotations:—**Mentd.** Lodwick *v.* Day (1844), 3 L. T. O. S. 4; Pace *v.* Pace (1891) 67 L. T. 383.

3736. —— ——.]—(1) A mtgee. is accountable, not merely for his actual receipts whilst in possession of the mtged. property, but also for whatever is received by those to whom he transfers possession under an arrangement inoperative to transfer title, & in derogation of the rights of the mtgor.

(2) A mtgee. who in a redemption suit sets up & fails to prove an absolute title to the mtged. property, & is then found to have been at the date of the suit, overpaid as mtgee., will not only not be allowed his costs of suit but may have costs given against him.—NATIONAL BANK OF AUSTRALASIA *v.* UNITED HAND-IN-HAND & BAND OF HOPE CO. (1879), 4 App. Cas. 391; 48 L. J. P. C. 50; 40 L. T. 697; 27 W. R. 889, P. C.

3737. —— **Not where assignment by order of court.**]—(1) The liability of a mtgee. in possession, who assigns his mtge., to account to the mtgor. for the profits of the estate after the assignment, exists only where the assignment is volunatry, & not where it is made by order of the ct.

(2) In an action to redeem a mtge., the mtgee. raised a defence under which he no longer treated himself as mtgee., but laid claim to part of the mtged. estate:—*Held:* he might properly be made to pay the costs of the action.—HALL *v.* HEWARD (1886), 32 Ch. D. 430; 55 L. J. Ch. 604; 54 L. T. 810; 34 W. R. 571, C. A.

Annotations:—**Reld.** Ledbrook *v.* Passman (1888), 57 L. J. Ch. 855; Kinnaird *v.* Trollope (1889), 42 Ch. D. 610; Heath *v.* Chinn (1908), 98 L. T. 855. **Mentd.** Carlton Main Colliery Co. *v.* Clawley, [1917] 2 K. B. 691.

C. To Subsequent Incumbrancers.

3738. When arising—Where mortgage after entry—From date of second mortgage.]—MADDOCKS *v.* WREN (1680), 2 Rep. Ch. 209; 21 E. R. 659.

3739. —— **Where mortgage before entry—From date of entry.**]—Mtgee. enters, & thereby prevents subsequent incumbrancers from entering, & yet permits the mtgor. to receive the profits. He shall be charged with all the profits he had or might have received since his entry.—COPPRING *v.* COOKE, COOKE *v.* KNIGHT (1684), 1 Vern. 270; 23 E. R. 463.

3740. In respect of surplus rents—After bill filed by second mortgagee.]—After bill filed by second incumbrancer, first incumbrancer in possession cannot pay surplus rents to debtor.—PARKER *v.* CALCRAFT, DUNN *v.* SAME (1821), 6 Madd. 11; 56 E. R. 992.

Annotation:—**Reld.** Hele *v.* Bexley, Whitfield *v.* Bowyer, Whitfield *v.* Knight (1855), 20 Beav. 127.

PART XVI. SECT. 2, SUB-SECT. 1.—A.

3733 i. *Mortgagee must be in possession as mortgagee.*]—In a redemption suit by the second mtgee. against the first, it appeared that the equity of redemption had become vested in the first mtgee., & that he had entered into possession & had cut & removed timber to a greater value than the amount due on his mtge.:—*Held:* he was bound to account only for the value of such timber & occupation rent as was taken or received by him as mtgee. not as owner of the equity of redemption.—STEINHOFF *v.* BROWN (1865), 11 Gr. 114.—**CAN.**

m. *When liability arises.*]—It is not always necessary for a mtgee. who has been in possession to produce his accounts on taking proceedings to foreclose. This necessity arises, first, when the mtgor. has deposited the principal, leaving the question of interest to be settled on an adjustment of the account; secondly, when he has deposited all that he admits or alleges to be due; thirdly, when he pleads & undertakes to prove that the whole of the principal & interest has been liquidated by the usufruct of the property.—FORBES *v.* AMEEROONISSA BEGUM (1866), 14 W. R. 481, P. C.—**IND.**

n. *Mortgagee in possession under power of attorney.*]—A mtgee., who went into possession under a power of attorney from his mtgor. subsequently to the mtge.:—*Held:* liable to be charged as a mtgee. in possession.—*Re* M'KINLEY'S ESTATE (1873), 7 I. R. Eq. 467.—**IR.**

PART XVI. SECT. 2, SUB-SECT. 1.—C.

3739 i. *When arising—Where mortgage before entry—From date of entry.*]—A prior mtgee. who has obtained leases, subsequent to a puisne mtgee., & who has entered into possession, will, as against the latter, be charged as mtgee. in possession.—GREGG *v.* ARROTT (1835), L. & G. *temp.* Sugd. 246.—**IR.**

Sect. 2.—Accounts by mortgagee in possession: Sub-sect. 1, C. & D.; sub-sects. 2 & 3, A.]

3741. In respect of overpayment.]—ARCHDEACON *v.* BOWES, No. 4285, *post.*

D. Welsh Mortgage.

3742. When profits exceed interest.]—A. conveyed lands to B., who was put into possession, but under an agreement, that if A. paid the money in ten years, B. should reconvey. The profits appearing to be much more than the interest, upon a bill by the heir to redeem, B. decreed to account for the profits, & not permitted to set the profits against the interest.—FULTHROPE *v.* FOSTER (1687), 1 Vern. 476; 23 E. R. 602.

Annotations:—**Refd.** Donovan *v.* Fricker (1821), Jac. 165; Alderson *v.* White (1858), 2 De G. & J. 97.

SUB-SECT. 2.—HOW TAKEN.

3743. Whether on footing of wilful default.]—MORLEY *v.* ELWAYS (1668), 1 Cas. in Ch. 107; 22 E. R. 717.

3744. ——.]—ROW *v.* COCKAYNE (1703), Colles. 310; 1 E. R. 301, H. L.

3745. ——.]—Trustee to be only charged for actual receipts; mtgee. for what he had or might have received.—HARNARD *v.* WEBSTER (1725), Cas. *temp.* King, 53; 25 E. R. 218.

3746. —— **Mortgagee not to speculate.**]—Mtgee. in possession, though answerable, beyond fraud, for wilful default, is to take the fair rents & profits, not bound to engage in, & will not be allowed for speculation & adventure.—HUGHES *v.* WILLIAMS (1806), 12 Ves. 493; 33 E. R. 187, L. C.

Annotations:—**Refd.** Wragg *v.* Denham (1836), 2 Y. & C. Ex. 117; Cocks *v.* Gray (1857), 5 W. R. 749; Millett *v.* Davey (1862), 31 Beav. 470.

3747. ——.]—In a case of adverse possession it is unusual in a decree to charge a party with rents & profits which he might have received but for his wilful default. The party charged is entitled to have a direction inserted in decree, that master in taking the accounts shall make him all just allowances. Mtgee. in possession & trustee guilty of a breach of trust, are the only cases where parties are charged with what they might have received but for their wilful default.—HOWELL *v.* HOWELL (1837), 2 My. & Cr. 478; 1 Jur. 492; 40 E. R. 722, L. C.

3748. ——.]—The mtgee., when he enters, enters under a condition imposed on him by this ct. of exercising the utmost diligence for the benefit of himself & the mtgor. (TURNER, L.J.).—SHERWIN *v.* SHAKSPEAR (1854), 5 De G. M. & G. 517; 2 Eq. Rep. 957; 23 L. J. Ch. 898; 24 L. T. O. S. 45; 18 Jur. 843; 2 W. R. 668; 43 E. R. 970, L. JJ.

Annotations:—**Refd.** Regent's Canal Co. *v.* Ware (1857), 23 Beav. 575; *Re* London Corpn. & Tubb's Contract, [1894] 2 Ch. 524. **Mentd.** Vickers *v.* Hand (1859), 26 Beav. 630; Palmerston *v.* Turner (1864), 33 Beav. 524; Herbert *v.* Salisbury & Yeovil Ry. (1866), L. R. 2 Eq. 221; Williams *v.* Glenton (1866), 1 Ch. App. 200; *Re* Phillips, *Ex p.* Kiveton Coal Co. (1872), 7 Ch. App. 730; Met. Ry. *v.* Defries (1877), 2 Q. B. D. 189; *Re* Riley to Streatfield (1886), 56 L. T. 48; Bennett *v.* Stone, [1903] 1 Ch. 509.

3749. ——.]—GASKELL *v.* GOSLING, No. 3733, *ante.*

3750. —— **On sale by mortgagee—Mortgagor not thereby entitled to question propriety of sale—Or adequacy of amount.**]—In an action for account by a mtgor. against a mtgee. in possession who has sold, the mtgor. is entitled to an account of the proceeds of sale received by the mtgee. or by his order or for his use, "or which without his wilful default might have been so received"; although wilful default may not have been charged in the pleadings & proved at the trial; but such an account does not entitle the mtgor. to question the propriety of the sale or the adequacy of the amount for which the property has been sold.—MAYER *v.* MURRAY (1878), 8 Ch. D. 424; 47 L. J. Ch. 605; 26 W. R. 690.

Annotations:—**Expld.** *Re* Symons, Luke *v.* Tonkin (1882), 21 Ch. D. 757. **Distd.** *Re* Wrightson, Wrightson *v.* Cooke, [1908] 1 Ch. 789. **Refd.** Barber *v.* Mackrell (1879), 12 Ch. D. 534.

3751. What amounts to wilful default—Refusal to let.]—Mtgee. shall not account for more than he actually receives, unless where he has been guilty of a wilful default; as if he has turned out or refused a sufficient tenant.—ANON. (1682), 1 Vern. 45; 23 E. R. 298.

3752. —— —— **Mortgagee acting through agent.**]—(1) Where a mtgee. in possession of leaseholds, being resident at a distance, employs an agent, & the property is advertised & let at intervals, but vacant for a long period, the mtgee. acting on the agent's advice in not letting, such mtgee. is not chargeable under a decree for wilful default in non-receipt of rent. But where a tenant is suffered to remain for several years in possession, paying no rent, & none being demanded by the mtgee., he is liable for wilful default as to such rent.

(2) Where a mtgee. in possession pays rent to the ground landlord, he is to be allowed such rent in account, but not after he has purchased the reversion; but he will be allowed payments made to a person for taking charge of the premises to save them from deterioration.

(3) The *onus* lies, *primâ facie*, on the party charging wilful default in not letting, to prove it; but if he shows that the property can be let, or has been let, the *onus* is transferred to the other party to show that he has not been guilty of wilful default, but has been vigilant.—BRANDON *v.* BRANDON (1862), 10 W. R. 287.

3753. —— ——.]—If the mtgee. is in receipt of the rents & profits the account is taken against him as if he were in possession, & he is answerable not only for what the tenants pay, but for not letting the property if he could have done so, & for not getting full rents from the tenants if they could have paid them; & he is looked upon as if he had taken upon himself the control & management of the estate as between those in actual occupation of the mtgor., so as to put an end to any right which the mtgor. has of dealing with the estate in the way of management, including letting & making allowances to tenants, & getting the best rent from them (COTTON, L.J.).—NOYES *v.* POLLOCK (1886), 32 Ch. D. 53; 55 L. J. Ch. 513; 54 L. T. 473; 34 W. R. 383, C. A.

3754. —— **Eviction of suitable tenant.**]—ANON. (1682), No. 3751, *ante.*

PART XVI. SECT. 2, SUB-SECT. 1.—D.

c. *Refusal to give account of rents.*]—A person in possession of land under an agreement in the nature of a Welsh mtge. having refused to give any statement of rents received or information as to the amount due on the agreement, a bill was filed by the mtgor. for an account. Although on taking the account a balance was found still due to deft., the ct. ordered him to pay the costs.—MORRISON *v.* NEVINS (1856), 5 Gr. 577.—**CAN.**

PART XVI. SECT. 2, SUB-SECT. 2.

3751 i. *What amounts to wilful default—Refusal to let.*]—If mtgee. dealt with the mtged. premises as his own he is only chargeable with the rent reserved unless he was guilty of wilful default, as by leaving the premises vacant, which would throw upon him the proof that no tenant offered.—METCALF *v.* CAMPION (1828), 1 Mol. 238.—**IR.**

3755. —— Refusal to levy execution.]—Mtgee. recovers judgment in ejectment, but in combination with the tenant in possession refuses to take out execution. He shall be compelled so to do, or answer for the profits, as in case of wilful default.—BUCKS (DUKE) *v.* GAYER (1684), 1 Vern. 258; 23 E. R. 453.

3756. —— —— For part of amount.] — A. assigns to B., as a security for a debt due to him from A., a judgment recovered by A. against C.; B. sues out execution upon the judgment; but, instead of levying the whole amount, enters into negotiations with C.; he receives part of the sum due upon the judgment, but C. dies insolvent before the residue of it is obtained:—*Held:* B. will be restrained from suing A.'s representatives, upon his covenant for this residue, & B. must account to A.'s representatives, not merely for what he received upon the judgment, but for what, without his wilful default, he might have received.—WILLIAMS *v.* PRICE (1824), 1 Sim. & St. 581; 2 L. J. O. S. Ch. 105; 57 E. R. 229.

Annotation:—**Apld.** Mayer *v.* Murray (1878), 8 Ch. D. 424.

3757. —— Refusal to defend action of replevin—Property of stranger seized under distress.] — A first mtgee. in possession of a livery stable-yard & premses let the same to a tenant. He afterwards distrained for rent, taking possession under such distress of divers horses & carriages standing at livery on the premises. On being threatened with legal proceedings by the owners of the chattels at livery so seized, he restored such chattels to them:—*Held:* in taking the accounts in a suit by a second mtgee. to redeem the premises, the first mtgee. was not answerable as for wilful neglect & default in not realising the chattels which he had seized & afterwards restored to the owners.—COCKS *v.* GRAY (1857), 1 Giff. 77; 26 L. J. Ch. 607; 3 Jur. N. S. 1115; 5 W. R. 749; 65 E. R. 831.

3758. —— Allowing tenant to remain without payment of rent.]—DOUGHTY *v.* COTTON (1699), Colles, 85; 1 E. R. 193, H. L.

3759. —— ——.]—BRANDON *v.* BRANDON, No. 3752, *ante*.

3760. —— Failure to get full rent.] — NOYES *v.* POLLOCK, No. 3753, *ante*.

3761. —— —— Tied lease of public-house.]—(1) Mtgees. in possession, who were brewers, let the premises with a restriction that the tenant should take his supply of beer entirely from them:—*Held:* the mtgees. must account for such additional rent as they would have made if the premises had been let without restrictions, but not for the profit which they made by the sale of beer to the tenant

(2) The mtge. was of a leasehold public house to secure £700, & such further sums as might become due from the mtgor. to the mtgees. for money advanced, goods sold, or otherwise. The mtge. contained a power of sale, & it was declared that the sale moneys should after payment of the costs of sale, or in anywise consequent on the mtgor.'s default, & the re-imbursement to the mtgees. of all moneys paid by them for insurance or repairs, or for keeping on foot the lease & the licenses, be applied in payment of the principal & interest due on the mtge., & subject thereto, in payment of the principal & interest due to a second mtgee., & that the surplus should be paid to the mtgor., "provided always that the total amount to be recovered by the mtgee. under these presents shall not exceed £900." The property was sold under the power, & on the account being taken by the ct. it was certified that at the time of the completion of the sale there was due to the mtgees. £1,415 principal & £615 interest, & that they had or might have received £396 for rents & profits. The property sold for £2,650. The £1,415 included the £700 lent & £88 for goods supplied, the rest of it was made up of payments of rent & fire insurance:—*Held:* the proviso limiting the amount recoverable did not apply to interest, or to outgoings incident to the possession of the premises which the mtgor. was bound to reimburse to the mtgees., & as the sum due for moneys lent & goods supplied did not exceed the limit, the mtgees. were entitled to retain out of the proceeds of sale the balance due to them.

[The mtgees.] have a right to set off against the rents & profits they have received, any . . . expense put upon them by reason of their being obliged to take & keep possession (LORD ESHER, M.R.).—WHITE *v.* CITY OF LONDON BREWERY CO. (1889), 42 Ch. D. 237; 58 L. J. Ch. 855; 61 L. T. 741; 38 W. R. 82; 5 T. L. R. 553, C. A.

3762. Onus of proof—On party charging wilful default.]—BRANDON *v.* BRANDON, No. 3752, *ante*.

When rests will be ordered.]—*See* Sect. 2, subsect. 5, *post*.

SUB-SECT. 3.—WHAT MAY BE CHARGED AGAINST MORTGAGEE.

A. In General.

3763. On death of mortgagee—Profits received during life.] — A. for £550 makes an absolute assignment of a lease for three lives to B., & B. by a writing under his hand agrees that if A. pays B. £600 at the end of the year, B. will reconvey; B. dies leaving C. his son & heir, two of the lives die, & the lease is twice renewed; yet redemption decreed on payment of the £550 & the two fines with interest, & during the life of B. the profits to be set against the interest of the £550.—MANLOVE *v.* BALE & BRUTON (1688), 2 Vern. 84; 23 E. R. 664.

3764. Estate let by mortgagee—Value deemed to remain the same—Unless shown otherwise.]—If mtgee. lets the estate, that shall be always supposed the value, unless he shows otherwise.—BLACKLOCK *v.* BARNES (1725), Cas. *temp.* King, 53; 25 E. R. 218, L. C.

3765. Mortgagee tenant for life—Property in disrepair.]—Testator, who died in 1878, devised some cottages & marsh lands upon trust for his wife for life, she out of the rents & profits keeping "the premises in good tenantable repair & condition,"

3760 i. —— *Failure to get full rent.*]—BURKE *v.* O'CONNOR (1855), 4 I. Ch. R. 418.—**IR.**

PART XVI. SECT. 2, SUB-SECT. 3.—A.

p. *Rents & profits.*]—A mtgee. taking possession & evicting a tenant of the mtgor. who is willing to remain & pay rent, will be held accountable for the rents from that time.—PENN *v.* LOCKWOOD (1850), 1 Gr. 547.—**CAN.**

q. ——.]—ROBERTSON *v.* SCOBIE (1864), 10 Gr. 557.—**CAN.**

r. ——.]—After default on a mtge. a tenant put in possession by the mtgor. promised to pay the mtgee. rent, but failed to do so:—*Held:* the mtgee. was not chargeable with such rent.—WADDELL *v.* MCCOLL (1868), 14 Gr. 211.—**CAN.**

t. ——.]—One of several devisees claimed to be solely entitled, & mortgaged the property. The mtgees. entered into the receipt of the rents:—*Held:* they must account to the other devisees for their shares of the rent.—MCINTOSH *v.* ONTARIO BANK (1872), 19 Gr. 155.—**CAN.**

a. ——.]—RICE *v.* GEORGE (1872), 19 Gr. 174.—**CAN.**

b. ——.]—Mtgee. will not be held responsible for any greater rent than he has actually received, unless it is clearly established in evidence that he knew a great rent might & could have been obtained, & that he refused or neglected to obtain the same.—MERRIAM *v.* CRONK (1874), 21 Gr. 60.—**CAN.**

c. ——.]—Four persons joined in

Sect. 2.—Accounts by mortgagee in possession: Subsect. 3, A., B. & C.; sub-sect. 4, A.]

& after her death upon trust for C. in fee. In 1882 C. mortgaged his reversion in fee to the widow, who was in receipt of the rents & profits of the property as tenant for life. She died in 1897, & her exors. brought an action of foreclosure against C., who had made no payment either of principal or interest since the date of the mtge., & who set up the Statutes of Limitations. At the trial C. submitted to the usual judgment for foreclosure with arrears of interest limited to six years prior to the date of the writ, but counterclaimed damages against the estate of the tenant for life for non-repair of the cottages & depreciation of the marsh lands, alleging that the latter had been continuously mown against all custom, & had thereby been greatly impoverished, & offered to redeem on the footing that any damages awarded him should be set off in account against what was due on the mtge., & contended that on redeeming he was only bound to pay six years' arrears of interest prior to the date of the writ. Testator had in 1874 granted a seven years' lease of the marsh lands, with a covenant by the lessee not to mow them oftener than once in any one year, but to keep them during the term in good condition, & the tenant for life in granting subsequent leases of the same lands had inserted covenants as to mowing similar to that in testator's lease. The cottages were out of repair, & the marsh lands had been depreciated to some extent by mowing:—*Held:* C. was entitled to damages for non-repair of the cottages, but not for depreciation of the marsh lands, the tenant for life in her dealings with the latter having followed the course that had been adopted by testator.—DINGLE *v.* COPPEN, COPPEN *v.* DINGLE, [1899] 1 Ch. 726; 68 L. J. Ch. 337; 79 L. T. 693; 47 W. R. 279.

Annotations:—**Refd.** Powell *v.* Brodhurst, [1901] 2 Ch. 160; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385.

Wilful default.]—*See* Sect. 2, sub-sect. 2, *ante.*

B. Occupation Rent.

3766. General rule—Only when mortgagee in actual occupation.]—*Semble:* in a suit to redeem, against a mtgee. in possession, the ct. will not direct the master to fix & charge deft. with an occupation rent, unless pltf. alleges & shows, not only that deft. has been in possession of the mtged. estate & in receipt of the rents & profits of it, but also that he has been in the actual occupation of it or part of it.—TRULOCK *v.* ROBEY (1846), as reported in 15 Sim. 265; 60 E. R. 619; *on appeal* (1847), 2 Ph. 395, L. C.

Annotations:—**Consd.** Shepard *v.* Jones (1882), 21 Ch. D. 469. **Mentd.** Green *v.* Jenkins (1860), 1 De G. F. & J. 454.

3767. Not when property in uninhabitable condition.]—MARSHALL *v.* CAVE, No. 3816, *post.*

3768. Refusal of tender—Money due less than amount tendered.]—Where a mtgee. was in possession & refused a tender made to him by the mtgor. In a suit for redemption:—*Held:* if it should turn out that less than the amount tendered was due at the time the tender was made, the mtgee. must pay all the costs of the suit, being allowed all sums laid out for necessary repairs & lasting improvements & being charged with occupation rent.—HOSKEN *v.* SINCOCK (1865), 34 L. J. Ch. 435; 12 L. T. 262; 11 Jur. N. S. 477; 13 W. R. 487.

3769. Sale by mortgagee under power—Purchaser let into possession before completion.]—(1) If a mtgee. in possession, or a mtgee. selling under his power of sale, has reasonably expended money in permanent works on the property, he is entitled on *primâ facie* evidence to that effect to an inquiry whether the outlay has increased the value of the property, & if it has done so, he is entitled to be repaid his expenditure so far as it has increased such value; & in such case it is immaterial whether the mtgor. had notice of the expenditure. Notice to the mtgor. is only material when the expenditure is unreasonable, for the purpose of showing that he acquiesced in it.

(2) A mtgee. in possession sold the property under his power of sale, a day being fixed for the completion of the sale & for letting the purchaser into possession. At the request of the purchaser the mortgagee let him into possession four months before the appointed day, but did not require him to pay any rent:—*Held:* in an action by the mtgor. for ascertaining the amount of the balance due to him, the mtgee. could not be charged with an occupation rent for the interval during which the purchaser had been in possession before the appointed day.

A man need not be in what is called personal occupation but occupation, like most other things in law, is a complex term, & it is impossible for a

executing a mtge. of their joint estate, & subsequently the interest of three of them was sold under executions at law:—*Held:* the purchaser at the sheriff's sale, who was also the mtgee., having gone into possession of the mtged. estate, was bound to account for the rents & profits.—CRONN *v.* CHAMBERLIN (1880), 27 Gr. 551.—**CAN.**

d. ——.]—INDEPENDENT ORDER OF FORESTERS *v.* PEGG (1900), 19 P. R. 254.—**CAN.**

e. ——.]—*Re* ALLEN'S DANFORTH THEATRE (Ont.), [1925] 4 D. L. R. 556.—**CAN.**

f. ——.]—A mtgee. of leasehold land who takes actual physical possession of the land is liable for the whole rent to the same extent as the original lessee.—NATIONAL MORTGAGE & AGENCY CO. OF NEW ZEALAND, LTD. *v.* KAIAPOI (MAYOR, COUNCILLORS & BURGESSES OF) (1888), 7 N. Z. L. R. 231.—**N.Z.**

g. ——.]—A mtgee. in possession of the mtged. property has a duty to take care of the property & to collect all rents & profits.—JUDES *v.* S. A. BREWERIES, LTD., [1922] W. L. D. 1.—**S. AF.**

h. *Proceeds of sale of timber.*]—Where a second mtgee. in possession had cut down timber & sold it, & subsequently in an action on the first mtge. a sale of the property proved insufficient to satisfy the amount thereof:—*Held:* the second mtgee. was bound to account for the value of the timber cut & removed by him prior to the action.—MCLEOD *v.* AVEY (1888), 16 O. R. 365.—**CAN.**

k. *Abortive sale—Surplus from second sale.*]—A mtgee., his power of sale on default having arisen, sold the mtged. premises ostensibly to a third person, in reality to himself. Subsequently he sold a portion of the premises to a third person for an amount in excess of the mtge. debt:—*Held:* the sale by the mtgee. to himself was abortive, & he was a mtgee. in possession, & should account to the mtgor. for the surplus from the second sale.—MITCHELL *v.* KINNEAR (1897), 1 N. B. Eq. Rep. 427.—**CAN.**

l. *Negligent cultivation.*]—A mtgee. in possession of agricultural land held liable in damages to the mtgor. for his gross negligence in respect to cultivation.—EDDY *v.* TRUST & LOAN CO. (Sask.), [1926] 3 W. W. R. 227.—**CAN.**

PART XVI. SECT. 2, SUB-SECT. 3.—B.

3766 i. *General rule—Only when mortgagee in actual occupation.*]—CUMMER *v.* TOMLINSON (1863), 1 Ch. Ch. 235.—**CAN.**

3766 ii. ——.]—Where the pltf., a mtgee., is in occupation of the mtged. premises, the master should charge him with occupation rent up to the day appointed for payment.—PIPE *v.* SHAFER (1864), 1 Ch. Ch. 251.—**CAN.**

3766 iii. ——.]—The rule that a mtgee. in actual possession of the mtged. premises is chargeable with an occupation rent, should be applied in a redemption action to a mtgee. who has obtained title to the mtged. lands, so long as he remains in actual occupation thereof.—BOLTON *v.* POSTNIKOFF (Sask.), [1926] 4 D. L. R. 22; [1926] 2 W. W. R. 744.—**CAN.**

3766 iv. ——.] — If mtgee. occupied, a fair occupation rent should be charged him.—METCALF *v.* CAMPION (1828), 1 Mol. 238.—**IR.**

man to be in occupation if somebody else is in occupation (JESSEL, M.R.).—SHEPARD *v.* JONES (1882), 21 Ch. D. 469; 47 L. T. 604; 31 W. R 308, C. A.

Annotations:—As to (1) **Folld.** Henderson *v.* Astwood Astwood *v.* Cobbold, Cobbold *v.* Astwood, [1894] A. C 150. **Refd.** Powell *v.* Brodhurst (1901), 70 L. J. Ch 587. *As to* (2) **Apld.** Bright *v.* Campbell (1885), 54 L. J Ch. 1077.

3770. Improvements by mortgagee—Occupation rent not increased—Unless improvements allowed.]—Where a first mtgee. in possession, after decree for redemption, has expended money on permanent improvements on the mtged. property, he is not to be charged with an increased occupation rent by reason of the value of the property having been increased by the improvements he has effected, unless the expenditure in improvements is allowed to him.—BRIGHT *v.* CAMPBELL (1885), 54 L. J. Ch. 1077; 53 L. T. 428, C. A.

C. Interest.

3771. Interest on surplus—Mortgagee holding over after payment of mortgage debt.]—(1) Mtgee. in possession holding over, after payment of his principal & interest, charged with the balance, & interest.

The mtgee., as soon as he is paid, becomes a mere naked trustee, holding the legal estate for the benefit of the *cestui que trust*, the mtgor. (PLUMER, V.-C.).

(2) The mtgee. himself is allowed interest which he is not entitled to by contract. I mean, the interest upon lasting improvements (PLUMER, V.-C.).—QUARRELL *v.* BECKFORD (1816), 1 Madd. 269; 56 E. R. 100.

Annotations:—As to (1) **Folld.** Archdeacon *v.* Bowes (1824), M'Cle. 149. **Refd.** Wilson *v.* Metcalfe (1826), 1 Russ. 530; Lewes *v.* Morgan (1829), 3 Y. & J. 394; Smith *v.* Pilkington (1859), 1 De G. F. & J. 120; Charles *v.* Jones (1887), 35 Ch. D. 544; Eley *v.* Read (1897), 76 L. T. 39. *Generally*, **Refd.** Wood *v.* Surr (1854), 19 Beav. 551; Bagot *v.* Chapman, [1907] 2 Ch. 222. **Mentd.** Krehl *v.* Park (1875), 10 Ch. App. 334; Brown *v.* Burdett (1887), 37 Ch. D. 207.

3772. —— Mortgagee overpaid.]—ARCHDEACON *v.* BOWES, No. 4288, *post*.

3773. —— ——.]—Mtgee. in possession, who becomes overpaid pending a suit to redeem, will be charged with interest on the balance, from the date of the report, & on the rents subsequently received by him, from the respective times when those rents were received.—LLOYD *v.* JONES (1842), 12 Sim. 491; 59 E. R. 1221.

3774. —— ——.]—In a suit to redeem, against a mtgee. in possession, deft., in his answer, set up an unfounded claim to the equity of redemption, & denied that the mtge. had been satisfied, although a balance was due from him when he filed his answer. The ct. ordered him to pay the costs occasioned by his claim, & the costs of the suit subsequent to the filing of his answer, & also interest on the balances in his hands since the time when the mtge. was satisfied.—MONTGOMERY *v.* CALLAND (1844), 14 Sim. 79; 8 Jur. 436; 60 E. R. 287.

*Annotation:—***Refd.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391.

SUB-SECT. 4.—WHAT MAY BE ALLOWED TO MORTGAGEE.

A. In General.

3775. General rule—Any expense incurred by reason of taking possession.]—WHITE *v.* CITY OF LONDON BREWERY CO., No. 3761, *ante*.

3776. Costs of ejectment.]—HORLOCK *v.* SMITH, No. 3851, *post*.

3777. ——.]—Mtgee., after the death of the mtgor. & the person supposed to be his heir, found the mtged. premises, which had been left vacant & out of repair, occupied by lodgers placed there by M., the owner of the adjoining house, who had entered by breaking through the party wall. Possession having been obtained by the mtgee., M. entered with a band of men & recovered possession. The mtgee. brought ejectment, upon the advice of counsel against M., & obtained a verdict. M. had previously brought an action of trespass against the mtgee., in which he was nonsuited:—*Held:* the mtgee. was entitled to receive the costs of the proceedings in ejectment out of the estate of the deceased mtgor., but not the costs of defending the action of trespass.—OWEN *v.* CROUCH (1857), 5 W. R. 545.

3778. Expenses of working mines.]—(1) A mtgee. in possession of mines expended large sums beyond the amount covered by his security in working the mines, paying agents, etc.; & also in keeping down the interest of prior incumbrances:—*Held:* the mtgees. were rightly allowed these sums with interest.

(2) It requires a very special case of vexatious conduct to induce the ct. to make a mtgee. pay the costs of a redemption suit.

An overstatement on the part of mtgees. in possession of a colliery as to the balance represented by them as remaining due on their mtge., & their refusal to furnish accounts to the mtgors., except on being paid the expenses of so doing:—*Held:* not such vexatious conduct as to deprive them of their costs of a redemption suit.—NORTON *v.* COOPER (1854), 5 De G. M. & G. 728; 25 L. J. Ch. 121; 2 W. R. 659; 43 E. R. 1053, L. JJ.

3779. —— Not when opened by mortgagee.]—A mtgee. in possession, who had opened & worked mines on the mtged. estate, charged with his receipts but disallowed his expenses.—THORNEYCROFT *v.* CROCKETT (1848), 16 Sim. 445; 12 L. T. O. S. 288; 12 Jur. 1081; 60 E. R. 946.

*Annotations:—***Consd.** Hood *v.* Easton (1856), 2 Gif. 692. **Refd.** Millett *v.* Davey (1862), 31 Beav. 470.

3780. Payments to outgoing tenant for crops, etc.]—(1) Where a mtgee. receives rents after the account has been taken, he must account, on affidavit, for the amount.

(2) After the amount due to a mtgee. had been ascertained & paid, the mtgee. was held entitled to some allowance for crops, manure, etc., for which he remained liable to pay to an outgoing tenant of the mtged. property.—OXENHAM *v.* ELLIS (1854), 18 Beav. 593; 52 E. R. 233.

3781. Payments of interest of prior incumbrances.]—NORTON *v.* COOPER, No. 3778, *ante*.

3782. Cost of defending action of trespass.]—OWEN *v.* CROUCH, No. 3777, *ante*.

3783. Ground rent.]—BRANDON *v.* BRANDON, No. 3752, *ante*.

3784. Expenses of caretaker.]—BRANDON *v.* BRANDON, No. 3752, *ante*.

3785. Insurance premiums.]—SCHOLEFIELD *v.* LOCKWOOD, No. 3810, *post*.

3783. —— Effect of proviso in mortgage deed—Limit of amount payable.]—WHITE *v.* CITY OF LONDON BREWERY CO., No. 3761, *ante*.

——.]—*See, generally*, Sect. 1, sub-sect. 4, C., *post*.

3787. Expenses of obtaining profits — When necessarily incurred.]—With regard to profits, clearly profits could not have been obtained without this expenditure, & of course, in allowing expenditure, all that must be allowed which was incidental & necessary for the purpose of obtaining the profits (COTTON, L.J.).—BOMPAS *v.* KING

Sect. 2.—Accounts by mortgagee in possession: Sub-

(1886), 33 Ch. D. 279; 56 L. J. Ch. 202; 55 L. T. 190; 2 T. L. R. 661, C. A.

3788. Charges for drawing notice to tenants.]—Where a mtgee. takes possession & serves the tenants with notice he is not entitled to charge for drawing more than one notice.—*Re* TWEEDIE'S TAXATION (1908), 53 Sol. Jo. 118.

3789. Annual charge fixed by mortgage.]—(1) If a mtgee. unequivocally refuses a proposed payment of the amount due, the mtgor. is not bound to make a formal tender of it, & the mtgee. cannot recover interest accruing subsequently. But a letter arguing that payment was not necessary, having regard to an unenforceable provision in the mtge., namely, that upon a default the mtgee. can purchase the property for the outstanding amount, is not a refusal which dispenses with the necessity of a tender. It was therefore not necessary to decide whether the above rule applied where the mtgor. had not the money or the control of it.

(2) A term in a mtge. whereby the mtgee. in possession can charge a fixed annual sum in respect of several charges & expenses of a variable amount is not invalid as giving the mtgee. an advantage which he is not entitled to exact.—CHALIKANI VENKATARAYANIM *v.* TUNI (ZAMINDAR) (1922), L. R. 50 Ind. App. 41.

Mortgage of ship.]—*See* SHIPPING.

B. Expenses of Management.

3790. Whether personal remuneration allowed—General rule.]—Where a mtgee. or trustee manage the estate themselves, there is no allowance to be made them for their care & pains; but if they employ a skilful bailiff, & give him £20 *per annum* that must be allowed, for a man is not bound to be his own bailiff (*per* CUR.).—BONITHON *v.* HOCKMORE (1685), 1 Vern. 316; 1 Eq. Cas. Abr. 7, pl. 1; 23 E. R. 492.

Annotations:—**Refd.** Leith *v.* Irvine (1833), 1 My. & K. 277; Barrett *v.* Hartley (1866), 14 W. R. 684.

3791. —— ——.]—(1) Mtgee. shall not be allowed for his trouble in receiving the rents of the estate himself; but if the estate lies at such a distance as obliges him to employ a bailiff to receive them, what he paid to the bailiff shall be allowed.

(2) He [the mtgee.] may add to the principal of his debt a sum expended in support of the mtgor.'s title where it is impeached & it shall carry interest.—GODFREY *v.* WATSON (1747), 3 Atk. 517; 26 E. R. 1098, L. C.

Annotations:—*As to* (1) **Refd.** Leith *v.* Irvine (1833), 1 My. & K. 277. *Generally*, **Refd.** Booth *v.* Leycester, Palmer *v.* Leycester (1836), Donnelly, 65; Barrett *v.* Hartley (1866), 14 W. R. 684.

3792. —— ——.]—CHAMBERS *v.* GOLDWIN, No. 3716, *ante*.

3793. —— ——.]—LANGSTAFFE *v.* FENWICK, FENWICK *v.* LANGSTAFFE, No. 3727, *ante*.

3794. —— ——.]—(1) Mtgee. in possession of a West India estate is not entitled to charge the mtgor. with commission on the amount of bills paid, on the value of the consignments, or on the costs & insurance of supplies shipped for the use of the estate; but stands in precisely the same situation as a mtgee. in possession of an estate in England.

(2) Principles on which the expense of the home management of such estates is to be calculated.

It is plain that the mtgee. can charge nothing for his own trouble or superintendence in any way; it is equally certain that for necessary expenses to which he has been put he may charge. The question arises upon the manner in which these shall be reckoned. If he chooses to be consignee himself, he has no commission; if he employs another, as there must be a consignee, that consignee's commission may be charged. It cannot, therefore, be at all admitted that the gain to the estate is the measure of the right to charge, for the estate would gain by saving the consignee's commission, if the mtgor. were himself consignee; & yet be could not, on that account charge it (LORD BROUGHAM, C.).—LEITH *v.* IRVINE (1833), 1 My. & K. 277; 39 E. R. 686, L. C.

Annotations:—*As to* (2) **Apld.** Faulkner *v.* Daniel (1843), 3 Hare, 199; Bertrand *v.* Davies (1862), 31 Beav. 429. **Refd.** Arnold *v.* Garner (1847), 9 L. T. O. S. 289. *Generally*, **Refd.** Henckell *v.* Daly (1828), 1 Moo. P. C. C. 51. **Mentd.** Irvine (or Douglas) *v.* Kirkpatrick (1850), 17 L. T. O. S. 32.

3795. —— ——.]—A person lent money to a business firm on the security of a deed of trust for sale of the personal property of the firm, without any proviso for redemption or repayment; which deed gave him full power to manage the business, & authorised him to pay off various debts, & to retain the money due to himself. He assisted in the management of the business, & charged in account certain annual sums for his assistance, under the designation of "bonuses." On bill filed by a surviving partner of the firm:—*Held*: the "bonuses" must be disallowed, & the property must be reassigned, on payment of the sum which, exclusive of the bonuses, should be found due.—BARRETT *v.* HARTLEY (1866), L. R. 2 Eq. 789; 14 L. T. 474; 12 Jur. N. S. 426; 14 W. R. 684.

Annotations:—**Refd.** James *v.* Kerr (1889), 40 Ch. D. 449; Mainland *v.* Upjohn (1889), 41 Ch. D. 126; Barnes *v.* Richards (1902), 71 L. J. K. B. 341. **Mentd.** Wheeler *v.* Sargeant (1893), 3 R. 663.

3796. —— ——.]—*Re* WALLIS, *Ex p.* LICKORISH, No. 3678, *ante*.

3797. —— **Effect of special contract.**]—The ct. will not allow a mtgee. more than his principal & interest, notwithstanding the mtgor. has agreed, he shall be paid for his trouble of receiving the rents.—FRENCH *v.* BARON (1740), 2 Atk. 120; 26 E. R. 475, L. C.

Annotations:—**Refd.** Leith *v.* Irvine (1833), 1 My. & K. 277; Barrett *v.* Hartley (1866), 14 W. R. 684; James *v.* Kerr (1889), 40 Ch. D. 449; Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307.

3798. —— —— **Deed prepared by solicitor mortgagee.**]—Stipulations for commission on receipt of rents & conversion of arrears of interest into principal inserted by a solr. mtgee. in a mtge. deed prepared by himself, & insisted upon by him as the condition of any further advance to his client, will not be allowed in taking the account between the solr., as mtgee. in possession, & his client in a foreclosure suit. Upon a proper case for opening signed accounts made by a mtgor. by his answer & evidence in a foreclosure suit in issue before Nov. 2, 1875, the ct. has power, under the Jud. Act, 1873 (c. 66), s. 24 (2) (3), to entertain this equitable defence in the same manner as if a cross bill, or, under the new procedure, a counterclaim, had been filed for the purpose. Form of the

PART XVI. SECT. 2, SUB-SECT. 4.—B.

3790 i. *Whether personal remuneration allowed—General rule.*]—COMYNS *v.* COMYNS (1871), 5 I. R. Eq. 583.—**IR.**

3797 i. —— *Effect of special contract.*]—*Held*: the agreement of 1878, being a new contract for a fresh consideration, had not the effect of imposing a fetter on the equity of redemption by reason of making the mtgee. the agent of the mtgor. to receive the rents, & empowering him to charge agency fees.—MAXWELL *v.* TIPPING, [1903] 1 I. R. 499.—**IR.**

account directed in such a case.—EYRE *v.* HUGHES (1876), 2 Ch. D. 148; 45 L. J. Ch. 395; 34 L. T. 211; 24 W. R. 597; 2 Char. Pr. Cas. 33.

Annotation:—**Refd.** Jones *v.* Linton (1881), 44 L. T. 601.

3799. —— ——.]—If the contract between the parties entitles a mtgee. to any commission he may claim it, either in taking the account of what is due on the mtge., or under the head of just allowances. But where the only commission to which a mtgee. was entitled was upon any renewal of the mtgor.'s promissory note which he might accept, &, though payment was not demanded upon its becoming due, the note was not in fact renewed:—*Held:* the fact that the mtgor. had been placed in as beneficial a position as if the note had been renewed, did not make the commission payable.—BUCKNELL *v.* VICKERY (1891), 64 L. T. 701, P. C.

3800. Payments to agent—Bailiff.]—BONITHON *v.* HOCKMORE, No. 3790, *ante*.

3801. —— ——.]—GODFREY *v.* WATSON, No. 3791, *ante*.

3802. —— **Receiver.**]—LANGSTAFFE *v.* FENWICK, FENWICK *v.* LANGSTAFFE, No. 3727, *ante*.

3803. —— ——.]—Mtgee. allowed the expense of a receiver, the mtged. property consisting of small houses at small rents, & the mtgee. living at a distance.—DAVIS *v.* DENDY (1818), 3 Madd. 170; 56 E. R. 473.

Annotations:—**Consd.** Stains *v.* Banks (1863), 9 Jur. N. S. 1049. **Refd.** Gilbert *v.* Dyneley (1841), 3 Man. & G. 12; Nicholson *v.* Tutin (1857), 3 Jur. N. S. 235.

3804. —— ——.]—LEITH *v.* IRVINE, No. 3794, *ante*.

3805. —— ——.]—STAINS *v.* BANKS, No. 3951, *post*.

3806. —— ——.]—UNION BANK OF LONDON *v.* INGRAM, No. 3952, *post*.

3807. —— ——.]—*Re* WALLIS, *Ex p.* LICKORISH, No. 3678, *ante*.

3808. —— —— **Not when trustee for creditors of mortgagor.**]—Certain real estates, subject to incumbrances, the interest of which more than exhausted the rents, were conveyed by the mtgor. to trustees, upon trust for his creditors. After the execution of this creditors' deeds, one of the trustees thereof was employed by the mtgees. as their agent, to collect the rents:—*Held:* he could not be allowed any commission out of the rents.—NICHOLSON *v.* TUTIN (No. 2) (1857), 3 K. & J. 159; 3 Jur. N. S. 234; 69 E. R. 1063.

Annotations:—**Refd.** Biron *v.* Mount (1857), 24 Beav. 642; Brandling *v.* Plummer (1857), 6 W. R. 117; Bath *v.* Standard Land Co., [1911] 1 Ch. 618. **Mentd.** Whitmore *v.* Turquand (1861), 3 De G. F. & J. 107; *Re* Composition Deed, *Ex p.* Shettle (1862), 7 L. T. 366.

3809. —— **Director of mortgagee company.**]—By an arrangement between pltf. & deft. co., the latter, who were mtgees. of pltf.'s property, arranged to manage, develop, & realise that property on certain terms. Deft. co. employed one of its directors who was a solr. paying him profit costs, & other of its directors at salaries & commissions to do necessary work in the course of such management:—*Held:* in taking the accounts between pltf. & deft. co. pltf. was not entitled to a declaration disallowing such salaries, commissions, & profit costs.—BATH *v.* STANDARD LAND CO., LTD., [1911] 1 Ch. 618; 80 L. J. Ch. 426; 104 L. T. 867; 27 T. L. R. 393; 55 Sol. Jo. 482; 18 Mans. 258, C. A.

C. Repairs and Improvements.

3810. General rule—Improvements allowed.]—A mtgee. in possession is entitled, under the usual directions for all just allowances, to be allowed moneys expended in insuring the premises, in the absence of any express powers in the deed; also to an accouht of moneys properly expended in improving the property.—SCHOLEFIELD *v.* LOCKWOOD (1863), as reported in 33 L. J. Ch. 106; 8 L. T. 409; 9 Jur. N. S. 738; 11 W. R. 409; *on appeal*, 4 De G. J. & Sm. 22, L. C.

3811. —— ——.]—In taking the accounts under the decree in a redemption action against a mtgee. in possession, the mtgee. is entitled to "necessary repairs," under the head of "just allowances"; but to entitle him to "permanent improvements," or "substantial repairs," he must make out a case for them at the trial.—TIPTON GREEN COLLIERY CO. *v.* TIPTON MOAT COLLIERY CO. (1877), 7 Ch. D. 192; 47 L. J. Ch. 152; 26 W. R. 318.

3812. Permanent improvements.]—TALBOT *v.* BRADDILL (1683), 1 Vern. 183; 23 E. R. 402.

Annotation:—**Refd.** Cowdry *v.* Day (1859), 1 L. T. 88.

3813. ——.]—NEWLING *v.* ABBOT (1728), 2 Eq. Cas. Abr. 596; 1 Vin. Abr. 185; 22 E. R. 501, L. C.

3809 i. *Payment to agent—Director of mortgagee company.*]—KAVANAGH *v.* WORKINGMAN'S BENEFIT BUILDING SOCIETY, [1896] 1 I. R. 56.—**IR.**

PART XVI. SECT. 2, SUB-SECT. 4.—C.

3810 i. *General rule—Improvements allowed.*]—*Semble:* when a mtgee. is charged with rents & profits received from improvements made by himself, he should be allowed the expense of such improvements to a corresponding amount.—CONSTABLE *v.* GUEST (1858), 6 Gr. 510.—**CAN.**

3810 ii. —— ——.]—Where the mtgee. in possession had planted fruit & ornamental trees, suitable for carrying out improvements commenced by the mtgor., he was allowed the cost price of the same, & a reasonable amount for care & cultivation, but not the value thereof at the time of redemption.—PAUL *v.* JOHNSON (1866), 12 Gr. 474.—**CAN.**

3810 iii. —— ——.]—As between mtgor. & mtgee. in possession, an allowance is properly made for reasonable lasting improvements, especially where the effect is to increase the revenue from rents & profits.—PATTERSON *v.* DART (1911), 20 O. W. R. 213; 3 O. W. N. 127; 24 O. L. R. 609.—**CAN.**

3812 i. *Permanent improvements.*]—ROMANES *v.* HERNS (1875), 22 Gr. 469.—**CAN.**

3812 ii. ——.]—Mtgors. released their equity of redemption to the mtgee., who about two months afterwards signed a memorandum agreeing to reconvey upon being paid principal & interest & all costs of improvements by her:—*Held:* on a bill to redeem, the mtgee. was entitled to recover for all permanent & lasting improvements, although the estate might not have been increased in value to an amount equal to the sum expended thereon.—BROTHERTON *v.* HETHERINGTON (1876), 23 Gr. 187.—**CAN.**

3812 iii. ——.]—Where the selling price of land sold under mtge. sale proceedings under Land Titles Act has been increased by expenditures made by the mtgee. in ploughing the land, the mtgee. is entitled to retain out of the proceeds of the sale an amount equal of such increase.—WATERLOO MANUFACTURING CO., LTD. *v.* HOLLAND (Sask.), [1917] 3 W. W. R. 198; 36 D. L. R. 216.—**CAN.**

3812 iv. ——.]—The planting of trees on a mtged. property by a mtgee. in possession is not such an improvement as entitles him to claim compensation from the mtgor., but he is entitled to cut down & remove those trees.—RAGHUNANDAN RAI, ETC. *v.* RAGHUNANDAN PANDE (1921), I. L. R. 43 All. 638.—**IND.**

3812 v. ——.]—MURPHY *v.* MEADE & WISE (1836), 1 Jo. Ex. Ir. 620.—**IR.**

3812 vi. ——.]—In proceedings to redeem a mtge. the mtgee. being in possession, the mtgee. will not be allowed in the accounts for expenditure upon improvements on the land mortgaged unless the expenditure is reasonable in amount & reasonable with reference to the existing purposes of the property & unless the improvement is a lasting one.—WOODS *v.* ROBERTSON (1901), 21 N. Z. L. R. 137.—**N.Z.**

m. —— *Necessity for consent of mortgagor.*]—A mtgee. in possession of a grist mill & other property erected a carding & fulling mill. This was disallowed to him, as being an improvement that a mtgee. could not make without consent.—KERBY *v.* KERBY (1856), 5 Gr. 587.—**CAN.**

n. —— ——.]—*Held:* deft. was entitled to be paid for his improvements, but not to the full extent of the

Sect. 2.—Accounts by mortgagee in possession: Sub-sect. 4, C.; sub-sect. 5, A. & B. (a).]

3814. ——.]—SPURGEON *v.* COLLIER (1758), 1 Eden. 55; 28 E. R. 605.

Annotations:—**Mentd.** Warden *v.* Jones (1857), 2 De G. & J. 76; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360.

3815. ——.]—STEPHENSON *v.* GREEN (1801), 3 Seton's Judgments & Orders, 6th ed. 2081.

3816. —— **New buildings substituted for old.**]—(1) A mtgee., who has taken possession, will be allowed in his accounts the expense of buildings substituted for decayed old buildings, even though the new erections should be on an improved scale.

(2) A mtgee. of a house, having taken possession of it, will not be charged with an occupation rent for it during a time when it was in so ruinous a state, that rent could not have been obtained for it.—MARSHALL *v.* CAVE (1824), 3 L. J. O. S. Ch. 57.

3817. ——.]—TOWNLEY *v.* MOORE (1856), 3 Seton's Judgments & Orders, 7th ed. 1885.

3818. ——.]—GLENCROSS *v.* PULMAN (1859), 3 Seton's Judgments & Orders, 7th ed. 1906.

3819. ——.]—HOSKEN *v.* SINCOCK, No. 3768, *ante*.

3820. ——.]—TIPTON GREEN COLLIERY CO. *v.* TIPTON MOAT COLLIERY CO., No. 3811, *ante*.

3821. ——.]—In a foreclosure action by a first mtgee., who was also third mtgee., against the second mtgees., the fourth mtgee., & the mtgor., pltf. having entered into possession of the mtged. property & laid out sums of money in lasting improvements, an account was directed of all sums of money "properly" laid out by the pltf. "as mtgee." in lasting improvements upon the property.—HOUGHTON *v.* SEVENOAKS ESTATE CO. (1884), 33 W. R. 341.

3822. ——.] — (1) Where a mtgee., whose interest is in arrear, puts the mtged. property up to auction, & goes through a form of sale with one who is in reality acting on his behalf, the transaction, although not necessarily a fraud or evidence of fraud, is inoperative. A subsequent sale by the mtgee. to an innocent third party is, therefore, good.

(2) In taking an account in an action between a mtgor. & a mtgee. in possession, allowance must be made for permanent improvements made by the latter while in possession, so far as the value of the premises is thereby enhanced.—HENDERSON *v.* ASTWOOD, ASTWOOD *v.* COBBOLD, COBBOLD *v.* ASTWOOD, [1894] A. C. 150; 6 R. 450, P. C.

Annotations:—*As to* (1) **Consd.** Deverges *v.* Sandeman, Clark, [1902] 1 Ch. 579. *As to* (2) **Refd.** Powell *v.* Brodhurst (1901), 70 L. J. Ch. 587.

3823. —— **Necessity for consent of mortgagor—Improvements to be strictly proved.**]—A mtgee. in possession will be allowed for repairs necessary for the support of the property, & for doing that which is essential for the protection of the title of the mtgor. If he has got the consent of the mtgor. or has given him notice in which he acquiesces, he may be allowed for money laid out in increasing the value of the property, but he is not justified in increasing the value of the estate by improvements so as to cripple the mtgor.'s power of redemption.

Mtgee. in possession, claiming upon a bill for redemption, to be allowed for substantial repairs & lasting improvement, but adducing no proof of any such expenditure:—*Held:* not entitled to any inquiry on the subject.—SANDON *v.* HOOPER (1843), 6 Beav. 246; 12 L. J. Ch. 309; 49 E. R. 820; *affd.* (1844), 14 L. J. Ch. 120, L. C.

Annotations:—**Consd.** Tipton Green Colliery Co. *v.* Tipton Moat Colliery Co. (1877), 7 Ch. D. 192; Shepard *v.* Jones (1882), 21 Ch. D. 469. **Apld.** Bright *v.* Campbell (1885), 54 L. J. Ch. 1077. **Refd.** Pelly *v.* Wathen (1849), 7 Hare, 351; Eyre *v.* Hughes (1876), 2 Ch. D. 148.

3824. —— —— **When improvements reasonable.**]—A mtgee. under a power of sale contained in the mtge. deed, put up the estate for sale by auction, but as there was no bidder he entered into the receipt of the rents, & expended money in repairs & the erection of new buildings. On the mtgor. filing a bill for redemption, the mtgee. claimed for the money he had expended in the repairs & the erection of new buildings. In the bill it was alleged that these were not done with the consent or knowledge of the mtgor., but there was no statement made in the bill that they were unnecessary & improper:—*Held:* as the mtgor. had not stated in his bill that the repairs & the erection of the new buildings were unnecessary & improper, he could only have the ordinary decree, in which deft. would be allowed for what he had expended in necessary repairs & lasting improvements.—POWELL *v.* TROTTER (1861), 1 Drew. & Sm. 388; 4 L. T. 45; 7 Jur. N. S. 206; 62 E. R. 428.

Annotation:—**Refd.** Tipton Green Colliery Co. *v.* Tipton Moat Colliery Co. (1877), 47 L. J. Ch. 152.

3825. —— —— ——.]—SHEPARD *v.* JONES, No. 3769, *ante*.

3826. —— —— ——.]—LAMACRAFT *v.* SMITH (1916), 140 L. T. Jo. 501.

3827. Substantial improvements—Not if nature of property changed.] — (1) A mtgee. will be allowed sums expended in substantial improvements, but he will not be allowed sums expended in changing the nature of the property, as for instance, in converting shops into an iron warehouse, although by so doing he may have considerably improved the value of the property.

(2) Where it appeared that the interest was paid half yearly & there was half a year's interest due when the mtgee. entered; it was held that that was sufficient arrear to protect him from annual rests.

(3) A mtgee. is ordinarily allowed his costs, but he may deprive himself of them by setting up a groundless defence.—MOORE *v.* PAINTER (1842), 6 Jur. 903.

3828. ——.]—TIPTON GREEN COLLIERY CO. *v.* TIPTON MOAT COLLIERY CO., No. 3811, *ante*.

3829. Repairs.]—STEPHENSON *v.* GREEN (1801), 3 Seton's Judgments & Orders, 6th ed. 2081.

3830. —— **When necessary.**] — SANDON *v.* HOOPER, No. 3823, *ante*.

3831. —— ——.]—TOWNLEY *v.* MOORE (1856), 3 Seton's Judgments & Orders, 7th ed. 1885.

3832. —— ——.] — GLENCROSS *v.* PULMAN (1859), 3 Seton's Judgments & Orders, 7th ed. 1906.

3833. —— ——.]—POWELL *v.* TROTTER, No. 3824, *ante*.

3834. —— ——.]—HOSKEN *v.* SINCOCK, No. 3768, *ante*.

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money expended thereon; it was not shown that pltfs. had acquiesced in the extensive improvements made.—MANITOBA LUMBER CO. *v.* EMERSON (1912), 21 W. L. R. 503; 18 B. C. R. 96; 5 D. L. R. 337; 2 W. W. R. 419.—CAN.

3829 i. *Repairs.*]—Though a mtgee. without any agreement is not allowed to charge the mtgor. with all sums which he may think fit to expend in the repair or the improvement of the mtged. property, yet he may charge the mtgor. for necessary repairs.—AMEEROOLLAH *v.* RAM DOSS (1867), 2 Agra, 197.—IND.

3829 ii. ——.]—Where a mtgee. of agricultural land had, with the consent of his mtgors., spent money in repairing a well on the property which had been rendered useless from natural causes:—*Held:* such mtgee. was entitled to add the amount so expended to the mtge. debt.—DURGA SINGH *v.* NAURANG SINGH (1895), I. L. R. 17 All. 282.—IND.

3835. ——— ———.]—TIPTON GREEN COLLIERY CO. *v.* TIPTON MOAT COLLIERY CO., No. 3811, *ante.*

3836. ——— **Effect of proviso in mortgage deed—Limit of amount payable.**]—WHITE *v.* CITY OF LONDON BREWERY CO., No. 3761, *ante.*

3837. Party in possession taking transfer of mortgage.]—In 1853, A. died intestate as to his real estate, but having appointed by will, never proved, his brother, B., his exor., & leaving two infant daughters his heirs in coparcenary. In 1834, one of the daughters, while still an infant, died, whereupon her moiety of her father's real estate descended upon her surviving sister, who married during infancy & was still under the disability of coverture. Upon the death of A., B. entered into possession of the whole of A.'s real estate, & received the rents thereof from that period up to his death in 1858. B., during his possession, paid the interest on a mtge. created by A. Considerable sums had also been laid out in improvements by B. Upon B.'s death, his widow continued in possession of A.'s real estate, & she paid off & took a transfer to herself of the above mtge. In 1860 a bill was filed by the surviving daughter of A. & her husband against B.' widow & administratrix & his infant heir for an account of the rents of A.'s real estate from his death in 1833. B.'s infant son, by his answer, claimed the benefit of Real Property Limitation Act, 1833 (c. 27), as to the whole of A.'s real estate, but at the bar the right of the female pltf. to the moiety of the lands which descended upon her from her father was admitted:—*Held:* the entry of B., who was named as the exor. in A.'s will, & was the uncle of his infant daughters, could not be considered as that of a stranger, & an account was directed of the rents of A.'s real estate received by B. as bailiff from A.'s death up to his death in 1858, & by B.'s widow, as mtgee. in possession since the death of B., & an inquiry was also directed as to the sums laid out in improvements by B.—PELLY *v.* BASCOMBE (1863), 4 Giff. 390; 2 New Rep. 263; 33 L. J. Ch. 100; 9 L. T. 317; 9 Jur. N. S. 1120; 11 W. R. 766; 66 E. R. 758; *affd.* (1865), 5 New Rep. 231, L. JJ.

3838. Second mortgagee in possession—No right to charge as against first mortgagee.]—A second mtgee. who enters into possession & does work by way of improvement on the mtged. land, which may result in its protection & the improvement of its value, is not entitled as against the first mtgee. to any charge in respect of the money so expended by him. If that were so, we should have in almost every case of a second mtgee. in possession, an inquiry whether any sum of money laid out in permanent improvements by the second mtgee. was not to be deemed to be salvage (FRY, J.).—LANDOWNERS WEST OF ENGLAND & SOUTH WALES LAND DRAINAGE & INCLOSURE CO. *v.* ASHFORD (1880), 16 Ch. D. 411; 50 L. J. Ch. 276; 44 L. T. 20.

Annotations:—**Mentd.** *Re* Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim (1883), 24 Ch. D. 85; *Re* Patent Ivory Manufacturing Co., Howard *v.* Patent Ivory Manufacturing Co. (1888), 38 Ch. D. 156; *Re* Mersey Ry. (1895), 64 L. J. Ch. 625.

3839. Sale by mortgagee to himself—Subsequent sale to third party.]—HENDERSON *v.* ASTWOOD, ASTWOOD *v.* COBBOLD, COBBOLD *v.* ASTWOOD, No. 3822, *ante.*

SUB-SECT. 5.—ACCOUNTS WITH RESTS.

A. In General.

3840. When account may be taken with rests—By direction of the Court.]—Mtgee. by entering into possession, by his own act makes himself accountable; & it is in this case the direction of annual rests is given.—ROBINSON *v.* CUMMING (1742), 2 Atk. 409; 26 E. R. 646, L. C.

Annotations:—**Folld.** Webber *v.* Hunt (1815), 1 Madd. 13. **Mentd.** Booth *v.* Leycester (1838), 3 My. & Cr. 459; *Re* Stevens, Cooke *v.* Stevens, [1898] 1 Ch. 162; Jacobs *v.* Davis, [1917] 2 K. B. 532; Cohen *v.* Sellar, [1926] 1 K. B. 536.

3841. ——— ——— **Master cannot order.**]—FOWLER *v.* WIGHTWICK (1810), cited in 1 Madd. at p. 14; 56 E. R. 6, L. C.

Annotation:—**Folld.** Webber *v.* Hunt (1815), 1 Madd. 13.

3842. ——— ——— ———.]—On a decree against a mtgee. in possession to account, rests cannot be made by the master, unless directed by the decree.—WEBBER *v.* HUNT (1815), 1 Madd. 13; 56 E. R. 6.

3843. ——— ——— **Effect of omission in order.**]—STEPHENS *v.* WELLINGS, No. 3859, *post.*

3844. ——— ——— ———.]—NELSON *v.* BOOTH, No. 3864, *post.*

3845. ——— ——— ———.]—WRIGLEY *v.* GILL, No. 3884, *post.*

3846. ——— ——— ——— **Though parts of mortgaged property sold.**]—In a redemption action against a mtgee. in possession, who has from time to time sold parts of the mtged. property, where a decree has been made directing the usual accounts & inquiries, but giving no direction as to rests, the mtgor. is not entitled to have rests made in the account of rents & profits, even though there may have been sales from time to time.—AINSWORTH *v.* WILDING, [1905] 1 Ch. 435; 74 L. J. Ch. 256; 92 L. T. 679; 49 Sol. Jo. 222.

Annotation:—**Refd.** Wrigley *v.* Gill, [1906] 1 Ch. 165.

B. When Ordered.

(*a*) *In General.*

3847. Not as of course.]—The master is not obliged for every trifling small exceed of interest, to apply it to sink the principal; nor do I know that the ct. has ever laid it down for an invariable rule, that the master must always in taking such accounts, make annual rests (LORD HARDWICKE, C.).—GOULD *v.* TANCRED (1742), 2 Atk. 533; 26 E. R. 720, L. C.

Annotations:—**Consd.** Webber *v.* Hunt (1815), 1 Madd. 13. **Mentd.** Worge *v.* Bradley (1790), 2 Dick. 570.

3848. ———.]—A purchase being set aside for fraud & the purchaser decreed to pay an occupation rent, receiving back his purchase-money with interest, there being a considerable excess of rent above the interest, annual rests directed to be made in the accounts, until the excess of the rent should liquidate the principal.

Rests not necessarily directed in accounts against mtgees.—DONOVAN *v.* FRICKER (1821), Jac. 165; 37 E. R. 813.

Annotation:—**Distd.** Neesom *v.* Clarkson (1845), 4 Hare, 97.

3849. ———.]—To the best of my recollection it is by no means of course in a decree for an account against a mtgee. in possession to introduce any particular clauses of that kind (LORD COTTENHAM, C.).—SCHOLEFIELD *v.* INGHAM (1838), Coop. Pr. Cas. 477; 47 E. R. 605, L. C.

3850. ——— **In absence of special circumstances.**]—WRIGLEY *v.* GILL, No. 3884, *post.*

PART XVI. SECT. 2, SUB-SECT. 5.—B. (a).

o. *As of course.*]—GRAHAM *v.* WALKER (1847), 11 I. Eq. R. 415.—**IR.**

p. *On rents received by mortgagee.*]—In taking the account in the master's office it is improper to charge a mtgee. in possession with annual rests on rents received by him until he is paid off in full.—COLDWELL *v.* HALL (1862), 9 Gr. 110.—**CAN.**

q. ———.]—Where the master had taken the account against the mtgee. with rests, & on appeal it appeared that at the date of the mtge. a balance was due to the mtgor., & that the mtgee. went into possession, part of the

Sect. 2.—Accounts by mortgagee in possession: Subsect. 5, B. (a), (b), (c), (d) & (e).

3851. Every circumstance to be considered—Question of interest in arrear not conclusive.]—(1) The ct. under special circumstances, & considering itself bound by the terms of previous decrees, declined to give a mtgee. her costs of an ejectment brought to recover the mtged. premises, in which she had, after much difficulty & opposition, recovered a verdict.

(2) The mere fact of an arrear of interest being or not being due to the mtgee., when the mtgee. takes possession, is not decisive upon the question of rests, but every circumstance must be regarded (KNIGHT-BRUCE, V.-C.).—HORLOCK *v.* SMITH (1844), 1 Coll. 287; 63 E. R. 422.

Annotation:—As to (1) **Expld.** Wilkes *v.* Saunion (1877), 7 Ch. D. 188.

3852. Whether in account of occupation rent.]—WILSON *v.* METCALFE, No. 3877, *post*.

3853. Not when mortgagee in possession as tenant only.]—B. mortgaged certain premises to L. The premises were required to be partly pulled down & rebuilt: P. undertook to perform the work, but required security for the payment. An agreement was entered into between B., L. & P., by which L. consented to become tenant of part of the premises when rebuilt, & to take a lease of them from P., to whom B., had assigned his interest for a term of years, & to pay P. £1,000 for the lease, & £250 a year for rent. The premises having been rebuilt, L. entered into possession, but as no lease was granted by P., did not pay the £1,000 nor the £250 a year rent. In a suit afterwards instituted by P., & to which both B. & L. were parties:—*Held:* (1) the accounts of what was due to L. on the mtge. were not to be taken with annual rests, as the accounts on the other side could not be taken in the same manner either as to the £1,000 or the £250 a year rent; (2) L. was a mere tenant, & though at the time a mtgee., was not mtgee. in possession, the possession being in respect of the tenancy & not of the mtge., & the agreement not having the effect of changing the relative situation of the parties in that respect. —PAGE *v.* LINWOOD (1837), 4 Cl. & Fin. 399; 7 E. R. 154, H. L.

3854. Not unless claimed in pleadings.]—The ct. will not direct the account to be taken with annual rests where no special case for that form of decree had been made on the pleadings.—NEESOM *v.* CLARKSON (1845), 4 Hare, 97; 9 Jur. 822; 67 E. R. 576.

3855. Rests ordered in previous action for redemption—Abandonment of action—Subsequent action for foreclosure.]—In a suit by a mtgor. for redemption, a decree was made for an account with annual rests. Pltf. died & the suit was abandoned; after which the mtgee. instituted a suit for foreclosure:—*Held:* the decree must be the same & with annual rests.—MORRIS *v.* ISLIP (1855), 20 Beav. 654; 52 E. R. 756.

3856. Conveyance on sale treated as mortgage—Agreement for receipt of rents in lieu of interest.]—Pltf., in 1842, executed an absolute conveyance of certain property to deft. in fee, as on a sale. In 1860 he filed his bill to have the transaction treated as a mtge. transaction & to redeem. The ct. being satisfied by parol evidence that the real agreement between the parties had been that deft. should only hold the estate as a security for the money which he paid & should receive the rents in lieu of interest:—*Held:* the case was not to be treated as one of conditional sale, but deft. must account as a mtgee. in possession & with rests, being allowed interest at 5 per cent. on the money he had advanced, & he had been rightly ordered to pay the costs of the suit.—DOUGLAS *v.* CULVERWELL (1862), 4 De G. F. & J. 20; 31 L. J. Ch. 543; 6 L. T. 272; 10 W. R. 327; 45 E. R. 1089, L. JJ.

Annotations:—**Apld.** *Re* Unsworth's Trust (1865), 2 Drew. & Sm. 337. **Consd.** Macleod *v.* Jones (1884), 53 L. J. Ch. 534.

3857. Property claimed by mortgagee.]—WRIGLEY *v.* GILL, No. 3884, *post*.

(b) Interest in Arrear on Entry into Possession.

3858. General rule—Rests not ordered.]—SHEPHARD *v.* ELLIOT, No. 3867, *post*.

3859. —— ——.]—(1) Where the interest on a mtge. is in arrear at the time of the mtgee. taking possession, annual rests will not be directed.

(2) A direction to the master to make annual rests between mtgor. & mtgee. will not, after a decree, be given on motion.—STEPHENS *v.* WELLINGS (1835), 4 L. J. Ch. 281.

3860. —— ——.]—Generally, annual rests are not directed against a mtgee. in possession, when the interest is in arrear at the time he took possession; & in the absence of special circumstances, if a mtgee. is not liable to account with annual rests, when he enters into possession, he does not become so liable, until the whole of the mtge. debt has been paid off.

Where, however, a mtgee. in possession came to an account with the mtgor., whereby all the arrears of interest, etc., were converted into principal, leaving thereby no arrears, & he continued in possession, the rent being more than sufficient to keep down the interest, the ct. directed annual rests.—WILSON *v.* CLUER (1840), 3 Beav. 136; 9 L. J. Ch. 333; 4 Jur. 883; 49 E. R. 53; *subsequent proceedings* (1841), 4 Beav. 214.

Annotation:—**Refd.** Wrigley *v.* Gill (1904), 74 L. J. Ch. 160.

3861. —— ——.]—FINCH *v.* BROWN, No. 3876, *post*.

3862. —— ——.]—MOORE *v.* PAINTER, No. 3827, *ante*.

3863. —— ——.]—An account against a mtgee. in possession will not be ordered to be taken with rests, unless it satisfactorily appears that he took possession of the mtged. property when there was no arrear, or no material arrear, of interest due, or, that the annual rents greatly exceeded the annual interest on the mtge. money. *Semble:* if the master, in taking the account, shall find that the annual rental received greatly exceeded the interest, the ct. may, on the order on further directions, direct the account to be again taken with rests, from the time when the principal & interest was thereby paid off.—UTTERMARE *v.* STEVENS (1851), 17 L. T. O. S. 115.

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arrangement being that he should apply the rents, etc., to the paying off of two prior mtges., but it was not shown that they were due when the moneys were received, so that the holder of the incumbrances could have been compelled to accept payment, the ct. ordered a reference back to the master to ascertain this fact.—WILLIAMS *v.* HAUN (1864), 10 Gr. 553.—**CAN.**

r. Possession necessary for protection of mortgagee.]—Where it is necessary that a mtgee. should, for his own protection, take possession, he is not chargeable with rests & this even though the mtge. was not in arrear.—GORDON *v.* EAKINS (1869), 16 Gr. 363. —**CAN.**

PART XVI. SECT. 2, SUB-SECT. 5.—B. (b).

t. Exception to rule—Rests ordered—Mortgagee setting up adverse title.]—INCORPORATED SOCIETY IN DUBLIN *v.* RICHARDS (1841), 1 Dr. & War. 258.—**IR.**

3864. —— ——.]—(1) A decree for redemption having been made against a mtgee. in possession, without directing annual rests:—*Held:* a direction to take the account with rests could not be made in chambers under 15 & 16 Vict. c. 86, s. 54, or under General Ords., Oct. 16, 1852, Ord. 20.

(2) *Semble:* an account will not be directed with rests against a mtgee. in possession, except in the case of no arrear of interest having been due when he took possession.—NELSON *v.* BOOTH (1858), 3 De G. & J. 119; 27 L. J. Ch. 782; 32 L. T. O. S. 45; 5 Jur. N. S. 28; 6 W. R. 845; 44 E. R. 1214, L. JJ.

Annotations:—As to (2) **Distd.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391; Carter *v.* James (1881), 29 W. R. 437. **Reld.** Wrigley *v.* Gill, [1905] 1 Ch. 241. *Generally,* **Mentd.** Foster *v.* Foster (1867), 3 Ch. App. 330.

3865. —— ——.]—SCHOLEFIELD *v.* LOCKWOOD (No. 3), No. 3882, *post.*

3866. What constitutes interest in arrear—Payment by bills of exchange before entry—Bills subsequently dishonoured.]—DOBSON *v.* LAND, No. 3486, *ante.*

(c) Interest Not in Arrear on Entry into Possession.

3867. General rule—Rests ordered.]—In this case the account must be directed with rests, in order that the excess of rent beyond the interest may be applied in sinking the principal. The ct. sometimes relaxes this rule, where the interest is in arrear when the mtgee. takes possession (LEACH, V.-C.).—SHEPHARD *v.* ELLIOT (1819), 4 Madd. 254; 56 E. R. 699.

*Annotation:—***Apld.** Carter *v.* James (1881), 29 W. R. 437.

3868. —— ——.]—UTTERMARE *v.* STEVENS, No. 3863, *ante.*

3869. —— ——.]—A mtgee. in possession brought a foreclosure action. In his statement of claim he did not allege that the interest was in arrear when he took possession. The mtgor., in his statement of defence, alleged that the rent received greatly exceeded the interest:—*Held:* the accounts must be directed to be taken with annual rests.—CARTER *v.* JAMES (1881), 29 W. R. 437.

3870. Entry to prevent forfeiture of lease—Possession as purchaser—Subsequent transfer of mortgage.]—A mtgee. of leaseholds may take possession, even when there is no arrear of interest due, under circumstances which may not render him liable to account with annual rests, as when he enters in order to prevent a forfeiture for non-payment of ground rent or for non-assurance, etc.

A. agreed to become the purchaser of some leasehold property which was subject to mtges. He entered into possession, & after the contract had been put an end to, he obtained a transfer of the mtges., having all along continued in possession:—*Held:* although the circumstances would have justified the mtgees. in taking possession, still A. was not entitled to stand in the same position, & he was directed to account as mtgee. in possession with annual rests from the date of the transfer to him of the mtges.—PATCH *v.* WILD (1861), 30 Beav. 99; 5 L. T. 14; 7 Jur. N. S. 1181; 9 W. R. 844; 54 E. R. 826.

(d) Rents Exceeding Interest.

3871. Whether rests ordered—When possession recovered by ejectment.]—The mere circumstance that a mortgagee has recovered the mtged. property by ejectment, & has retained possession, is not sufficient to induce the ct. to direct annual rests to be made in the accounts between a mtgor. & mtgee., although the rents exceed the interest.—BALDWIN *v.* LEWIS (1835), 4 L. J. Ch. 113.

3872. —— **When great excess.**]—UTTERMARE *v.* STEVENS, No. 3863, *ante.*

3873. —— ——.]—CARTER *v.* JAMES, No. 3869, *ante.*

(e) Mortgagee Not Originally Liable.

3874. General rule—Rests not ordered subsequently.]—Annual rests are not directed in the accounts against a mtgee. in possession from the middle of the time, but only from the beginning in a special case, or not at all.—DAVIS *v.* MAY (1815), 19 Ves. 383; Coop. G. 238; 34 E. R. 560.

*Annotations:—***Apld.** Latter *v.* Dashwood (1834), 6 Sim. 462. **Reld.** Webber *v.* Hunt (1815), 1 Madd. 13; Donovan *v.* Fricker (1821), Jac. 165; Thorneycroft *v.* Crockett (1848), 2 H. L. Cas. 239.

3875. —— ——.]—A. conveyed his estates to B., in trust to sell & pay off a mtge. & other incumbrances on the estates, & to retain a debt due to B., &, until the sale, to apply the rents in keeping down the interest on the charges, & to pay the surplus to A. B. took a transfer of the mtge., & entered into & remained in possession for twenty-four years, but did not sell the estates. For the first ten years the rents were less than the interest; but afterwards they exceeded it. A. filed a bill for an account of the rents received by B., with yearly rests, & for a reconveyance of the estates. But the ct. refused to direct the rests.—LATTER *v.* DASHWOOD (1834), 6 Sim. 462; 3 L. J. Ch. 149; 58 E. R. 667.

3876. —— —— **Though arrears of interest paid off.**]—The ordinary rule between mtgor. & mtgee. in possession is, that the ct. will not direct an account with annual rests, if there was an arrear of interest due on the mtge. at the time of the mtgee.'s taking possession.

A property was subject to a mtge. for £1,000; B. agreed with the mtgor. for the purchase of a portion of this property, & entered into possession without paying his purchase-money. In 1813 B. bought up the whole mtge. for £1,000, on which an arrear of interest of £101 was due. There was at the same time due from B., in respect of his purchase, £365. Nothing further being paid by the mtgor., B. in 1816 recovered possession of the property. The rents exceeded the amount of interest, & in 1823 the whole arrear of interest had been paid off. The ct. refused to direct annual rests.—FINCH *v.* BROWN (1840), 3 Beav. 70; 49 E. R. 27.

3877. On payment of principal & interest.]—(1) After the time is ascertained at which the mtge. debt of a mtgee. in possession was paid off, annual rests from that date will be made in the accounts against him, though rests were not directed by the previous orders & decrees under which those accounts were taken. Annual rests are directed in an account of occupation rent as well as in an account of rents & profits received.

(2) Where a prior decree has ordered the costs of a deft. mtgee. to be taxed, he will be entitled to his costs, though it appears at the hearing on further directions, that his debt was paid off before the commencement of the suit, & that he has set up an improper defence.—WILSON *v.* METCALFE (1826), 1 Russ. 530; 38 E. R. 204.

Annotations:—As to (1) **Distd.** Hoighington *v.* Grant (1840), 5 My. & Cr. 258. **Foll.** Ashworth *v.* Lord (1887), 36 Ch. D. 545. **Reld.** Uttermare *v.* Stevens (1851), 17 L. T. O. S. 115. *As to* (2) **Distd.** Ashworth *v.* Lord (1887), 36 Ch. D. 545. *Generally,* **Mentd.** Brown *v.* Burdett (1887), 37 Ch. D. 207.

3878. ——.]—WILSON *v.* CLUER, No. 3860, *ante.*

3879. ——.]—UTTERMARE *v.* STEVENS, No. 3863, *ante.*

Sect. 2.—Accounts by mortgagee in possession: Subsect. 5, B. (e), & C. Sects. 3 & 4.]

3880. ——.]—In a redemption action against mtgees. in possession pltfs., who claimed to represent the original mtgor., alleged that defts. had been overpaid. Defts. by their statement of defence denied the title of pltfs. to redeem; pleaded statute of limitations; & asserted that a large amount was still due to them. At the trial pltfs.' title to redeem was not disputed, & the defence of the statute was overruled. The judgment directed the taking of the ordinary accounts in a redemption action against mtgees. in possession, including an account of what was due to defts. for principal & interest, & their taxed costs of the action; & that, on payment by pltfs. within six months after the certificate of the balance, if any, which should be found due to defts., defts. should reconvey the mtged. property to pltfs., & that, in default of payment, the action should be dismissed with costs. But, in case it should appear on taking the accounts that defts. had been overpaid, the further consideration of the action was to be adjourned. The chief clerk found by his certificate that the mtgees. went into possession in May, 1857; that the mtge. debt was fully repaid in Nov. 1866; & that at the date of the certificate there was a balance of £618 due from defts.:—*Held:* (1) the account must be taken against defts. with annual rests from the date at which the mtge. debt was fully paid; (2) defts. must pay the costs of the action.—ASHWORTH *v.* LORD (1887), 36 Ch. D. 545; 57 L. J. Ch. 230; 58 L. T. 18; 36 W. R. 446.

Annotations:—As to (1) **Refd.** Eley *v.* Read (1897), 76 L. T. 39. *As to* (2) **Refd.** Heath *v.* Chinn (1908), 98 L. T. 855.

3881. Subsequent agreement between parties—Arrears of interest converted into principal.]—WILSON *v.* CLUER, No. 3860, *ante*.

3882. ——.]—(1) Where the liability of a mtgee. in possession to account without annual rests once begins, it continues until changed by some further agreement come to between the mtgor. & mtgee.

(2) I think it impossible to charge the mtgee. with annual rests; it being admitted that, at the time she took possession, the interest was in arrear, & that she did not receive within some weeks anything to pay off any capital (ROMILLY, M.R.).—SCHOLEFIELD *v.* LOCKWOOD (No. 3) (1863), 32 Beav. 439; 8 L. T. 409; 11 W. R. 555; 55 E. R. 172.

3883. Sale of part of property.]—A mtgee. in possession, who sells part of the mtged. property under a power of sale in the mtge., must apply the proceeds of sale, first, in payment of interests & costs, & then either pay the balance to the mtgor., or apply it in reduction of the principal due on the mtge.; &, in taking an account against the mtgee., who has retained sale moneys beyond the interest & costs due, a rest must be made at the time of the receipt of the proceeds of sale, even although he may have entered into possession when the interest due to him was in arrear. The same rule applies where two distinct mtges. are held by the same person, who sells one of the mtged. estates.—THOMPSON *v.* HUDSON (1870), L. R. 10 Eq. 497; 40 L. J. Ch. 28; 23 L. T. 278; 18 W. R. 1081; *on appeal* (1871), 6 Ch. App. 320, L. JJ.

*Annotations:—***Expld.** Ainsworth *v.* Wilding, [1905] 1 Ch. 435; Wrigley *v.* Gill, [1905] 1 Ch. 241. **Mentd.** *Re* Accidental Death Insce. (1878), 7 Ch. D. 568; Wilding *v.* Sanderson (1897), 77 L. T. 57.

3884. ——.]—(1) Under a proviso in a mtge. for the capitalisation of interest in arrear for twenty-one days, a mtgee. in possession, through the default of the mtgor., is not entitled, on the accounts being taken, to charge the mtgor. with compound interest, unless he can prove that after crediting the rents received each half-year the interest was actually in arrear at the times specified in the proviso.

(2) The sale by a mtgee. in possession of part of the mtged. property does not of itself entitle the mtgor. to an account with a general rest of the rents & profits as well as of the proceeds of sale, as on the date of the receipt thereof.

(3) Unless rests have been directed in the judgment the account of rents & profits, following the usual rule, goes on without rests.

The ordinary rule is admitted that in the absence of special circumstances the account against a mtgee. in possession is not directed with rests, that is to say, the account of the rents & profits runs on from beginning to end without reference to the question whether he has at any particular time had in his hands more than sufficient to pay the interest or not, the reason being that a mtgee. is not bound to accept payment by driblets, but is entitled to have the account taken as a whole, & not to be treated as repaid until that account has been so taken. It is said there are certain exceptions. One of those is where the mtgee. has himself claimed the property, that is to say, has insisted that the mtgor. is not entitled to redeem (WARRINGTON, J.).—WRIGLEY *v.* GILL, [1905] 1 Ch. 241; 74 L. J. Ch. 160; 92 L. T. 491; 53 W. R. 334; *on appeal*, [1906] 1 Ch. 165, C. A.

Annotation:—As to (3) **Folld.** Ainsworth *v.* Wilding, [1905] 1 Ch. 435.

3885. Sale of one of two mortgaged properties.]—THOMPSON *v.* HUDSON, No. 3883, *ante*.

C. Effect of Order.

3886. Time when rests made—Whether between annual rests—Order for application of excess in reduction of principal.] — (1) Where a decree ordered, that, in taking the accounts of a mtgee. in possession, annual rests should be made, & that the rents & profits of the premises, as often as they exceeded the interest accrued due on the debt, should be applied in reduction of the principal; a rest ought to be made at the date of the receipt by the mtgee. of a sum exceeding the interest, though occurring in the interval between the annual rests. From that date the subsequent annual rests ought to be computed.

(2) An equity of redemption, being subject to a trust for sale, the mtgee. with some of the *cestuis que trust* of the equity of redemption, filed a bill for the sale of the premises, alleging that the whole of his principal, with an arrear of interest, was due to him, & suppressing the fact, that he had been for several years in possession; the result of the account was, that nothing was due on the mtge. when the bill was filed:—*Held:* the mtgee. must pay to defts. the costs of so much of the suit as related to the mtge., & the accounts & inquiries concerning it.—BINNINGTON *v.* HARWOOD (1825), Turn. & R. 477; 37 E. R. 1184, L. C.

Annotation:—Generally, **Refd.** Heighington *v.* Grant (1840), 5 My. & Cr. 258.

3887. Mortgagee charged with compound interest.]—COTHAM *v.* WEST (1839), 2 Seton's Judgments & Orders, 6th ed. 1160.

*Annotation:—***Consd.** Heighington *v.* Grant (1840), 5 My. & Cr. 258.

3888. ——.]—Under a direction, in a decree, that the master shall ascertain balances in the hands of a party at the end of each year, & shall compute interest on such balances, & shall "in taking the said accounts" make annual rests,

followed by a direction that the party shall be charged with interest "after the rate & in manner aforesaid upon such balances"; the interest computed on the balance due at the end of the first year is to form part of the balance due at the end of the second year, & upon which interest is then to be computed, & so on from year to year, to the end of the account.—HEIGHINGTON *v.* GRANT (1840), 5 My. & Cr. 258; 10 L. J. Ch. 12; 4 Jur. 1052; 41 E. R. 369, L. C.; *revsg.* (1839), 1 Beav. 228.

Annotations :—**Consd.** Feltham *v.* Turner (1870), 23 L. T. 345. **Mentd.** Jesus College *v.* King (1839), 3 Y. & C. Ex. 662; A.-G. *v.* Carrington (1843), 6 Beav. 454; Hardy *v.* Hull (1853), 17 Beav. 355; Knight *v.* Pursell (1879), 49 L. J. Ch. 120; Saner *v.* Bilton (1879), 48 L. J. Ch. 545.

SECT. 3.—INTEREST.

See Part XVII., *post*.

SECT. 4.—PRACTICE.

See R. S. C., Ord. 15.

3889. Whether claim barred by lapse of time.]—PEARSON *v.* PULLEY (1668), 1 Cas. in Ch. 102; 22 E. R. 714.

Annotations :—**Apld.** Whiting *v.* White (1792), 2 Cox, Eq. Cas. 290. **Refd.** Aggas *v.* Pickerell (1745), 3 Atk. 225.

——.]—*See, generally*, LIMITATION OF ACTIONS, Vol. XXXII., pp. 476 *et seq.*

3890. With what action claim may be joined—Action against purchaser of mortgaged estate.]—Bill for an account of testator's estate, & also to set aside sales made by the exor. & trustee, to himself & to another person, held to be multifarious.—SALVIDGE *v.* HYDE (1821), Jac. 151; 37 E. R. 807, L. C.

Annotations :—**Folld.** Ellice *v.* Goodson (1838), 2 Jur. 127. **Mentd.** Campbell *v.* Mackay (1836), Donnelly, 158; A.-G. *v.* Cradock (1837), Donnelly, 231; Miller *v.* Crawford (1840), 9 L. J. Ch. 195; Miller *v.* Walker (1843), 9 Jur. 197; Lund *v.* Blanshard (1844), 4 Hare, 9; Bouck *v.* Bouck (1866), L. R. 2 Eq. 19; Marshall *v.* Gilliard (1866), 14 L. T. 618; Pointon *v.* Pointon (1871), L. R. 12 Eq. 547.

3891. —— Action against trustees & executors of mortgagor—By devisees & legatees.]—Devisees & legatees filed a bill against the trustees & exors. of the will & a mtgee. in possession of part of the estates, alleging that the trustees & exors. colluding with the mtgee., refused to make him account for the rents which he had received or to redeem the mtge., & praying for an account of testator's assets, & that the mtge. might be redeemed. A demurrer, by the mtgee. for multifariousness, was allowed.—PEARSE *v.* HEWITT (1835), 7 Sim. 471; 7 L. J. Ch. 286; 58 E. R. 918.

Annotations :—**Refd.** Lund *v.* Blanshard (1844), 4 Hare, 9; Jerdein *v.* Bright (1861), 2 John. & H. 325.

3892. —— —— By creditors.]—Answer being put into an original bill, objection taken that the demurrer ought not to be to the whole of the amended bill disallowed. In a suit instituted by the creditors for the administration of A.'s estate, against parties who are in possession or have dealt with the estate, being the real & personal representatives, or deriving title through them, amongst the parties made defts., are certain mtgees. of A.'s estate, having become so subsequent to the death of A. A demurrer put in by one of these for multifariousness allowed on the ground of his having no concern with the accounts prayed against the other mtgees., nor with several other matters in the bill.—ELLICE *v.* GOODSON (1837), 7 L. J. Ch. 147; 2 Jur. 127; *affd.* (1838), 3 My. & Cr. 653; 7 L. J. Ch. 148; 2 Jur. 249, L. C.

Annotations :—**Mentd.** Creasy *v.* Beavan (1842), 13 Sim. 354; Slade *v.* Slade (1842), 11 L. J. Ch. 143; Powell *v.* Cockerell (1846), 4 Hare, 557.

3893. Who may bring proceedings—Subsequent judgment creditor—Not without offer to redeem.]—A judgment creditor cannot sustain a bill for a general administration & account against a prior incumbrancer, unless the bill contains an offer to redeem; as redemption is the only relief in equity, to which a subsequent incumbrancer is entitled, as against a prior mtgee.—GORDON *v.* HORSFALL (1847), 5 Moo. P. C. C. 393; 13 E. R. 542; *sub nom.* GORDON *v.* HORSFALL, HORSFALL *v.* DUNSTONE, 11 Jur. 509, P. C.

Annotation :—**Refd.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391.

3894. Who should be parties—Corporation purchasing property for public improvements—Sum paid into court.]—C. obtained an agreement for a lease of some warehouses & premises, which was deposited with his solr., who subsequently agreed to advance £300 to C. for the repairs of the premises, upon his signing a memorandum charging them with that amount & with all further advances not exceeding £500. The premises were afterwards taken by the Corpn. of London, by virtue of an Act of Parliament, for making public improvements & in consequence of questions between C. & his solr. respecting the amount due upon the security, & also in consequence of notice of judgment debt due by C., the purchase-money was paid into ct. & upon a petition by C. asking for an account, & that £500 might be set apart to answer what should be found due from him to his solr., & that the surplus, after payment of the judgment debt, might be paid to C.:—*Held*: the amount of debt between C. & his solr. must be ascertained by the master, & the corpn. need not attend, but it must pay the costs of the petition but not of the affidavits made relating to the claims of the parties.—*Ex p.* COLLINS (1850), 19 L. J. Ch. 244; *sub nom. Re* LONDON CITY IMPROVEMENT ACT, 1847, *Re* LANDS CLAUSES CONSOLIDATION ACT, 1845, *Ex p.* COLLINS, 15 L. T. O. S. 362.

3895. —— Purchaser with concurrence of second mortgagee—Counterclaim by first mortgagee.]—First mtgee. being sole deft. to an action by second mtgees. for an account of what was due to them respectively & to have a contract for sale entered into by the first mtgee. completed, & the sale moneys applied accordingly, made the purchaser co-deft. with pltfs., to a counterclaim for specific performance by the purchaser with the concurrence of pltfs., alleging that their concurrence was a term of the contract, & that the purchaser refused to complete without it. The defence & counterclaim having been served on the purchaser under R. S. C. Ord. 22, rr. 5, 6, he moved under Ord. 22, r. 9, to have so much of the counterclaim as affected him excluded:—*Held*: there being a question between deft. & pltfs. "along with" the purchaser which deft. was entitled to raise by cross action, the purchaser was properly made a deft. to the counterclaim, & the motion refused with costs accordingly.—DEAR *v.* SWORDER, SWORDER *v.* DEAR (1876), 4 Ch. D. 476; 46 L. J. Ch. 100; 25 W. R. 124.

3896. Form of order.]—SCHULDT *v.* KENT (1854), 3 Seton's Judgments & Orders, 6th ed. 1960.

PART XVI. SECT. 4.

3896 1. *Form of order.*]—A flat by a local master providing for a reference to the local registrar to ascertain the amount due to pltf. in a mtge. foreclosure action, should direct the registrar to ascertain the amount due as of the date of the reference, & the registrar should take into account both advances which had been made by the mtgee. & the instalments which had

Sect. 4.—Practice. Part XVII. Sect. 1.]

3897. ——.]—ARTHUR *v.* HIGGS (1856), 3 Seton's Judgments & Orders, 7th ed. 1887.

3898. What particulars ordered—Receipts by mortgagee on bills of exchange & open account.]—It was alleged by counterclaim to a redemption action that the mtge. comprised: a certain commission, a sum also secured by bills of exchange, a sum due on open account, & that the mtgee. had received divers sums in respect of the bills of exchange & on the open account. The mtgee. counter-claimed for an account & foreclosure or sale. Particulars of the sums received by him on the bills of exchange & open account were ordered to be given.—KEMP *v.* GOLDBERG (1887), 36 Ch. D. 505; 56 L. T. 736; 36 W. R. 278.

3899. When proceedings stayed—Amount due exceeding value of property—Unless security for costs given.]—Order made staying until further order, with liberty to apply, the prosecution of accounts & inquiries directed by a judgment in the nature of a foreclosure judgment, unless defts. would give security for the costs of the proceedings, on the ground that it was shown to be highly probable that the amount due to pltfs. would greatly exceed the value of the property, & that the costs of further proceedings would be thrown away.—EXCHANGE & HOP WAREHOUSES, LTD. *v.* ASSOCN. OF LAND FINANCIERS (1886), 34 Ch. D. 195; 56 L. J. Ch. 4; 35 W. R. 120.

Annotation:—**Reid.** Stevens *v.* Theatres, [1903] 1 Ch. 857

Part XVII.—Interest on Mortgages.

SECT. 1.—IN GENERAL.

3900. Interest payable—Where account stated.]—Stated accounts shall carry interest, especially in the case of mtges., & more strongly when settled by a master pursuant to any order.—STROUD *v.* MOOR (1717), 2 Eq. Cas. Abr. 529; 22 E. R. 447.

3901. Interest accrues from day to day.]—Had it continued a mtge., the purchaser would have been entitled to his demand, for there interest accrues every day for forbearance of the principal.—PEARLY *v.* SMITH (1745), 3 Atk. 260; 26 E. R. 952, L. C.

Annotation:—**Mentd.** Sherrard *v.* Sherrard (1747), 3 Atk. 502.

3902. Release by mortgagee—Liability of mortgagor after death of mortgagee.]—A voluntary declaration by a creditor that he intends to release his debtor from a debt, though not amounting to a release at law, may nevertheless be held in equity to be a representation which the creditor is bound to make good. Where, therefore, a mtgee., on hearing that his son in law, the mtgor., was about to sell the mtged. property, a house occupied by the mtgor., in order to pay off the debt, wrote that he might continue to live there without paying any rent:—*Held:* the mtgor. was entitled to redeem, on paying the principal, together with interest from the last day on which interest fell due, previously to the death of the mtgor.—YEOMANS *v.* WILLIAMS (1865), L. R. 1 Eq. 184; 35 Beav. 130; 35 L. J. Ch. 283; 55 E. R. 844.

Annotation:—**Mentd.** Goddard *v.* O'Brien (1882), De Colyar's County Court Cases, 110.

3903. Deed providing for increased interest—Executed after intermediate mortgage—Receiver appointed under first mortgage.]—A first mtge. was made to secure a principal sum, with interest at 5 per cent., & was accompanied by a receivership deed in the common form. A subsequent mtge. was made to M., containing a stipulation that if the interest should be in arrear forty days, the receiver under the former deed should act, & should stand possessed of the rents, after payment of interest on the first mtge., in trust to pay the interest on M.'s mtge., & pay the ultimate surplus to the mtgor. The first mtgees. & the receiver had notice of this deed. By a subsequent deed the property was charged, in favour of the first mtgees., with an extra 1 per cent. interest on the sum secured by the first mtge. The receiver at times took possession at the instance of the first mtgees., & from the date of the last-mentioned deed interest

fallen due since the issue of the writ.—CANADA LIFE ASSURANCE CO. *v.* MACDONALD (Sask.), [1926] 3 D. L. R. 984; [1916] 3 W. W. R. 21.—**CAN.**

a. *What may be shown on taking account.*]—The master, on a reference to take an account of what was due, required the production of the accounts on the footing of which the mtge. debt was created:—*Held:* the parties were *primâ facie* bound by the amount stated in the mtge. as the true debt.—POLLOCK *v.* PERRY (1856), 5 Gr. 591.—**CAN.**

b. ——.]—Where a reference is directed to take an account on a mtge., the parties may show the real object for which it was made, if not apparent on its face.—STERLING *v.* RILEY (1862), 9 Gr. 343.—**CAN.**

c. *How taken.*]—A mtgor. paid the mtgee. from time to time money, in pursuance of an agreement, contemporaneous with the mtge., that five per cent. *per annum*, in addition to the legal rate of interest, should be paid on the amount loaned. In taking the account in a suit brought by the mtgee. to foreclose, the master gave credit for the money thus paid, as so much money paid on account of principal & legal interest:—*Held:* the master was right in his mode of taking the account.—STIMSON *v.* KERBY (1859), 7 Gr. 510.—**CAN.**

d. ——.]—A mtgee. in bringing his accounts into the master's office, should charge himself with the net proceeds only of any rents or profits received by him out of the mtged. premises, leaving the incumbrancer to surcharge if he considers the mtgor. entitled to a larger credit.—PHILLIPS *v.* PROUT (1898), 12 Man. L. R. 143.—**CAN.**

e. *Onus of proof.*]—The decree directed a reference to the master at B. to take an account of the amount due upon the mtge. in question:—*Semble:* the *onus* of proof under such a reference rests upon the holder of the mtge.—ELLIOTT *v.* HUNTER (1869), 15 Gr. 640.—**CAN.**

f. ——.]—In taking an account on mtge. in a suit for redemption, where the mtgee. had been in possession, it lies upon the mtgee. to prove what is due from the mtgor. in respect of principal & interest.—GANGA MULIK *v.* BAYAJI (1882), I. L. R. 6 Bom. 669.—**IND.**

PART XVII. SECT. 1.

g. *Agreement to reduce rate of interest—Mortgage overdue—Whether binding.*]—Where a mtge. is overdue, a verbal bargain between the mtgor. & mtgee. to reduce the rate of interest, acted upon for some time is binding in equity.—LEWIS *v.* LEVY (1876), 2 V. L. R. (Eq.) 110.—**AUS.**

h. *Proof of agreement for interest—Admission of parol evidence.*]—A vendor executed an agreement to convey certain premises & receive back a mtge. for part of the price payable by instalments, the agreement not stating that the mtge. should be payable with interest:—*Held:* parol evidence was admissible to show that the real understanding was that interest should be payable.—GOULD *v.* HAMILTON (1855), 5 Gr. 192.—**CAN.**

k. *Exorbitant interest—Whether court will grant relief.*]—*Qu.:* whether the amount of interest reserved by a mtge. may not be so great as to evidence such a case of oppression as would induce the ct. to refuse to interfere in behalf of the mtgee., leaving him to his remedies at law, notwithstanding the repeal of the usury laws.—GOODHUE *v.* WIDDIFIELD (1861), 8 Gr. 531.—**CAN.**

l. *Bargain for extra interest between derivative mortgagee & mortgagor—Whether insurer to benefit of original*

at the increased rate was uniformly paid to the first mtgees., sometimes by the mtgor., & at other times by the receiver with his consent, no notice ever having been given to the receiver to pay interest to M., or that his interest was in arrear. A foreclosure suit having been instituted by the first mtgees., a decree was made directing the usual account of what was due on the first mtge. The Chief Clerk certified the whole principal to be due, but the V.-C. directed him to review his certificate, & to charge the first mtgees. with everything they had received from the receiver in excess of 5 per cent.:—*Held:* this decision could not be maintained, for that whether the extra 1 per cent. was rightfully received or not, it was neither paid nor received in respect of the principal moneys & interest secured by the first mtge., & could not be attributed to it, nor taken into account in ascertaining what was due on the first mtge., & that M.'s claim, if any, in respect of such extra payments must be enforced by some independent proceeding; M. had no such claim, for that the trust to pay M.'s interest out of the surplus rents did not attach unless & until the receiver had notice that such interest was in arrear.

It was contended on behalf of defts., M., that the appointment of the receiver by the deed of even date with pltfs.' first mtge. . . . did not constitute the receiver for all purposes the agent of the mtgor. & that, in fact, the receiver must be deemed when in possession to have received the rents as agent of the pltfs., & that the only object & effect of the receivership deed was to prevent pltfs. from being charged in the accounts for wilful neglect or default. No direct authority was cited for this proposition & if it were necessary now to decide it I should hold that it could not be maintained & that the receiver must be treated as being for all purposes the agent of the mtgor. (ROLT, L.J.).—LAW *v.* GLENN (1867), 2 Ch. App. 634, L. JJ.

Annotation:—**Reld.** *Re* Hale, Lilley *v.* Foad, [1899] 2 Ch. 107.

3904. Receipt of rents by mortgagee in possession—Whether equivalent to payment of interest—In absence of appropriation—Rents exceeding interest on mortgage.]—The receipt of rents by a mtgee. in possession, even when the rents are more than the interest on the mtge., is not by itself equivalent to a payment of interest in the absence of appropriation.—COCKBURN *v.* EDWARDS (1881), 18 Ch. D. 449; 51 L. J. Ch. 46; 45 L. T. 500; 30 W. R. 446, C. A.

Annotations:—**Apld.** Bright *v.* Campbell (1889), 41 Ch. D. 388. **N.F.** Wrigley *v.* Gill, [1906] 1 Ch. 165. **Mentd.** Craddock *v.* Rogers (1884), 53 L. J. Ch. 968; Pooley's Trustee *v.* Whetham (1886), 33 Ch. D. 111; Andrews *v.* Barnes (1888), 39 Ch. D. 133; Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank, [1891] 1 Ch. 270; Stokes *v.* Prance, [1898] 1 Ch. 212; The Swiftsure (1900), 16 T. L. R. 275; Nocton *v.* Ashburton, [1914] A. C. 932.

3905. —— —— ——.]—WRIGLEY *v.* GILL, No. 3884, *ante*.

3906. Interest fixed sum per annum.]—HUTTON *v.* BROWN (1881), 45 L. T. 343; 29 W. R. 928.

Annotation:—**Expld.** Schiller *v.* Peterson, [1924] 1 Ch. 394.

3907. A charge on mortgaged property.]—A mtgee. is entitled to treat interest due under a mtge. as a charge upon the mtge. property in the absence of any contract to the contrary.

In a suit to redeem two mtges. of property in the possession of the mtgee. under earlier usufructuary mtges. the deeds provided for the annual payment of interest, & the mtgor. could redeem upon payment of the mtge.-money:—*Held:* the above general rule was not displaced, & the interest was a charge upon the property payable upon redemption.—GANGA RAM *v.* NATHA SINGH (1924), L. R. 51 Ind. App. 377, P. C.

Interest on bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 378, 379, Nos. 3488-3495.

Exorbitant interest as ground for impeaching mortgage deed.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 275, 276, Nos. 996-1001.

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mortgagee.]—A bargain for extra interest made between a derivative mtgee. & mtgor. inures to the benefit of the original mtgee.—(GRAHAME *v.* ANDERSON (1868), 15 Gr. 189.—**CAN.**

m. *Mortgagee exercising power of sale—Right to retain arrears of interest.*]—A mtgee. sold the mtged. property under a power of sale:—*Held:* the mtgee. was entitled to retain arrears of interest for more than six years.—FORD *v.* ALLEN (1869), 15 Gr. 565.—**CAN.**

n. *Partition suit—Purchase by mortgagor—Right of mortgagee to interest—Until payment of purchase-money into court.*]—In a partition suit the mtgors. of an undivided share became the purchasers, but they did not pay the purchase-money into ct. until long after the day named in the master's report:—*Held:* the mtgee. though a party to the suit, was entitled to interest at the rate reserved in the mtge. until notice of such payment into ct.—MCDERMID *v.* MCDERMID (1879), 7 P. R. 457.—**CAN.**

o. *Proviso for interest for one year only—Rate of interest payable for subsequent years.*]—The covenant provided for payment of interest at 9 per cent. up to the end of a year from the date of the mtge.:—*Held:* there being no evidence why such rate of interest was provided for, & 9 per cent. not being excessive, the same rate of interest should be allowed for the years subsequent to the expiry of the first year.—MCDONALD *v.* ELLIOTT (1886), 12 O. R. 98.—**CAN.**

p. *Proof of payment of interest.*]—MARKLE *v.* ROSS (1889), 13 P. R. 135.—**CAN.**

q. *Time of commencement of interest—When money advanced.*]—Under ordinary circumstances a mtgee. can claim interest only from the time the money is advanced.—EDMONDS *v.* HAMILTON PROVIDENT & LOAN SOCIETY (1891), 18 A. R. 347.—**CAN.**

r. *Increase of rate—By parol agreement—Whether valid.*]—A parol agreement to increase the rate of interest reserved by a mtge. upon land will not be enforced as against the land.—MURCHIE *v.* THERIAULT (1898), 1 N. B. Eq. Rep. 588.—**CAN.**

t. *Mortgage in arrears—Payment on account—Application to payment of interest.*]—Where money is paid by a mtgor. to a mtgee. on account of the mtge. indebtedness, the mtge. being arrears in respect of both principal & interest, & no appropriation is made by the mtgor. at the time of payment, it is the duty of the mtgee. to apply it to payment of interest.—BURGE *v.* FINES (1916), 33 W. L. R. 813; 10 W. W. R. 74.—**CAN.**

s. *Compliance with Interest Act, 1906, s. 6.*]—CANADA MORTGAGE INVESTMENT CO. *v.* BAIRD (1916), 34 W. L. R. 985; 10 W. W. R. 1195.—**CAN.**

b. ——.] — STANDARD RELIANCE MORTGAGE CORPN. *v.* COWRIE, [1917] 3 W. W. R. 238; 10 Sask. L. R. 263.—**CAN.**

c. ——.]—STUBBS *v.* STANDARD RELIANCE MORTGAGE CORPN., [1917] 3 W. W. R. 402.—**CAN.**

d. ——.]—CANADIAN MORTGAGE INVESTMENT CO. *v.* CAMERON (Alta.), [1917] 3 W. W. R. 521.—**CAN.**

e. ——.]—POAPST *v.* BRITISH COLUMBIA PERMANENT LOAN CO., [1920] 2 W. W. R. 532.—**CAN.**

f. *Discretion of court as to rate of interest—On proving preliminary decree.*]—Unless for some legal reason it sees fit to interfere with the contract as to the rate of interest, a ct. passing a preliminary decree in a mtge. suit has no power to award interest at other than the contractual rate up to the date fixed for payment.—RAJWANTA KUNWAR *v.* SHIAM NARAIN SINGH (1914), I. L. R. 36 All. 220.—**IND.**

g. *Relief granted by court—Where interest amounts to penalty.*]—It is competent to a ct. to grant relief whenever the stipulation for payment of interest at a specified rate appears to the ct. to be a stipulation by way of penalty.—KRISHNA CHARAN BARNIAU *v.* SANAT KUMAR DAS (1917), I. L. R. 44 Calc. 162.—**IND.**

h. *Mortgagee of bankrupt's estate—Right to recall rents from assignee—For payment of interest.*]—*Ex p.* CALWELL (1828), 1 Mol. 259.—**IR.**

k. *Successive transfers to mortgage—Default by ultimate transferee—Liability of original mortgagor to pay interest.*]—KNUCKEY *v.* BADDELEY (1910), 29 N. Z. L. R. 710.—**N.Z.**

SECT. 2.—INTEREST ON MORTGAGE DEBT.

SUB-SECT. 1.—EXPRESS PROVISION FOR PAYMENT.

See Part IV., Sect. 2, *ante*.

SUB-SECT. 2.—NO EXPRESS PROVISION FOR PAYMENT.

3908. Interest payable.]—A solr. paid off with his own money a mtge. debt on a client's property, which was thereupon reconveyed to the client. The solr. took the title deeds by way of equitable mtge. with a written memorandum. Afterwards he induced another client to advance a smaller sum on a proposed mtge. of the property. The money was paid to the solr. by the second client, & a mtge. was prepared for execution by the first client, who, however, never executed it, nor was aware of the intended security. The title deeds were kept by the solr. apart from other deeds of the mtgor., but were not placed in any box of the proposed mtgee. On the solr. becoming bkpt. :—*Held :* the second client had a valid security on the property as against the assignees, & the property having been sold by arrangement, he was entitled to be paid his principal & interest & costs in priority to any claim on the part of the assignees in respect of the residue of the sum secured.—*Re* EVERY, *Ex p.* HIRTZEL, *Ex p.* HINE (1858), 3 De G. & J. 464 ; 44 E. R. 1347, L. JJ.

Annotation :—**Apld.** *Re* Drax, Savile *v.* Drax, [1903] 1 Ch. 781.

3909. —— Agreement to secure money "with interest"—Covenants for payment restricted to principle.]—A mtge. deed recited an agreement to secure the money "with interest," but the proviso for redemption on a day certain, & the covenant to pay & the trusts of the produce of a sale, were restricted to the principal only :—*Held :* interest was payable.—ASHWELL *v.* STAUNTON (1861), 30 Beav. 52 ; 54 E. R. 808.

3910. —— Assignment absolute in terms—Actually by way of mortgage.]—The solr. to the trustees & exors. of testator advanced money to legatees entitled subject to a life interest, & charged no interest. He took assignments from such legatees, in terms absolute, & died insolvent. A creditor's suit was instituted to administer his estate, & the question was, it being admitted at the bar that the assignments were not absolute under the circumstances, whether interest was payable at 5 or 4 per cent., & how the costs should be borne :—*Held :* interest at 5 per cent. must be allowed, the general costs to be borne by the assignees' estate, those of a principal creditor by the assignors.

Semble : the ct. will lay down no general rule as to the rates of interest in cases of assignments redeemable.—*Re* UNSWORTH'S TRUST (1865), 2 Drew. & Sm. 337 ; 12 L. T. 49 ; 13 W. R. 448 ; 62 E. R. 649.

Annotation :—**Apld.** Macleod *v.* Jones (1884), 53 L. J. Ch. 534.

3911. —— Mortgage by deposit of title deeds—Subsequent memorandum not mentioning interest.]—A co. had borrowed from a bank a sum of money, to be repaid with interest, & deposited a lease as security. Afterwards a document was drawn up by the co., stating that the lease had been deposited as security for the loan, without mentioning the interest. The bank refused to give up the deed until the whole of the interest as well as the loan had been repaid :—*Held :* in an action of detinue for the lease, the written document was not conclusive against the bank as to the terms of the loan, & parol evidence was rightly admitted to show that the lease had been intended as security for the interest as well as the principal.—PENTREGUINNY FUEL CO. *v.* YOUNG (1866), 12 Jur. N. S. 56.

3912. —— Mortgage of insurance policy—Premiums paid by mortgagee—Interest on debt & premiums.]—Where a policy of assurance was deposited to secure a simple contract debt, without any agreement as to interest, & the creditor paid the premiums down to the death of the debtor :—*Held :* the policy was charged not only with the original debt & the amount of the premiums, but also with interest on both sums at 4 per cent.—*Re* KERR'S POLICY (1869), L. R. 8 Eq. 331 , 38 L. J. Ch. 539 ; 17 W. R. 989.

Annotations :—**Apld.** *Re* Drax, Savile *v.* Drax, [1903] 1 Ch. 781. **Refd.** Lippard *v.* Ricketts (1872), L. R. 14 Eq. 291. **Mentd.** Sadler *v.* Worley, [1894] 2 Ch. 170.

3913. —— Charge on land payable at fixed day—Instrument silent as to interest—Interest from day fixed for payment.]—Where money is charged upon land under any instrument or contract to be paid at a fixed date, the general rule is that, as between the owner of the charge & the owner of the land, the charge carries interest from the time when the money becomes payable, though nothing is said in the instrument or contract as to interest.—*Re* DRAX, SAVILE *v.* DRAX, [1903] 1 Ch. 781 72 L. J. Ch. 505 ; 88 L. T. 510 ; 51 W. R. 612 47 Sol. Jo. 405, C. A.

SECT. 3.—INTEREST ON SUMS OTHER THAN MORTGAGE DEBT.

SUB-SECT. 1.—IN GENERAL.

3914. Rents & profits.]—This ct. will not allow interest for rents & profits.—MICKLETHWAIT *v.* BOATMAN (1660), 1 Rep. Ch. 184 ; 21 E. R. 544.

3915. Costs.]—Interest computed on costs.—BICKHAM *v.* CROSS (1752), 2 Ves. Sen. 471 ; 4 Bro. C. C. 319, n. ; 28 E. R. 301, L. C.

Annotations :—**Consd.** Creuze *v.* Hunter (1793), 2 Ves. 157. **Distd.** Whatton *v.* Craddock (1836), 6 L. J. Ch. 178. **Foll.** Elton *v.* Curteis (1881), 19 Ch. D. 49.

PART XVII. SECT. 2, SUB-SECT. 2.

l. *Interest payable—Mortgage by deposit of title deeds.*]—If deeds are deposited by way of equitable mtge., to secure a simple contract debt, the debt bears interest from the date of the deposit, & by reason of it, though there be no express contract that the demand should bear interest.—CAREY *v.* DOYNE (1856), 5 I. Ch. R. 104.—**IR.**

3913 i. —— *Charge on land payable at fixed day—Instrument silent as to interest—Interest from day fixed for payment.*]—Where no interest is reserved by a mtge., none is recoverable until after the day appointed for payment of the principal.—REID *v.* WILSON (1881), 9 P. R. 166.—**CAN.**

3913 ii. —— —— —— ——.]—McDERMOTT *v.* KEENAN (1887), 14 O. R. 687.—**CAN.**

3913 iii. —— —— —— ——.]—B. C. LAND & INVESTMENT AGENCY, LTD. *v.* ROBINSON, [1922] 2 W. W. R. 1185.—**CAN.**

3913 iv. —— —— —— ——.]—BIKRAMJIT TEWARI *v.* DURGA DYAL TEWARI (1893), I. L. R. 21 Calc. 274.—**IND.**

m. *Mortgage to secure balance of planter's account — Whether interest chargeable.*]—A planter to increase the security of a merchant, for advances for the fishery, gave him a mtge. on his land. In an action seeking a foreclosure, the merchant claimed interest under the mtge. though the instrument contained no covenant for interest :—*Held :* no interest was chargeable.—MCBRIDE *v.* COLLINS (1868), 5 Nfld. L. R. 221.—**NFLD.**

PART XVII. SECT. 3, SUB-SECT. 1.

n. *Possession by mortgagee after payment—Liability for interest.*]—If a mtgee. retains possession of the property after being paid in full, the general rule is, to charge him with

3916. —— & charges.]—Mtgee. enters, & the profits are not sufficient to answer the interest, yet the arrears shall not carry interest, but the costs & charges must.—PROCTER *v.* COOPER (1700), Prec. Ch. 116; 2 Vern. 377; 1 Eq. Cas. Abr. 314; 24 E. R. 56.

Annotations :—**Refd.** Heaton *v.* Hugell (1729), 1 Barn. K. B. 272; Whiting *v.* White (1792), 2 Cox, Eq. Cas. 290.

3917. —— Taxed costs directed to be added to security—Carry interest from date of taxing master's certificate.]—Mtgee. is not entitled, in carrying in his accounts under a foreclosure judgment, to charge interest on his taxed costs unless they are directed to be added to his security, & then they carry interest from the date of the taxing master's certificate, & not from the date of the judgment. An action by a mtgor. against a mtgee. to set aside the mtge. having been dismissed with costs, which were ordered to be paid by pltf. to deft., judgment was given for foreclosure on deft.'s counterclaim, & an account was directed of what was due to deft. for principal, interest, the mtge. reserving 5 per cent., & the taxed costs of the action. On appeal the judgment was affirmed with costs, the Ct. of Appeal giving deft. leave to add the taxed costs of the appeal to his security. In carrying in his accounts deft. charged pltf. with interest at 4 per cent. on the taxed costs under the original judgment from the date of the judgment, & also interest at 4 per cent. on the taxed costs of the appeal from the date of the judgment of the Ct. of Appeal:—*Held*: no interest on the costs under the original judgment could be charged by deft., the mtgee.; but as to the costs of the appeal, interest at 4 per cent. was chargeable, though only from the date of the taxing master's certificate, & not from the date of the judgment of the Ct. of Appeal.—EARDLEY *v.* KNIGHT (1889), 41 Ch. D. 537; 58 L. J. Ch. 622; 60 L. T. 780; 37 W. R. 704.

Annotation :—**Refd.** *Re* Drax, Saville *v.* Drax, [1903] 1 Ch. 781.

——.]—*See* Nos. 3995–3998, *post*.

3918. Balance found due from mortgagee—Redemption improperly resisted.]—Where a mtgee. improperly resists redemption, & on taking the accounts a balance is found to be in his hands, the ct. has power to charge him with interest on such balance, though he has not been in possession of the mtged. premises.—SMITH *v.* PILKINGTON (1859), 1 De G. F. & J. 120; 29 L. J. Ch. 227; 24 J. P. 227; 45 E. R. 304, L. C. & L. JJ.

Annotations :—**Refd.** Matterson *v.* Elderfield (1869), 20 L. T. 563; Eley *v.* Read (1897), 76 L. T. 39.

3919. Redemption of land tax.]—KNOWLES *v.* CHAPMAN (1815), 3 Seton's Judgments & Orders, 7th ed. 1905.

3920. Life insurance premiums.]—By the same deed A. agreed that B. should insure her life, & that the costs of such insurance, & the payments for keeping same on foot, should be paid out of the property charged, & she directed the trustees to make the necessary payments for effecting & keeping on foot the policies. The trustees did not make the payments, but the policy was kept on foot by B.:—*Held*: he was entitled to interest thereon at 4 per cent.—HODGSON *v.* HODGSON (1837), 2 Keen, 704; 7 L. J. Ch. 5; 48 E. R. 800.

Annotation :—**Mentd.** Bolton *v.* Salmon, [1891] 2 Ch. 48.

3921. ——.]—MARSHALL *v.* NUNN (1853), 3 Seton's Judgments & Orders, 7th ed. 1885.

3922. ——.]—BATES *v.* JOHNSON (1859), as reported in 3 Seton's Judgments & Orders, 7th ed. 1885.

Annotations :—**Mentd.** West London Commercial Bank *v.* Reliance Permanent Bldg. Soc. (1884), 53 L. J. Ch. 860; Taylor *v.* Russell, [1891] 1 Ch. 8; Bailey *v.* Barnes, [1894] 1 Ch. 25.

Fines & premiums in mortgages to building societies.]—*See* BUILDING SOCIETIES, Vol. VII., pp. 469, 470, 475, 476, 480, Nos. 91–100, 132, 159.

SUB-SECT. 2.—REPAIRS AND IMPROVEMENTS.

3923. Repairs.]—The mtgee. shall be allowed interest for money bestowed on repairs, as for a sum in gross; the mtgor. having the benefit of improvement upon account, if it be thereby increased.—CAMPION *v.* IPPON (1677), Freem. Ch. 146; 22 E. R. 1118.

3924. ——.]—EYRE *v.* HUGHES (1876), 2 Ch. D. 148; 45 L. J. Ch. 395; 34 L. T. 211; 24 W. R. 597; 2 Char. Pr. Cas. 33.

Annotation :—**Refd.** Jones *v.* Linton (1881), 44 L. T. 601.

3925. Lasting improvements.]—STEPHENSON *v.* GREEN (1801), 3 Seton's Judgments & Orders, 6th ed. 2081.

3926. ——.] — QUARRELL *v.* BECKFORD, No. 3771, *ante*.

3927. ——.]—TOWNLEY *v.* MOORE (1856), 3 Seton's Judgments & Orders, 7th ed. 1885.

3928. ——.]—GLENCROSS *v.* PULMAN (1859), 3 Seton's Judgments & Orders, 7th ed. 1887.

SUB-SECT. 3.—RATE OF INTEREST.

3929. General rule—Rate recovered by mortgage.]—Money disbursed by a mtgee. shall carry same interest as the original sum.—WOOLLEY *v.* DRAG (1795), 2 Anst. 551; 145 E. R. 964.

3930. —— ——.]—STEPHENSON *v.* GREEN (1801), 3 Seton's Judgments & Orders, 6th ed. 2081.

3931. —— ——.]—KNOWLES *v.* CHAPMAN (1815), 3 Seton's Judgments & Orders, 7th ed. 1905.

3932. —— ——.]—MARSHALL *v.* NUNN (1853), 3 Seton's Judgments & Orders, 7th ed. 1885.

3933. —— ——.]—TOWNLEY *v.* MOORE (1856), 3 Seton's Judgments & Orders, 7th ed. 1885.

3934. —— ——.] — GLENCROSS *v.* PULMAN (1859), 3 Seton's Judgments & Orders, 7th ed. 1887.

3935. —— ——.]—EYRE *v.* HUGHES (1876), 2 Ch. D. 148; 45 L. J. Ch. 395; 34 L. T. 211; 24 W. R. 597; 2 Char. Pr. Cas. 33.

Annotation :—**Refd.** Jones *v.* Linton (1881), 44 L. T. 601.

3936. Interest on insurance premiums—4 per cent.]—HODGSON *v.* HODGSON, No. 3920, *ante*.

SECT. 4.—RATE OF INTEREST.

SUB-SECT. 1.—REDUCTION ON PUNCTUAL PAYMENT.

3937. Validity of covenant for reduction.]—BROADWAY *v.* MORECRAFT, No. 3969, *post*.

3938. Agreement may be by parol.]—A. lends money upon a mtge. at a certain rate of interest, & afterwards by parol, agrees to reduce the rate

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interest & rests in respect of his subsequent receipts.—CRIPPEN *v.* OGILVIE (1869), 15 Gr. 568.—**CAN.**

o. *Mortgage to secure overdrawn account—Whether overdrawn account chargeable with interest.*]—BANK OF MONTREAL *v.* DUNLOP (1902), 22 C. L. T. 327; 2 N. B. Eq. Rep. 388.—**CAN.**

3937 i. *Validity of covenant for reduction.*]—HARDCASTLE *v.* CURLETT (1903), 22 N. Z. L. R. 825.—**N.Z.**

Sect. 4.—Rate of interest: Sub-sects. 1 & 2.]

of interest; this agreement, though not in writing, is binding.—MILTON (LORD) *v.* EDGWORTH (1773), 5 Bro. Parl. Cas. 313; 2 E. R. 700, H. L.

Annotation:—**Mentd.** Pember *v.* Mathers (1779), 1 Bro. C. C. 52.

3939. Payment must be made punctually—Whether relief given.]—Mtge. at 5 per cent. with covenant to pay 6 on default of paying the interest within sixty days after due. If the interest is behind sixty days, the mtge. shall carry interest at 6 per cent. & the ct. will not relieve against it.—HALLIFAX (MARQUIS) *v.* HIGGENS (1689), 2 Vern. 134; 23 E. R. 694.

Annotations:—**Distd.** Holles *v.* Wyse (1693), 2 Vern. 289; Anon. (1694), Freem. Ch. 197.

3940. —— ——.]—HOLLES (LADY) *v.* WYSE, No. 3956, *post*.

3941. —— ——.]—STRODE *v.* PARKER, No. 3958, *post*.

3942. —— ——.]—A mtge. was made for security of money with interest at 5 per cent. with a covenant that in case the money were not paid within one month after it became payable, that then 6 per cent. should be paid for interest; & upon a bill to redeem, the question was only concerning interest, whether 5 or 6 should be paid, & decreed that in this case 5 per cent. only should be paid, because the original agreement was for 5, & the covenant to pay 6 but a *nomine pœnæ*. But where the original agreement is to pay 6 per cent. with a proviso that if the money be paid within one or two months, etc., after it becomes payable, that then the mtgee. will accept 5, there, unless the money be paid within the time agreed, the ct. will allow 6 per cent.—ANON. (1694), Freem. Ch. 197; 22 E. R. 1157.

3943. —— ——.]—A mtgee. lends money at 6 per cent., & in the deed agrees to take 5 per cent. if it be paid within three months after it became due; if the mtgor. fail to pay at the precise time, he must afterwards pay 6 per cent.—JORY *v.* COX (1701), Prec. Ch. 160; 24 E. R. 77; *sub nom.* ANON., 2 Eq. Cas. Abr. 611.

3944. —— ——.]—(1) Mtgor. reserving 6 per cent. with proviso to take 5 per cent. if paid within three months after due; if a great arrear ct. will not relieve; *secus* if but a small slip of time.

(2) Interest computed by the master's report shall carry interest. But where the mtgor. signed an account, whereby so much is admitted to be due for interest, this will not carry interest unless the mtgor. by any letter or writing under his hand agrees to make it principal.—BROWN *v.* BARKHAM (1720), 1 P. Wms. 652; 24 E. R. 555, L. C.

3945. —— ——.]—Where a mtge. is at 4½ per cent. with a proviso that if the interest be paid after each half year before three quarters of a year become due, the mtgee. will accept of 4 per cent. if the mtgor. fails of paying the interest at the appointed time, he cannot be relieved in this ct.

But if the mtge. had been made, with a reservation of 4 per cent. interest, with a proviso that upon non-payment thereof, within a certain time after it is due, the mtgor. shall pay 5 per cent., such proviso would not be good, & has been determined several times; because where the interest is to be increased, if not paid at the day, that is but as a *nomine pœnæ*, & relievable in equity (LORD HARDWICKE, C.).—NICHOLLS *v.* MAYNARD (1747), 3 Atk. 519; 26 E. R. 1100, L. C.

3946. —— ——.]—There is a distinction in the Ct. of Ch., that if 5 per cent. be reserved for interest on a mtge., with a condition to accept 4 if punctually paid; this condition must be strictly performed & the debtor shall not have relief in equity after the day of payment is elapsed, because the 1 per cent. was to be abated upon a condition which is not performed. But if 4 per cent. be reserved, with an agreement that if the 4 be not punctually paid at the day, the mtgee. shall pay 5, that shall be considered as a penalty added & the ct. of equity will in such case relieve against it (LORD MANSFIELD, C.J.).—BONAFOUS *v.* RYBOT (1763), 3 Burr. 1370; 97 E. R. 878.

Annotations:—**Reid.** *Re* Dixon, Heynes *v.* Dixon, [1900] 2 Ch. 561. **Mentd.** Preston *v.* Dania (1872), L. R. 8 Exch. 19.

3947. —— ——.]—So upon a mtge. at 5 per cent. with condition for 4, if regularly paid, or at 4 per cent., to have 5, if not regularly paid; the 5 per cent. regarded in this ct. only as a penalty to secure the 4, & relief given upon that principle.—SETON *v.* SLADE, HUNTER *v.* SETON (1802), 7 Ves. 265; 32 E. R. 108, L. C.

Annotations:—**Distd.** Hicks *v.* Gardner (1837), 1 Jur. 541. **Consd.** Stains *v.* Banks (1863), 9 Jur. N. S. 1049. **Distd.** Leeds & Hanley Theatre of Varieties *v.* Broadbent, [1898] 1 Ch. 343. **Reid.** Roberts *v.* Berry (1853), 3 De G. M. & G. 284. **Mentd.** Halsey *v.* Grant (1806), 13 Ves. 73; Hall *v.* Smith (1808), 14 Ves. 426; Jenkins *v.* Reynolds (1821), 6 Moore, C. P. 86; Hipwell *v.* Knight (1835), 1 Y. & C. Ex. 401; Laythoarp *v.* Bryant (1836), 2 Bing. N. C. 735; Parkin *v.* Thorold (1851), 2 Sim. N. S. 1.

3948. —— **Rate only affected for instalment not paid punctually.**]—Deed of mtge. at 5 per cent. contained a proviso that as often as the interest should be paid half yearly on the days appointed, or within three months next after each, so much should be deducted as would make the interest 3½ per cent. By a separate agreement, mtgee. covenanted not to call in the money within five years, unless the interest should be in arrear. The first half year's interest not having been tendered till after the three months, but the second half year's interest before:—*Held*: (1) mtgee. was only entitled to interest at 5 per cent. for the half year which had been tendered after the time; (2) in consequence of the default, he was entitled to call in his money.—STANHOPE *v.* MANNERS (1763), 2 Eden, 197; 28 E. R. 873, L. C.

Annotation:—*Generally*, **Reid.** Williams *v.* Morgan, [1906] 1 Ch. 804.

3949. —— ——.]—Where there is the common proviso for reduction of the interest payable on a mtge. debt, in case of punctual payment; a failure in such punctual payment only affects the rate of interest, payable for the half year in which such condition was not fulfilled.—WAYNE *v.* LEWIS (1855), 3 Eq. Rep. 1021; 25 L. T. O. S. 264; 3 W. R. 600.

3950. —— ——.]—By a bond & disposition in security dated Nov. 9, 1910, a loan was effected on the security of a Scottish estate, the loan to be repaid on the following Whit Sunday with interest during non-payment at the rate of 5 per cent. *per annum*, payable on Feb. 1, May 1, Aug. 1, & Nov. 1, in each year; & by a minute of agreement of even date with the bond it was agreed (1) that on the punctual payment of interest as thereafter modified the loan should not be called in for fourteen years, & (2) that the 5 per cent. interest stipulated for in the bond should be modified to 4 per cent. so long as the interest at said lower rate was punctually paid. By a letter of Apr. 29, 1918, the lenders demanded payment of the instalments of interest due on Feb. 1 & May 1, 1918, respectively & stated that unless the interest were in future regularly & punctually paid interest at the rate stipulated for in the bond would be exacted. On May 13 payment of interest for the two quarters at the lower rate was made & was accepted without

demur. On Aug. 7 the borrower sent a cheque for the interest due on Aug. 1, but it was returned as being neither timeous nor sufficient:—*Held:* (1) default had been made in the punctual payment of interest, & (2) the lenders were not estopped by their conduct from insisting on their strict rights under the bond.—MACLAINE *v.* GATTY, [1921] 1 A. C. 376; 90 L. J. P. C. 73; 124 L. T. 385; 37 T. L. R. 139; 26 Com. Cas. 148, H. L.

3951. Mortgagee in possession—Right to charge higher rate.]—(1) In taking the accounts of a mtgee. in possession, the chief clerk disallowed three claims made for commission, at the rate of £5 per cent. paid to agents for receiving the rents; & on application to the ct. before certificate, the disallowance of the chief clerk was confirmed.

(2) Where the mtgee. was in possession, & there was a stipulation in the mtge. deeds for the payment of interest, at £4 10*s.* per cent. if paid regularly, & £5 per cent. if not, the ct. confirmed the chief clerk's decision, allowing £4 10*s.* per cent. —STAINS *v.* BANKS (1863), 9 Jur. N. S. 1049; *revsd., see* 16 Ch. D. p. 55.

Annotation:—*As to* (1) & (2) **N.F.** Union Bank of London *v.* Ingram (1880), 16 Ch. D. 53.

3952. —— ——.]—Under a proviso in a mtge. deed for reduction of interest on punctual payment, a mtgee. in possession through the default of the mtgor. is entitled, on the accounts being taken (1) to charge the mtgor. with the higher rate of interest; (2) in a proper case, with the commission paid to a receiver for collecting the rents.

It is not a matter of course that a mtgee. can pay an agent to collect the rents for him (JESSEL, M.R.).—UNION BANK OF LONDON *v.* INGRAM (1880), 16 Ch. D. 53; 50 L. J. Ch. 74; 43 L. T. 659; 45 J. P. 255; 29 W. R. 209.

Annotations:—*As to* (1) **Apld.** Bright *v.* Campbell (1889), 41 Ch. D. 388. **Distd.** Wrigley *v.* Gill, [1906] 1 Ch. 165.

3953. —— —— **Though interest not in arrear when possession taken.**]—A proviso in a mtge. for reduction of interest on punctual payment does not apply to the case of the mtgee. taking possession & receiving the rents, whether he does so by arrangement with the mtgor. or otherwise; & accordingly the mtgee. will be allowed, in his accounts as mtgee. in possession, the higher rate of interest, even though there was no interest in arrear at the time of taking possession.—BRIGHT *v.* CAMPBELL (1889), 41 Ch. D. 388; 60 L. T. 731; 37 W. R. 745.

Annotations:—**Apld.** *Re* Atkinson, Barbers' Co. *v.* Gross-Smith (1904), 90 L. T. 825. **Distd.** Wrigley *v.* Gill, [1906] 1 Ch. 165.

3954. Acceptance of lower rate after default—By mortgagee trustee.]—In a mtge. to secure a debt, interest was reserved at the rate of 5 per cent., with a proviso for reduction of the rate to 4 per cent., on punctual payment. The mtgee., who was a trustee, was held justified in accepting 4 per cent. after default made in punctual payment.—BOOTH *v.* ALINGTON (1856), 6 De G. M. & G. 613; 5 W. R. 107; 43 E. R. 1372; *sub nom.* BOOTH *v.* ALINGTON, ALINGTON *v.* BOOTH, 26 L. J. Ch. 138; 28 L. T. O. S. 211; 3 Jur. N. S. 49, L. C.

Annotations:—**Mentd.** Miller *v.* Huddlestone (1868), 16 W. R. 478; De Lisle *v.* Hodges (1874), L. R. 17 Eq. 440; Gilbert *v.* Whitfield (1882), 52 L. J. Ch. 210; Wilson *v.* Kenrick (1885), 31 Ch. D. 658; *Re* Saunders-Davies, Saunders-Davies *v.* Saunders-Davies (1887), 34 Ch. D. 482; *Re* Cruddas, *Re* Smith, Cruddas *v.* Smith (1900), 69 L. J. Ch. 355.

3955. ——.]—MACLAINE *v.* GATTY, No. 3950, *ante.*

SUB-SECT. 2.—INCREASE ON FAILURE OF PUNCTUAL PAYMENT.

3956. Proviso not enforced—If amounting to penalty.]—Interest reserved at 5 per cent. but if not duly paid, then to answer interest at 6 per cent. *per annum.* Great arrear of interest. Mtgor. decreed to pay but 5 per cent., the reservation at 6 per cent. being only as a *nomine pœnæ.* But where interest was reserved at 6 per cent., & if duly paid, then agreed to take 5; interest not duly paid, & ct. allowed 6 per cent.—HOLLES (LADY) *v.* WYSE (1693), 2 Vern. 289; 23 E. R. 787.

Annotation:—**Distd.** General Credit & Discount Co. *v.* Glegg (1883), 48 L. T. 182.

3957. —— ——.] — ANON. (1694), No. 3942, *ante.*

3958. —— ——.]—A mtge. is made with interest at 5 per cent. provided that if the interest be not paid within two months after due, then to pay 5½, this is in nature of a penalty, & the ct. will relieve against it; otherwise if 5½ per cent. be reserved originally, & to be lessened to 5 per cent. if duly paid within two months after due.—STRODE *v.* PARKER (1694), 2 Vern. 316; 23 E. R. 804.

Annotation:—**Distd.** General Credit & Discount Co. *v.* Glegg (1883), 48 L. T. 182.

3959. —— ——.]—NICHOLLS *v.* MAYNARD, No. 3945, *ante.*

3960. —— ——.]—BONAFOUS *v.* RYBOT, No. 3946, *ante.*

3961. —— ——.]—SETON *v.* SLADE, HUNTER *v.* SETON, No. 3947, *ante.*

3962. —— ——.]—PILKINGTON *v.* BAKER (No. 2), [1877] W. N. 210.

3963. —— ——.]—The other question which was much argued before your lordships was the question of penalty. I apprehend that there again the case is quite clear. The illustration of the form adopted in mtges. is a very good illustration, I think, of what the true principle is. The form adopted long since, I do not know whether it is still continued or not, in mtges., was when you wished to reserve in reality interest at 4 per cent., to reserve the interest by contract at 5 per cent., but to mitigate the severity of that contract in the event of the money being paid by a certain day. It is not a penalty on non-payment, though it seems a fine distinction, when you say that your contract shall be made for interest at 5 per cent. to be reduced, in the event of your punctual payment, to 4 per cent.; but it is a relaxation of the terms of that original contract, not taking it by way of penalty at all, but a relaxation of your contract which you would merit & purchase by paying at a definite & fixed time. If that definite & fixed time were exceeded, then the original contract revived in all its force. Sometimes mtge. deeds, being somewhat unskilfully drawn, interest at 4 per cent. was reserved by the contract to be raised to 5 per cent. if there was non-payment at a particular day; & although that brings the case to an extremely fine & nice distinction, it all the better illustrates the rule which has been applied at all times by the cts., with reference to this question of penalty. If there had been indulgence at any time upon given terms, as long as those terms are observed, the indulgence lasts. When those terms are departed from the indulgence at once fails, & the original contract is revived in full force (LORD HATHERLEY).—WALLINGFORD *v.*

PART XVII. SECT. 4, SUB-SECT. 2.

3956 i. *Proviso not enforced—If amounting to penalty.*]—KNAPP *v.* CAMERON (1858), 6 Gr. 559.—**CAN.**

3956 ii. —— ——.]—MCLAREN *v.* MILLER (1874), 20 Gr. 637.—**CAN.**

3956 iii. —— ——.]—SCHWARTZ *v.* WILLIAMS (1915), 35 O. L. R. 33; 9 O. W. N. 235.—**CAN.**

Sect. 4.—Rate of interest: Sub-sects. 2 & 3. Sects. 5 & 6.]

MUTUAL SOCIETY (1880), 5 App. Cas. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81, H. L.

Annotations:—**Mentd.** Edmunds *v.* Wallingford (1885), 14 Q. B. D. 811; Speers *v.* Daggers (1885), Cab. & El. 503; Purkiss *v.* Low (1886), 3 T. L. R. 63; Gunga Narain Gupta *v.* Tilluckram Chowdhry (1888), L. R. 15 Ind. App. 119; Steadman *v.* Hakim (1888), 58 L. J. Q. B. 57; Manger *v.* Cash (1889), 5 T. L. R. 271; Lawrance *v.* Norreys (1890), 15 App. Cas. 210; Arnold & Butler *v.* Bottomley, [1908] 2 K. B. 151.

3964. Validity of covenant for increase.]—BROADWAY *v.* MORECRAFT, No. 3969, *post.*

SUB-SECT. 3.—ON SUMS OTHER THAN MORTGAGE DEBT.

See Sect. 3, sub-sect. 3 *ante.*

SECT. 5.—**COMPOUND INTEREST.**

See, generally, MONEY & MONEY-LENDING, pp. 199–201, *ante.*

3965. Whether compound interest allowed.]—PROUD *v.* COMBES (1664), 3 Rep. Ch. 18; Nels. 100; 21 E. R. 715; *sub nom.* COMBS *v.* PROUD, 1 Cas. in Ch. 54.

3966. ——.]—If a mtge. is twenty years old, the mtgee. shall have no interest on interest. But herein he is not satisfied, especially in this case, where deft. could not get into possession by reason of the estate for life to D., who lived till 1668, & was clearly of opinion that pltf. ought not to be admitted to redeem. & made great difference between parties that came to redeem, who are no parties to the mtge., & those that are parties to the mtge. & so the bill was dismissed (*per* CUR.).—ROSCARRICK *v.* BARTON (1672), 1 Cas. in Ch. 217; 22 E. R. 769.

Annotations:—**Reid.** Sherman *v.* Cox (1674), 3 Rep. Ch. 83; Reynoldson *v.* Perkins (1769), Amb. 564. **Mentd.** Salisbury *v.* Bagott (1677), 2 Swan. 603.

3967. ——.]—ANON. (1675), 1 Cas. in Ch. 258; Freem. Ch. 142; 22 E. R. 789.

3968. ——.]—PROCTER *v.* COOPER, No. 3916, *ante.*

3969. ——.]—A covenant in a mtge., that at the end of every year, if the interest is not paid within three months after it becomes due, it shall bear interest, is a void covenant. Or, that on non-payment of the interest at the day, it should be turned into principal, & bear interest. Or, that in default of payment, the interest shall be advanced from 5 to 6 per cent. Or to pay 6 per cent., but if the money is paid at the day, to pay only 5, & there is no difference in reason between the two last covenants.—BROADWAY *v.* MORECRAFT (1729), Mos. 247; 25 E. R. 377.

Annotation:—**Mentd.** Bosanquett *v.* Dashwood (1734), Cas. *temp.* Talb. 38.

3970. —— **Interest accrued during infancy.**]—Bill to foreclose an infant. By decree it is sent to a master to see what due. Master reports what is due for principal, interest & costs. Whether upon a subsequent order to carry on interest, the former interest during the infancy shall carry interest.—BENNET *v.* EDWARDS & SELBY (1700), 2 Vern. 392; 23 E. R. 852.

3971. —— —— **Agreement by infant's relations.**]—CHESTERFIELD (EARL) *v.* CROMWELL (LADY) (1701), 1 Eq. Cas. Abr. 287; 21 E. R. 1050, L. C.

Annotation:—**Consd.** Cottrell *v.* Finney (1874), 9 Ch. App. 541.

3972. —— **Necessity for agreement by mortgagor.**]—CHESTERFIELD (EARL) *v.* CROMWELL (LADY) (1701), 1 Eq. Cas. Abr. 287; 21 E. R. 1050, L. C.

Annotation:—**Consd.** Cottrell *v.* Finney (1874), 9 Ch. App. 541.

3973. —— —— **After interest accrued.**]—Proviso, that future interest, if not paid, shall be taken as principal, & bear interest, is void.

To make interest principal, it is requisite that interest be first grown due & then an agreement

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3964 i. *Validity of covenant for increase.*]—QUINLAN *v.* GORDON (1861), 20 Gr. App. I.—**CAN.**

3964 ii. ——.]—TOTTEN *v.* WATSON (1870), 17 Gr. 233.—**CAN.**

3964 iii. ——.]—WILSON *v.* CAMPBELL (1893), 15 P. R. 254.—**CAN.**

3964 iv. ——.]—TRUST & LOAN CO. *v.* MCKENZIE (1896), 23 A. R. 167.—**CAN.**

3964 v. ——.]—SPARLING *v.* CUNNINGHAM (Y. T.) (1906), 4 W. L. R. 336.—**CAN.**

3964 vi. ——.]—MCKENZIE *v.* MCLEOD (1909), 4 N. B. Eq. Rep. 72; 5 E. L. R. 172; 6 E. L. R. 553; 39 N. B. R. 230.—**CAN.**

3964 vii. ——.]—PORTER & SONS, LTD. *v.* MACKENZIE (1920), 37 B. C. R. 287.—**CAN.**

3964 viii. ——.]—Where a mtge. deed provided for repayment of the debt in four instalments with interest at 6 per cent. & in default of payment of any instalment on the due date, for interest at 12 per cent. from the date of the bond:—*Held:* the stipulation being reasonable, pltf. was entitled on default to recover the higher rate of interest from the date of the bond.—BABAVAYYA *v.* SUBBARAZU (1888), I. L. R. 11 Mad. 294.—**IND.**

3964 ix. ——.]—GATTY *v.* MACLAINE, [1920] S. C. 441.—**SCOT.**

p. *Whether increase amounts to penalty.*]—Where a mtge. stipulated that up to a certain day the interest should be 8 per cent.; & if the principal were not then paid, 12 per cent. should be thereafter charged:—*Held:* the stipulation for payment of 12 per cent. was not by way of penalty, but an agreement to pay that rate from the day named.—WADDELL *v.* MCCOLL (1868), 14 Gr. 211.—**CAN.**

q. *Payment without interest—Whether interest payable on default.*]—MCDONELL *v.* WEST (1868), 14 Gr. 492.—**CAN.**

r. *Rate of interest chargeable.*]—PEOPLE'S LOAN & DEPOSIT CO. *v.* GRANT (1890), 18 S. C. R. 262.—**CAN.**

t. ——.]—MANITOBA & NORTH WEST LOAN CO. *v.* BARKER (1892), 8 Man. L. R. 296.—**CAN.**

a. ——.]—CREDIT FONCIER FRANCO-CANADIEN *v.* SCHULTZ (1893), 9 Man. L. R. 70.—**CAN.**

b. ——.]—HANFORD *v.* HOWARD (1896), 1 N. B. Eq. Rep. 241.—**CAN.**

c. ——.]—BIGGS *v.* FREEHOLD & SAVINGS CO. (1901), 21 C. L. T. 222; 31 S. C. R. 136.—**CAN.**

d. ——.]—MCKENZIE *v.* MCLEOD (1908), 5 E. L. R. 172.—**CAN.**

e. ——.]—*Re* ANDERSON FURNITURE CO. (1908), 39 N. B. R. 139.—**CAN.**

PART XVII. SECT. 5.

3965 i. *Whether compound interest allowed.*]—Where a mtge. to secure the repayment of money with interest at 10 per cent. provided that should default be made in payment of the principal money or interest then the amount so overdue & unpaid should bear interest at the rate of 20 per cent. *per annum* until paid:—*Held:* the proviso was not invalid, or relievable against on the ground of forfeiture.—DOWNEY *v.* PARNELL (1882), 2 O. R. 82.—**CAN.**

3965 ii. ——.]—KING *v.* KEITH (1898), 1 N. B. Eq. Rep. 538.—**CAN.**

3965 iii. ——.]—UMESH CHANDRA KHASNAVIS *v.* GOLAL LAL MUSTAFI (1903), I. L. R. 31 Calc. 233.—**IND.**

3965 iv. ——.]—The cts. do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is in the absence of disentitling circumstances allowed.—HARI *v.* RAMJI (1904), I. L. R. 28 Bom. 371.—**IND.**

3965 v. ——.]—M'CARTHY *v.* LLANDAFF (LORD) (1810), 1 Ball & B. 375.—**IR.**

3965 vi. ——.]—CLANCARTY (LORD) *v.* LATOUCHE (1810), 1 Ball & B. 420.—**IR.**

3972 i. —— *Necessity for agreement by mortgagor.*]—Interest due on a mtge. cannot be added to the principal & interest charged upon that interest, unless the mtgor. has entered into an express agreement to that effect.—THOMSON *v.* O'TOOLE (1888), 21 N. S. R. 1.—**CAN.**

3972 ii. —— ——.]—THOMAS *v.* GIRVAN (No. 2) (1896), 1 N. B. Eq. Rep. 257.—**CAN.**

3972 iii. —— ——.]—JACKSON *v.* RICHARDSON (1896), 1 N. B. Eq. Rep. 325.—**CAN.**

3972 iv. —— ——.]—RICHARDSON *v.* JACKSON (1897), 34 N. B. R. 301.—**CAN.**

f. *What amounts to agreement for compound interest.*]—WILSON *v.* CAMPBELL (1879), 8 P. R. 154.—**CAN.**

g. ——.]—Where a mtge. provides for payment of interest half-yearly &

concerning it may make it principal (*per* CUR.).—OSSULSTON (LORD) *v.* YARMOUTH (LORD) (1707), 2 Salk. 449 ; 91 E. R. 388, L. C.

Annotation :—**Refd.** Rufford *v.* Bishop (1829), 5 Russ. 346.

3974. —— —— ——.]—Though compound interest cannot be taken under an antecedent contract, accounts may be settled, even half-yearly, upon that principle.—*Ex p.* BEVAN (1803), 9 Ves. 223 ; 32 E. R. 588, L. C.

Annotations :—**Consd.** Rufford *v.* Bishop (1829), 5 Russ. 346. **Refd.** Eaton *v.* Bell (1821), 5 B. & Ald. 34 ; Fergusson *v.* Fyffe (1841), 8 Cl. & Fin. 121.

3975. —— —— —— **Agreement confirmed by deed.**]—Where the interest due upon a mtge. had become in arrear, & in the mtgee.'s account of arrears, rests were made from time to time, on which interest was calculated, & ultimately a general account of all arrears, calculated on the footing of those rests, was signed by the mtgor. & confirmed by a deed, executed by him three years afterwards, for securing repayment of the balance to the mtgee. :—*Held :* these transactions were not usurious, & the mtgor. was liable for the balance.—BLACKBURN *v.* WARWICK (1836), 2 Y. & C. Ex. 92 ; 6 L. J. Ex. Eq. 17 ; 160 E. R. 325.

3976. —— —— **Agreement at time of mortgage.**]—A. & B., reversioners after a life interest in C., mortgaged their property & covenanted that interest in arrear should be capitalised & bear interest after the same rate, & C. also assigned her life interest as part of the security :—*Held :* the covenant was good & valid, & the mtgee. was not limited to six years' interest.—CLARKSON *v.* HENDERSON (1880), 14 Ch. D. 348 ; 49 L. J. Ch. 289 ; 43 L. T. 29 ; 28 W. R. 907.

Annotations :—**Consd.** Mainland *v.* Upjohn (1889), 41 Ch. D. 126. **Refd.** *Re* Middlesbrough Bldg. Soc. (1884), 54 L. J. Ch. 592.

3977. —— —— **Agreement must be express.**]—Award not to be impeached for allowing compound interest ; for it may be allowed in case of a contract for it either express or to be inferred from the nature of the dealings between the parties ; as if it is according to the course of their trade ; therefore it is a conclusion of fact, on which the judgment of the arbitrators is final : but this doctrine as to interest has no relation to mtges.—MORGAN *v.* MATHER (1792), 2 Ves. 15 ; 30 E. R. 500.

Annotations :—**Refd.** Rufford *v.* Bishop, Bishop *v.* Rufford (1829), 7 L. J. O. S. Ch. 108. **Mentd.** *Re* Plews & Middleton (1845), 6 Q. B. 845 ; *Re* Whiteley & Robert's Arbitration, [1891] 1 Ch. 558.

3978. —— —— ——.]—DANIELL *v.* SINCLAIR, No. 3719, *ante*.

3979. —— —— —— **Writing under hand of mortgagor.**]—BROWN *v.* BARKHAM, No. 3944, *ante*.

3980. —— **Payment extracted under duress.**]—A mtgee., where the mtge. was only 4½ per cent. compelled the mtgor. to turn the interest into principal at 5 per cent. at the end of every six months, & at the time the mtge. was paid off, insisted on an advance of six months interest, over & above the interest which was due. The bill was brought for relief against the mtgee., & to set aside the grant to deft. of the place of steward to a manor of pltf.'s, as obtained by fraud. Lord Hardwick relieved pltf., both in respect to the transactions relating to the mtge., & also in regard to the grant of the stewardship.—THORNHILL *v.* EVANS (1742), 2 Atk. 330 ; 9 Mod. Rep. 331 ; 26 E. R. 601, L. C.

Annotations :—**Refd.** Blackburn *v.* Warwick (1836), 2 Y. & C. Ex. 92. **Mentd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677.

3981. —— **Proof in bankruptcy of mortgagor.**]—*Re* FANE, *Ex p.* HOPE, [1888] W. N. 231, C. A.

Annotation :—**Mentd.** *Re* London, Windsor & Greenwich Hotels Co., Quartermaine's Case, [1892] 1 Ch. 639.

3982. What amounts to agreement—Not mere signing of account—Admitting interest due.]—BROWN *v.* BARKHAM, No. 3944, *ante*.

3983. —— **Not mere intimation by mortgagee—Of intention to charge.**]—Upon a correspondence between mtgee. & mtgor., in which the former states his intention, if the interest is not paid, to add it to the principal, & to charge same interest upon the amount as the mtge. bears, & the latter replies that he cannot pay the interest, & that it must be added to the claim of the mtgor. :—*Held :* there was nothing amounting to an agreement to pay compound interest, & the claim of the mtgee. was not allowed.—TOMPSON *v.* LEITH (1858), 32 L. T. O. S. 100 ; 4 Jur. N. S. 1091.

Annotation :—**Refd.** *Re* Morris, Mayhew *v.* Halton, [1921] 1 Ch. 172.

3984. Order for payment of principal & interest into court—Extension of time—Interest during extension on principal only.]—B., on whose estate pltf. had a charge for principal & interest, being desirous of paying it instead of having it raised out of the estate, was ordered to pay it into ct. by a given day. He made default, & applied for an extension of the time, which was granted :—*Held :* pltf. was not entitled to subsequent interest on the aggregate of principal & interest due, but on the principal only.—WILKINSON *v.* CHARLESWORTH (1840), 2 Beav. 470 ; 48 E. R. 1263.

Annotations :—**Folld.** Whitfield *v.* Roberts (1861), 7 Jur. N. S. 1268 ; Arden *v.* Arden (1885), 29 Ch. D. 702. **Apprvd.** Gresham Life Assce. Soc. *v.* Crowther, [1915] 1 Ch. 214. **Refd.** Elton *v.* Curtois (1881), 45 L. T. 435.

Interest after master's report.]—*See* Sect. 10, *post*.

Interest after transfer.]—*See* Sect. 11, *post*.

Interest as against puisne incumbrancers.]—*See* Sect. 12, *post*.

SECT. 6.—OVERPAYMENTS AND UNDERPAYMENTS.

3985. Interest received at rate lower than reserved—Mortgage deed mislaid—Underpayment made good to mortgagee.]—Where a mtge. deed had been mislaid for many years, & interest had been paid & received at a lower rate than that reserved by the deed, the payment having been made during a portion of the time under a decree in an administration suit on an erroneous affidavit as to the contents of the missing deed :—*Held :*

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that, "on default in payment of any instalment of interest, such interest shall at once become principal & bear interest at the rate aforesaid," the account in the master's office should be taken with half-yearly rests, the interest being compounded half-yearly.—CANADA PERMANENT LOAN & SAVINGS CO. *v.* HILLIARD (1885), 3 Man. L. R. 32.—**CAN.**

h. ——.]—IMPERIAL TRUSTS CO. *v.* NEW YORK SECURITY & TRUST CO. (1905), 5 O. W. R. 213 ; 10 O. L. R. 289.—**CAN.**

k. ——.]—Where a mtge. deed provides only for the payment of simple interest, the assent of the mtgor. to accounts of interest in arrear, prepared by the mtgee. & computed with half-yearly rests, does not amount to a contract to pay compound interest where such assent was given under the mistaken belief that such a charge was authorised by the mtge. deed.—SINCLAIR *v.* DANIELL (1880), O. B. & F. (C. A.) 1.—**N.Z.**

PART XVII. SECT. 6.

l. *Interest received at rate higher than reserved — After principal due.*]—A mtge. having properly borne interest at 8 per cent. during its currency, & this having been regularly paid, the parties went on after the mtge. fell due, the one paying & the other receiving the 8 per cent. for a long period, in ignorance that the liability was to pay only 6 per cent. :—*Held :* the money could not be recovered back by the mtgor. as money paid

Sect. 6.—Overpayments and underpayments. Sects. 7, 8, 9, 10 & 11.]

the case not being one to which Stat. Limitations applied, a tenant for life of the interest on the mtge. debt, who was not shown to have agreed to take less than the reserved interest, was entitled to payment of the difference since she became tenant for life. — GREGORY *v.* PILKINGTON (1856), 8 De G. M. & G. 616; 26 L. J. Ch. 177; 5 W. R. 57; 44 E. R. 528, L. JJ.

3986. Interest on amount greater than held charged—Overpayment not in reduction of principal.]—Interest was paid on a mtge. of £360 from 1829 to 1852, but the ct., in 1857, decided, that £110 of the £360 was not well charged on the property:—*Held:* in taking the accounts, the interest, thus paid for twenty three years on the £110, ought not to be treated as payments in discharge of the capital of the remaining £250.—BLANDY *v.* KIMBER (No. 2) (1858), 25 Beav. 537; 53 E. R. 742.

SECT. 7.—INTEREST BY WAY OF DAMAGES.

3987. General rule.]—There is no authority . . . that where a security for money payable at a certain date stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is implied to be payable afterwards. On the contrary the distinction seems to be well established between cases where the interest is expressly reserved in the instrument, & where it is not. In the latter case it is recoverable not as interest according to the contract, but as damages for the breach of it (LORD CHELMSFORD).—COOK *v.* FOWLER (1874), L. R. 7 H. L. 27; 43 L. J. Ch. 855, H. L.

Annotations:—**Consd.** *Re* Dixon, Heynes *v.* Dixon, [1900] 2 Ch. 561. **Refd.** Wallington *v.* Cook (1878), 47 L. J. Ch. 508; Goldstrom *v.* Tallerman (1886), 18 Q. B. D. 1; Di Ferdinando *v.* Simon, Smits, [1920] 3 K. B. 409.

3988. Rate of interest allowed—5 per cent.]—Mtgor. covenanted to pay the principal & interest at the rate of 5 per cent. per month on a fixed day, & charged a reversionary interest, with payment of the principal & interest, "at the rate aforesaid," but there was no further covenant for payment of interest. In taking accounts in a mtgee.'s action, the mtgee. was allowed interest after the fixed day at the rate of 5 per cent. *per annum* only.—WALLINGTON *v.* COOK (1878), 47 L. J. Ch. 508.

3989. —— ——.]—By a mtge. deed reciting an agreement for an advance at 10 per cent. the mtgor. covenanted for payment of the principal sum at the expiration of twelve months, & for the payment of interest in the meantime at the rate of 10 per cent. *per annum*, but there was no covenant as to payment of interest in the event of the principal sum, or any part of it, remaining unpaid after the day named for repayment. The money was not repaid on the day, but interest at 10 per cent. was paid for several years. The mtgor. having died, & a decree having been made for administration of his estate, the mtgee. proved as a creditor for the principal sum & interest:—*Held:* interest was recoverable only as damages, & ought to be limited to 5 per cent.—*Re* ROBERTS, GOODCHAP *v.* ROBERTS (1880), 14 Ch. D. 49; 42 L. T. 666; 28 W. R. 870, C. A.

Annotations:—**Consd.** *Re* King, *Ex p.* Furber (1881), 17 Ch. D. 191; Mellersh *v.* Brown (1890), 45 Ch. D. 225. **Refd.** *Re* Frisby, Allison *v.* Frisby (1889), 43 Ch. D. 106.

3990. —— ——.]—A mtge. of reversionary interests in personal estate contained a covenant by the mtgor. for payment of the mtge. money with interest at 5 per cent. on a specified day; but there was no provision for payment of any subsequent interest. No interest was ever paid. Fourteen years after the date of the mortgage an action was brought for foreclosure & the usual decree was made:—*Held:* redemption could only be allowed on payment of interest at 5 per cent. for the whole period of fourteen years.—MELLERSH *v.* BROWN (1890), 45 Ch. D. 225; 60 L. J. Ch. 43; 63 L. T. 189; 38 W. R. 732.

Annotation:—**Apld.** *Re* Stucley, Stucley *v.* Kekewich, [1906] 1 Ch. 67.

3991 to execute legal mortgage—At stated interest.]—*Re* KING, *Ex p.* FURBER, No. 497, *ante*.

3992. Covenant not to transfer until payment.]—MATHURA DAS *v.* RAJA NARINDAR BAHADUR PAL (1896), 12 T. L. R. 609, P. C.

SECT. 8.—INTEREST ON REDEMPTION.

See Part VII., Sect. 8, sub-sect. 3, B. (*a*), *ante*.

SECT. 9.—INTEREST AFTER JUDGMENT.

See JUDGMENTS, Vol. XXX., pp. 164, 165, Nos. 334–339.

SECT. 10.—INTEREST AFTER MASTER'S REPORT.

3993. On what amount payable—Amount found due for principal & interest.]—BROWN *v.* BARKHAM, No. 3944, *ante*.

3994. —— ——.]—Subsequent interest on a mtge. to be calculated upon the principal & interest reported due.—PERKYNS *v.* BAYNTON (1784), 1 Bro. C. C. App. 574; 28 E. R. 1305, L. C.

Annotation:—**Refd.** Whatton *v.* Cradock (1836), 1 Keen, 267.

3995. —— —— **& costs.**]—What is due for principal, interest, & costs on a mtge. shall carry interest from the confirmation of the report, & the principal shall bear interest from the date to the

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under a mistake, nor could the excess of interest be applied in reduction of the principal in a redemption action.—STEWART *v.* FERGUSON (1899), 31 O. R. 112.—**CAN.**

m. —— *Right to recover overpayments.*]—*Re* JONES'S ESTATE, [1914] 1 I. R. 188.—**IR.**

n. *Interest on amount greater than held charged—Overpayment in reduction of principal.*]—*Re* CARROLL'S ESTATE, [1901] 1 I. R. 78.—**IR.**

PART XVII. SECT. 7.

3987 i. *General rule.*]—Where a mtge. contains no covenant to pay interest after the date fixed for redemption, the mtgee. after default is entitled to recover damages for non-payment of the principal; these damages will not be less than the amount of interest at the rate of 5 per cent. *per annum* on the mtge. debt.—MCI'HERSON *v.* SUMMERVILLE (1905), 6 S. R. N. S. W. 1; 22 N. S. W. W. N. 224.—**AUS.**

3987 ii. ——.]—By the terms of a mtge. in which the principal was payable by instalments, interest was reserved at the rate of 8 per cent. *per annum* "until payment in full":—*Held:* these words related to the period fixed for the payment of principal, & interest was recoverable after that time only as damages.—POWELL *v.* PECK (1888), 15 A. R. 138.—**CAN.**

3987 iii. ——.]—A mtge. contained no proviso for payment of interest at the rate therein specified after maturity, but merely a covenant to pay same "at the day & time & in manner above mentioned":—*Held:* interest after maturity was recoverable only as damages for detention of the principal, at the statutory rate of 6 per cent.—CUNNINGHAM *v.* HAMILTON (1897), 5 B. C. R. 539.—**CAN.**

PART XVII. SECT. 10.

3993 i. *On what amount payable—Amount found due for principal & interest.*]—UNIACKE *v.* BRUNDIGE (1856), 2 Thom. 57.—**CAN.**

confirmation.—JACOB *v.* SUFFOLK (EARL) (1728), Mos. 27 ; 25 E. R. 250, L. C.

3996. —— —— ——.]—After the report of principal, interest & costs on mtge., & time enlarged, with order to compute subsequent interest, this subsequent interest shall be computed on the aggregate reported sum of principal, interest, & costs, & not on the principal only ; & agreed the practice in Chancery to be the same. —ROBINSON *v.* PENNYMAN (1790), 7 Sim. 483, n. ; 58 E. R. 922.

3997. —— —— ——.]—Rule as to the computation of subsequent interest, where the amount of the principal, interest, & costs, due upon a mtge., has been found by the master's report.—BREWIN *v.* AUSTIN (1838), 2 Keen, 211 ; 48 E. R. 609.

3998. —— —— ——.]—ELTON *v.* CURTEIS, No. 4016, *post.*

3999. —— **On principal only.**]—WHATTON *v.* CRADOCK, No. 3309, *ante.*

4000. At what rate payable—Rate in deed reduced where other mortgagee & creditors.] —A decree for a sale of an estate in mtge., the master reported a stated sum due to the mtgee. for principal & interest, & report confirmed ; as the mtge. is at 5 per cent. & there is another mtgee. & creditors besides, from the time of the master's report being confirmed, it shall carry only 4 per cent.—HARRIS *v.* HARRIS (1750), 3 Atk. 722 ; 26 E. R. 1214, L. C.

Annotations :—**Consd.** Elton *v.* Curteis (1881), 19 Ch. D. 49. **Reld.** Whatton *v.* Cradock (1836), 1 Keen, 267.

4001. From what date payable—From confirmation of report.]—JACOB *v.* SUFFOLK (EARL), No. 3995, *ante.*

4002. —— ——.]—HARRIS *v.* HARRIS, No. 4000, *ante.*

SECT. 11.—**INTEREST AFTER TRANSFER.**

4003. Arrears due at transfer paid by transferee—Whether capitalised.] —Mtgee. assigns over for £1,500 the amount of the principal, & interest shall be paid to the assignee on redemption.—ANON. (1660), Freem. Ch. 145 ; 22 E. R. 1118.

4004. —— ——.]—All money really due & paid by the assignee to mtgee. to be taken as principal against the mtgor. from the time of the assignment.—SMITH *v.* PEMBERTON (1665), 1 Cas. in Ch. 67 ; Freem. Ch. 184 ; 1 Eq. Cas. Abr. 287 ; 22 E. R. 698, L. C.

Annotation :—**Reld.** Porter *v.* Hubbart (1672), 3 Rep. Ch. 78.

4005. —— ——.]—ANON. (1675), 1 Cas. in Ch. 258 ; Freem. Ch. 142 ; 22 E. R. 789.

4006. —— ——.]—A mtge. made for £450 payable at the end of five years, with interest at 5 per cent. in the meantime. About two months before the end of the five years, the mtgee. assigned over the mtge. for £500, being the principal & interest then due. The £500 shall carry interest, though the five years were not elapsed ; the mtge. being forfeited by the non-payment of the interest. —GLADWYN *v.* HITCHMAN (1690), 2 Vern. 135 ; 1 Eq. Cas. Abr. 287 ; 23 E. R. 695.

4007. —— —— **Necessity for concurrence by mortgagor.**]—A. mortgages to B. for security of £500, the interest runs on for seven years unpaid, so that the money due to the mtgee. is then £710 ; then the mtgee., upon receipt of this £710 from S. assigns this mtge. to him :—*Held :* S. shall not reckon interest for £710 from the time of the assignment, but only for the £500 which was the original principal, for if that should be allowed, by that means the mtgee. might assign over every six months, & by that device have interest upon interest.—ANON. (1674), Freem. Ch. 303 ; 22 E. R. 1225.

4008. —— —— ——.]—Mtgee., after money is incurred for interest, assigns over to one that pays him his principal & interest : the question was, whether or no this assignee, upon the redemption, should have interest for the interest, & this difference was taken, that when a mtgee. assigns, with the consent of the mtgor., to one that pays him the principal & interest, there the interest & principal are consolidated by the consent of the mtgor., & there, upon redemption, the assignee shall have interest for the whole sum that he disburses ; & so it is, if the mtgor. & mtgee. state their account & come to an agreement to continue the money longer. But if a mtgee. assign over without the consent of the mtgor., there no interest shall be allowed to the assignee for what he pays for interest ; for if that should be allowed, the scriveners of London would make a trade of assigning every six months, & so turn their interest into principal, & by that means receive interest upon interest.—PORTER *v.* HOBBARD (1677), as reported in Freem. Ch. 30 ; 22 E. R. 1039.

4009. —— —— ——.]—MACCLESFIELD (EARL) *v.* FITTON (1683), 1 Vern. 168 ; 23 E. R. 392.

4010. —— —— ——.]—The general rule is, where a man makes a security on mtge., & there is an arrear of interest thereon, if the incumbrancer assigns the same, with the concurrence of the mtgor. the interest paid to the mtgee. by the assignee shall be taken as principal, & carry interest . . . ; but where it is assigned without the consent of the mtgor., the assignee must take it only upon the same terms with the assignor (LORD HARDWICKE, C.).—ASHENHURST *v.* JAMES (1745), 3 Atk. 270 ; 26 E. R. 958, L. C.

4011. —— —— ——.]—MATTHEWS *v.* WALLWYN, No. 3663, *ante.*

4012. —— —— —— **Effect of mortgagor's refusal to pay or join in transfer.**]—Mtge. assigned with or without the privity of the mtgor., the difference as to interest.

If a considerable sum be due for interest on a mtge., & the mtgee. assigns over for the consideration of so much as the principal & interest come to, if this assignment be without the privity of the mtgor. then the interest shall be carried on only upon the principal ; but if the mtgee. had applied to the mtgor. before, & demanded his money, & required him to join in the assignment, if the mtgor. refuses either to pay or join, the assignee shall carry interest both on the principal & interest.—ANON. (1719), Bunb. 41 ; 145 E. R. 588.

4013. —— —— **Transfer taken to prevent sale.**] —An estate subject to a mtge. was vested in C. upon trust to set apart out of the rents a fixed yearly sum, out of which he was to pay the interest on the mtge. & accumulate the residue as a sinking fund to pay off the principal. In June, 1804, the interest being in arrear, the mtgees. advertised the property for sale. C. thereupon applied to F. to pay off the mtgees. & take a transfer, which he agreed to do. The mtgees. would not stop the sale unless the whole arrear of interest & their

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PART XVII. SECT. 11.

o. *Transfer to private person—By loan company—Right to same rate of interest.*]—A loan co., being the holders of a mtge. bearing 8 per cent. interest, transferred the same to a private individual :—*Held :* the assignee was entitled to enforce payment of the stipulated interest, notwithstanding that at the time of the creation of the incumbrance the co. only could legally have reserved such a rate of interest.—REID *v.* WHITEHEAD (1864), 10 Gr. 446.—**CAN.**

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costs were paid them, which F. at once did; & he subsequently paid them the interest down to Sept. 1864. The transfer was not made till Aug. 1865, & it purported to transfer the principal sum with interest only from Sept. 1864. A contemporaneous deed was executed by which C. purported to charge the estate with the payment of a principal sum made up of the payments by F. in 1864, & the costs & interests thereon. It was admitted that this deed was invalid, as being beyond the powers of the trustee. A bill for redemption having been filed by the beneficial owners:—*Held:* F. was entitled to charge in his accounts the sums paid by him in 1864 for interest, notwithstanding the form of the deeds of 1865, & the fact that C. was guilty of a breach of trust in allowing the interest to be in arrear.—COTTRELL *v.* FINNEY (1874), 9 Ch. App. 541; 43 L. J. Ch. 562; 30 L. T. 733, L. JJ.

SECT. 12.—INTEREST AS AGAINST PUISNE INCUMBRANCERS.

4014. Whether interest added to principal—Prior incumbrancer taking possession—No interest demanded from mortgagor.]—A. mortgages to B., & after to C., then B. enters, & after suffers A. the mtgor. to receive the profits for several years, without requiring interest. This interest shall not be charged on the lands to keep out C.—BENTHAM *v.* HAINCOURT (1691), Prec. Ch. 30; 1 Eq. Cas. Abr. 320, pl. 2; 24 E. R. 16.

4015. —— Prior incumbrancer with notice of subsequent incumbrancers.]—Prior incumbrancer cannot turn interest into principal against a subsequent incumbrancer, having notice.—DIGBY *v.* CRAGGS (1763), Amb. 612; 2 Eden, 200; 27 E. R. 396, L. C.

4016. —— Redemption by puisne incumbrancer.]—When a judgment for foreclosure, obtained by a first mtgee. against subsequent mtgees. & the mtgor., directs successive redemptions, & foreclosures in default of redemption, & a puisne mtgee. fails to pay the amount found due from him to the prior mtgee. for principal, interest, & costs, & is accordingly foreclosed, in taking the account against the person next entitled to redeem, subsequent interest ought to be computed on the whole sum found due from the person who has failed to redeem, *i.e.*, upon the interest found due from him, as well as upon the principal & costs.—ELTON *v.* CURTEIS (1881), 19 Ch. D. 49; 51 L. J. Ch. 60; 45 L. T. 435; 30 W. R. 316.

SECT. 13.—INTEREST ON MORTGAGES OF SETTLED PROPERTY.

4017. Neglect to obtain interest from tenant for life—Recovery of arrears from remainderman.]—Incumbrancer entitled to arrears of interest against remainderman, though by laches he omitted to obtain interest from the tenant for life.—ROE *v.* POGSON (1816), 2 Madd. 457; 56 E. R. 403.

4018. Mortgagee husband of tenant in tail—Interest during wife's tenancy—Redemption by reversioner after wife's death.]—(1) Husband of tenant in tail takes in a mtge. & is in receipt of the rents & profits. On a bill to redeem by reversioner after the wife's death, no interest allowed to the husband during his wife's life time.

(2) As to tenant for life keeping down the interest of an incumbrance. Real estate rendered by a testator primarily liable.—AMESBURY *v.* BROWN (1750), 1 Ves. Sen. 477; 27 E. R. 1152, L. C.

Annotations:—*As to* (2) **Refd.** Jones *v.* Morgan (1783), 1 Bro. C. C. 206. *Generally*, **Refd.** Burges *v.* Mawbey (1823), Turn. & R. 167. **Mentd.** Davies *v.* Ashford (1845), 15 Sim. 42.

Liability as between tenant for life & remainderman.]—*See* SETTLEMENTS.

SECT. 14.—EFFECT OF TENDER.

4019. General rule—Interest ceases to run from date of tender.]—Mtgee. refusing to receive his money on tender after forfeiture, shall lose his interest from the tender.—MANNING *v.* BURGES (1663), 1 Cas. in Ch. 29; Freem. Ch. 174; 22 E. R. 678.

Annotations:—**Follid.** Webb *v.* Crosse, [1912] 1 Ch. 323. **Refd.** Graham *v.* Seal (1918), 88 L. J. Ch. 31.

4020. —— ——.]—JOHNSON *v.* EVANS, No. 4379, *post.*

4021. —— ——.]—ROURKE *v.* ROBINSON, No. 3457, *ante.*

4022. Money must be kept continuously available—No profit made.]—A deed in nature of a mtge. covenant to reconvey on payment; the money was tendered at the day & place, & refused; decreed the money without interest from the time of the tender & to reconvey, though pltf. ought to make oath that the money was kept, & no profit made of it.—LUTTON *v.* RODD (1675), 2 Cas. in Ch. 206; 22 E. R. 913.

4023. —— ——.]—As to tender of mtge. money, there ought to be reasonable notice of paying it in; & if the tender be insisted on to stop interest, the money must be kept dead from that time, because the party is to be *uncore prist.* Six months' notice given to pay in the mtge. money at Lincoln's Inn Hall, though this be not the place mentioned in the proviso of the deed, yet where money was lent in town, & no objection made to the notice, no reason for a personal tender, or to make a man carry a great sum to a person in the country.—GYLES *v.* HALL (1726), 2 P. Wms. 378; 24 E. R. 774, L. C.

Annotations:—**Apld.** Kinnaird *v.* Trollope (1889), 42 Ch. D. 610. **Refd.** Bank of New South Wales *v.* O'Connor (1889), 14 App. Cas. 273; Yungmann *v.* Briesemann (1892), 67 L. T. 642.

4024. —— ——.]—EDMONDSON *v.* COPLAND, No. 4277, *post.*

4025. ——.]—KINNAIRD *v.* TROLLOPE, No. 4028, *post.*

-.]—*See* CONTRACT, Vol. XII., p. 322, Nos. 2661–2666.

PART XVII. SECT. 13.

p. *Arrears.*]—A mtge. had been created by a married woman upon her estate; after her death, a suit praying a sale of the mtged. premises was brought against her husband & her children; & the ct., in directing a sale of the mtged. property, refused to make the estate of the children liable to arrears of interest for more than six years.—TAYLOR *v.* HARGRAVE (1872), 19 Gr. 271.—**CAN.**

q. ——.]—CAULFIELD *v.* MAGUIRE (1845), 2 Jo. & Lat. 141.—**IR.**

PART XVII. SECT. 14.

4019 i. *General rule—Interest ceases to run from date of tender.*]—CHALIKANI VENKATARAYANIM *v.* ZAMINDAR OF TUNI (1922), I. L. R. 46 Mad. 108.—**IND.**

4019 ii. —— ——.]—RAMABHADRA THEVAR *v.* ARIMACHALAM PILLAI (1926), I. L. R. 49 Mad. 609.—**IND.**

4022 i. *Money must be kept continuously available—No profit made.*]—In equity a tender by a mtgor. stops interest, unless the mtgee. shows that the money was afterwards used by the mtgor. & a profit made of it.—KNAPP *v.* BOWER (1871), 17 Gr. 695.—**CAN.**

r. *After commencement of suit for*

4026. Necessity for strict tender.]—If strict tender not made by mtgor., interest is not stopped. —BISHOP *v.* CHURCH (1751), 2 Ves. Sen. 371; 28 E. R. 238, L. C.

Annotations :—**Apld.** Kinnaird *v.* Trollope (1889), 42 Ch. D. 610. **Mentd.** Hoare *v.* Contencin (1779), 1 Bro. C. C. 27; ——— *v.* Burn (1798), 3 Ves. 573; Ball *v.* Storie (1823), 1 Sim. & St. 210; Devaynes *v.* Noble (1831), 2 Russ. & M. 495; Beresford *v.* Browning, Browning *v.* Beresford (1875), L. R. 20 Eq. 564.

4027. ——.]—Interest on mtge. not stopped but on proper tender & notice. Not upon proposals to deduct upon open account on the other side, nor costs.—GARFORTH *v.* BRADLEY (1755), 2 Ves. Sen. 675; 28 E. R. 430, L. C.

Annotations :—**Consd.** Kinnaird *v.* Trollope (1889), 42 Ch. D. 610. **Mentd.** Mitford *v.* Mitford (1803), 9 Ves. 87; Richards *v.* Richards (1831), 2 B. & Ad. 447; Scarpellini *v.* Atcheson (1845), 7 Q. B. 864; Fitzgerald *v.* Fitzgerald (1849), 8 C. B. 592; De Wahl *v.* Braune (1856), 1 H. & N. 178; Fleet *v.* Perrins (1869), L. R. 4 Q. B. 500.

4028. —— **Summons to stay proceedings.**]—Defts. mortgaged leasehold property to pltfs., & afterwards sold & assigned the equity of redemption therein to B., who further charged the property in favour of pltfs. B. having become insolvent, pltfs. brought an action against defts. upon the covenants in the original mtge. for the principal money & interest thereby secured. Defts. then took out a summons asking that, upon payment within one month of the principal money claimed in the action, with interest down to the date of payment, & costs, all further proceedings in the action might be stayed, & that pltfs. upon such payment might reconvey the mtged. property to defts. Pltfs. refused to reconvey, except upon payment of the moneys payable under the further charge, as well as those payable under the mtge. A special case was then stated in the action, upon which the question was decided against pltfs., the costs being reserved. Accounts were then taken in the action as between pltfs. & defts., including an account of what was due under the mtge, & in taking such accounts the Chief Clerk computed & certified interest on the principal moneys secured by the mtge. down to the date of payment. Upon a summons taken out by defts. to vary the Chief Clerk's certificate, by disallowing all interest subsequent to the date of the summons to stay proceedings :—*Held :* (1) the summons for the stay of proceedings was not equivalent to a tender by defts., & interest must be paid by them down to the date of the payment of the principal; (2) where no actual offer of money is made, nor any payment into ct. under R. S. C., Ord. 22, rr. 1, 3, the ct. must, before allowing a plea of tender, be satisfied of that continued readiness to pay which, both at law & in equity, is essential to the success of such a plea.

(3) Upon the further consideration of the action :—*Held :* pltfs. were not entitled to such part of the costs of the action as were occasioned by their having unsuccessfully disputed defts.' right to redeem.—KINNAIRD *v.* TROLLOPE (1889), 42 Ch. D. 610; 58 L. J. Ch. 556; 60 L. T. 892; 5 T. L. R. 513.

Annotations :—*As to* (3) **Reld.** Santley *v.* Wilde (1899), 43 Sol. Jo. 262; Rourke *v.* Robinson, [1911] 1 Ch. 480.

4029. —— **Tender insufficient as defence to action at law.**]—(1) A tender by a mtgor. to a mtgee. of mtge. moneys due need not, in order to prevent further interest running, necessarily be such a tender as would afford a defence to an action at law.

(2) Where the tender is made conditional on the execution of a reconveyance, a reasonable time must be allowed to obtain the execution of the deed, especially when the conveying parties are not the persons to whom the tender is to be made.

(3) As a general rule, the costs of reconveyance fall on the mtgor., & the costs of obtaining a vesting order of land where the legal estate is in an absconding trustee mtgee. are no exception to the general rule.—WEBB *v.* CROSSE, [1912] 1 Ch. 323; 81 L. J. Ch. 259; 105 L. T. 867; 56 Sol. Jo. 177.

Annotations :—*As to* (1) **Consd.** Graham *v.* Seal (1918), 88 L. J. Ch. 31. *As to* (2) **Consd.** Graham *v.* Seal (1918), 88 L. J. Ch. 31.

4030. —— **Unequivocal refusal of proposed payment.**]—CHALIKANI VENKATARAYANIM *v.* TUNI (ZAMINDAR), No. 3789, *ante*.

4031. —— **Letter contesting necessity for payment.**]—CHALIKANI VENKATARAYANIM *v.* TUNI (ZAMINDAR), No. 3789, *ante*.

4032. Payment into court.] — Mtgee. having refused to reconvey & deliver up the title deeds, though the amount of the mtge. money & interest was tendered to him on the day on which the mtge. was redeemable, a decree was made against him, with costs; & the money having been paid into ct., no interest was allowed to him subsequent to the tender.—ROBARTS *v.* JEFFERYS (1830), 8 L. J. O. S. Ch. 137.

Annotation :—**Mentd.** *Re* Taylor, Stileman & Underwood, [1891] 1 Ch. 590.

4033. ——.]—KINNAIRD *v.* TROLLOPE, No. 4028, *ante*.

4034. ——.] — EDMONDSON *v.* COPLAND, No. 4277, *ante*.

——.]—*See* CONTRACT, Vol. XII., p. 322, Nos. 2667–2672.

4035. Payment delayed by conduct of mortgagee.] —Where a mtgor. did all that was incumbent on him for the purpose of, but was prevented from discharging himself of the mtge. debt by the act of the mtgee., by whose conduct he was subsequently driven to file a bill to redeem, the ct. declared, that the interest on the mtge. debt stopped on the day on which the mtgor. had perfected all that was incumbent on him for so discharging himself, & ordered the mtgee. to pay him his costs of the suit.—CLIFF *v.* WADSWORTH (1843), 2 Y. & C. Ch. Cas. 598; 7 Jur. 1008; 63 E. R. 268.

4036. ——.]—There having been a mtge. created by pltf., in respect of which pltf. was indebted, the amount due upon the mtge. was paid by pltf. & in an ordinary case he would be entitled to the benefit of the ordinary rights arising out of that state of circumstance. . . . That consequence was prevented by the conduct of deft., & we are now asked to allow him interest in respect of a delay arising from his own wrong. I think that the claim urged by [counsel] cannot be maintained (KNIGHT BRUCE, L.J.).—THORNTON *v.* COURT (1854), 3 De G. M. & G. 293; 22 L. J. Ch. 361; 20 L. T. O. S. 318; 17 Jur. 151; 43 E. R. 151, L. JJ.

Annotation :—**Mentd.** Walker *v.* Jones (1866), L. R. 1 P. C. 50.

4037. Omission to attend to receive money—At time & place fixed.]—In a suit to redeem, the mtgee. having, by mistake, omitted to attend at the time & place fixed by the master for payment of the sum computed to be due to him for principal,

foreclosure.]—When a mtge. becomes forfeited by non-payment of the interest, & a suit for foreclosure is brought, the suit can only be terminated by payment of the principal, interest & costs, & in such a case, a tender of the interest due & costs of the suit is of no avail.—MARITIME WARE- & DOCK CO. & MARITIME BANK OF DOMINION OF CANADA *v.* NICHOLSON (1884), 24 N. B. R. 170.—CAN.

Sect. 14.—*Effect of tender. Sects.* 15 *&* 16. *Part XVIII. Sect.* 1.]

interest & costs, the ct., upon motion, with notice, appointed a new time & place for the payment of the money ten days after the date of the order.—HUGHES *v.* WILLIAMS (1853), Kay, App. iv.; 69 E. R. 313.

Mortgagee refusing to reconvey.]—*See* Part VII., Sect. 8, sub-sect. 3, B. (*c*), *ante*.

SECT. 15.—EFFECT OF STATUTES OF LIMITATION.

See LIMITATION OF ACTIONS, Vol. XXXII., pp. 421–424, Nos. 984–1009.

Acknowledgment by one of two executors & trustees.]—*See* EXECUTORS, Vol. XXIII., p. 363, No. 4301.

SECT. 16.—OTHER CASES.

4038. Bond for mortgage debt & arrears of interest—Receipt for interest indorsed on mortgage—Bankruptcy of obligee—Right to interest notwithstanding indorsement.]—Mtgee., upon the trust premises, under a title prior to the devise, having a great arrear of interest due upon her mtge., in 1778 accepted a bond from M. the bkpt., for the payment thereof with interest, & at the same time indorsed upon the mtge. deed a receipt of the interest up to that time. The bond remained unpaid at the time of the bkpcy.:—*Held:* the mtgee. was entitled to interest on the mtge. notwithstanding the indorsement.—HARDWICK *v.* MYND (1794), 1 Anst. 109; 145 E. R. 815.

4039. Arrear of interest on legacy from mortgagee to mortgagor—Right of devisee of equity of redemption to set off—Against interest due on mortgage.]—Devisee of an equity of redemption not entitled to have an arrear of interest upon a legacy from the mtgee. to the mtgor. set off against the interest due upon the mtge.—PETTAT *v.* ELLIS (1804), 9 Ves. 563; 32 E. R. 721.

Annotation:—**Refd.** Wallis *v.* Bastard (1853), 4 De G. M. & G. 251.

4040. Mortgage debt secured by bond—Interest beyond penalty of bond.]—Interest beyond the penalty of a bond upon a mtge. for the same debt; though by a surety.—CLARKE *v.* ABINGDON (LORD) (1810), 17 Ves. 106; 34 E. R. 41.

Annotations:—**Refd.** Grant *v.* Grant (1830), 3 Sim. 340; Hughes *v.* Wynne (1832), 1 My. & K. 20; Mathews *v.* Keble (1867), L. R. 4 Eq. 467; *Re* European Central Ry., *Ex p.* Oriental Financial Corpn. (1876), 4 Ch. D. 33.

Part XVIII.—Costs, Charges, and Expenses.

SECT. 1.—IN GENERAL.

See, generally, R. S. C., Ord. 65.

4041. To what mortgagee entitled—General rule—All costs & expenses reasonably incurred.]—(1) Mtgee., though entitled to costs in general, deprived of costs occasioned by improper conduct; & even compelled to pay costs.

A mtgee. acting reasonably as such, is to have his reasonable expenses (LORD ELDON, C.).

(2) The first obligation upon deft., standing in that relation to pltf., is, a duty upon his part perfectly easy, that his accounts ought to have been quite clear. The conclusion upon his answer to this bill for an account, that his accounts would not be ready for six weeks, is, that he had not done his duty (LORD ELDON, C.).—DETILLIN *v.* GALE (1802), 7 Ves. 583; 32 E. R. 234, L. C.

Annotations:—*As to* (1) **Apld.** Harvey *v.* Tebbutt (1820), 1 Jac. & W. 197; Dryden *v.* Frost (1838), 3 My. & Cr. 670. **Refd.** Taylor *v.* Baker (1818), Dan. 71; Archdeacon *v.* Bowes (1824), M'Cle. 149; Roberts *v.* Williams (1841), 5 Jur. 1057; National Provincial Bank of England *v.* Games (1886), 31 Ch. D. 582; Wales *v.* Carr, [1902] 1 Ch. 860. *Generally*, **Mentd.** Abbey *v.* Petch (1842), 1 Y. & C. Ch. Cas. 258.

PART XVII. SECT. 16.

t. *Computation of interest—Payment after default.*]—Where a mtge. contains a covenant for payment at a future date, which has not arrived, & for payment of interest in the meantime, & where the mtgor., after default & notice pays off principal & interest before such future date, the mtgee. is entitled to payment of interest only up to the date at which the principal money comes into his hands.—EWART *v.* GENERAL FINANCE, ETC., SOCIETY OF AUSTRALASIA (1889), 15 V. L. R. 625.—**AUS.**

v. MCPAUL (1912), 13 S. R. N. S. W. 171; 30 N. S. W. W. N. 4.—**AUS.**

a. —— *Payment after bill filed for foreclosure.*]—Where a bill is filed to foreclose a mtge. payable by instalments, & deft. moves to dismiss on payment of the instalment & interest then due, the interest upon the mtge. money is only to be computed up to the day named for payment in the mtge., & not to the time of making the application.—STRACHAN *v.* MURNEY (1858), 6 Gr. 378.—**CAN.**

b. —— *Covenant to pay principal & interest in instalments.*]—HALL *v.* BROWN (1858), 15 U. C. R. 419.—**CAN.**

c. *What amounts to payment of interest—Acceptance of draft—Subsequent dishonour.*]—CAMERON *v.* KNAPP (1858), 7 C. P. 502.—**CAN.**

d. *Date when interest ceases to be payable—Mortgagor unable to redeem—Loss of title deeds.*]—Where a mtgor. is unable to redeem at the time fixed for redemption, owing to the mtgee. not being able to hand over the title deeds, interest stops running in favour of the mtgee., whether the loss of the deeds is attributable to negligence on his part or not.—PERPETUAL TRUSTEE CO., LTD. *v.* GREGG (1914), 14 S. R. N. S. W. 266; 31 N. S. W. W. N. 97.—**AUS.**

e. —— *Interest payable half-yearly in advance—Bill for sale filed by mortgagee.*]—TRUST & LOAN CO. *v.* KIRK (1880), 8 P. R. 203.—**CAN.**

f. *Power of distress for arrears of interest—Exercise of power by mortgagee.*]—LA VASSAIRE *v.* HERON (1880), 45 U. C. R. 7.—**CAN.**

g. *Appeal from master—Whether more than six years' interest allowed.*]—On an appeal from a report of a master who had allowed more than six years' arrears of interest in taking an account of what was due on a mtge. containing a covenant to pay interest. In a foreclosure suit:—*Held:* interest when due for more than six years should be allowed in taking the mtge. account instead of allowing it for six years only, & compelling pltf. to bring another action on the covenant to recover the balance.—MACDONALD *v.* MCDONALD (1886), 11 O. R. 187.—**CAN.**

h. *Action for instalment of interest within jurisdiction—Outstanding instalments bringing amount outside jurisdiction.*]—A mtgee. cannot sue in the div. ct. for the amount of an instalment of interest within the jurisdiction of that ct., when other instalments of interest are due which bring the whole amount beyond the jurisdiction.—*Re* REAL ESTATE LOAN CO. *v.* GUARDHOUSE (1898), 29 O. R. 602.—**CAN.**

k. *Failure of mortgagee to prevent mortgagor from redeeming—Whether mortgagee entitled to interest.*]—WILLIAMS *v.* BOX (1913), 24 W. L. R. 93; 4 W. W. R. 244; 12 D. L. R. 90.—**CAN.**

PART XVIII. SECT. 1.

4041 i. *To what mortgagee entitled—General rule—All costs & expenses reasonably incurred.*]—Where it is shown that a mtgee. has, for the *bonâ fide* purpose of preserving the mtge. premises from destruction or dilapidation, instituted proceedings at law to obtain possession, he will not be deprived of his costs in equity.—DALLAS *v.* GOW (1858), 1 Ch. Ch. 65.—**CAN.**

4041 ii. —— —— ——.]—NIXON *v.* HUNTER (1870), 17 Gr. 96.—**CAN.**

l. —— *Costs of ascertaining & de-*

4042. ——— ——— ———.]—DRYDEN *v.* FROST, No. 3676, *ante*.

4043. ——— ——— ———.]—*Re* SNEYD, *Ex p.* FEWINGS, No. 3636, *ante*.

4044. ——— ——— ———.]—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES, No. 4048, *post*.

4045. ——— **Costs of ascertaining & defending rights—Defence unsuccessful.**]—DRYDEN *v.* FROST, No. 3676, *ante*.

4046. ——— **Bill to have benefit of former suit—Joinder of unnecessary parties.**]—Where a mtgee. files a bill against the mtgor. & other parties to have the benefit of a former suit, & makes persons parties to the suit who are unnecessary, & the bill is dismissed against them with costs, he is not entitled to charge those costs as between himself & the mtgor.—BOOTH *v.* CRESWICKE (1844), 13 L. J. Ch. 217; 2 L. T. O. S. 493; 8 Jur. 323, L. C.; *subsequent proceedings*, 3 L. T. O. S. 198, L. C.

4047. ——— **Effect of including costs in security—"Just allowances."**]—A mtge. deed provided that it should be a security not only for the principal sums advanced, & interest, but also for the costs of preparing the deed, & for all costs which might be incurred by the mtgee. in selling the property, or in any actions or suits relating to it. The mtgor. filed a bill to redeem, & a decree was made directing an account of what was due to deft. for principal & interest under the mtge. deed, & an account of sale moneys, rents, & profit received by deft. In taking the accounts deft. carried in a claim for costs incurred in legal proceedings relating to the property, which the chief clerk refused to entertain. & deft. then appealed from the decree:—*Held:* (1) the decree was right, for that all costs properly incurred in the actions might be claimed under it as "just allowances"; (2) the costs might be claimed under the decree as principal moneys due under the deed.—BLACKFORD *v.* DAVIS (1869), 4 Ch. App. 304; 20 L. T. 199; 17 W. R. 337, L. JJ.

Annotations:—*Generally*, **Refd.** Rees *v.* Metropolitan Board of Works (1880), 14 Ch. D. 372; Instone *v.* Elmslie (1886), 54 L. T. 730.

4048. ——— **Costs of correspondence—Relating to security.**]—In an action to foreclose a mtge. by deposit of title deeds, accompanied by a memorandum by which the mtgor. agreed to execute a legal mtge. of his estate & interest at the request of the mtgee., the taxing master disallowed the following charges in the mtgees.' bill of costs: (*a*) Costs of an action in the Q. B. Div. for recovery of the debt. (*b*) Costs of correspondence with a surety who had given a promissory note for part of the debt. (*c*) Costs of investigating the mtgor.'s title. (*d*) Costs of preparing a legal mtge. which the mtgor. refused to execute. (*e*) Costs of correspondence with the mtgor. as to the legal mtge.:—*Held:* a mtgee. is entitled to be allowed in account the costs of all proceedings reasonably taken by him to enforce his rights under the mtge. contract, including proceedings to obtain the mtge. money or any part thereof, either from the mtgor., or from a surety, or out of the estate, & therefore heads (*b*), (*d*), & (*e*) must be allowed. (*a*) Would ordinarily be a proper charge, but in the present case it could not be allowed as it was excluded by the special terms of the order directing taxation, & (*c*) could not be allowed, as an investigation of the title was not necessary for the purpose of preparing the legal mtge., but the mtgees. must be allowed all expenses properly incurred with reference to the preparation of the legal mtge., which would include the expense of such inspection of the title deeds as was necessary for preparing it.—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES (1886), 31 Ch. D. 582; 55 L. J. Ch. 576; 54 L. T. 696; 34 W. R. 600, C. A.

Annotations:—**Distd.** *Re* Wallis, *Ex p.* Lickorish (1890), 38 W. R. 482. **Apld.** Sachs *v.* Ashby (1903), 88 L. T. 393. **Refd.** Day *v.* Kelland (1900), 82 L. T. 142; Wales *v.* Carr (1902), 71 L. J. Ch. 483.

4049. ——— **Anticipatory costs.**]—(1) The solr. to a mtgee. whose security included costs, charges & expenses of or incidental thereto, delivered to the mtgor. a bill containing an item of 2 guineas in anticipation of future work. This was subsequently increased to 4 guineas, & an explanatory bill was delivered to account for the 4 guineas so charged. On taxation the taxing master refused to allow the second 2 guineas charged in anticipation, &, treating the explanatory bill as a bill delivered to be taxed, disallowed it:—*Held:* the 4 guineas was properly charged in anticipation, & the bill was explanatory only, & not to be taxed.

(2) Costs of certain attendances at meetings of the mtgor.'s creditors, & of advice as to the application of the proceeds of sale of part of the mtge. security, were disallowed by the taxing master:—*Held:* in the circumstances such costs were properly incurred, & were payable by the mtgor.—*Re* PAICE & CROSS (1914), 58 Sol. Jo. 593.

4050. ——— **Attendance at meetings of mortgagor's creditors.**]—*Re* PAICE & CROSS, No. 4049, *ante*.

4051. ——— **Advice as to application of proceeds of sale.**]—*Re* PAICE & CROSS, No. 4049, *ante*.

4052. Time for claiming costs by mortgagee.]—On a motion for a reference under 7 Geo. 2, c. 20, the ct. refused to direct the master to take into the account, costs incurred at law, no mention of proceedings at law being made in the bill; but the ct. gave leave to amend the bill in that respect, & directed the motion to stand over until the bill was amended.—MILLARD *v.* MAGOR (1818), 3 Madd. 433; 50 E. R. 564.

4053. ———.]—If a mtgee. of leaseholds, before he files a bill of foreclosure, is under the necessity of citing the next of kin of the deceased mtgor., before the ecclesiastical ct., in order to compel them to take out administration to the deceased; this ct. will not allow him the costs of the citation, unless he states his case for them, on his bill.—WARD *v.* BARTON (1841), 11 Sim. 534; 10 L. J. Ch. 163; 5 Jur. 405; 59 E. R. 980.

4054. Costs a matter of contract—Not discretion of court.]—The right of a trustee to his costs, like that of a mtgee., is a matter of contract & is not in the discretion of the judge, although he may be deprived of them for misconduct.—TURNER *v.* HANCOCK (1882), 20 Ch. D. 303; 51 L. J. Ch. 517; 46 L. T. 750; 30 W. R. 480, C. A.

Annotations:—**Refd.** Dutton *v.* Thompson (1883), 52 L. J. Ch. 661; *Re* Weall, Andrews *v.* Weall (1889), 42 Ch. D. 674; *Re* Beddoe, Downes *v.* Cottam, [1893] 1 Ch. 547; *Re* Jones, Christmas *v.* Jones (1897), 45 W. R. 598; *Re* Ruddock, Newberry *v.* Mansfield (1910), 102 L. T. 89; *Re* England's Settlement Trusts, Dobb *v.* England, [1918] 1 Ch. 24; *In the Estate of* Plant, Wild *v.* Plant, [1926] P. 139.

4055. For what mortgagee liable—Costs of mistaken claim in bringing in accounts—Mistake bonâ fide.]—W., the owner & occupier of a public-house, gave to H. & co., brewers, a mtge. to secure £1,300, & also all sums which should at any time

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fending rights.]—Where joint tenants join in mortgaging their joint property, the mtgee. is entitled to add to the amount of the mtge. debt as against all the mtgors., the costs reasonably incurred by him in realising & enforcing his security, although such costs were wholly caused by the factious opposition of one only of the mtgors.—UNION FINANCE ASSOCN. *v.* HOWARTH (1903), 4 S. R. N. S. W. 31; 21 N. S. W. W. N. 6.—**AUS.**

m. ——— ———.]—FORSYTH *v.* MCINTOSH (1860), 9 C. P. 492.—**CAN.**

be owing to them from W., " his exors., administrators, or assigns " on any account whatsoever. W. died giving, by will, all his property to his wife, for life, without any directions as to carrying on his business. Letters of administration, with the will annexed, were granted to the widow. The widow carried on the business, & was supplied with beer by H. & co. to whom she from time to time made payments which discharged the moneys due to them from W. at his decease other than the £1,300, but a balance of £138 was due from her to them at her decease for beer supplied. H. & co. sold the property under a power of sale, & claimed to retain not only the £1,300 but the £138. The question was raised on summons in an action for the administration of W.'s estate. The chief clerk was prepared to make an order without costs against H. & co. to pay into ct. the balance of purchase-money in their hands without deducting the £138 ; but H. & co. insisted on having the case heard by the judge. KAY, J., held that they must pay in the balance without deducting the £138, & ordered them to pay the costs of the adjournment to him as being in the nature of an unsuccessful appeal. On appeal :—*Held :* as the widow was assign of the public-house, the £138 was covered by the security, & H. & co. were entitled to retain it ; the adjournment to the judge was not in the nature of an appeal, it being the right of H. & co. to have the point heard by the judge personally, & even if they had been wrong on the merits they ought not to have been ordered to pay costs, for that a mtgee. cannot be deprived of costs merely because he claims *bonâ fide* something more than the ct. holds him entitled to.—*Re* WATTS, SMITH *v.* WATTS (1882), 22 Ch. D. 5 ; 52 L. J. Ch. 209 ; 48 L. T. 167 ; 31 W. R. 262, C. A.

Annotations :—**Apld.** Bird *v.* Wenn (1886), 33 Ch. D. 215 ; Ledbrook *v.* Passman (1888), 57 L. J. Ch. 855 ; Stone *v.* Lickorish, [1891] 2 Ch. 363. **Distd.** Squire *v.* Pardoe (1891), 66 L. T. 243. **Reld.** Kinnaird *v.* Trollope (1889), 42 Ch. D. 610 ; Lloyd's Bank *v.* Princess Royal Colliery Co. (1900), 82 L. T. 559.

4056. Whether constituting debt—For which action maintainable—By mortgagee against mortgagor.]—*Re* SNEYD, *Ex p.* FEWINGS, No. 3636, *ante.*

Jurisdiction of court to order delivery of bill of costs.]—*See* SOLICITORS.

Where mortgaged land compulsorily purchased—Costs of investment.] — *See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 258, Nos. 1678–1684.

SECT. 2.—COSTS OF MORTGAGE TRANSACTIONS.

SUB-SECT. 1.—IN GENERAL.

4057. Completed mortgage—General rule—Mortgagor liable.]—When a mtge. is completed the mtgor. is liable to pay to the mtgee. the expenses incident to the mtge. transaction. The mtge. is primarily liable to his own solr. for those expenses. The mtgor. is liable to pay over to the mtgee. what he pays to his own solr., but there is no debt until the transaction is completed. Indeed, it has been decided that, if the transaction falls through, the intending mtgee. cannot recover his expenses from the intending mtgor., & to avoid that difficulty it has for many years become the practice of solrs. before engaging in a mtge. transaction to obtain an undertaking by the intending borrower's solr. to pay the expenses (JESSEL, M.R.).—*Re* COWBURN, *Ex p.* FIRTH (1882), 19 Ch. D. 419 ; 51 L. J. Ch. 473 ; 46 L. T. 120 ; 30 W. R. 529, C. A.

Annotations :—**Consd.** Wales *v.* Carr, [1902] 1 Ch. 860. **Apld.** *Re* Foster, Barnato *v.* Foster, [1920] 3 K. B. 306. **Mentd.** *Re* Sharp, *Ex p.* Sharp (1893), 10 Morr. 114 ; London & Provinces Discount Co. *v.* Jones, [1914] 1 K. B. 147.

4058. —— Mortgage set aside by court.]—WYATT *v.* COOK, [1868] W. N. 237, L. C. ; *affg.*, 3 L. J. N. C. 75.

Annotations :—**Consd.** Wales *v.* Carr, [1902] 1 Ch. 860. **Reld.** *Re* Doody, Fisher *v.* Doody, Hibbert *v.* Lloyd, [1893] 1 Ch. 129.

4059. —— Primary liability of mortgagee to own solicitor.]—*Re* COWBURN, *Ex p.* FIRTH, No. 4057, *ante.*

4060. ——.]—The primary liability is that of the mtgee. & while the work is being done no other person is chargeable (SCRUTTON, L.J.).—*Re* FOSTER, BARNATO *v.* FOSTER, [1920] 3 K. B. 306 ; 89 L. J. K. B. 958 ; 36 T. L. R. 721 ; 64 Sol. Jo. 600, C. A.

4061. Investigation of mortgagor's title.]—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES, No. 4048, *ante.*

4062. Negotiations—Deposit with memorandum—Debt discharged—Subsequent verbal agreement to continue deposit as security for further debt.]—Where equitable deposit is made, accompanied with memorandum, for debt subsequently discharged, & on fresh debt contracted, it is verbally agreed that deposit shall continue as security for latter debt, mtgee. is not entitled to the costs out of produce of sale.—*Re* RAMSEY, *Ex p.* PIGEON (1832), 2 Deac. & Ch. 118 ; 2 L. J. Bcy. 3, Ct. of R.

Annotation :—**N.F.** *Re* Halls, *Ex p.* Cobham (1839), 3 Deac. 609.

4063. —— Surveyor's fee—Surveyor mortgagee.]—FIELD *v.* HOPKINS, No. 3684, *ante.*

4064. —— Personal liability of mortgagor.]—A mtgee.'s solr.'s costs of negotiating the loan & preparing the mtge. deed become, on completion of the transaction, simple contract debt at common law due to the mtgee. by the mtgor. ; & cannot be added by the mtgee. to his security as part of the costs, charges, & expenses properly incurred under or by virtue of his mtge.—WALES *v.* CARR, [1902] 1 Ch. 860 ; 71 L. J. Ch. 483 ; 86 L. T. 288 ; 50 W. R. 313.

Annotation :—**Consd.** *Re* Foster, Barnato *v.* Foster, [1920] 3 K. B. 306.

4065. —— Solicitor-mortgagee — Scale.] — Property belonging to D. was in mtge. N., a solr., arranged that the mtge. should be paid off, that the property should be reconveyed to D. & that N. should lend his own money to D. on mtge. of the same property ; & this was done. N. had not a partner with him in his business as a solr. :—*Held :* Mortgagee's Legal Costs Act, 1895 (c. 25), s. 2, expressly provides for such a case, & entitles a solr. practising alone to charge the scale fee for negotiating a loan to his client where the solr. himself advances the sum secured by the mtge.—*Re* NORRIS, [1902] 1 Ch. 741 ; 71 L. J. Ch. 187 ; 86 L. T. 46 ; 50 W. R. 316 ; 46 Sol. Jo. 248.

4066. Costs of preparing deed—Effect of order of court that mortgagee shall have his costs.]—Where the ct. had ordered in a suit that money should be raised by mtge. & the mtge. deed was

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PART XVIII. SECT. 2, SUB-SECT. 1.

n. *Unnecessary costs.*] — A mtge. should not create unnecessary expense against the mtgor., by executing several powers of attorney.—GOODHUE *v.* CARTER (1856), 1 Ch. Ch. 13.—**CAN.**

o. *Costs of proceedings to obtain sale—Charge on land.*]—The costs of proceedings to obtain a sale of mtged. premises are such a charge upon the estate as will entitle the mtgee. to proceed to a sale of the property in the event of non-payment.—THOMPSON *v.* HOLMAN (1880), 28 Gr. 35.—**CAN.**

p. *Costs of preparing deed—Liability of mortgagee.*]—There is no general rule that a mtgee. incurs no liability for the payment of the costs of preparing a mtge. It is a matter of evidence, depending on the facts involved in each

submitted to counsel on behalf of the mtgee., the fees for settling the deed were directed to be allowed by the officer in taxing the mtgee.'s costs, the mtgee. having been ordered to have his costs, charges & expenses.—NICHOLSON *v.* JEYES (1853), 1 Eq. Rep. 34; 22 L. J. Ch. 833; 1 W. R. 278, L. JJ.

Annotations:—**Consd.** Wales *v.* Carr, [1902] 1 Ch. 860. **Refd.** *Re* Gray, [1901] 1 Ch. 239.

4067. —— **Solicitor mortgagee.**] — GREGG *v.* SLATER, No. 4292, *post*.

4068. —— ——.]—A client mortgaged property, which was at the time subject to a first mtge., to his solrs., who prepared the mtge. deed to themselves. Afterwards the mtgor. made a third mtge. to another person. In an action by the solrs. against the first & third mtgees. & the mtgor.: —*Held:* they were entitled only to their ordinary costs as mtgees., & they had no lien on the mtge. deed for the costs of its preparation or other costs due to them from the mtgor.—SHEFFIELD *v.* EDEN (1878), 10 Ch. D. 291; 40 L. T. 283; 27 W. R. 477, C. A.

4069. —— —— **Profit costs.**]—A solr. cannot charge his client with profit costs for the preparation of a mtge. from the client to himself.—*Re* ROBERTS (1889), 43 Ch. D. 52; 38 W. R. 225; *sub nom. Re* ROBERTS, *Ex p.* EVANS, 59 L. J. Ch. 25; *sub nom. Re* ROBERTS, EVANS *v.* ROBERTS, 62 L. T. 33.

Annotations:—**Apld.** Field *v.* Hopkins (1890), 44 Ch. D. 524. **Apprvd.** *Re* Wallis, *Ex p.* Lickorish (1890), 25 Q. B. D. 176. **Consd.** *Re* Doody, Fisher *v.* Doody, Hibbert *v.* Lloyd, [1893] 1 Ch. 129. **Refd.** Eyre *v.* Wynn-Mackenzie, [1894] 1 Ch. 218; Cheese *v.* Keen, [1908] 1 Ch. 245.

4070. —— —— —— **Solicitor acting for himself & co-mortgagee.**]—*Held:* (1) by STERLING, J., & Ct. of Appeal, a solr. mtgee. acting as solr. for himself & his co-mtgee. cannot charge any profit costs against the mtgor. either as to proceeding in an action or business done out of ct. But (2) by STERLING, J., in principle there is nothing to prevent a partner of the solr. mtgee. from receiving remuneration for his trouble & in the absence of any agreement that the solr. mtgee. is not to share in the profits arising from the transaction in question the proper course is to ascertain what the profit costs are & then to allow the other partner the same share in them as he is entitled to in the general profits of the partnership business.—*Re* DOODY, FISHER *v.* DOODY, HIBBERT *v.* LLOYD, [1893] 1 Ch. 129; 62 L. J. Ch. 14; 68 L. T. 128; 41 W. R. 49; 9 T. L. R. 77; 37 Sol. Jo. 49; 2 R. 166, C. A.

Annotations:—*As to* (2) **Folld.** Wellby *v.* Still (1893), 37 Sol. Jo. 481. **Apld.** Eyre *v.* Wynn-Mackenzie, [1894] 1 Ch. 218.

4071. —— —— ——.]—A solr. mtgee. cannot in the absence of express agreement charge the mtgor. with any profit costs either for work done in respect of the mtged. property as solr. for the mtgee. including the preparation of the mtge. to himself or, where the mtge. is of a life interest of collecting, receiving & distributing the income as agent for the mtgor.; but *semble:* this rule does not preclude a partner of the solr. mtgee. from receiving remuneration for his trouble.—EYRE *v.* WYNN-MACKENZIE, [1894] 1 Ch. 218; 63 L. J. Ch. 239; 69 L. T. 823; 42 W. R. 220; 8 R. 53; *subsequent proceedings*, [1896] 1 Ch. 135, C. A.

Annotation:—**Refd.** Cheese *v.* Keen, [1908] 1 Ch. 245.

4072. —— ——.]—FIELD *v.* HOPKINS, No. 3684, *ante*.

4073. —— **Partner of mortgagee solicitor.**]—*Re* DOODY, FISHER *v.* DOODY, HIBBERT *v.* LLOYD, No. 4070, *ante*.

4074. —— ——.]—WELLBY *v.* STILL (1893), 37 Sol. Jo. 481.

4075. —— ——.]—EYRE *v.* WYNN-MACKENZIE, No. 4071, *ante*.

4076. —— **Refusal of mortgagor to execute.**]—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES, No. 4048, *ante*.

4077. —— **Personal liability of mortgagor.**]—WALES *v.* CARR, No. 4064, *ante*.

SUB-SECT. 2.—ABORTIVE NEGOTIATIONS.

4078. Liability of mortgagor—To mortgagee.]—*Re* COWBURN, *Ex p.* FIRTH, No. 4057, *ante*.

4079. —— —— **Agreement to pay all "fair & reasonable expenses in ascertaining value"—Default of mortgagee.**]—In a negotiation for the advance of a sum of money by way of mtge., where the proposed mtgor. undertakes, in writing, to pay to mtgee. all "fair & reasonable expenses in ascertaining the value of the property"; if the negotiation goes off, by the default of the mtgee., the mtgor. is not bound to pay such expenses.—ST. LEGER *v.* ROBSON (1831), 9 L. J. O. S. K. B. 184.

4080. —— —— **Costs of investigating title.**]—A party proposing to borrow money on security, does not bind himself by implication of law, to produce a security of any particular degree of safety or of any particular title, as in the case of a contract of sale where *primâ facie* the vendor is to make out a title in fee. On the contrary, the transaction of borrowing implies that a security of any degree of safety may be made available by a term compensating for the increased risk.

Where a treaty for loan on specified securities goes off, the lender not being satisfied with the title, there being no contract by the proposed borrower to make any other or better title than he had, & the lender not being bound to accept the security unless he found it satisfactory, & no stipulation to pay costs in the event of the treaty going off, the proposed borrower is not liable for the costs incidental to the investigation of the title.—MELBOURNE *v.* COTTRELL (1857), 29 L. T. O. S. 293; 5 W. R. 884.

4081. —— —— ——.]—The ct. sanctioned the raising of money by mtge. of an infant's estate, but after expenses had been incurred by the intended mtgee. in investigating the title, the matter went off without his default. He was allowed his costs out of the estate.—CRAGGS *v.* GRAY (1866), 35 Beav. 166; 55 E. R. 858.

4082. —— —— **Refusal of mortgagor to complete.**]—Where the negotiations for a mtge. are broken off owing to the proposed mtgee. being dissatisfied with the security upon investigation, the proposed mtgor. has no claim upon the proposed mtgee. for the costs attending the investigation, but if the negotiations go off without such reason, the proposed mtgee. may recover his costs reasonably incurred.—CARTER *v.* MERRION (1875), 32 L. T. 663; 39 J. P. 647.

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case.—*Re* HODGE & GIBSON, *Ex p.* HODGE (1883), 2 N. Z. L. R. 206 (S. C.). —**N.Z.**

q. *Stamp duty.*]—The rule of law that the expenses incident to a mtge. are payable by the mtgor. applies to the stamp duty imposed upon mtges. by Finance Act, 1915, notwithstanding that the person made primarily liable for the duty by the Act is the mtgee.—DEABLE *v.* GOWER, [1916] N. Z. L. R. 751.—**N.Z.**

PART XVIII. SECT. 2, SUB-SECT. 2.

4078 i. *Liability of mortgagor—To mortgagee.*]—BRITISH COLUMBIA PROVINCIAL LOAN ASSOCN. *v.* CHARNOCK, 29 C. L. T. 155.—**CAN.**

Sect. 2.—*Costs of mortgage transactions: Sub-sects.* 2 & 3. *Sect.* 3: *Sub-sect.* 1.]

4083. —— —— ——.]—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES, No. 4048, *ante.*

4084. —— **To solicitors of mortgagee—Undertaking to pay expenses—Alleged lien of solicitors on title deeds.**]—A. wishing to borrow money on a mtge. of land, delivered the title deeds to B. the intended mtgee. for examination & said that he would pay all expenses. B. handed the deeds to his own attorneys to be investigated. The negotiation went off, & the attorneys being requested by A. to return his deeds, refused to do so till he paid their bill of costs. On *assumpsit* brought by A. against the attorneys, to recover back the money so paid:—*Held:* defts. could not be considered as having acted for both parties in the negotiation, & therefore had not a lien against A., as his attorneys: supposing A., liable to B. for the costs incurred, B. could not communicate to his own attorneys a lien upon A.'s deeds, by handing them to the attorneys for investigation: the undertaking of A. to B., if it amounted to a promise to pay these costs, did not entitle B.'s attorneys to detain the deeds, as it established no privity between them & A.: & A. might have brought trover for the deeds & was entitled to recover in this action.—PRATT *v.* VIZARD (1833), 5 B. & Ad. 808; 2 Nev. & M. K. B. 455; 3 L. J. K. B. 7; 110 E. R. 989.

Annotations:—**Distd.** Wakefield *v.* Newbon (1844), 13 L. J. Q. B. 258. **Folld.** Hallett *v.* Chamberlayne (1848), 12 L. T. O. S. 272. **Refd.** Webb *v.* Rhodes (1837), 4 Scott, 497; Smith *v.* Sleap (1844), 12 M. & W. 585; Oates *v.* Hudson (1851), 6 Exch. 346; *Re* Foster, Barnato *v.* Foster, [1920] 3 K. B. 306.

4085. —— —— —— **Reasonable costs.**]—An intended mtgor. agreed to pay the reasonable costs of the mtgee.'s solr., if the matter went off:—*Held:* this did not include the expenses of withdrawing the money from a banker's & of remitting it to London for payment.—*Re* BLAKESLEY & BESWICK (1863), 32 Beav. 379; 8 L. T. 343; 27 J. P. 436; 9 Jur. N. S. 1265; 11 W. R. 656; 55 E. R. 148.

4086. —— —— ——.]—*Re* COWBURN, *Ex p.* FIRTH, No. 4057, *ante.*

4087. —— —— **Negotiations broken off.**]—PRATT *v.* VIZARD, No. 4084, *ante.*

4088. —— —— ——.]—A. wishing to borrow a sum of money on mtge. of leasehold premises applied to B. a solr. who promised to obtain the money for him. A. delivered an abstract of his title which underwent investigation. The negotiation went off & B. brought an action against A. for his costs & recovered a verdict which was afterwards set aside & a non-suit entered.—HALLETT *v.* CHAMBERLAYNE (1848), 12 L. T. O. S. 272.

4089. —— —— **Default of mortgagor.**]—The proposed mtgee.'s solr. has no claim for his charges against the proposed mtgor., where the negotiation for the mtge. goes off through the default of the latter: he must look to the person who retains him, leaving him to his remedy against the party who occasioned the fruitless expense.—WILKINSON *v.* GRANT (1856), 18 C. B. 319; 25 L. J. C. P. 233; 27 L. T. O. S. 108; 139 E. R. 1392.

4090. —— **To solicitor of proposed mortgagor—Action for money paid by solicitor.**]—KIRBY *v.* WILLIAMSON (1852), 19 L. T. O. S. 203.

4091. Liability of mortgagee—To mortgagor—Default by mortgagee—Security inadequate.]—CARTER *v.* MERRION, No. 4082, *ante.*

SUB-SECT. 3.—DISCHARGE OF MORTGAGE.

4092. Costs of reconveyance—Vesting order—Person to reconvey under disability.]—The infant heir of a mtgee. in fee, having been found by the master, to be a trustee of the mtged. estate for the exor. of the mtgee., the exor. petitioned that the infant might be ordered to convey the estate to the mtgor., on payment of the principal & interest due on the mtge., & costs:—*Held:* the costs of the proceeding before the master, must be paid by the mtgor.—*Ex p.* OMMANEY (1841), 10 Sim. 298; 5 Jur. 647; 59 E. R. 629; *sub nom. Re* OMMANEY, 10 L. J. Ch. 315.

Annotation:—**Refd.** Webb *v.* Crosse, [1912] 1 Ch. 323.

4093. —— —— **Person to reconvey not ascertainable.**]—The costs of the petition & order under 1 Will. 4, c. 60, for the reconveyance of a mtged. estate to the mtgor., or his representatives, upon payment of the mtge. money, are to be borne by the mtgor. or his estate, although such proceedings were rendered necessary by the circumstance that the mtgee. had devised the legal estate in the mtged. premises to three trustees, one of whom could not be found.—KING *v.* SMITH (1848), 6 Hare, 473; 18 L. J. Ch. 43; 12 L. T. O. S. 145; 12 Jur. 1083; 67 E. R. 1251.

Annotation:—**Refd.** Webb *v.* Crosse, [1912] 1 Ch. 323.

4094. —— —— **Person to reconvey absconded.**]—WEBB *v.* CROSSE, No. 4029, *ante.*

4095. —— **Mortgage covering several properties—Redemption of one property by one mortgagor—Cost of covenant to produce title deed.**]—CAPPER *v.* TERRINGTON, No. 3490, *ante.*

4096. —— **Title deed in court in administration action—Costs of obtaining deed out of court.**]—A suit was instituted to administer the estate of testator, who had appointed A., B., & C., his exors.; & a decree was made therein. After the decree A., B., & C., lent money, forming part of the estate of their testator, to N. on mtge., N. not having any notice at the time of their character of exors., or of any suit, or any decree affecting the money. After the mtge., the title deeds of the mtged. estates were, in pursuance of an order made in the suit, deposited in the master's office. N. paid off the mtge. debt:—*Held:* N. was entitled to be paid, by the mtgees., the costs attending the getting of the title deeds out of the master's office.—REED *v.* FREER (1844), 13 L. J. Ch. 417; *sub nom.* READE *v.* FREERE, 3 L. T. O. S. 320; 8 Jur. 704.

4097. Costs of removing deeds out of court—Administration of mortgagee's estate.]—Where deeds relating to mtged. property, the mtge. being absolute at law, come into the custody of a ct. of equity, by means & in the course of a reasonable & proper administration of the mtgee.'s estate, the costs of removing them out of ct., upon the mtge. being paid off, must be borne by the mtgor.—BURDEN *v.* OLDAKER (1844), 1 Coll. 105; 13 L. J. Ch. 240; 2 L. T. O. S. 517; 8 Jur. 418; 63 E. R. 341.

Annotation:—**Distd.** Reed *v.* Freer (1844), 13 L. J. Ch. 417.

4098. Costs occasioned by refusal to reconvey—By trustee of mortgagee—At direction of mortgagee.]—Trustee of a term in trust for securing to a mtgee. in fee, with a power of sale, his mtge. money, & subject thereto in trust for the mtgor., his heirs, etc., decreed, in a plain case, to pay the costs of a suit brought against him to compel him to execute a deed for surrendering the term to

PART XVIII. SECT. 2, SUB-SECT. 3.

r. *Collection fees.*] — Where mtge. moneys were made payable at T. but were paid to the co.'s solr. at E. by whom no proceedings were taken:—*Held:* the mtgor. could not be called upon to pay the collection fee charged by the solrs. against the co.—CANADIAN NORTHERN INVESTMENT CO. *v.* CAMERON (1916), 34 W. L. R. 866; 10 W. W. R. 959.—CAN.

a purchaser from the mtgee.—HAMPSHIRE *v.* BRADLEY (1845), 2 Coll. 34 ; 63 E. R. 624.

SECT. 3.—**COSTS OF FORECLOSURE, SALE AND REDEMPTION.**

SUB-SECT. 1.—IN GENERAL.

See R. S. C., Ord. 65, r. 1.

4099. General rule—Mortgagee entitled to costs.]—GRUBB *v.* WOODHOUSE (1692), Freem. Ch. 187 ; 22 E. R. 1151.

4100. ——— ———.]—A decree for costs necessarily follows a decree for payment of principal & interest.—INDIA CO. *v.* EKINS (1718), 2 Eq. Cas. Abr. 238 ; 6 Vin. Abr. 365, pl. 13 ; 22 E. R. 202.

4101. ——— ———.]—MOORE *v.* PAINTER, No. 3827, *ante*.

4102. ——— ———.]—Where the ct. finds a course of misconduct on the part of the mtgee. in the mtge. transaction, the mtgee., notwithstanding the general rule that the mtgor. is liable to all costs, will be directed to pay costs.—DUNSTAN *v.* PATTERSON (1847), 2 Ph. 341 ; 16 L. J. Ch. 404 ; 9 L. T. O. S. 469 ; 11 Jur. 595 ; 41 E. R. 974, L. C.

Annotation :—**Mentd.** Teevan *v.* Smith (1882), 47 L. T. 208.

4103. ——— ———.]—BARLOW *v.* GAINS, MORRIS *v.* ISLIP, No. 4284, *post*.

4104. ——— ———.]—COTTERELL *v.* STRATTON, No. 4393, *post*.

4105. ——— ———.]—BANK OF NEW SOUTH WALES *v.* O'CONNOR, No. 3475, *ante*.

4106. ——— ———.]—WILLIAMS *v.* JONES, No. 4371, *post*.

4107. ——— ——— **Limited to costs incurred by him as mortgagee.**]—Deft. to a creditors' suit, being made a party as mtgee. with power of sale, & also as claiming to be entitled to two other mtges. on the estate, which were set aside, sold under his power, & received the purchase-money The judge then made an order in chambers, directing an account of the purchase-money, & of what was due to the deft. for principal, interest & costs, as mtgee., other than the costs of the suit, & after deducting such principal, interest & costs out of the moneys in his hands, payment of the balance to pltfs. :—*Held* : the order was right & deft. had no right to retain generally his costs of suit.—WICKENDEN *v.* RAYSON (1856), 25 L. J. Ch. 641 ; 27 L. T. O. S. 50 ; 4 W. R. 443, L. C.

4108. Priorities as to costs—Sale by consent.]—Under a bill by the first mtgee., the second & third mtgees. consenting to a sale, the fund proving deficient, the costs are paid in the first place.—KENEBEL *v.* SCRAFTON (1807), 13 Ves. 370 ; 33 E. R. 332, L. C.

Annotations :—**Consd.** Hepworth *v.* Heslop (1844), 3 Hare, 485 : Ford *v.* Chesterfield (1856), 21 Beav. 426. **Refd.** Tipping *v.* Power (1842), 1 Hare, 405 ; Armstrong *v.* Storer (1851), 14 Beav. 535 ; Macrae *v.* Ellerton (1858), 6 W. R. 851.

4109. ——— ———.]—A first mtgee. filed a bill against the mtgor. & subsequent mtgees. for a foreclosure, but at the hearing he consented to a sale. The proceeds being insufficient to pay pltf. his principal & interest, the ct. refused to give defts. their costs, & directed the whole fund to be transferred to pltf.—UPPERTON *v.* HARRISON (1835), 7 Sim. 444 ; 58 E. R. 908.

Annotations :—**Refd.** Tipping *v.* Power (1842), 11 L. J. Ch. 257 ; Hepworth *v.* Heslop (1844), 3 Hare, 485 ; Ford *v.* Chesterfield (1856), 21 Beav. 426

4110. ——— ———.]—A decree for sale of an encumbered estate, does not, of itself, alter the rights of parties.

Mtgee. of estates on which the incumbrances were numerous & of a complicated nature, filed a bill for foreclosure & redemption, &, by consent, the estate was sold :—*Held* : the costs of sale ought not to be paid, in the first place, out of the general fund, but the money arising from the sale of each separately encumbered estate, ought to be treated in the same manner as the estate itself would have been, & the mtgees. ought to be paid their principal, interest, & costs, according to their respective priorities.—WILD *v.* LOCKHART, LEE *v.* LOCKHART (1847), 10 Beav. 320 ; 16 L. J. Ch. 519 ; 50 E. R. 605.

4111. ——— ———.]—Equitable mtgee. of part of intestate's estate, who had not been made a party to the suit, but had consented to the sale of the mtged. estate, presented a petition for payment to him out of ct. of the moneys arising from the sale, & served the assignees with the petition. The produce of the sale of the mtged. estate was insufficient to satisfy the principal & interest found due upon the mtge. The assignees appeared upon the petition, but were not allowed their costs.—CARR *v.* HENDERSON (1848), 11 Beav. 415 ; 18 L. J. Ch. 39 ; 12 L. T. O. S. 520 ; 50 E. R. 877.

4112. ——— ———.]—Mtgee. of one-thousand years' term filed a bill for foreclosure. At the hearing, by arrangement, a decree was made for the sale of the fee. It produced a little more than sufficient to pay the mtge. Defts. declining an inquiry as to the value of the reversion in fee :—*Held* : pltf.'s costs had priority over those of deft.—CUTFIELD *v.* RICHARDS (1858), 26 Beav. 241 ; 53 E. R. 890.

4113. ——— ———.]—Where, at the instance of mtgee. pltf., a decree is made for sale of the mtged. property, & a puisne mtgee. concurs in a conveyance to a purchaser under the decree, such puisne incumbrancer is not entitled to any costs in respect of such concurrence unless the prior incumbrancer has been paid in full.—WONHAM *v.* MACHIN (1870), L. R. 10 Eq. 447 ; 39 L. J. Ch. 789 ; 23 L. T. 479 ; *sub nom.* WANHAM *v.* MACHIN, 18 W. R. 1098.

4114. ——— ———.]—Legal mtgees. having filed a bill for foreclosure only, amended their bill by

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PART XVIII. SECT. 3, SUB-SECT. 1.

4099 i. *General rule—Mortgagee entitled to costs.*]—As a general rule, a mtgee. is ortitled to his costs in a suit for the redemption of his mtge.—LIVINGSTONE *v.* BANK OF NEW BRUNSWICK (1865), 6 All. 252.—**CAN.**

4099 ii. ——— ———.]—A mtgor. coming to redeem is liable for the costs of suit where a balance is found in favour of deft.—LITTLE *v.* BRUNKER (1880), 28 Gr. 191.—**CAN.**

t. Reservation of costs.]—Where a mtgee. files a bill to foreclose, & a question arises at the hearing whether he has not received sufficient to pay off the incumbrance before the commencement of the suit, the costs will be reserved.—GOODERHAM *v.* DE GRASSI (1850), 2 Gr. 135.—**CAN.**

a. Costs at law & equity—Whether both allowed.]—Where a mtgee. proceeds both at law & in equity, he cannot, in the absence of special circumstances to justify the proceedings, elect to take the chancery costs instead of those at law, if deft. object.—WEIR *v.* TAYLOR (*circa* 1865), 1 Ch. Ch. 371.—**CAN.**

b. ——— ———.]—A mtgee. was vested in trustees. One of them sued at law on the mtge. as pltf.'s attorney. A bill was afterwards filed by another solr. to foreclose the mtge. :—*Held* : pltfs. were not entitled to the costs at law in addition to those in equity.—ONTARIO *v.* WINNAKER (1867), 13 Gr. 443.—**CAN.**

c. Costs on appeal—Failure on main point.]—Where an appeal from the report in a foreclosure suit failed on the main point, & succeeded only in respect of a redemption, the ct. gave resps. the costs of appeal.—BROWNLEE *v.* CUNNINGHAM (1867), 13 Gr. 586.—**CAN.**

d. Costs of redemption suit—By second mortgagee.]—A first mtgee. is entitled as against the owner of the equity of redemption, to add to his debt the necessary costs of a suit to redeem brought by a second mtgee., & dismissed with costs for default of

Sect. 3.—Costs of foreclosure, sale and redemption: Sub-sects. 1 & 2.]

stating that they had, with deft.'s consent, contracted to sell the property, & prayed that the purchase might be carried out under the sanction of the ct. By a consent decree, the ct. ordered the sale to be carried out. The purchase-money being sufficient only to pay the principal & interest with a small balance over:—*Held:* pltfs. were entitled to their costs of suit so far as the fund would go, before defts. were paid any costs.—COOK *v.* HART (1871), L. R. 12 Eq. 459; 41 L. J. Ch. 143; 24 L. T. 779; 19 W. R. 947.

4115. —— Transfer of mortgage—Payment by transferee of interest in arrear through breach of trust.]—COTTRELL *v.* FINNEY, No. 4013, *ante*.

4116. —— Sale by order of court.]—(1) The costs of several mtgees. held to be payable according to their priorities, although the estates were by order of the ct. sold, & the purchase-money was paid into ct., & formed one general fund.

(2) A. having two estates, mtged. both to B., then one to C., then both again to B. to secure both the original & a further advance, then both to D. The puisne incumbrancers had notice of the prior charges. The estates were not sufficient to pay all the mtges., but one of the estates called No. 32 was sufficient to pay B. in full. The ct. will not, as between C. & D., marshal the securities by directing B. to take his full payment out of No. 32, so as to leave C. the first incumbrancer on the other estate, but B.'s debt must be thrown ratably on both estates.—BARNES *v.* RACSTER (1842), 1 Y. & C. Ch. Cas. 401; 11 L. J. Ch. 228; 6 Jur. 595; 62 E. R. 944.

Annotations:—As to (2) **Apld.** Wellesley *v.* Mornington (1869), 17 W. R. 355; Flint *v.* Howard, [1893] 2 Ch. 54. **Refd.** Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377; Bowker *v.* Bull (1850), 1 Sim. N. S. 29; Gibson *v.* Scagrim (1855), 20 Beav. 614; Wood *v.* West (1895), 40 Sol. Jo. 114; Baglioni *v.* Cavalli (1900), 83 L. T. 500.

4117. —— Trustees' costs—Mortgagee claiming under cestui que trust.]—Trustees' costs have priority over the claims of a mtgee. claiming under their *cestui que trust*.—ROSE *v.* SHARROCK (1863), 1 New Rep. 419; 11 W. R. 356.

4118. —— —— Conveyance by mortgagor to trustee for sale—Trustee obtaining transfer of some incumbrances & legal estate.]—The trustee of a mtgor. is not entitled to avail himself of the legal estate for the purpose of altering the priorities of the mtgees.

The owner of a farm mortgaged it in succession to three persons, the third mtgee. having no notice of the second mtge. By a deed made between the mtgor. & P., in order, as was recited, to stop a forced sale by the mtgees., the equity of redemption was conveyed to P. upon trust for sale, with power to postpone the sale & raise money, by mtge. or otherwise, to pay off the mtgees., & the proceeds were to be held by P. upon trust to pay his costs & expenses, & after payment of the same & the mtges., to pay the residue to the mtgor. P., having notice of the second mtge., paid off the first & third out of his own money & took a transfer of the benefit of them, & he subsequently got in the legal estate. Upon an action by the second mtgee. for redemption:—*Held:* P. acted as a trustee for the mtgor., & he was not entitled to tack to the prejudice of the second mtgee., but he was entitled to add his costs to his security.—LEDBROOK *v.* PASSMAN (1888), 57 L. J. Ch. 855; 59 L. T. 306.

4119. Costs of issue directed on exceptions to master's report—Mortgagee unsuccessful.]—On a bill to redeem, the mtgee. insisted that B., the heir-at-law stated in the bill to be dead, was alive. By the decree, a reference was made to the master, to ascertain whether he was dead. He reported he was dead. Exceptions were taken to his report, & master directed to review the same. In reviewed report he continued of opnion B. was dead. Exceptions were taken to the same, & an issue was directed whether B. was dead, etc. The jury found he was dead. Exceptions were then overruled; & held, the mtgee. ought not to pay the costs of the issue.—WILSON *v.* METCALFE (1818), 3 Madd. 45; 56 E. R. 426.

4120. Apportionment of costs — Mortgage to secure debt of partners.]—Where deeds were deposited, with a written memorandum, to secure the debt of two partners, & after the death of one, it was verbally agreed that the deposit should be extended to secure the separate debt of the surviving partner:—*Held:* the costs should be apportioned as to the sums respectively due from the joint & separate estate, in the one case as on a deposit with a written agreement & in the other as on a deposit by parol.—*Re* TAYLOR, *Ex p.* FORD (1843), 3 Mont. D. & De G. 457, Ct. of R.

4121. —— Separate mortgages of two estates.]—An action was brought by a mtgee. for the foreclosure of two mtges. of two distinct estates, executed by the same mtgor. to secure two different advances. Both mtges. were executed since Conveyancing Act, 1881 (c. 41), came into operation:—*Held:* the whole of the costs of the action ought to be included in the account relating to each estate, & the mtgor. could not redeem either estate separately without paying the whole of the costs of the action.—CLAPHAM *v.* ANDREWS (1884), 27 Ch. D. 679; 53 L. J. Ch. 792; 51 L. T. 86; 33 W. R. 395.

Annotation:—**Overd.** De Caux *v.* Skipper, Tee *v.* De Caux (1886), 31 Ch. D. 635.

4122. —— —— No consolidation.]—When a mtgee. brings an action to foreclose two mtges. of two distinct estates, but which mtges. are by force of the statute or otherwise not liable to be consolidated, the costs of the action are not to be charged against each estate, but must be apportioned ratably between the two estates. *Clapham* v. *Andrews*, No. 4121, *ante*, overd.—DE CAUX *v.* SKIPPER, TEE *v.* DE CAUX (1886), 31 Ch. D. 635; 54 L. T. 481; 34 W. R. 402, C. A.

4123. Redemption suit—Provision for costs of pending foreclosure suit.]—AINSWORTH *v.* ROE (1850), 15 L. T. O. S. 451; 14 Jur. 874.

4124. —— Costs of specific performance action—By mortgagee against defaulting purchaser.]—Mtgee. had a power of sale, & of retaining his costs, charges & expenses. He sold; but the purchaser resisted the completion, on the ground of misdescription. Being advised by counsel that the objection was untenable, he filed a bill for specific performance, which was dismissed with costs.

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pltf. therein.—MCKINNON *v.* ANDERSON (1870), 17 Gr. 636.—**CAN.**

e. *Summary application—In questions of costs—Application to mortgage suits.*]—MCLEAN *v.* CROSS (1871), 3 Ch. Ch. 432.—**CAN.**

f. *Costs of argument—On joinder of parties.*]—MERCHANTS BANK *v.* SPARKES (1880), 28 Gr. 108.—**CAN.**

g. *Costs of release—Release unnecessary.*]—HUDSON'S BAY CO. *v.* RUTTAN (1884), 1 Man. L. R. 330.—**CAN.**

h. *Costs subsequent to date of decree—Jurisdiction of court.*]—A judge has no jurisdiction to add to an order made by another judge for redemption of a mtge. on payment of the debt & costs to date of decree, a further term adding subsequent costs & requiring their payment as a further condition of redemption & charge upon the lands.—LEHMAN *v.* WILKINSON (1893), 3 B. C. R. 19.—**CAN.**

k. *Rule of court—Allowing one set of costs—Against inheritance—Exception to.*]—CANE *v.* BROWNRIGG (1840), 2 I. Eq. R. 413.—**IR.**

Upon a redemption :—*Held :* he could not charge the costs of the suit.—PEERS *v.* CEELEY (1852), 15 Beav. 209 ; 51 E. R. 517.

4125. Costs of affidavit of documents—Required by mortgagor.]—When a mtge. is to be paid off under the order of the ct., if the mtgor. requires an affidavit of documents from the mtgee., he must pay the costs occasioned by such an affidavit, & ought to give some notice of his intention to require its production.—WEEKS *v.* STOURTON (1865), 5 New Rep. 426 ; 12 L. T. 71 ; 11 Jur. N. S. 278 ; 13 W. R. 489.

4126. Order appointing Settled Land Act trustees—Made subsequent to mortgage.]—FIELD *v.* HOPKINS, No. 3684, *ante*.

4127. Costs between mortgagor & solicitor's mortgagee—Not relating to mortgage transaction.]—FIELD *v.* HOPKINS, No. 3684, *ante*.

SUB-SECT. 2.—PLAINTIFF'S COSTS.

4128. Whether payable out of proceeds of sale.]—Upon an application for the sale of an equitable mtge., the costs of the assignees are to be paid out of the proceeds of the estate.

As the necessity of the application was created by the defect of petitioner's title, the expenses of it, & of all fair inquiries into the validity of the security should be satisfied out of the proceeds of the sale, unless indeed where the assignees by an unnecessary & vexatious resistance should call for a deviation from that practice (LORD ELDON, C.).—*Ex p.* GARBUTT (1814), 2 Rose, 78, L. C.

4129. —— Petition for sale as against assignees—Assignees opposing on frivolous grounds.]—Equitable mtgee. praying a sale of mtged. estate, pays the costs of the petition, & of the assignees appearance to it, not out of the produce of the mtged. estate, but personally ; but if the assignees oppose the petition on frivolous or mistaken grounds, they pay the costs occasioned by such opposition.—*Ex p.* HORNE (1816), 1 Madd. 622 ; 56 E. R. 229.

4130. —— Mortgage of shares.]—*Re* LEYBURN, *Ex p.* VAUXHALL BRIDGE CO. (1821), 1 Gl. & J. 101.

Annotations :—**Distd.** *Re* Gregory, *Ex p.* Rodgers (1843), 3 Mont. D. & De G. 297. **Mentd.** Brockbank *v.* Dilworth (1829), 8 L. J. O. S. Ch. 1 ; *Re* Lashmeer, *Ex p.* Vallance (1837), 3 Mont. & A. 224 ; Bradley *v.* Holdsworth (1838), 7 L. J. Ex. 153 ; Baxter *v.* Newman (1845), Cox & Atk. 86.

4131. —— Plaintiff asking leave to bid.]—*Re* CLARK, *Ex p.* BROWN (1832), 1 Deac. & Ch. 34, Ct. of R.

4132. —— ——.]—The costs of an application by a legal mtgee. for a sale of his security, & for leave to bid at the sale, will not be allowed out of the proceeds.—*Re* KERSHNER, *Ex p.* MARTELLI (1842), 6 Jur. 352, Ct. of R.

4133. —— ——.]—A mtgee. of a bkpt.'s estate presenting a petition for liberty to bid is not entitled to the costs of the petition.—*Re* FIELD, *Ex p.* SMITH (1849), 18 L. J. Bcy. 17 ; 13 Jur. 1044.

4134. —— —— Consent of assignees.]—The rule of practice is, that if the assignees consent, costs may be paid out of the estate ; if they do not, petitioner must pay them (ERSKINE, C.J.).—*Re* HALL, *Ex p.* WILLIAMS (1832), 1 Deac. & Ch. 489 ; Mont. 514, Ct. of R.

4135. —— —— ——.]—On the usual petition of an equitable mtgee. for a sale, & leave to bid, the costs come out of the estate though the assignees do not consent.—*Re* DEACON, *Ex p.* BERKELEY (1834), 2 Mont. & A. 54, Ct. of R.

4136. —— Mortgage by deposit with memorandum—Substitution of other deeds without memorandum.]—Where there is a deposit of title deeds with a written memorandum, & other deeds are substituted without a fresh memorandum, the equitable mtgee. is not entitled to the costs of the sale.—*Re* HALL, *Ex p.* COBHAM (1839), 3 Deac. 609 ; 8 L. J. Bcy. 51, Ct. of R.

4137. —— —— Memorandum lost.]—*Re* GREGORY, *Ex p.* RODGERS (1843), 3 Mont. D. & De G. 297 ; 1 L. T. O. S. 151 ; 7 Jur. 406.

4138. —— Costs of sale—Expense of assignees attending sale.]—WONHAM *v.* MACHIN, No. 4113, *ante*.

4139. Payment of costs of former unsuccessful suit—As condition precedent to award in second suit.]—A mtgee., after filing a foreclosure bill, unsuccessfully moving for a receiver, & rendering himself liable to the costs of the motion, died, & his exors., without reviving the suit, filed a new bill for foreclosure of the same estate :—*Held :* defts., not by plea to the new bill insisting upon the former suit, but claiming by their answers the benefit of the objection as if they had pleaded it, the ct. would not refuse the decree in the second suit, or stay the proceedings therein until the former costs should be paid ; the ct., not approving of the course taken by pltfs., would give them no costs of the second suit, unless they submitted to pay the costs to which the mtgee. was liable in the first suit.—LONG *v.* STORIE (1852), 9 Hare, 542 ; 21 L. J. Ch. 521 ; 19 L. T. O. S. 135 ; 16 Jur. 319 ; 68 E. R. 627.

4140. Foreclosure suit stayed—Plaintiff obtaining full payment in administrative proceedings.]—A decree was made in a suit for the administration of a mtgor.'s estate. The mtgee. afterwards filed a foreclosure bill, but subsequently obtained full payment in the administration suit :—*Held :* he

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PART XVIII. SECT. 3, SUB-SECT. 2.

4128 i. *Whether payable out of proceeds of sale.*]—GRANGE *v.* BARBER (1864), 2 Ch. Ch. 189.—**CAN.**

4128 ii. ——.]—JOYCE *v.* DE MOLEYNS (1846), 3 Jo. & Lat. 698.—**IR.**

4128 iii. ——.]—Where an action for foreclosure & sale is instituted by a puisne mtgee. & is afterwards adopted by a prior mtgee., the costs of the puisne mtgee. are payable out of the proceeds of the sale of the mtged. premises, although they are insufficient to pay the prior mtge.—HUTCHINSON *v.* CUMMINS (1920), 54 I. L. T. 168.—**IR.**

l. Costs of reference to master—As to other incumbrances.]—Where pltf. in suits for foreclosure or sale asks for a reference to the master to inquire as to other incumbrances, he takes such reference at the peril of costs, if there are in reality no other incumbrances.—HAMILTON *v.* HOWARD, BURNSIDE *v.* LUND (1854), 4 Gr. 581.—**CAN.**

m. Action brought in wrong court—Whether costs allowed.]—Where pltf. files a bill in the Ct. of Ch. to foreclose a mtge. for a sum within the jurisdiction of the county ct., no costs will be allowed him.—CONNELL *v.* CURRAN (1856), 1 Ch. Ch. 11.—**CAN.**

n. —— ——.]—The practice of bringing an action for an amount due on a mtge. within the proper competence of the div. ct. in the High Ct., by making a claim for possession of the land, is one that must be carefully guarded ; & except in cases clearly indicating the necessity for proceedings in the High Ct., no costs will be given to pltf.—VANDEWATERS *v.* HORTON (1885), 9 O. R. 548.—**CAN.**

o. Breach of covenant—Third party joined—Whether costs incurred are necessary consequence—Of breach.]—PARKER *v.* MCDONALD (1861), 11 C. P. 478.—**CAN.**

p. Assignee's action—On covenant for validity of security.]—STURGESS *v.* BITNER (1861), 11 C. P. 102.—**CAN.**

q. Full costs—Demand not exceeding £50.]—Where a bill is filed to foreclose in respect of a demand not exceeding £50, pltf. will be entitled to his full costs if it appear that there is an incumbrance beyond that sum.—HYMAN *v.* ROOTS (1865), 11 Gr. 202.—**CAN.**

r. Of proof of loss—Of title deeds.]—MCDONALD *v.* HIME (1868), 15 Gr. 72.—**CAN.**

s. Of hearing—On disputed facts.]—Where deft. submitted by answer to be

Sect. 3.—Costs of foreclosure, sale and redemption: Sub-sects. 2 & 3, A.

was entitled to stay proceedings in his own suit & to have the costs of it.—BROOKSBANK *v.* HIGGINBOTTOM, BENT *v.* BUCKLEY (1862), 31 Beav. 35; 54 E. R. 1050.

4141. Plaintiff failing to bring proper parties before court—Costs of the day.]—Where pltf. in a foreclosure suit brought the cause on for hearing, without having all the proper parties before the ct., he was ordered to pay the costs of the day.—CADDICK *v.* COOK (1863), 32 Beav. 70; 1 New Rep. 463; 32 L. J. Ch. 769; 7 L. T. 844; 9 Jur. N. S. 454; 11 W. R. 395; 55 E. R. 27.

4142. Costs of abortive attempt to sell—Payable out of money paid into court—By second mortgagee applying for sale.]—The money paid into ct. by a second mtgee. in order to obtain an order for sale under 15 & 16 Vict. c. 86, s. 48, held to be applicable to indemnify the first mtgee. for his costs in an abortive attempt to sell.—CORSELLIS *v.* PATMAN (1867), L. R. 4 Eq. 156; 16 L. T. 446; 15 W. R. 828.

4143. What costs included—Costs not being costs of action.]—Where a bill in a foreclosure suit alleged that there were costs, charges & expenses properly incurred by the mtgee., besides costs in an action on the mtgor.'s covenant for interest, & the mtgor. by his answer admitted that such was the fact:—*Held:* there must be an inquiry in the decree for foreclosure as to the "costs, charges & expenses properly incurred," but that such inquiry was not of course; the ct. refused to decide whether the costs of the action at law could be allowed until a question with respect to them had been raised before the taxing master.—MERRIMAN *v.* BONNER (1864), 10 L. T. 88; 10 Jur. N. S. 534; 12 W. R. 461.

Annotation:—**Reld.** National Provincial Bank *v.* Games (1886), 31 Ch. D. 582.

4144. —— ——.]—Mtged. property, the subject of a foreclosure action, was purchased by a public body under their statutory powers, & the sum which had been assessed for compensation was paid into ct.:—*Held:* the mtgee. was only entitled to the ordinary inquiry whether anything & what was due to him for any & what costs, charges, & expenses properly incurred by him in respect of his mtge. security, & he was not entitled to an express direction for the allowance of his extra costs, beyond those allowed on taxation between himself & the public body, of the inquiry to assess the compensation.—REES *v.* METROPOLITAN BOARD OF WORKS (1880), 14 Ch. D. 372; 49 L. J. Ch. 620; 42 L. T. 685; 28 W. R. 614.

4145. —— ——.]—Pltf. in a foreclosure action is as a general rule entitled to an account of only principal & interest due to him on his mtge., & of the costs of the action. To entitle him to an account of any other costs he must make out a special case.

Where pltf. was the transferee of a mtge., on which interest was overdue at the date of the transfer, & the mtgor. was a bkpt.:—*Held:* pltf. was entitled to an account of costs generally.—BOLINGBROKE *v.* HINDE (1884), 25 Ch. D. 795; 53 L. J. Ch. 704; 32 W. R. 427.

SUB-SECT. 3.—DEFENDANT'S COSTS.

A. In General.

4146. Costs of parties claiming under mortgagee—Action to redeem.]—Mtgor. filing a bill to redeem, must pay the costs of persons, defts., claiming under the mtgee.—WETHERELL *v.* COLLINS (1818), 3 Madd. 255; 56 E. R. 502.

Annotations:—**Apld.** Bartlo *v.* Wilkin (1836), 8 Sim. 238; Burden *v.* Oldaker (1844), 1 Coll. 105. **Distd.** Reed *v.* Freer (1844), 13 L. J. Ch. 417. **Reld.** Webb *v.* Crosse, [1912] 1 Ch. 323.

4147. Costs of assignee of bankrupt mortgagor.]—In a foreclosure suit, to which the provisional assignee of the Insolvent Debtors' Ct. is made a party, as representing the owner of the equity of redemption, the costs of the provisional assignee will be ordered to be paid by the pltf., who will add them, along with his own costs, to the sum due on the mtge.—PEAKE *v.* GIBBON (1831), 2 Russ. & M. 354; Taml. 505; 9 L. J. O. S. Ch. 168; 39 E. R. 429.

Annotation:—**Overd.** Appleby *v.* Duke (1843), 1 Ph. 272.

4148. ——.]—Mtgor. having taken the benefit of the Insolvent Act, the provisional assignee was made deft. to a suit to foreclose. He put in an answer claiming no interest in the premises:—*Held:* pltf. ought to pay him his costs & add them to his debt.—WOODWARD *v.* HADDON (1831), 4 Sim. 606; 1 L. J. Ch. 106; 58 E. R. 227.

Annotations:—**Folld.** Weaving *v.* Count (1834), 6 Sim. 439. **Overd.** Appleby *v.* Duke (1843), 1 Ph. 272.

4149. ——.]—The provisional assignee of an insolvent debtor having been made deft. to a suit by a mtgee. to foreclose the insolvent & those claiming under him:—*Held:* to be entitled to his costs, to be paid by pltf., who was to add them to his security.—BOSWELL *v.* TUCKER (1839), 1 Beav. 493; 48 E. R. 1031.

Annotation:—**Overd.** Appleby *v.* Duke (1843), 1 Ph. 272.

4150. —— **Security deficient.**] — The official assignee & the creditor's assignees of a bkpt., who are necessary parties to a suit for foreclosure in respect of their interest in the equity of redemption of premises of which the bkpt. was the mtgor., & which are an insufficient security for the amount of the mtges. thereon, are not entitled to their costs of the suit from pltf.—CASH *v.* BELCHER (1842), 1 Hare, 310; 11 L. J. Ch. 196; 6 Jur. 190; 66 E. R. 1051.

Annotations:—**Consd.** Tipping *v.* Power (1842), 1 Hare, 405. **Reld.** Massey *v.* Moss (1842), 1 Hare, 319.

4151. —— ——.] — When the provisional assignee under the Insolvent Act is made a deft. in that character to a bill of foreclosure, in respect of the equity of redemption, he is not entitled to his costs from pltf.; although he may have received no assets of insolvent wherewith to pay

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redeemed on payment of costs, & made statements which, if true, would have entitled him to costs:—*Held:* pltf. was justified in going to a hearing to prove facts which entitled him to costs against deft.—BRAND *v.* MARTIN (1869), 16 Gr. 566.—**CAN.**

a. *Time for payment.*]—DORNYN *v.* FRALICK (1874), 21 Gr. 191.—**CAN.**

b. *Improper defence—Personal order for costs.*]—Where in a suit to foreclose, deft. improperly resists the claim of pltf., the costs occasioned thereby will be ordered to be paid to pltf. whether deft. redeems or not.—BRYSON *v.* HUNTINGTON (1877), 25 Gr. 265.—**CAN.**

c. *What costs allowed—Action for foreclosure & ejectment.*]—A bill prayed foreclosure & ejectment. The answer attacked the mtge. & claimed title in defts. At the hearing defts. submitted to foreclosure, but contended that ejectment ought not, upon the frame of the bill, to be decreed & pltf. did not press for it:—*Held:* pltf. should have the costs of a simple foreclosure merely.—EDEN *v.* EDEN (1890), 6 Man. L. R. 596.—**CAN.**

PART XVIII. SECT. 3, SUB-SECT. 3.—A.

4147 i. *Costs of assignee of bankrupt mortgagor.*]—In a foreclosure suit, the provisional assignee having been made a deft., in consequence of the insolvency of one of the mtgors., was declared entitled to his costs against pltf., the latter to have them over against the fund.—SPROULE *v.* OATS (1839), 2 I. Eq. R. 323.—**IR.**

4147 ii. ——.]—LAHEY *v.* BELL (1842), 5 I. Eq. R. 108.—**IR.**

them.—APPLEBY *v.* DUKE (1843), 1 Ph. 272; 13 L. J. Ch. 9; 2 L. T. O. S. 73; 7 Jur. 985; 41 E. R. 635, L. C.; *affg.* (1842), 1 Hare, 303.

Annotations :—**Apld.** Cash *v.* Belcher (1842), 1 Hare, 310; Clarke *v.* Wilmot (1843), 1 Ph. 276. **Distd.** Grigg *v.* Sturgis (1846), 5 Hare, 93; Ohrly *v.* Jenkins (1847), 11 Jur. 1001. **Apld.** Talbot *v.* Kemshead (1859), 32 L. T. O. S. 60. **Refd.** Massey *v.* Moss (1842), 1 Hare, 319; Gabriel *v.* Sturgis (1846), 15 L. J. Ch. 201. **Mentd.** Gloucester Corpn. *v.* Woods (1843), 3 Hare, 131.

4152. ——— ———.]—Judgments Act, 1837 (c. 110), s. 68, does not make it the duty of a mtgee., as against the provisional assignee of an insolvent mtgor., to obtain an order from the comrs. of the Insolvent Debtors' Ct. for a conveyance of the equity of redemption; & an offer by the provisional assignee to facilitate the proceedings in such an application does not entitle him to his costs in a suit subsequently instituted against him for foreclosure.—GRIGG *v.* STURGIS (1846), 5 Hare, 93; 6 L. T. O. S. 478; 10 Jur. 133; 67 E. R. 841.

4153. Settlement of mortgage debt—Costs of settlement trustees.]—A sum due on mtge. was settled on a marriage. The husband, afterwards, obtained a decree of foreclosure in a suit in which the mtgor. & the trustee of the settlement were defts. The trustee's costs were ordered to be paid by pltf. & added to the mtge. debt.—BARTLE *v.* WILKIN (1836), 8 Sim. 238; 59 E. R. 95.

Annotation :—**Apld.** Smith *v.* Chichester (1842), 2 Dr. & War. 393.

4154. Costs of assignee of mortgagor pendente lite—In ex parte application.]—The assignee of the mtgor.'s interest, *pendente lite*, may be allowed to attend the master under a reference in a foreclosure suit, upon payment of the costs of the application, & of all costs occasioned by such attendance.—WHITEHURST *v.* BONEST (1840), 9 L. J. Ex. Eq. 43.

4155. Additional costs—Occasioned by plaintiff.]—PHILLIPS *v.* DAVIES, No. 4190, *post*.

4156. Costs of assignee of bankrupt mesne incumbrancer.]—An official assignee, made deft. to a foreclosure suit, as representing the interest of a mesne incumbrancer who had become bkpt., held not to be entitled to his costs from pltf., although he disclaimed absolutely at the hearing.—CLARKE *v.* WILMOT (1843), 1 Ph. 276; 13 L. J. Ch. 10; 2 L. T. O. S. 145; 41 E. R. 637, L. C.

Annotations :—**Folld.** Staffurth *v.* Pott (1848), 2 De G. & Sm. 571. **Refd.** Gabriel *v.* Sturgis (1846), 15 L. J. Ch. 201.

4157. Infant defendant—Suit in nature of partial administration.]—BACKHOUSE *v.* WALTON (1859), cited in 7 W. R. 542.

Annotation :—**Distd.** Wake *v.* Ward (1859), 33 L. T. O. S. 218.

4158. —— **Security deficient.**]—Where mtged. property was clearly not worth the money advanced upon it, the ct., at the hearing of a foreclosure suit, made an immediate decree for foreclosure absolute against the infant heir of the mtgor., the mtgee. paying the infant's costs.—CROXON *v.* LEVER (1863), 3 New Rep. 238; 9 L. T. 597; 10 Jur. N. S. 87; 12 W. R. 237.

Annotation :—**Folld.** Bennett *v.* Harfoot (1871), 24 L. T. 86.

4159. —— ———.]—Where, in a foreclosure suit against the infant heiress at law of the mtgor., the property was insufficient to satisfy the mtge. debt the ct., at the instance of pltf., & upon his offering to pay defts. costs, made an immediate & absolute foreclosure decree.—BENNETT *v.* HARFOOT (1871), 24 L. T. 86; 19 W. R. 428.

4160. ——.]—To a bill by a mtgee. for a partition, an infant deft. had not appeared, & the solr. to the suitors' fund was appointed guardian *ad litem*, under Ord. 28 of Oct. 26, 1842. At the hearing of the cause, it was directed that pltf. should pay the infant's costs & add them to his debt.—ROBINSON *v.* ASTON (1845), 5 L. T. O. S. 36; 9 Jur. 224.

4161. ——.]—Where the solr. to the suitors' fund has been appointed to act, & acts as guardian for infant defts. in a foreclosure suit, at the request of pltf., under Ord. 28, Oct. 1842, the ct., upon making a decree of foreclosure, will direct pltf. to pay the guardian's costs, & to add them to his own, even where the security is inadequate.—HARRIS *v.* HAMLYN (1849), 3 De G. & Sm. 470; 18 L. J. Ch. 403; 13 L. T. O. S. 399; 14 Jur. 55; 64 E. R. 566.

4162. ——.]—The costs of the solr. to the suitors' fund, who had been made guardian for infant deft. on his non-appearance to the writ of summons, must be paid in the first instance by the equitable mtgee., & those costs added to the amount of his security.—NEWBURGH (EARL) *v.* MORTON (1850), 16 L. T. O. S. 482; 15 Jur. 166.

Annotation :—**Refd.** Mellor *v.* Porter (1883), 25 Ch. D. 158.

4163. —— **Mortgagee only realising security.**]—(1) Where a mtgee. only seeks by his bill to realise his security against the heir of his mtgor., the heir is not entitled to his costs of the suit, as against the mtgee.'s debt & costs. Where, however, a vesting order had been made in the suit under Trustee Act, 1850 (c. 60), he was entitled to his costs of such order.

(2) Where an equitable mtgee. by deposit institutes a suit merely to realise his security, & not for the administration of the general estate of deceased mtgor.; & a sale of the mtged. property having been directed, the proceeds of the sale prove insufficient to satisfy both; the mtgee. is entitled to the payment of his debt, interest & costs before the payment of the costs of deft. infant heir of the mtgor.—WADE *v.* WARD (1859), 4 Drew. 602; 29 L. J. Ch. 42; 7 W. R. 542; 62 E. R. 231; *sub nom.* WAKE *v.* WARD, 33 L. T. O. S. 218.

4164. —— **Costs of vesting order.**]—WADE *v.* WARD, No. 4163, *ante*.

4165. Costs of puisne mortgagee defendant—Insufficiency of produce of sale.]—A mtge. in fee was made to pltf. & a power of sale was given to him;

4155 i. *Additional costs—Occasioned by plaintiff.*]—A.-G. *v.* REDMOND & BUCHANAN (1836), 2 Jo. Ex. Ir. 254.—**IR.**

d. *Action to redeem—Allegations of fraud.*]—Where a mtgor. seeking to redeem land alleged to have been sold by the mtgee., proved that the alleged sale was, on technical points, invalid, but his bill contained charges of fraud & collusion against the mtgee. & the purchasers which were not proved:—*Held*: though entitled to a redemption decree, he should pay the costs of both the mtgee. & the purchaser.—ROSS *v.* VICTORIAN PERMANENT PROPERTY INVESTMENT BLDG. SOCIETY (1882), 8 V. L. R. (L.) 254.—**AUS.**

e. *Compromise of suit.*]—ROBERTHON *v.* BEAMISH (1869), 16 Gr. 676.—**CAN.**

f. *Default of assignees of equity of redemption.*]—CAMPBELL *v.* ROBINSON (1880), 27 Gr. 634.—**CAN.**

g. *Of dispute as to rate of interest.*]—A mtgee. will not be deprived of his costs in a redemption suit made necessary by a dispute as to the rate of interest to which he was entitled.—THOMAS *v.* GIRVAN (NO. 1) (1896), 1 N. B. Eq. Rep. 314.—**CAN.**

h. *Unnecessary party joining of own accord.*]—COCKSHUTT PLOW CO. *v.* BEDINOFF (Sask.) (1922), 70 D. L. R. 514.—**CAN.**

k. *Personal liability of mortgagor.*]—It is contrary to the scheme of the Transfer of Property Act to make the mtgor. personally liable for costs in any case before the sale proceeds have proved insufficient to satisfy the mtge. claim.—KAMALAMMA *v.* KAMANDUR NARASIMHA CHARLU (1907), I. L. R. 30 Mad. 464.—**IND.**

l. ——.]—Costs incurred in proceedings in execution of the final decree in a mtge. suit are not chargeable against the mtged. property, but are payable by the judgment debtor personally.—

Sect. 3.—Costs of foreclosure, sale and redemption: Sub-sect. 3, A. & B.]

the mtgor. subsequently incumbered his property. The first mtgee. filed this bill against the mtgor. & all the subsequent claimants, for a sale under the power, when the property produced less than the amount of the first mtge. :—*Held :* the subsequent incumbrancers were nevertheless entitled to their costs out of the produce.—ALSTON *v.* PARKER (1835), 5 L. J. Ch. 3.

4166. —— ——.]—On a suit brought by a first mtgee. with power of sale, for the sale of the mtged. premises, in this ct. :—*Held :* the subsequent mtgees. were entitled to their costs, although a sale had been ordered with their consent, & the produce of the sale had not been sufficient to satisfy the first mtgee.—COOKE *v.* BROWN (1840), 4 Y. & C. Ex. 227 ; 9 L. J. Ex. Eq. 41 ; 160 E. R. 989.

4167. —— Effect of motion by pulsne mortgagee —How costs paid.]—In a suit for foreclosure & redemption by one of several successive mtgees., upon motion by a subsequent incumbrancer, the bill was ordered to be dismissed with costs against all other defts., without prejudice to any other suit, upon payment by deft. moving of a certain sum of money into ct. on or before a certain day, such money to be invested & accumulated. Pltf. to pay the taxed costs of all the other defts., & to have them over from deft. moving, who was ordered to pay to pltf. & other defts. their costs of this application ; & deft. moving, by his counsel, undertaking to indemnify pltf. against any proceedings which might be taken in the meantime by any party for redeeming pltf.'s securities, a reference was directed, to ascertain what was due to pltf. for principal & interest ; & the taxing master was ordered to tax his costs & those of the mtgees. other than deft. moving, who, as well as pltf., were to have liberty to apply.—JONES *v.* TINNEY (1845), Kay, App. xlv ; 69 E. R. 336.

Annotation :—**Refd.** Paynter *v.* Carew (1854), Kay, App. xxxvi.

4168. Costs of executors & devisees of mortgagor —Mortgagee proving in administration action—Security deficient.]—A mtgee. of freeholds with power of sale, &, by deposit of deeds, of leasehold premises, having failed after repeated trials to sell under his power, filed his bill for foreclosure, or for a sale of the mtged. property, against the exors. & devisees in trust of the mtged. premises under the will of the mtgor. Pltf. also went in & proved his debt in another suit, which had been instituted for the general administration of the mtgor.'s estate. The fund, realised under a decree for sale made in the suit, was insufficient to pay the mtge. debt :—*Held :* nevertheless, defts. were entitled to their costs out of the fund. —MACRAE *v.* ELLERTON (1858), 27 L. J. Ch. 777 ; 32 L. T. O. S. 101 ; 4 Jur. N. S. 967 ; 6 W. R. 851.

Annotations :—**Distd.** Cutfield *v.* Richards (1858), 26 Beav. 241 ; Cook *v.* Hart (1871), L. R. 12 Eq. 459.

4169. Defendant having agreed to assign mortgage—Transfer not executed.]—A first mtgee. having notice that A., a second mtgee. had agreed, for valuable consideration, to transfer his mtge. to B., but had not executed a transfer, made A. a deft. to a foreclosure suit. Before appearing, & again immediately after appearing, A. told pltf. that he had no interest in the property, & offered to disclaim, & being served with interrogatories, he put in an answer & disclaimer. Afterwards he executed a transfer of his mtge. to B., & pltf. then offered to dismiss the bill against him without costs :—*Held :* A., until he executed the transfer, was a necessary party, & he was not entitled to his costs.—ROBERTS *v.* HUGHES (1868), L. R. 6 Eq. 20.

B. Defendant having No Interest, claiming No Interest.

4170. General rule—Defendant entitled to costs.]—In a foreclosure suit against an insolvent mtgor. & the provisional assignee of the Insolvent Ct. who claims no interest, pltf. must pay the costs of the assignee & add them to his debt.—WEAVING *v.* COUNT (1834), 6 Sim. 439 ; 3 L. J. Ch. 148 ; 58 E. R. 659.

Annotation :—**Refd.** Appleby *v.* Duke (1843), 1 Ph. 272.

4171. —— ——.]—Where in a foreclosure suit a deft. by his answer properly disclaims all interest in the mtged. property, the ct. will give him his costs, to be paid by pltf., & by him added to his mtge. debt.—SILCOCK *v.* ROYNON (1843), 2 Y. & C. Ch. Cas. 376 ; 7 Jur. 548 ; 63 E. R. 166.

4172. —— ——.]—Mtgor. devised the mtged. estate to a person who did not accept the devise, & did not take or claim any benefit under the will. A bill of foreclosure was filed against him, without any allegation that he had been asked to accept the devise. He put in a disclaimer & the cause was brought to a hearing :—*Held :* he was entitled to his costs, to be paid by pltf.—HIGGINS *v.* FRANKIS (1850), 20 L. J. Ch. 16 ; 16 L. T. O. S. 358 ; 15 Jur. 277.

4173. —— ——.]—A.'s solr. agreed with B. that £1,000 of A.'s money should be advanced to B. on a second mtge. of property already in mtge. for £1,000. A mtge., dated Feb. 16, 1842, was prepared accordingly, & executed by B., no money passing. As soon as A. heard of the transaction he repudiated it, but agreed to advance £2,000 on a transfer of the first mtge. & a further charge. This was carried out by a deed of transfer & further charge, dated Feb. 28, 1842. The deed of Feb. 16 was not cancelled, but remained in the possession of A.'s solr. In 1844 the solr. advised C. to advance £1,000 on a transfer of the security of Feb. 16, 1842. C. paid the money to the solr., who handed over to C. the deed, with a memorandum, which he had fraudulently induced A. to sign, undertaking to transfer the mtge. The solr. employed the money for his own purposes. In 1848 the solr., by fraud, induced A. to execute to C. a deed of transfer of the mtge. of Feb. 16, 1842, & to sign a receipt for the £1,000. This deed contained words sufficient to pass the legal estate, which A. had in him by virtue of the deed of Feb. 28, 1842 : —*Held :* (1) A. must pay all the costs of the suit instituted by C. to obtain her rights, except the costs of the mtgor. & those of a deft. who ought not to have been made a party ; (2) the mtgor. was to blame in not having taken care, that the deed of Feb. 16, 1842, was cancelled, & he therefore must bear his own costs.

Deft., who had been a mtgee. of the equity of redemption of the property, disclaimed by his

HET RAM *v.* RAJA DUTT PRASAD (1926), I. L. R. 48 All. 682.—**IND.**

m. *Addition of parties.*]—In a redemption suit, pltf. as a general rule must pay the costs of all necessary parties.—WYNNE *v.* BRADY (1843), 5 I. Eq. R. 239.—**IR.**

n. *Plaintiff paid before bill filed.*]—Costs of a redemption suit instituted by a pulsne incumbrancer against a mtgee. in possession, given to the mtgee. up to the filing of his answer, & against him afterwards ; he having been, before answer, overpaid the sum due to him at the filing of the bill ; the balance being against him ; & his conduct being against conscience.—SNAGG *v.* FRIZELL (1846), 3 Jo. & Lat. 383.—**IR.**

o. *Untenable defence.*]—GUARDIAN ASSURANCE CO. *v.* AVONMORE (LORD) (1873), 7 I. R. Eq. 496.—**IR.**

answer, stating that his mtge. had been satisfied before the bill was filed, &, if any application had been made to him before making him a party, he would then have disclaimed :—*Held :* he was entitled to his costs.—HIORNS *v.* HOLTOM, FORTNUM *v.* HOLTOM (1852), 16 Beav. 259 ; 20 L. T. O. S. 188 ; 16 Jur. 1077 ; 51 E. R. 778.

4174. —— ——.]—If a disclaiming deft. shows that he never had & never claimed any interest, or, having an interest, that he had disclaimed or offered to disclaim before the institution of the suit, he is entitled to his costs. But if, having an interest, he neither disclaims nor offers to disclaim till he puts in his disclaimer, he is not entitled. These rules prevail, though pltf. never applied to deft. to disclaim prior to the institution of the suit. In a foreclosure suit by second mtgee., a subsequent judgment creditor, by his answer, disclaimed all interest, & stated that he had never been applied to by pltf. to disclaim, previously to the filing of the bill ; but he did not add, that if he had been so applied to he would have disclaimed, or that he had never claimed an interest :—*Held :* he was not entitled to his costs from pltf.—FORD *v.* CHESTERFIELD (EARL) (1853), 16 Beav. 516 ; 22 L. J. Ch. 630 ; 20 L. T. O. S. 288 ; 1 W. R. 217 ; 51 E. R. 878 ; *subsequent proceedings* (1856), 21 Beav. 426.

Annotations :—**Apld.** Bellamy *v.* Brickenden (1858), 4 K. & J. 670 ; Clarke *v.* Toleman (1872), 42 L. J. Ch. 23.

4175. Application of rule—Defendant having had interest — Assigning before action.]—A supplemental bill being filed against the assignees of deft. to the original suit, who had become bkpt., they put in their answer, stating that they had re-assigned their interest to bkpt., & disclaiming all interest. Pltf. then made bkpt., who had got his certificate, a deft., & he put in his answer admitting the re-assignment, & claiming the interest which had vested in the assignees. Pltf. filed replications to both answers, but no evidence was gone into :—*Held :* on the hearing of the supplemental suit the assignees were entitled to have the bill dismissed as against them, with costs, notwithstanding there was no evidence of the re-assignment to bkpt.—GLOVER *v.* ROGERS (1847), 17 L. J. Ch. 2 ; 10 L. T. O. S. 302 ; 11 Jur. 1000.

4176. —— —— ——.]—In a suit instituted for redemption of prior & foreclosure of subsequent incumbrances, creditors by judgment & by deposit of title deeds, who had parted with their interest in the securities before they were made parties to the suit put in their respective answers disclaiming all interest in the estates mortgaged :—*Held :* they were entitled not only to the general costs of the suit, but also to the costs of the evidence which one of them had gone into to support the statements in his answer, which had been replied to.—HURST *v.* HURST (1852), 16 Beav. 372 ; 22 L. J. Ch. 538, 546 ; 1 W. R. 105 ; 51 E. R. 822.

Annotation :—**Reld.** *Re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332.

4177. —— —— ——.]—(1) In a foreclosure suit by mtgees., judgment creditors, who had not issued execution, were made defts. :—*Held :* they were unnecessary parties & having disclaimed all interest upon being served with a copy of the bill, they were dismissed with costs.

(2) Other judgment creditors were made defts., who, after issuing execution, had assigned away all their interest before bill filed & disclaimed by their answer :—*Held :* they were entitled to their costs.—CORK (EARL) *v.* RUSSELL (1871), L. R. 13 Eq. 210 ; 41 L. J. Ch. 226 ; 26 L. T. 230 ; 20 W. R. 164.

Annotation :—*As to* (1) **Reld.** Hatton *v.* Haywood (1874), 43 L. J. Ch. 372.

4178. —— **Trustee never having acted—Costs additional to general costs of suit.**]—A trustee put in a disclaimer to a bill of foreclosure, & set out a correspondence to show that he had always refused to act :—*Held :* he was entitled to the whole costs, for pltf. might have shown by the bill that a simple disclaimer was sufficient.—BENBOW *v.* DAVIES (1848), 11 Beav. 369 ; 50 E. R. 859.

4179. —— **Judgment creditor not having issued execution—Disclaiming immediately after service.**]—CORK (EARL) *v.* RUSSELL, No. 4177, *ante*.

4180. —— **Second mortgage paid off.**]—Foreclosure bill against mtgor. & second mtgee. After bill filed the second mtgee. stated that he had been paid off & offered to disclaim at pltf.'s cost. This was refused, & the second mtgee. filed a disclaimer : —*Held :* he was entitled to his costs.—DAY *v.* GUDGEN (1876), 2 Ch. D. 209 ; 45 L. J. Ch. 263 ; 24 W. R. 425.

Annotation :—**Distd.** Lewin *v.* Jones (1884), 53 L. J. Ch. 1011.

4181. Proper form of disclaimer—Allegation that defendant "has not & never had" interest.]—SILCOCK *v.* ROYNON (1843), 2 Y. & C. Ch. Cas. 376 ; 7 Jur. 548 ; 63 E. R. 166.

4182. —— ——.]—The proper form of a disclaimer, to entitle deft. to costs against pltf., is a disclaimer of all right & interest, legal & equitable, & that deft. does not & never did claim. Therefore, where, in a foreclosure suit, deft. states in her answer simply that she "disclaims" all right & interest, & pltf. afterwards discovers that such deft. has, in fact, no interest, & amends his bill so as to show that fact :—*Held :* deft. was not entitled, on the bill being dismissed as against her, to have it dismissed with costs.—VALE *v.* MERIDETH (1854), 18 Jur. 992.

4183. —— ——.]—RIDGWAY *v.* KYNNERSLEY, No. 4194, *post*.

4184. Time for disclaimer—Whether after action brought.]—In suits for redemption to entitle a deft., who has never claimed an interest, to his costs, he is not bound to show that he has disclaimed, or given notice to that effect, before he was made a deft. to the suit.

A devisee of mtge. estates, in a suit for redemption, disclaimed after the suit had been revived against him, denying that he ever had or claimed any interest :—*Held :* he was entitled to costs, notwithstanding persons who had acted as his solrs. in other matters, on being applied to by pltfs. before he was made a deft., to know whether he claimed an interest, had neglected to return any answer to such application.—BELLAMY *v.* BRICKENDEN (1858), 4 K. & J. 670 ; 70 E. R. 278.

PART XVIII. SECT. 3, SUB-SECT. 3.—B.

4175 i. *Application of rule—Defendant having had interest—Assigning before action.*]—When a mtgee. sells or otherwise disposes of his mtge. security, being aware that the mtgor. has parted with his interest, he is bound to communicate that information to his assignee otherwise, in the event of such assignee filing a bill to foreclose against the mtgor., who disclaims any interest in the property, the mtgee. will be bound to pay the costs of the mtgor.—MASSON *v.* ROBLIN (1845), 2 O. S. 41.—**CAN.**

4175 ii. —— —— ——.]—A mtgor. was made deft. in a foreclosure suit, appeared thereto & answered, disclaiming any interest in the property. On motion to dismiss the bill as against the mtgor. :—*Held :* as pltf. either knew or had the means of knowing, before commencing the suit, that the mtgor. had conveyed away his equity of redemption in the property, the mtgor. was entitled to his costs.—WILSON *v.* HORNBROOK & MCKENNA (1866), 12 N. B. R. (1 Han.) 167.—**CAN.**

Sect. 3.—Costs of foreclosure, sale and redemption: Sub-sect. 3, B., C. & D.]

4185. —— ——.]—WARD *v.* SHAKESHAFT, No. 4196, *post.*

4186. —— ——.]—CORK (EARL) *v.* RUSSELL, No. 4177, *ante.*

4187. —— ——.]—DAY *v.* GUDGEN, No. 4180, *ante.*

C. Defendant having Interest disclaiming before Action.

4188. Right to costs.]—PIERSON *v.* GRUNDELL (1822), 3 Seton's Judgments & Orders, 7th ed. 1918.

4189. ——.]—THOMPSON *v.* KENDALL, No. 4216, *post.*

4190. ——.]—(1) If a mtgee. by the frame of his bill seeking a foreclosure, occasions additional costs, he must pay them.

(2) A trustee, having disclaimed by his answer, was allowed his costs of suit against pltf., who was held to be entitled to be repaid them.—PHILLIPS *v.* DAVIES (1843), 12 L. J. Ch. 232; 7 Jur. 52.

4191. ——.]—FORD *v.* CHESTERFIELD (EARL), No. 4174, *ante.*

4192. —— **Inquiry to determine date of notice of disclaimer.**]—A. insisted by his answer that B., claimant of the property in question, should be a party; B., on being made a party, stated by his answer that he had given notice of disclaimer to A. before the suit began, but did not enter into evidence; the ct. cannot determine the question of costs on the answers, but may direct an inquiry to ascertain when the notice of disclaimer was given.—PERKINS *v.* BRADLEY (1842), 1 Hare, 219; 6 Jur. 254; 66 E. R. 1013.

Annotations:—**Consd.** Cash *v.* Belcher (1842), 1 Hare, 310. **Mentd.** Fuller *v.* Benett (1843), 2 Hare, 394; Esquimalt & Namaimo Ry. *v.* Wilson, [1920] A. C. 358.

4193. —— **Sufficiency of offer to disclaim.**]—In a foreclosure suit, brought by mtgees. against, amongst other parties, the assignees of a tenant for life who had executed the mtge. deed, the assignees, by their answer stated, that before & since the filing of the bill they had offered to pltfs. to disclaim by deed, & they disclaimed by their answer:—*Held:* the assignees were entitled to their costs.—LOCK *v.* LOMAS (1851), 15 Jur. 162.

4194. —— ——.]—If a deft. seeks by his disclaimer to entitle himself to costs, he must either say that he has not & never had claimed any interest, or he must show that before bill filed he had disclaimed in some manner which ought to have satisfied the pltf., & under circumstances which either established actual notice of such disclaimer against him or showed that with ordinary care & prudence he might have had such notice (PAGE WOOD, V.-C.).—RIDGWAY *v.* KYNNERSLEY (1865), 2 Hem. & M. 565; 71 E. R. 583.

4195. —— ——.]—Where a subsequent incumbrancer, deft. in a foreclosure suit, offers to disclaim or release his interest before suit, he will be entitled to his costs.—BRADLEY *v.* BORLASE (1858), 32 L. T. O. S. 156; 7 W. R. 125.

4196. —— **Disclaimer before answer—Defendant compelled to appear & disclaim by answer.**]—(1) A mtgee. who answers the bill, but does not then disclaim, & who afterwards files an affidavit offering to do so, on payment of his costs, is not entitled to them.

(2) A., before service of a copy of the bill on him, but after it was filed, undertook to appear. Pltf. knew that A. had no interest in the suit, but he compelled him to put in an answer. By that answer A. disclaimed all interest in the suit, & stated that no application had been made to him by or on behalf of pltf. before bill filed:—*Held:* A. was entitled to his costs.—WARD *v.* SHAKESHAFT (1860), 1 Drew. & Sm. 269; 2 L. T. 203; 8 W. R. 335; 62 E. R. 381.

Annotation:—**Mentd.** Taylor *v.* Roe, [1894] 1 Ch. 413.

D. Defendant having Interest disclaiming only after Action.

4197. Whether entitled to costs—Defendant properly made party.]—CLARK *v.* WILMOT, No. 2970, *ante.*

4198. —— ——.]—TIPPING *v.* POWER, No. 4360, *post.*

4199. —— ——.]—In a suit by a second mtgee. to foreclose & redeem, certain defts., including the provisional assignee of the insolvent mtgor., disclaimed. They were, however, brought to a hearing, & it then appearing that there was insufficient to pay the first mtge., pltf. declined taking the account. The bill was dismissed as against the disclaiming defts., without costs, & the first mtgee. alone was entitled to his costs.—GIBSON *v.* NICOL (1846), 9 Beav. 403; 15 L. J. Ch. 195; 7 L. T. O. S. 108; 10 Jur. 419; 50 E. R. 399.

Annotation:—**Refd.** Ohrly *v.* Jenkins (1847), 11 Jur. 1001.

4200. —— ——.]—In order to entitle a party disclaiming to his costs, in a foreclosure suit, he must, on the first notice of the proceedings, inform pltf. of his disclaimer.—WHITCOMBE *v.* DEAKIN (1846), 7 L. T. O. S. 109.

4201. —— ——.]—The assignee in insolvency of a sub-mtgor. disclaimed:—*Held:* he was not entitled to his costs.—STAFFURTH *v.* POTT (1848), 2 De G. & Sm. 571; 64 E. R. 255.

4202. —— ——.]—In a suit for foreclosure, a party interested in the equity of redemption disclaimed & stated, he did not, & never did, claim any interest. The bill being brought to a hearing:

PART XVIII. SECT. 3, SUB-SECT. 3.—C.

4188 i. *Right to costs.*]—Where a deft., having an interest in the property in question in a foreclosure suit at the time of the filing of the bill, puts in a disclaimer, he will not be entitled to any costs.—BERRIE *v.* MACKLIN (1863), 1 Ch. Ch. 351.—**CAN.**

4188 ii. ——.]—A person interested in an equity of redemption informed the mtgee. before suit that he was willing to release to him his interest in the property. The mtgee., notwithstanding, made him a deft. to a bill for sale of the mtged. premises, & he filed an answer setting forth his willingness to release, & that he had before suit informed the pltf. of such willingness:—*Held:* he was entitled to costs.—WARING *v.* HUBBS (1866), 12 Gr. 227.—**CAN.**

4188 iii. ——.]—To a foreclosure bill alleging that deft. C. was the assignee of the equity of redemption, & was entitled to redeem, deft. C. filed a disclaimer & asked to be dismissed with costs:—*Held:* upon a hearing on bill & answer, deft. C. should pay the costs occasioned by the disclaimer.—WILTON *v.* WILTON (1886), 4 Man. L. R. 227.—**CAN.**

4188 iv. ——.]—Where a judgment creditor, having registered a memorial of his judgment, is made a party to a suit for the foreclosure of a mtge. given previously by the judgment debtor, & disclaims, he is not entitled to costs on the dismissal of the bill as against him.—NICHOLSON *v.* REID (1899), 1 N. B. Eq. Rep. 607.—**CAN.**

4188 v. ——.]—There must be material before a judge to justify him in awarding costs against an encumbrancer who, in what is in effect a foreclosure suit, promptly disclaims all interest in the land & submits to the relief sought.—GIBSON *v.* SNAITH (1915), 8 W. W. R. 247; 25 Man. L. R. 278.—**CAN.**

4193 i. —— *Sufficiency of offer to disclaim.*]—To a bill of foreclosure, an assignee in insolvency filed an answer & disclaimer, admitting the statements of the bill, & alleging that he was willing, & offered before being served with the bill, to release his right to the property, but not alleging that he had made the offer to pltf., or to whom he did make it:—*Held:* he was not entitled to costs.—DRURY *v.* O'NEIL (1868), 15 Gr. 123.—**CAN.**

4193 ii. —— ——.]—MANITOBA INVESTMENT ASSOCN. *v.* MOORE (1886), 4 Man. L. R. 41.—**CAN.**

—*Held:* he was not entitled to his costs.—BUCHANAN *v.* GREENWAY (1848), 11 Beav. 58; 50 E. R. 738.

4203. —— ——.]—Parties properly made defts. to a suit in the first instance, & afterwards giving notice to pltf. that they do not claim any interest, are not entitled to their costs, notwithstanding such notice was given before putting in their answer, unless they have gone on to offer their consent to have the bill dismissed against them without costs up to the date of such notice, & it rests with defts. to offer such consent, & not with pltfs. to ask it.—TALBOT *v.* KEMSHEAD (1858), 4 K. & J. 93; 32 L. T. O. S. 60; 6 W. R. 263; 70 E. R. 39.

Annotations:—**Folld.** Dillon *v.* Ashwin (1864), 9 L. T. 753. **Refd.** Durham *v.* Crackles (1862), 11 W. R. 138.

4204. —— ——.]—WARD *v.* SHAKESHAFT, No. 4196, *ante*.

4205. —— ——.]—Where a registered judgment creditor, made a deft. to a foreclosure suit, disclaims by answer, the course is to dismiss the bill against him without costs up to the filing of the answer, but with the costs subsequently incurred, & it makes no difference that he has made a previous disclaimer by letter.—GOWING *v.* MOWBRAY (1863), 2 New Rep. 384; 8 L. T. 531; 9 Jur. N. S. 844; 11 W. R. 851.

4206. —— —— **Through own default or negligence.**]—A judgment creditor, whose debt had been satisfied but who had not entered satisfaction on the rolls, was made a deft. to a foreclosure suit. He disclaimed:—*Held:* he was not entitled to his costs, in consequence of his negligence in not entering up satisfaction of his judgment.—THOMPSON *v.* HUDSON (1864), 34 Beav. 107; 55 E. R. 574.

4207. —— —— ——.]—In 1870, certain chambers in Gray's Inn, were, by deed, assigned for the residue of a term of years to deft. A. in trust for deft. B. In 1871 B. mortgaged his interest in the chambers to pltf., who gave notice of her mtge. to A.

A.'s name was never substituted for that of the assignor in the books of the society, &, by an order of pension made in 1873, a previous order permitting the assignment to A., was rescinded. A. gave no notice of this latter order to pltf.

To a foreclosure bill filed in 1874, by pltf., A. put in an answer & disclaimer, & claimed to be dismissed with costs:—*Held:* A., as he had given pltf. no notice of the order of pension made in 1873, was not entitled to any costs.—SLIPPER *v.* GOUGH (1877), 36 L. T. 92.

4208. —— **Bill against puisne mortgagee by prior incumbrancer.**]—A subsequent mtgee. who, in his answer to a bill of foreclosure by a prior incumbrancer, disclaims & offers to assign on having his costs paid, may be brought to a hearing, & will not be allowed his costs.—LAND *v.* WOOD (1823), 1 L. J. O. S. Ch. 89.

4209. —— ——.]—In a foreclosure suit by the first mtgee. against a second mtgee. & the mtgor., the second mtgee. disclaimed, & was brought to the hearing of the cause by pltf.:—*Held:* pltf. was bound to pay the disclaiming party his costs, & was entitled to add them to the mtge. debt.—DALTON *v.* LAMBERT (1846), 15 L. J. Ch. 208; 7 L. T. O. S. 3.

4210. —— ——.]—Where, on a bill of foreclosure by a first mtgee. against a second mtgee. & the mtgor., the second mtgee., by his answer, disclaimed, yet pltf. brought the second mtgee. to the hearing, no costs were given to the second mtgee. on the decree against him, upon the preponderance of modern decisions, though, formerly, the practice was to give such disclaiming second mtgee. deft. his costs, pltf. adding such costs to his own.—OHRLY *v.* JENKINS (1847), 1 De G. & Sm. 543; 17 L. J. Ch. 22; 10 L. T. O. S. 155; 11 Jur. 1001; 63 E. R. 1185.

—— ——.]—*See, also*, Nos. 4212, 4225, 4226, *post*.

4211. —— **Declaration by defendants that if applied to they would have disclaimed.**]—Assignees of an insolvent mtgor. are not entitled to the costs of a suit for foreclosure, though they by their answer disclaim, & say that if they had been applied to, they would have released the equity of redemption.—COLLINS *v.* SHIRLEY (1830), 1 Russ. & M. 638; 39 E. R. 245.

Annotations:—**Consd.** Thompson *v.* Kendall (1840), 9 Sim. 397; Rochfort *v.* Battersby (1849), 2 H. L. Cas. 388. **Refd.** Appleby *v.* Duke (1842), 11 L. J. Ch. 194; Melbourne Banking Corpn. *v.* Brougham (1879), 4 App. Cas. 156.

4212. —— ——.]—In a foreclosure suit by a first mtgee. against the mtgor. & puisne incumbrancers, pltf. alleged that application had been made to defts. to pay the debt, interest & costs, but that they had refused so to do. The second mtgees., by their answer & disclaimer, alleged that no application had been made to them, but that had they been applied to they would have released & discharged all interest. On the suit being brought to a hearing:—*Held:* they were entitled to their costs.—GURNEY *v.* JACKSON (1852), 1 Sm. & G. 97; 22 L. J. Ch. 417; 20 L. T. O. S. 176; 17 Jur. 204; 1 W. R. 91; 65 E. R. 43.

Annotation:—**Consd.** Ford *v.* Chesterfield (1853), 16 Beav. 516.

4213. —— ——.]—The assignees of a bkpt. mtgor. who had no assets disclaimed, & said that they would have disclaimed before suit, if any application had been made to them:—*Held:* nevertheless, they were not entitled to costs.—FORD *v.* WHITE (1852), 16 Beav. 120; 51 E. R. 723.

Annotations:—**Mentd.** Benham *v.* Keane (1861), 1 John. & H. 685; Chadwick *v.* Turner (1866), 1 Ch. App. 310; *Re* Monolithic Building Co., Tacon *v.* The Co., [1915] 1 Ch. 643.

4214. —— ——.]—FORD *v.* CHESTERFIELD (EARL), No. 4174, *ante*.

4215. —— **Defendants consenting to foreclose.**]—Where a suit for foreclosure was instituted by first mtgees. against the assignees of the mtgor., who was a bankrupt, & second mtgees., & the assignees by their answer stated that there were no assets, & consented to a foreclosure, but claimed their costs:—*Held:* they were not entitled to their costs.—GAUNT *v.* ALLEN (1839), 3 Jur. 840.

4216. —— **Defendants consenting to join in conveying estate—& distribute assets.**]—The assignee of an insolvent mtgor., who by his answer to a bill of foreclosure disclaimed, &, before the bill was filed, had consented to join in conveying the estate to the mtgor., & had distributed the insolvent's estate amongst the creditors, was ordered at the hearing to be paid his costs of the suit by pltf.—THOMPSON *v.* KENDALL (1840), 9 Sim. 397; 9 L. J. Ch. 318; 4 Jur. 551; 59 E. R. 411.

Annotation: **Refd.** Appleby *v.* Duke (1842), 11 L. J. Ch. 194.

4217. —— **Disclaimer in answer to amended bill.**]—Where, in a foreclosure suit, a deft., who had answered, & who had been called upon to answer the amended bill, stated in his further answer, that, having regard to his former answer, it was unnecessary & vexatious to call upon him to answer the amended bill; & that the costs of such answer ought, without reference to the result of the suit, to be paid by pltf.; the ct. ordered such costs to be taxed & paid by pltf., & not to be allowed to him as part of his costs.

Sect. 3.—Costs of foreclosure, sale and redemption: Sub-sect. 3, D.; sub-sect. 4, A., B. & C.]

Where no objection had been taken by another deft., required under similar circumstances to put in a further answer, the ct. refused to make any order.—COCKS *v.* STANLEY (1857), 4 Jur. N. S. 942; 6 W. R. 45.

4218. —— Costs incurred subsequent to disclaimer.]—TALBOT *v.* KEMSHEAD, No. 4203, *ante*.

4219. —— ——.]—In a suit for foreclosure, the assignees of a mtgor. disclaimed, & offered to be dismissed without costs. Pltfs. having brought them to a hearing, were ordered to pay their costs subsequent to the disclaimer.—DAVIS *v.* WHITMORE (1860), 28 Beav. 617; 2 L. T. 687; 6 Jur. N. S. 880; 8 W. R. 596; 54 E. R. 503.

Annotations:—**Distd.** Maxwell *v.* Wightwick (1866), L. R. 3 Eq. 210. **N.F.** Clarke *v.* Toleman (1872), 27 L. T. 599.

4220. —— ——.]—HOWKINS *v.* BENNET (1863), 2 Hem. & M. 567; 71 E. R. 583.

4221. —— ——.]—GOWING *v.* MOWBRAY, No. 4205, *ante*.

4222. —— ——.]—Deft. to a foreclosure suit, who had assigned *pendente lite*, & offered to have the bill dismissed as against him, without costs up to the date of the notice of the assignment, allowed his costs subsequent to such notice.—DILLON *v.* ASHWIN (1864), 3 New Rep. 359; 9 L. T. 753; 10 Jur. N. S. 119; 12 W. R. 366.

4223. —— ——.]—In a foreclosure suit, the official assignee of the mtgor. having been made a party to the suit, & served with the bill & interrogatories, wrote to say that he claimed no interest whatever in the subject-matter of the suit, that, if an answer was insisted upon, he should apply for costs against pltf. The interrogatories not having been withdrawn, the official assignee put in an answer & disclaimer, & applied at the hearing for his costs:—*Held:* as he had not been content simply to disclaim, but had put in an answer & appeared for the purpose of claiming his costs, he was not entitled to any costs.—MAXWELL *v.* WIGHTWICK (1866), L. R. 3 Eq. 210; 15 L. T. 348; 15 W. R. 304.

4224. —— ——.]—Deft. to a foreclosure suit who disclaims will not be entitled to his costs of appearing on subsequent proceedings, even though served with notice of them. *Davis* v. *Whitmore*, No. 4219, *ante*, overd.—CLARKE *v.* TOLEMAN (1872), 42 L. J. Ch. 23; 27 L. T. 599; 21 W. R. 66.

Annotation:—**Folld.** Lewin *v.* Jones (1884), 53 L. J. Ch. 1011.

4225. —— ——.]—A puisne mtgee. disclaiming is entitled to all costs incurred subsequent to offer to disclaim.—GREENE *v.* FOSTER (1882), 22 Ch. D. 566; 52 L. J. Ch. 470; 48 L. T. 411; 31 W. R. 285.

Annotation:—**Distd.** Lewin *v.* Jones (1884), 53 L. J. Ch. 1011.

4226. —— ——.]—A puisne mtgee., who had disclaimed in a foreclosure action, appeared on motion for judgment. Judgment was given against him without costs.—LEWIN *v.* JONES (1884), 53 L. J. Ch. 1011; 51 L. T. 59.

SUB-SECT. 4.—WHERE MORTGAGEE DEPRIVED OF, OR ORDERED TO PAY COSTS.

A. Default in Reconveying.

4227. Mortgagee ordered to pay costs—Redemption action—After payment under protest.]—ROURKE *v.* ROBINSON, No. 3457, *ante*.

4228. —— ——.]—GRAHAM *v.* SEAL, No. 3459, *ante*.

4229. ——.]—HOLME *v.* FIELDSEND, No. 3529, *ante*.

B. Unreasonable or Vexatious Conduct.

4230. General rule.]—Answer of mtgor. cannot be read against mtgee. on the subject of costs.

If the mtgee. was to be deprived of his costs for misconduct there must be proof of such misconduct (PLUMER, M.R.).—WRIGHT *v.* JONES (1822), Coop. Pr. Cas. 493; 47 E. R. 614.

4231. ——.]—DUNSTAN *v.* PATTERSON, No. 4102, *ante*.

4232. ——.]—NORTON *v.* COOPER, No. 3778, *ante*.

4233. ——.]—COTTERELL *v.* STRATTON, No. 4393, *post*.

4234. ——.]—BANK OF NEW SOUTH WALES *v.* O'CONNOR, No. 3475, *ante*.

4235. Oppressive use of legal process.]—A creditor being decreed to reconvey on payment of what was due on an estate in the West Indies, acquired by an unconscientious use of legal process, was deprived of costs subsequent to the payment of money into ct.—CRANSTOWN (LORD) *v.* JOHNSTON (1800), 5 Ves. 277; 31 E. R. 586.

4236. Withholding accounts.]—DETILLIN *v.* GALE, No. 4041, *ante*.

4237. —— Unless expenses of production paid.]—NORTON *v.* COOPER, No. 3778, *ante*.

4238. Usurious contract.]—Where, on a bill for redemption, a party is brought before the ct. in the character of mtgee., but has acquired his interest in the subject-matter of the suit by an usurious contract, he will not be allowed his costs.—JOHNSON *v.* WILLIAMSHURST (1823), 1 L. J. O. S. Ch. 112.

4239. Discharge by mortgagor hindered.]—CLIFF *v.* WADSWORTH, No. 4035, *ante*.

4240. Overstatement of amount due—Accounts refused except on payment of expenses of production.]—NORTON *v.* COOPER, No. 3778, *ante*.

4241. Joinder of unnecessary parties.]—In a foreclosure suit, the parties to the mtge. deed & those claiming under them ought alone to be made parties.

PART XVIII. SECT. 3, SUB-SECT. 4.—B.

4230 i. *General rule.*]—In cases of positive misconduct on the part of the mtgee., he may not only be deprived of costs, but ordered to pay them.—PAGE *v.* CHAMBERS (1879), 1 R. & G. 232.—**CAN.**

4230 ii. ——.]—In an action to enforce two land mtges. by foreclosure, in default of payment, judgment was given for pltf. for the amount of principal & interest secured by the mtges., subject to be reduced by credits allowed to deft. Pltf. was deprived of costs on account of misconduct.—BURTON *v.* MACFIE (1911), 19 W. L. R. 707.—**CAN.**

4230 iii. ——.]—A mtgee. is always entitled to costs, unless there be positive misconduct on his part.—LOFTUS *v.* SWIFT & ST. PATRICK'S HOSPITAL (GOVERNORS) (1806), 2 Sch. & Lef. 642.—**IR.**

4235 i. *Oppressive use of legal process.*]—Where a bill had been filed on a mtge. on which only a small sum for interest had become due two days previously, & deft.'s solr. had called at pltf.'s solr.'s office & left word that he was ready to pay the money, the ct. refused pltf. his costs.—MCLEAN *v.* CROSS (1871), 3 Ch. Ch. 432.—**CAN.**

4235 ii. ——.]—Where a first mtgee. has commenced a foreclosure suit, & has obtained an order for foreclosure & sale, a second order for foreclosure & sale will not be granted to a second mtgee. in a second action in respect of the same lands. Such an order is unnecessary & oppressive. The second mtgee. is not entitled to add to his claim the costs of his foreclosure suit.—WENTWORTH *v.* WALSH, 20 C. L. T. 340.—**CAN.**

4235 iii. ——.]—GRANT *v.* WALSH, 20 C. L. T. 341.—**CAN.**

4235 iv. ——.]—BANK OF HAMILTON *v.* LESLIE (NO. 2) (N. W. T.) (1906), 7 Terr. L. R. 303; 3 W. L. R. 401.—**CAN.**

4236 i. *Withholding accounts.*]—CASSIDY *v.* SULLIVAN (1878), 1 L. R. Ir. 313.—**IR.**

4241 i. *Joinder of unnecessary parties.*]—On a motion for a final decree, it appeared that several unnecessary parties were added in the

As against deft., Amelia Horn, I must make the usual decree for foreclosure, but I am of opinion I must accede to the application of Mr. Fischer upon the subject, & except from that decree the costs of the evidence gone into by pltf., which, as against defts. added by amendment, who are not affected by the mtge. deed, was unnecessary, & as respects deft., Amelia Rossiter, afterwards Amelia Horn, was improper, as she admitted, without qualification, the full title of pltf. In truth, all this evidence was gone into for the sole purpose of proving the case of pltf. as against the other defts., who had either not admitted, or were incapable of admitting, the facts alleged by pltf. (ROMILLY, M.R.).—AUDSLEY *v.* HORN (1858), as reported in 26 Beav. 195; 28 L. J. Ch. 293; 32 L. T. O. S. 202; 53 E. R. 872; *on appeal* (1859), 1 De G. F. & J. 226, L. C.

Annotations :—**Mentd.** Newill *v.* Nowill (1871), L. R. 12 Eq. 432; *Re* Adam's Policy Trusts (1883), 23 Ch. D. 525; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415.

4242. Necessity for proof of misconduct.]—WRIGHT *v.* JONES, No. 4230, *ante*.

C. Unsuccessful Resistance to Claim to Redeem.

4243. General rule.]—PRICE *v.* BERRINGTON (1849), 7 Hare, 394; 15 L. T. O. S. 326; 68 E. R. 163; *on appeal* (1851), 3 Mac. & G. 486, L. C.

Annotations :—**Mentd.** Jacobs *v.* Richards, Jacobs *v.* Porter (1854), 18 Beav. 300; Elliot *v.* Ince (1857), 7 De G. M. & G. 475; York Glass Co. *v.* Jubb (1925), 134 L. T. 36.

4244. ——.]—COWDRY *v.* DAY (1859), 1 Giff. 316; 29 L. J. Ch. 39; 1 L. T. 88; 5 Jur. N. S. 1199; 8 W. R. 55; 65 E. R. 936.

4245. ——.]—Pltf., a second mtgee., obtained the costs of so much of a suit for redemption as had been incurred by defts., the first mtgees. unsuccessfully disputing his rights to redeem. But the ct., instead of ordering those costs to be paid to pltf. personally, directed them to be set off in case of pltf.'s redeeming.—WHEATON *v.* GRAHAM (1857), 24 Beav. 483; 53 E. R. 444.

Annotation :—**Apld.** Forbes *v.* Jackson (1882), 19 Ch. D. 615.

4246. ——.]—KINNAIRD *v.* TROLLOPE, No. 3468, *ante*.

4247. Mortgagee wrongfully claiming to be owner.]—Mtge., redemption resisted, & mtgee. ordered to pay costs.—BAKER *v.* WIND (1748), 1 Ves. Sen. 160; 27 E. R. 956, L. C.

Annotation :—**Distd.** Williams *v.* Owen (1840), 5 My. & Cr. 303.

4248. ——.]—Conveyances held upon the circumstances & answer of deft. to be mtges., & not absolute conveyances; & deft. having insisted upon their being absolute conveyances; pltfs. were allowed to redeem with costs.—ENGLAND *v.* CODRINGTON (1758), 1 Eden, 169; 28 E. R. 649.

Annotations :—**Refd.** Dryden *v.* Frost (1838), 3 My. & Cr. 670; Lincoln *v.* Wright (1859), 28 L. J. Ch. 705.

4249. ——.]—MONTGOMERY *v.* CALLAND, No. 3774, *ante*.

4250. ——.]—NATIONAL BANK OF AUSTRALASIA *v.* UNITED HAND-IN-HAND & BAND OF HOPE CO., No. 3736, *ante*.

4251. ——.]—HALL *v.* HEWARD, No. 3737, *ante*.

4252. —— **Subsequent admission of holding as mortgagee—Costs up to time of admission.**]—In 1850, H. conveyed certain estates to two trustees for the benefit of creditors, & Y., who prepared the deed, was appointed the solr., & acted in the matters of the trust. Y. in Jan. 1857, in reply to inquiries on behalf of H. stated that he had, in Feb. 1853, purchased interests in the property, & was willing, on receiving the amount that would be due to him, to deliver up all the deeds in his possession, but limiting the offer to that month. The statement of account sent with the letter was disputed. Y. refused to furnish a copy of the deed of 1850, alleging that the document was his title deed. The original bill of H. was filed in Mar. 1859, & was dismissed in July following, he residing abroad, & not being able to comply with an order obtained by Y. requiring security for costs. The bill was again filed in July, 1862, & prayed for declarations that Y. was a mtgee. in possession & entitled to such sums as had been actually paid by him, for accounts, etc. On Dec. 6, 1862, Y. put in his answer, stating that he ceased to be the solr. to the trustees in Oct. 1852; that the interests in the estates & certain policies were conveyed & assigned to him in Apr. 1853; that he had never set up any title as purchaser, but was willing to be treated as a mtgee. On Jan. 7, 1863, Y. filed a bill for foreclosure, to which H. put in an answer in the following Mar. H. filed an amended bill in Feb. 1863, setting forth all the correspondence, for the purpose of showing that Y. had insisted upon his position of purchaser, & to that bill Y. filed a voluntary answer in Mar. following:—*Held*: H. was entitled to redeem, Y. must pay the costs of the litigation up to the time of filing his answer in Dec. 1862, when he consented to be considered as a mtgee. in possession, & H. must pay all the costs of the subsequent litigation; & ordered the usual accounts to be taken.—YETTS *v.* HILTON, HILTON *v.* SEWELL (1863), 9 L. T. 502; 9 Jur. N. S. 1273.

4253. Foreclosure decree obtained collusively.]—Mtgee. resisting the right to redemption, on the ground of a decree of foreclosure collusively obtained, decreed to pay so much of the costs as was occasioned by his resistance.—HARVEY *v.* TEBBUTT (1820), 1 Jac. & W. 197; 37 E. R. 350.

Annotations :—**Apld.** Roberts *v.* Williams (1841), 11 L. J. Ch. 65; Perkins *v.* Bradley (1842), 1 Hare, 219; Price *v.* Berrington (1849), 7 Hare, 394. **Consd.** Harmer *v.* Priestley (1853), 16 Beav. 569; Powell *v.* Roberts (1869), L. R. 9 Eq. 169.

4254. Defence not connected with title as mortgagee.]—*Semble*: in a redemption suit, the mtgee. will be ordered to pay the costs occasioned by a defence, in which he fails, not connected with his title as mtgee.—ROBERTS *v.* WILLIAMS (1841), 11 L. J. Ch. 65; 5 Jur. 1057.

Annotation :—**Consd.** Harmer *v.* Priestley (1853), 16 Beav. 569.

4255. Refusal on ground of puisne incumbrancer desiring to redeem.]—Mtgee. refused to allow his security to be redeemed by an assignee of the mtgor., on the ground that a subsequent incumbrancer was desirous to redeem him:—*Held*: this was a ground for making him pay the costs of the suit for redemption.—TOMLINSON *v.* GREGG (1866), 15 W. R. 51.

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master's office. The motion was refused, & the costs thus caused were deducted from pltf.'s bill.—RICE *v.* BROOKS (1859), 1 Ch. Ch. 71.—**CAN.**

PART XVIII. SECT. 3, SUB-SECT. 4.—C.

4243 i. *General rule.*]—A mtgee. who impugns his mtgor.'s right to redeem must, if unsuccessful, pay the costs of the suit.—*Re* UNDERWOOD'S WILL (1889), 10 N. S. W. Eq. 227.—**AUS.**

4243 ii. ——.]—Pltf. alleged several grounds for relief which he failed to establish, although he succeeded in showing a right to redeem, which right deft. had contested. The ct. refused costs to either party up to the hearing, & gave deft. the subsequent costs as of a redemption suit where the right to redeem is admitted.—BOSWELL *v.* GRAVLEY (1869), 16 Gr. 523.—**CAN.**

4247 i. *Mortgagee wrongfully claiming to be owner.*]—A mtgee. who takes a deed absolute in form, & then fraudulently denies the right of redemption, will be made to pay the costs of the suit.—LE TARGE *v.* DE TUYLL (1852), 3 Gr. 595.—**CAN.**

Sect. 3.—Costs of foreclosure, sale and redemption: Sub-sect. 4, C., D. & E.]

4256. Redemption by surety—Mortgagee retaining securities for further advances.]—FORBES *v.* JACKSON (1882), 19 Ch. D. 615; 51 L. J. Ch. 690; 48 L. T. 722; 30 W. R. 652.

Annotations:—**Mentd.** Lowes *v.* Maughan & Fearon (1884), Cab. & El. 340; Leicestershire Banking Co. *v.* Hawkins (1900), 16 T. L. R. 317; Nicholas *v.* Ridley, [1904] 1 Ch. 192.

4257. Redemption by lessee of mortgagor—Lease not binding on mortgagee.]—Pltf. brings his action undoubtedly on an allegation that deft. T. is found to grant him his lease. I think there is no case for that at all, & if it had been asked for, I think the judge would have dismissed that portion of the action with costs. But as regards redemption I think the judge was right in following the ordinary course in directing T. to pay the costs up to the hearing. I cannot think there can be any great costs incurred as a consequence of asking for specific performance, when he had no right to it (COTTON, L.J.).—TARN *v.* TURNER (1888), 39 Ch. D. 456; 57 L. J. Ch. 1085; 59 L. T. 742; 37 W. R. 276; 4 T. L. R. 735, C. A.

4258. Whether treated as separate item—Set-off as against other costs of action.]—WHEATON *v.* GRAHAM, No. 4245, *ante*.

Unsuccessful claim to tack.]—*See* Nos. 4260–4262, *post*.

Unsuccessful claim to consolidate.]—*See* No. 4263, *post*.

D. Mortgagee setting up Untenable Claim.

4259. General rule.]—MOORE *v.* PAINTER, No. 3827, *ante*.

4260. Unsuccessful claim to tack.]—I am . . . of opinion that pltf. is entitled to redeem Brown's mtge. upon payment only of what is due upon that security; & as the whole of this litigation has arisen from the claim of deft. to tack his debt, which I am of opinion he is not entitled to, he must pay the costs up to the hearing, including the costs of the hearing. The decree must be varried accordingly (LORD COTTENHAM, C.).—LACEY *v.* INGLE (1847), 2 Ph. 413; 41 E. R. 1002, L. C.

4261. ——.]—GRAHAM *v.* HORN, [1866] W. N. 166.

4262. ——.]—An owner of lands in Yorkshire mortgaged them to secure repayment of an advance of £1,100. The mtgee. registered a memorial of his mtge., not stating the amount of it, & afterwards he made a further advance, for which he received a memorandum of further charge upon the same lands, which he did not register. The mtgor. subsequently mortgaged the same lands to another person to whom he gave no notice of the further charge to the first mtgee., merely saying that the first mtge. was for £1,100. The second mtgee. registered his mtge. & gave notice of it to the first mtgee. The first mtgee. having refused to be redeemed except upon payment of the amount due upon both his mtge. & his further charge, the second mtgee. filed his bill for redemption:—*Held:* the second mtgee. was not bound, when he found the memorial of the first mtge. on the register, to inquire how much was due to the first mtgee., & the first mtgee., having refused to be redeemed except upon payment of both his mtge. & his further charge, was not entitled to his costs of the suit.—CREDLAND *v.* POTTER (1874), 10 Ch. App. 8; 44 L. J. Ch. 169; 31 L. T. 522; 39 J. P. 73; 23 W. R. 36, L. C. & L. JJ.

Annotations:—**Consd.** Kinnaird *v.* Trollope (1889), 42 Ch. D. 610. **Refd.** Carlton Main Colliery Co. *v.* Clawley, [1917] 2 K. B. 691. **Mentd.** Kettlewell *v.* Watson (1882), 21 Ch. D. 685; Rodger *v.* Harrison, [1893] 1 Q. B. 161; *Re* Calcott & Elvin's Contract, [1898] 2 Ch. 460; Fullerton *v.* Provincial Bank of Ireland, [1903] A. C. 309.

4263. Wrongful claim to consolidate.]—Deft. & pltf., were respectively first & second mtgees. of the A. estate, & deft. was also a mtgee. of the B. estate, belonging to the same mtgor. Pltf., before action brought, made deft. a definite offer to redeem deft.'s mtge. on A. This offer deft. refused, claiming to be entitled to consolidate his mtge. on B. with his mtge. on A., & requiring pltf. to redeem both. Pltf. then brought an action for redemption of deft.'s mtge. on A., & to have it declared that deft. was not entitled to consolidate:—*Held:* deft. was not entitled to consolidate; &, as the litigation had been solely caused by the refusal of deft. to accept an offer rightly made to redeem him, deft. should pay pltf.'s costs of the action up to & including the trial as well as the costs of the appeal.—SQUIRE *v.* PARDOE (1891), 66 L. T. 243; 40 W. R. 100; 36 Sol. Jo. 77, C. A.

4264. Statement of wrong date of taking possession.]—(1) When mtgees. have gone into possession & having sold under powers of sale in their mtge. deeds, a surplus remains in their hands, but they nevertheless make claims of various amounts as due to them from the representative of their mtgor., & state a wrong date as that on which they have taken possession, they will, in an action for redemption brought by the legal personal representative of their mtgor. more than nine years after his death, to which statutes of limitation are pleaded, be held by their conduct to have forfeited their otherwise absolute right to costs, & will be given no costs down to judgment, except as to a particular issue as to which the action was dismissed, but, in such circumstances, will not be ordered to pay any costs to that date.

(2) If on taking the accounts under the judgment the mtgees., notwithstanding the fraud of their agent prevents them ascertaining the truth, persist that a balance is due to them, they must pay the costs of action subsequent to judgment, subject to a set-off of the costs of the particular issue, & simple interest at 4 per cent. on the surplus balance from the date when they were overpaid.

(3) If the balance on taxation of costs should prove to be in the mtgees.' favour, the balance of costs ought to be deducted from such surplus balance & the interest thereon as at the date of the writ in the action, inasmuch as no costs could be incurred until the action was commenced, & not as on the date when they were first fully paid.—HEATH *v.* CHINN (1908), 98 L. T. 855.

E. Refusal of Tender.

4265. General rule.]—SHUTTLEWORTH *v.* LOWTHER (undated), cited in 7 Ves. at p. 586; 32 E. R. 236.

Annotations:—**Refd.** Detillin *v.* Gale (1802), 7 Ves. 583; Taylor *v.* Baker (1818), Dan. 71; Harvey *v.* Tebbutt (1820), 1 Jac. & W. 197; Harmer *v.* Priestley (1853), 16 Beav. 569.

4266. ——.]—Exceptions to the general rule, entitling a mtgee. to costs.

If the conduct of the mtgee. shows, that, though

PART XVIII. SECT. 3, SUB-SECT. 4.—E.

4265 i. *General rule.*]—To relieve the mtgor. from liability to costs he must make an unconditional tender of the amount actually due.—DAIGNEAU *v.* DAGNENAIS (1903), 23 C. L. T. 90; 5 O. L. R. 265.—**CAN.**

4265 ii. ——.]—A mtgee. rightfully commencing an action to enforce his mtge. security is entitled to prosecute that action until he has been paid or tendered his money; & he cannot be compelled to tax his costs until he gets it.—WESTERN TRUST CO. *v.* POPHAM (1912), 21 W. L. R. 187; 2 W. W. R. 297; 3 D. L. R. 326; 5 Sask. L. R. 226.—**CAN.**

repeated tenders should be made, he will not act upon them, I would apply the doctrine of law to that case (LORD ELDON, C.).——*v.* TRECOTHICK (1813), 2 Ves. & B. 181 ; 35 E. R. 287, L. C.

Annotation :—**Refd.** Dryden *v.* Frost (1838), 3 My. & Cr. 670.

4267. —— **Tender before action.**]—ROBARTS *v.* JEFFERYS, No. 4032, *ante*.

4268. —— ——.]—Decree against a mtgee. in possession, with costs ; a tender having been made before suit, & it having been found, upon taking the accounts with annual rests, which was the point in the cause, that nothing was, at that time, due to the mtgee.—WILSON *v.* CLUER (1841), 4 Beav. 214 ; 49 E. R. 320.

Annotation :—**Refd.** Harmer *v.* Priestley (1853), 16 Beav. 569.

4269. —— ——.]—An incumbrancer, to whom a sum, greater than the balance found due to him, had been tendered before the bill was filed, ordered to pay the costs.—ROBERTS *v.* WILLIAMS (1844), 4 Hare, 129 ; 67 E. R. 589.

Annotation :—**Refd.** Harmer *v.* Priestley (1853), 16 Beav. 569.

4270. —— ——.]—First mtgee., after the usual notice given him by the second mtgee. to redeem, filed a bill of foreclosure. At the end of the term mentioned in the notice, the second mtgee. tendered the mtge. money & costs to the first mtgee., which the latter declined to accept :—*Held :* under all the circumstances of the case, the first mtgee. was not entitled to the costs of the suit after the tender.—SMITH *v.* GREEN (1844), 1 Coll. 555 ; 63 E. R. 541.

Annotations :—**Consd.** Paynter *v.* Carew (1854), Kay, App. xxxvi. **Refd.** Harmer *v.* Priestley (1853), 16 Beav. 569 ; Wicks *v.* Scrivens (1860), 1 John. & H. 215 ; Pearce *v.* Morris (1869), 5 Ch. App. 227.

4271. —— ——.]—After action brought by mtgee., a solr., against mtgor., for his bill of costs on effecting the mtge., & £35 taken out of ct. in that action by mtgee., in satisfaction of his demand, & after second action brought between the same parties to recover the mtge. money, & costs in that action taxed at £19 16*s.* 4*d.*, mtgor. tendered to mtgee. principal, interest, & sum of £19 16*s.* 4*d.* & £10, for any other costs & expenses that might be due : mtgee., however, refused to reconvey, because the bill of costs, the subject of the first action, had not been satisfied, & the taxed costs of the second action were only costs as between party & party. Upon a bill filed by mtgor. against mtgee., to compel a reconveyance :—*Held :* the mtgee. must pay the costs of the suit.—MORLEY *v.* BRIDGES (1846), 2 Coll. 621 ; 11 Jur. 706 ; 63 E. R. 888.

4272. —— ——.]—Where a mtgor. makes an unconditional tender to the mtgee. of a sum, & the mtgee. refuses to accept it, he does so at his own peril ; & if the amount tendered was all that was due, the mtgee. must bear the costs of a subsequent suit for redemption.—HARMER *v.* PRIESTLEY (1853), 16 Beav. 569 ; 22 L. J. Ch. 1041 ; 21 L. T. O. S. 177 ; 1 W. R. 343 ; 51 E. R. 899.

Annotations :—**Apld.** Hosken *v.* Sincock (1865), 34 L. J. Ch. 435. **Consd.** Greenwood *v.* Sutcliffe, [1892] 1 Ch. 1.

4273. —— ——.]—HOSKEN *v.* SINCOCK, No. 3768, *ante*.

4274. —— ——.]—A mtge. of a reversionary interest is but a sale of it *pro tanto*, & is governed by the ordinary rules of the court which regulate such sales.

Pltf. mortgaged a reversionary interest in real estate to deft. ; but, as it afterwards appeared, the security was made to extend far beyond the actual advances. On the occasion of the mtge. pltf. employed his own solr. Pending certain disputes which arose out of the transaction, pltf. offered to pay deft. more than he was ultimately held entitled to ; but deft. refused that offer. Pltf. then filed a bill to set aside the mtge. :—*Held :* the mtge. must stand as a security for so much only as was actually advanced to pltf. ; but deft. must pay the costs of the suit.—EMMET *v.* TOTTENHAM, TOTTENHAM *v.* EMMET (1865), 12 L. T. 838 ; 14 W. R. 3, L. C.

Annotations :—**Mentd.** Aylesford *v.* Morris (1872), 42 L. J. Ch. 146 ; Beynon *v.* Cook (1875), 32 L. T. 353.

4275. —— ——.]—LEWIS *v.* WEBBER, [1876] W. N. 187.

4276. —— ——.]—BANK OF NEW SOUTH WALES *v.* O'CONNOR, No. 3475, *ante*.

4277. —— **Tender at time when mortgagor entitled to pay off.**]—On Mar. 15 the solrs. for the mtgors. wrote to the solrs. for the mtgee. & said that they were willing to complete & pay the money on the next day upon an undertaking being given by the solrs. for the mtgee. to obtain execution of the deed of reassignment. On Mar. 16 there was a meeting at the office of the solrs. for the mtgee. & tender was made of the principal & interest up to that date. In the argument before me it was ultimately conceded that having regard to the authorities it is perfectly clear that on this occasion there was a good legal tender of the proper amount.

Well this tender was refused, although it was a perfectly good tender. I think that when such a notice be given or demand made as there was here mere failure to pay within or on the day of the expiration of the three months does not render the mtgor. liable to pay an additional six months' interest or anything of the kind ; & most certainly is this not so where the failure to pay happens or is occasioned in the manner in which it was in the present case. Therefore on this point as to tender & demand for further interest the mtgee. was wrong & has remained wrong throughout, & she certainly must pay the general costs of the action. . . . I think it clear that, even after tender improperly refused, it would be unreasonable that the mtgor. should have & make full use of the mtgee.'s money without paying any interest. On the whole I think that, in order to avoid payment of interest after tender improperly refused, the mtgor. must either pay the money into ct., if there be any proceedings in which that could be done, or keep the money ready, & either make no profit, or, if he make profit . . . he must account for such profit to the mtgee. (JOYCE, J.).—EDMONDSON *v.* COPLAND, [1911] 2 Ch. 301 ; 80 L. J. Ch. 532 ; 105 L. T. 8 ; 27 T. L. R. 446 ; 55 Sol. Jo. 520.

Annotation :—**Refd.** Graham *v.* Seal (1918), 88 L. J. Ch. 31.

4278. Necessity for express formal tender.]—It must be an actual tender to excuse costs.—

4277 1. —— *Tender at time when mortgagor entitled to pay off.*]—A mtge. contained a covenant for payment of interest by equal quarterly payments so long as the principal remained unpaid. After the day fixed for payment of principal, & between two of the quarterly days for payment of interest, six months' notice to redeem was given. At the end of six months, principal & interest to date were tendered & refused by the mtgee., who insisted on his right to interest up to next quarterly day of payment. On bill to redeem :—*Held :* the amount tendered was sufficient, & the mtgor. was entitled to his costs of suit.—CONROY *v.* MARSH (1871), 2 V. R. (Eq.) 93.—**AUS.**

p. *Tender of part of money due—To executors of mortgagee—Part already paid to one executor.*]—Mtgor. having paid off part of the principal to one of several exors. of the mtgee., tendered the remainder, which the other exors. refused, insisting that the whole sum was due. On bill for redemption a

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GAMMON *v.* STONE (1749), 1 Ves. Sen. 339; 27 E. R. 1068, L. C.

Annotation:—**Mentd.** Woffington *v.* Sparks (1754), 2 Ves. Sen. 569.

4279. —— Offer without tender.]—The point in dispute was, whether a mtgee. was entitled to six years' or twenty years' arrears of interest. Deft., the mtgor., was willing before suit to pay the principal & six years' interest, but made no tender. At the hearing the mtgor. succeeded on the point of interest:—*Held:* as there had been no tender, the mtgee. must pay the costs.—HODGES *v.* CROYDON CANAL CO. (1840), 3 Beav. 86; 49 E. R. 34.

Annotations:—**Consd.** Kinnaird *v.* Trollope (1889), 42 Ch. D. 610. **Mentd.** Hunter *v.* Nockolds (1850), 1 Mac. & G. 640; Toft *v.* Stevenson (1854), 5 De G. M. & G. 735.

4280. Costs of application for stay.]—The ct. will not, on staying proceedings under 7 Geo. 2, c. 20, in an ejectment brought by a mtgee., compel the mtgee. to pay the costs of the rule, because he had refused a tender of the sum due.—DOE d. SIMPSON *v.* BUNN (1838), 1 Will. Woll. & H. 49.

4281. Motion to dismiss creditor's suit—Tender after bill filed.]—WAINWRIGHT *v.* SEWELL (1863), 11 W. R. 560.

F. When Mortgagees fully paid.

4282. Mortgagee resisting redemption.]—WOODROFT *v.* SOYS (undated), Beames' Costs in Equity, 2nd ed. 26, n.

4283. ——.]—WILSON *v.* CLUER, No. 4268, *ante*.

4284. ——.]—In a suit for redemption a mtgee. is entitled to his costs, if it be found that anything was due to him at the filing of the bill, although the accounts be directed to be taken against him with annual rests.

Where on a bill for redemption nothing is found due to the mtgee., he must pay the costs of the suit.

Mtgor. obtained a decree for redemption, but did not prosecute it, & died. The mtgee. then instituted a second suit against the representative of the mtgor. for foreclosure, & a similar decree was made. It was found that a balance was due to the mtgee. at the institution of the first suit, but none at the second. The mtgee. obtained his costs of the first suit, but was ordered to pay those of the second.—BARLOW *v.* GAINS, MORRIS *v.* ISLIP (1856), 23 Beav. 244; 53 E. R. 95.

Annotation:—**Reld.** Heath *v.* Chinn (1908), 98 L. T. 855.

4285. ——.]—ASHWORTH *v.* LORD, No. 3880, *ante*.

4286. —— At suit of representatives of deceased mortgagor—Mortgagor tenant for life.]—The tenant for life of property subject to a mtge. filed a bill against the mtgee. in possession, & others to redeem the property. The decree made gave her a right to redeem & also directed an inquiry whether any past rents were due to her from the mtgee. in possession in respect of her life estate & declared that for what, if anything, should be so found due to her she was entitled to a charge on the property. After the decree she died without having redeemed. The suit was revived by her personal representatives, & the inquiry was prosecuted, & the chief clerk found that £285 was due to deceased pltf. in respect of her life estate:—*Held:* her representatives were entitled to the costs of the suit.—PAWLEY *v.* COLYER (1867), 16 W. R. 114, L. J.

4287. —— Payment into court—Costs up to payment in.]—Mtgor. filed a bill to redeem & alleged that he had paid off part of the debt, & prayed an injunction against proceedings at law. The injunction was granted until answer, on his paying a sum of money into ct. Deft., by his answer, denied that the part payment had been made to any person authorised to receive the money, & on his motion the injunction was dissolved. The money paid in by pltf. was taken out of ct. by deft., & when the accounts were taken, it was found that deft. had been overpaid. On further consideration it was ordered (*inter alia*) that the costs of the suit up to the time when the money in ct. was paid out to deft. should be paid by pltf.; that, from that date to the decree, there should be no costs to either party, & that the subsequent costs should be paid by deft. The taxing master included in the costs to be paid by pltf. those of the two motions to obtain & dissolve the injunction, &, their lordships decided that they were rightly included, as they were costs incurred at a time when pltf. was in the wrong.—WEBSTER *v.* MANBY (1869), 4 Ch. App. 372; 20 L. T. 387; 17 W. R. 545, L. JJ.

4288. Costs of proceedings caused by mortgagee after payment.]—(1) Mtgee. let in possession by mtgor. till he should be paid the sum lent & interest, overpaid in two, & holding over thirty-four years longer, charged with the balance, & interest from the date of a notice to pay the receipts to a prior mtgee.

(2) Only 4 per cent. interest allowed, though the overpaid mtgee. had purchased two small shares of a prior mtge. on the same estate which had been paid off with interest at 5 per cent.

(3) Mtgee. in possession entitled to costs incurred by him in that character, but charged with the costs of subsequent proceedings, rendered necessary by his conduct when overpaid.

It is a general, but not an universal rule, that a mtgee. in possession, party to a suit, is to have his costs.—ARCHDEACON *v.* BOWES (1824), M'Cle. 149; 13 Price, 353; 148 E. R. 62.

4289. Costs of proceedings instituted by mortgagee—Sale.]—BINNINGTON *v.* HARWOOD, No. 3886, *ante*.

4290. —— Foreclosure.]—BARLOW *v.* GAINS, MORRIS *v.* ISLIP, No. 4284, *ante*.

4291. —— ——.]—SEAL *v.* KEMSLEY, [1883] W. N. 122, C. A.

4292. Payment while proceedings pending—Suit brought to hearing.]—(1) A. mortgaged to B., & the securities were prepared by a firm of solrs. in which B. was a partner. The firm acted for the mtgor.:—*Held:* B.'s security did not extend to the bill of costs of the firm.

(2) Pending a foreclosure suit, the mtgee. was fully paid. He, however, made further claims & brought the cause to a hearing. His claim appearing unfounded, he was ordered to pay all the subsequent costs.—GREGG *v.* SLATER (1856), 22 Beav. 314; 25 L. J. Ch. 440; 26 L. T. O. S. 319; 2 Jur. N. S. 246; 4 W. R. 381; 52 E. R. 1129.

Annotations:—*As to* (1) **Apld.** Field *v.* Hopkins (1890), 44 Ch. D. 524. **Consd.** Wales *v.* Carr, [1902] 1 Ch. 860.

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reference was made to the master, who found that the sum tendered was all that was due:—*Held:* although pltf. had thus sustained the substance of his bill, yet pltf. & defts. having been both guilty of irregularities, no costs should be given on either side.—LEWIS *v.* LEVY (1878), 4 V. L. R. (Eq.) 106.—AUS.

q. —— *Slight insufficiency.*]—CORNWALL *v.* BROWN (1852), 3 Gr. 633.—CAN.

PART XVIII. SECT. 3, SUB-SECT. 4.—F.

4282 i. *Mortgagee resisting redemption.*]—O'NEIL *v.* INNES (1864), 15 I. Ch. R. 527.—IR.

G. Other Cases.

4293. Assignment of mortgage during proceedings.]—Where, upon a bill of redemption & foreclosure, the mtgee. assigns his mtge., after a decree for the usual accounts, the mtgor. is not to pay the costs of the supplemental bill, which is necessary to bring the assignee of the mtgee. before the ct. —BARRY *v.* WREY (1827), 3 Russ. 465; 38 E. R. 650.

Annotations :—**Distd.** Bartle *v.* Wilkin (1836), 8 Sim. 238. **Reid.** Massey *v.* Moss (1842), 1 Hare, 319.

4294. ——.]—(1) Mtgee. filed a bill of foreclosure & pending the suit, transferred the mtge. to A. who transferred it to C. :—*Held :* the extra costs thus occasioned were not to be charged against mtgor.

(2) Pending a suit, by a first mtgee. to foreclose, pltf. obtained a transfer from the second mtgee. : —*Held :* the costs occasioned were chargeable against the estate.

(3) Mtgee. had been in possession. She transferred the whole of her interest, & afterwards became insolvent. Her assignees were made defts. to a bill of foreclosure :—*Held :* their costs ought not to be charged on the mortgaged estate, but on pltf.—COLES *v.* FORREST, WARD *v.* FORREST (1847), 10 Beav. 552; 50 E. R. 694.

4295. Allegations of fraud — Charge unsubstantiated.]—Pltf. must clearly have the general costs of the suit. But a considerable part of the costs has arisen from the charges in the bill. . . . In those charges I think pltf. has wholly failed; & I shall, therefore, in giving him his costs, except all costs occasioned by those charges; & I shall declare defts. to be entitled to all their costs occasioned by the introduction of such charges, to be set off against the pltfs.' general costs of the suit (LORD CRANWORTH, V.-C.).—WEST *v.* JONES (1851), 1 Sim. N. S. 205; 20 L. J. Ch. 362; 61 E. R. 79.

4296. —— **General charges.**]—A general charge of fraud does not affect the rule as to payment of costs by a resisting mtgee.—HAYWARD *v.* KEARSEY (1866), 14 L. T. 879; 14 W. R. 999, L. C.

4297. Costs of suit to enforce agreement to purchase—Completion resisted on ground of misdescription—Suit dismissed.]—PEERS *v.* CEELEY, No. 4124, *ante*.

4298. Costs of further suit after accounts taken.]—A decree for foreclosure being made, the mtgee. after the accounts had been taken, incurred further costs in another proceeding :—*Held :* he could not, by petition, obtain an order to add them to his security.—BARRON *v.* LANCEFIELD (1853), 17 Beav. 208; 51 E. R. 1012.

4299. Overstatement of amount due.]—COTTERELL *v.* STRATTON, No. 4393, *post*.

4300. Second mortgagee contesting priority of first mortgagee.]—Pltfs. must add to their security so much of the costs of the action in the ct. below as would have been incurred if the action had been a simple action for foreclosure & no question of priority had been raised & deft. must pay to pltfs. the residue of pltf.'s costs in the ct. below & the whole of the costs of the appeal.—NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. *v.* WHIPP (1884), 26 Ch. D. 482; 53 L. J. Ch. 629; 51 L. T. 806; 32 W. R. 626, C. A.

Annotations :—**Mentd.** Garnham *v.* Skipper (1885), 53 L. T. 940; Manners *v.* Mew (1885), 29 Ch. D. 725; National Provincial Bank of England *v.* Jackson (1886), 33 Ch. D. 1; Farrand *v.* Yorkshire Banking Co. (1888), 40 Ch. D. 182; Taylor *v.* Russell, [1891] 1 Ch. 8; Isaac *v.* Worstencroft (1892), 67 L. T. 351; Brocklesby *v.* Temperance Permanent Bldg. Soc., [1893] 3 Ch. 130; *Re* Ingham, Jones *v.* Ingham, [1893] 1 Ch. 352; Garside *v.* Liverpool Ry. Permanent Benefit Bldg. Soc. (1897), 13 T. L. R. 189; *Re* Castell & Brown, Roper *v.* Castell & Brown, [1898] 1 Ch. 315; Oliver *v.* Hinton, [1899] 2 Ch. 264; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231; Berwick *v.* Price (1904), 74 L. J. Ch. 249; Cottey *v.* National Provincial Bank of England (1904), 20 T. L. R. 607; Ruben *v.* Great Fingall Consolidated, [1904] 2 K. B. 712; Longman *v.* Bath Electric Tramways, [1905] 1 Ch. 646; Walker *v.* Linom, [1907] 2 Ch. 104.

4301. Mortgagee referring to court question of amount due — Contention unsuccessful.]—(1) A solr. mtgee. acting as solr. for himself in a redemption action is entitled to costs out of pocket, but not to remuneration for personal trouble. The objection to the allowance to a deft. solr. mtgee. of profit costs need not be taken at the hearing, but may be taken before the taxing master after judgment in the usual form containing the common order for taxation of costs has been given in a mtgor.'s redemption action.

(2) A mtgee. does not necessarily lose his right to costs by bringing before the ct. a question as to the amount which is due to him in respect of principal, interest, or costs, even although he be unsuccessful in his contention (STIRLING, J.).—STONE *v.* LICKORISH, [1891] 2 Ch. 363; 60 L. J. Ch. 289; 64 L. T. 79; 39 W. R. 331.

Annotation :—*As to* (1) **Reid.** *Re* Doody, Fisher *v.* Doody, Hibbert *v.* Lloyd, [1893] 1 Ch. 129.

SUB-SECT. 5.—TAXATION.

See Sect. 12, sub-sect. 2, *post*.

SUB-SECT. 6.—SECURITY FOR COSTS.

4302. Plaintiff suing by next friend — Security of next friend insufficient.]—In a suit for redemption of real estate of a *feme covert* suing by her next friend, although her husband was co-pltf. in the suit :—*Held :* the personal security of the next

PART XVIII. SECT. 3, SUB-SECT. 4.—G.

4295 i. *Allegations of fraud—Charge unsubstantiated.*]—RICHMOND *v.* EVANS (1861), 8 Gr. 508.—**CAN.**

4295 ii. —— ——.]—ENGERSON *v.* SMITH (1862), 9 Gr. 16.—**CAN.**

r. *Mortgage transaction fraudulent.*]—Although the general rule is, that if a balance is found due to deft. he will receive his costs, still, under the special facts in this case, the ct., upon a bill by the mtgor. against the exors. of the mtgee., impeaching the whole transaction for fraud, ordered his estate to pay all the costs of the litigation.—SOUTER *v.* BURNHAM (1863), 10 Gr. 375.—**CAN.**

t. *Costs of defending redemption suit.*]—In a suit for foreclosure of a mtge., by which the mtgor., in addition to other property conveyed, assigned a mtge. given to him by M., pltf. is not entitled to recover the costs incurred by him in defending a suit for redemption brought against him by the assignee of the redemption of M., in which suit each party was ordered to pay his own costs.—BANK OF NEW BRUNSWICK *v.* CRONK (1867), 12 N. B. R. (1 Han.) 228.—**CAN.**

a. *Claim for subsequent advances—Claim abandoned.*]—CROOKS *v.* HUGHES (1867), 13 Gr. 485.—**CAN.**

b. *Costs of taking new account—On payment of taxes by mortgagee—Payment not for protection of security.*]—MATHEW *v.* MCLEAN (Sask.) (1909), 11 W. L. R. 630.—**CAN.**

c. *Wrongful foreclosure set aside.*]—A mtgee., who has wrongfully obtained a foreclosure in the Land Titles office, which has been subsequently set aside by the judgment of the ct., is not entitled to have the costs of obtaining that foreclosure added to his claim on taking the mtge. account in the master's office.—WILLIAMS *v.* BOX (1913), 24 W. L. R. 93; 4 W. W. R. 244; 12 D. L. R. 90.—**CAN.**

d. *Sale proceedings continued by mortgagee without leave—After winding-up order.*]—*Re* WINNIPEG & WESTERN DEVELOPMENT CO. (1916), 33 W. L. R. 749; 9 W. W. R. 1360.—**CAN.**

PART XVIII. SECT. 3, SUB-SECT. 6.

e. *Party resident out of jurisdiction.*]—Where a deft. had by answering waived his right to security for costs & pltf. assigned his interest in the

Sect. 3.—Costs of foreclosure, sale and redemption: Sub-sects. 6 & 7. Sects. 4 & 5.]

friend appearing to be insufficient, & the husband being a bkpt., the former must give security for costs.—SMITH *v.* ETCHES (No. 2) (1864), 1 Hem. & M. 711; 3 New Rep. 457; 9 L. T. 757; 10 Jur. N. S. 124; 12 W. R. 368; 71 E. R. 311.

Annotation :—**Refd.** Beardmore *v.* Gregory (1865), 11 Jur. N. S. 363.

4303. Cross suits by companies—Defendant company in liquidation.]—The I. society filed a bill against the M. co. to foreclose a mtge. comprising nearly the whole of the effects of the M. co. At this time the M. co. was in process of being wound up under the supervision of the ct. By leave of the ct. in the winding up, a bill was filed in the name of the M. co. against the I. society, praying that it might be declared that the mtge. deed was not binding on the M. co., or its bond-holders or shareholders; but that, if the ct. held it to be good security, certain renewed bills might be excluded from its operation, & that it might be declared a security only for bills of exchange accepted by the I. society; & that, in estimating the debt covered by it, no bills accepted by persons or firms other than the I. society might be included; & that an account might be taken on this footing of what was due; & that the M. co. might be allowed to redeem on payment of what should be so found due :—*Held :* the bill was not a mere cross bill; & security for costs must be given; *semble :* even had it been a pure cross bill, security for costs must have been given, as it was filed in the name of a co. which was being wound up.—CITY OF MOSCOW GAS CO. *v.* INTERNATIONAL FINANCIAL SOCIETY (1872), 7 Ch. App. 225; 41 L. J. Ch. 350; 26 L. T. 377; 20 W. R. 394, L. J.

Annotations :—**Apld.** Pure Spirit Co. *v.* Fowler (1890), 25 Q. B. D. 235. **Refd.** New Fenix Compagnie Anon. d'Assurances de Madrid *v.* General Accident, Fire & Life Assce. Corpn., [1911] 2 K. B. 619.

See, generally, COMPANIES, Vol. IX., pp. 680–684, Nos. 4538–4567.

4304. Sale in foreclosure action.]—An action having been brought to foreclose an equitable mtge., pltf. at the hearing asked for a sale. Defts. did not oppose this, but they wished to have the conduct of the sale. The parties left it to the judge to decide who should have the conduct :—*Held :* defts. ought to have the conduct, because it was most to their interest to obtain the best possible price for the property; inasmuch as defts. alone would be liable for the costs of the sale, there was no reason for requiring them to give security for the costs.—DAVIES *v.* WRIGHT (1886), 32 Ch. D. 220.

Annotation :—**Consd.** Brewer *v.* Square, [1892] 2 Ch. 111.

SUB-SECT. 7.—APPEALS AS TO COSTS.

See Sect. 13, *post.*

SECT. 4.—COSTS OF COMPLETING SECURITY.

4305. What may be allowed—Expenses in connection with copyholds.]—LANE *v.* KING (1799), 3 Seton's Judgments & Orders, 7th ed. 1886.

4306. —— —— Expenses of surrender.]—A. & B. were tenants in common in tail of a copyhold estate, with cross-remainders between them. A. deposited the deeds with C., as a security for money advanced to him, & by a memorandum of deposit engaged to surrender his interest when required. At the foot of the memorandum B. wrote, "I join in the deposit." A. died without issue, & B. thereupon became entitled, as remainderman, to the entirety. On a bill by C. for a foreclosure :—*Held :* the charge affected the moiety of A. only & B. was bound to surrender such moiety to pltf., & to bear the expenses of such surrender.—PRYCE *v.* BURY (1854), L. R. 16 Eq. 153, n.; 23 L. J. Ch. 676; 22 L. T. O. S. 324; 18 Jur. 967; 2 W. R. 216, L. C. & L. JJ.

Annotations :—**Consd.** National Provincial Bank of England *v.* Games (1886), 31 Ch. D. 582. **Mentd.** James *v.* James (1873), L. R. 16 Eq. 153; Backhouse *v.* Charlton (1878), 8 Ch. D. 444.

4307. —— Costs of declaration of trust—From mortgagee to cestui que trust advancing loan.]—In taxing the costs upon a mtge. transaction, the mtgee. is not allowed the expense of a declaration of trust from him to a *cestui que trust* who lends the money.—MARTIN *v.* BAXTER (1828), 5 Bing. 160; 2 Moo. & P. 240; 6 L. J. O. S. C. P. 242; 130 E. R. 1022.

Annotations :—**Refd.** *Re* Radcliffe (1856), 22 Beav. 201. **Mentd.** Doe d. Crawley *v.* Gutteridge (1848), 11 Q. B. 409.

4308. —— Costs of application for stop order—Needless application.]—A fund having become distributable, & a mtgee., with notice that the parties entitled had presented a petition for payment out of ct. to the mtgee. & to themselves, having applied for a stop order, was refused his costs of his application.—HOOLE *v.* ROBERTS (1848), 12 Jur. 108.

4309. —— —— Express power to apply in mortgage deed.]—The mtgee. of a fund in ct. is entitled to the expense of obtaining a stop order on the fund in a case in which he is empowered by the mtge. deed to apply to the ct. for that purpose, but such expenses are not allowed by the taxing master under the common order to tax the costs of the mtgee.—WADDILOVE *v.* TAYLOR (1848), 6 Hare, 307; 17 L. J. Ch. 408; 67 E. R. 1183.

Annotation :—**Refd.** National Provincial Bank of England *v.* Games (1886), 31 Ch. D. 582.

SECT. 5.—COSTS OF ASSERTING OR DEFENDING TITLE.

4310. Of mortgagor.]—GODFREY *v.* WATSON, No. 3791. *ante.*

4311. ——.]—SANDON *v.* HOOPER, No. 3823, *ante.*

4312. Of mortgagee—Defence unjust.]—Mtgee. shall not onerate his pledge with costs which he occasions by an unjust defence.—MOCATTA *v.* MURGATROYD (1717), 1 P. Wms. 393; 24 E. R. 440, L. C.

Annotations :—**Refd.** Allen *v.* Wedgwood (1845), 4 L. T. O. S. 492. **Mentd.** Digby *v.* Craggs (1763), 2 Eden, 200; Beckett *v.* Cordley (1784), 1 Bro. C. C. 353; Plumb *v.* Fluitt (1791), 2 Anst. 432; Toulmin *v.* Steere (1817), 3 Mer. 210; Watts *v.* Symes (1851), 1 De G. M. & G. 240; Stevens *v.* Mid-Hants Ry., London Financial Assocn. *v.* Stevens (1873), 8 Ch. App. 1064; Adams *v.* Angell (1877), 5 Ch. D. 634; Manks *v.* Whiteley, [1911] 2 Ch. 448.

4313. —— Equitable mortgagee.]—DRYDEN *v.* FROST, No. 3676, *ante.*

4314. —— —— Petition by lessor.]—*Re* BUTT,

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mtge., the subject of the suit, to a party resident out of the jurisdiction :—*Held :* deft. was entitled to security for costs against the new pltf.—THOMPSON *v.* CALLAGAN (1870), 3 Ch. Ch. 15.—**CAN.**

PART XVIII. SECT. 4.

1. *What may be allowed—Costs of enforcing specific performance of mortgage.*]—AUSTIN *v.* OFFICIAL ASSIGNEE OF BRAY (1888), 6 N. Z. L. R. 349.—**N.Z.**

PART XVIII. SECT. 5.

g. *General rule.*]—The general rule is, that a mtgee. is not allowed to add to his mtge. debt the cost of unsuccessful proceedings at law instituted by

Ex p. VARDY (1843), 3 Mont. D. & De G. 340; 1 L. T. O. S. 433.

Annotation:—**Refd.** Mackley *v.* Pattenden (1861), 7 Jur. N. S. 1056.

4315. —— —— ——.]—A copy of a petition by a landlord, under 6 Geo. 4, c. 16, s. 75, was served upon an equitable mtgee. of the lease:—*Held:* he was entitled to have his costs of appearing on the petition paid him by petitioner.—*Re* WEGG, *Ex p.* BANBURY (1843), as reported in 7 Jur. 660.

4316. —— **Misrepresentation by mortgagor.**]—B. being embarrassed, consulted her solr. as to the best means of raising money to pay her creditors. He suggested that certain leaseholds which had been voluntarily settled by her upon trust for the benefit of herself & her infant children, might be treated as if they belonged to her absolutely & mortgaged. The trustees of the settlement, however, refused to comply with this arrangement, but eventually consented to retire from the trust, & to the appointment of new trustees. The mtge. was then effected, the new trustees giving their consent on the understanding that the mtge. should be confirmed by B.'s children on coming of age. The existence of the settlement was concealed from the mtgee. at the date of the transaction, & on discovering it he took no immediate steps for the recovery of his money; but subsequently, on the children coming of age, & refusing to confirm the mtge., he filed a bill, nine years after the discovery, against B., her solr., & the old & new trustees, praying for a declaration that all & each were liable to make good the money he had advanced:—*Held:* all of defts. were liable to repay him his principal, interest & costs.—CLARK *v.* HOSKINS (1867), 36 L. J. Ch. 689; 16 L. T. 730; 15 W. R. 1161; *on appeal* (1868), 37 L. J. Ch. 561, L. JJ.

Annotation:—**Mentd.** Head *v.* Gould, [1898] 2 Ch. 250.

4317. ——.]—SOMES *v.* MARTIN, [1882] W. N. 113.

4318. —— **Interpleader rule.**]—Deft. being sued for rent arrear, & having received notice from a mtgee. not to pay the rent to pltf., obtained a rule for the mtgee. to interplead: the mtgee. having declined to appear to the rule, the ct. ordered that each party should pay his costs of the rule.—MURDOCH *v.* TAYLOR (1840), 6 Bing. N. C. 293; 8 Scott, 604; 9 L. J. C. P. 188; 133 E. R. 116.

4319. —— **Mortgagee solicitor—Out of pocket expenses.**]—Mtgee. who acts as his own solr. in a suit in defence of his title, is entitled to costs out of pocket only.—SCLATER *v.* COTTAM (1857), 29 L. T. O. S. 309; 3 Jur. N. S. 630; 5 W. R. 744.

Annotations:—**Consd.** *Re* Donaldson (1884), 27 Ch. D. 544. **Apprvd.** *Re* Wallis, *Ex p.* Lickorish (1890), 25 Q. B. D. 176. **Consd.** Stone *v.* Lickorish, [1891] 2 Ch. 363; *Re* Doody, Fisher *v.* Doody, Hibbert *v.* Lloyd, [1893] 1 Ch. 129. **Refd.** *Re* Roberts (1889), 43 Ch. D. 52.

4320. —— **Proceedings for construction of will.**]—Testator's estate proving insufficient, the exors. of a mtgee., in whom the legal estate was vested, were held entitled to a first charge upon the estate for their costs of suit.—HABERGHAM *v.* RIDEHALGH (1870), L. R. 9 Eq. 395; 23 L. T. 214; 18 W. R. 427.

Annotations:—**Mentd.** *Re* Speakman, Unsworth *v.* Speakman (1876), 4 Ch. D. 620; *Re* Gilbert, Daniel *v.* Matthews (1886), 54 L. T. 752; *Re* Hannam, Haddelsey *v.* Hannam, [1897] 2 Ch. 39.

4321. —— **Mortgagor of reversionary interest—Land sold & purchase-money paid into court.**]—After payment into ct. by a co. of the purchase-money of land belonging to a tenant for life & remaindermen, some of the latter mortgaged their reversionary interests in the fund. Upon the death of the tenant for life, the owners of the fund & their incumbrancers presented a petition for payment of the fund out of ct.:—*Held:* the co. were not liable to pay the costs incurred by the mtgees. in proving their incumbrances.—*Re* GOUGH'S TRUSTS, *Ex p.* GREAT WESTERN RY. Co. (1883), 24 Ch. D. 569; 53 L. J. Ch. 200; 49 L. T. 494; 32 W. R. 147.

Annotations:—**N.F.** *Re* Olive's Estate (1890), 44 Ch. D. 316. **Refd.** *Re* Ruck's Trusts (1895), 13 R. 637.

4322. —— —— ——.]—Land in settlement having been taken compulsorily by a public body under Lands Clauses Consolidation Act, 1845 (c. 18), & the purchase money paid into ct. a reversioner mortgaged his reversionary interest in the fund. After the death of the tenant for life a petition was presented for the payment of the money out of ct. & the mtgee. was served:—*Held:* the public body must pay the costs of mtgee.'s appearance those costs being limited to 42*s.* & they must also pay the costs of serving the mtgee. with the petition.—*Re* OLIVE'S ESTATE (1890), 44 Ch. D. 316; 59 L. J. Ch. 360; 62 L. T. 626; 38 W. R. 459.

Annotation:—**Refd.** *Re* Ruck's Trusts (1895), 39 Sol. Jo. 601.

See, further, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 266, 267, Nos. 1867–1871.

4323. —— **Ejectment by mortgagee—Trespass by third person.**]—OWEN *v.* CROUCH, No. 3777, *ante*.

4324. —— **When paid out of general estate—Costs incurred for benefit of parties entitled to property.**]—Where a mtgee. has been put to expenses in defending the title to the estate, the defence being for the benefit of all parties interested, he is entitled to charge such expenses against the estate; but if his title to the mtge. only is disputed, the costs of his defence should not be borne by the estate as against parties interested in the equity of redemption, unless they can be shown to have concurred in or assisted the litigation.—PARKER *v.* WATKINS (1859), John. 133; 33 L. T. O. S. 270; 70 E. R. 369.

Annotations:—**Mentd.** *Re* Keane, Lumley *v.* Desborough (1871), L. R. 12 Eq. 115; Walters *v.* Woodbridge (1878), 7 Ch. D. 504.

4325. —— **Application for relief from forfeiture Mortgagees by sub-demise—Objection by landlord to relief.**]—Lessor having ejected an underlessee for non-payment of ground-rent, mtgees. by sub-demise of the underlease applied for relief under the ordinary equitable jurisdiction & the C. L. P. Acts, claiming a direct lease for their mtge. term, on the usual conditions. The lessor opposed the application on the ground that the lessee & the assignee of the head lease were not parties, & on other grounds which failed.

It appeared that the lease had been assigned by the lessee's trustee in bkpcy. twenty-seven years ago, & that the assignee had not been heard of for twenty-six years, & could not be traced:—*Held:* the mtgees. must pay the costs of the action, except so far as they had been increased by the lessor resisting their claim to relief, which increased costs must be paid by the lessor.—HUMPHREYS *v.* MORTEN, [1905] 1 Ch. 739; 74 L. J. Ch. 370; 92 L. T. 834; 53 W. R. 552.

himself, & not undertaken with the approval of the mtgor.—WELLS *v.* TRUST & LOAN CO. OF CANADA (1884), 9 O. R. 170.—**CAN.**

h. Of mortgagee—Against subsequent incumbrancers.]—BARRY *v.* STAWELL (1838), 1 Dr. & Wal. 618.—**IR.**

k. Charges.]—The costs incurred by a person entitled to an annuity & charge on an estate in successfully enforcing his claim against the owner, who resisted it, take the same rank as the principal sum.—*Re* BALDWIN'S ESTATE, [1900] 1 I. R. 15.—**IR.**

Sect. 5.—Costs of asserting or defending title. Sects. 6, 7 & 8.]

4326. —— Successful assertion of priority—Deduction of costs of particular unsuccessful issue—Justifiably raised.] — Mtgee. is entitled to the general costs of an action in which he successfully asserts his priority & in which he is guilty of no misconduct, & the ct. has no discretion to deprive him of such costs: but the ct. may, where the security is deficient, except from such the general costs of a particular issue upon which the mtgee. has failed, even though the raising of such issue by the mtgee. was perfectly justified.—DEELEY *v.* LLOYD'S BANK, LTD. (No. 2) (1909), 53 Sol. Jo. 419; *subsequent proceedings*, 57 Sol. Jo. 158, C. A.

SECT. 6.—COSTS OF SPECIAL APPLICATIONS.

4327. By mortgagee—Petition for sale—Bankrupt mortgagor.]—*Ex p.* WARRY (1815), 19 Ves. 472; 34 E. R. 591, L. C.

4328. —— Application for leave to bid at sale.]—Where an equitable mtgee. applies for leave to bid at the sale of the mtged. premises, the ordinary & proper practice is that he should pay the costs of the order.—*Re* JACKAMAN, *Ex p.* ROBINSON (1829), Mont. & M. 261.

4329. —— Petition for liberty to make improvements.]—An equitable mtgee. permitted, on consent, to make improvements on the property, & to add the amount of the expense to his charge on the mtged. estate.—*Re* CUNNINGTON, *Ex p.* SMITH (1837), 3 Mont. & A. 63; 2 Deac. 236, Ct. of R.

4330. —— Not party to suit—Motion with consent of all parties.] — Pltfs. obtained an *ex p.* injunction to restrain defts., a dock co., from parting with certain wine, on the ground that it was fraudulently corked & marked, so as to resemble that of pltfs. A prior *bonâ fide* mtgee. of the wine, who was no party to the suit, moved, with consent of all parties to it, for an order enabling him to withdraw the existing & substitute proper corks, at his own expense, & on payment of defts.' charges to take possession of the wine:—*Held:* he was entitled to the order moved for; he was not bound to pay pltfs.' costs of the suit; but as he had moved with consent of all parties to the suit, he must pay their costs of his motion.—PONSARDIN *v.* PETO, *Ex p.* UZIELLI (1863), 33 Beav. 642; 3 New Rep. 237; 33 L. J. Ch. 371; 9 L. T. 567; 10 Jur. N. S. 6; 12 W. R. 198; 55 E. R. 518.

Annotation:—**Mentd.** Moët *v.* Pickering (1878), 47 L. J. Ch. 527.

By tenant for life—Land compulsorily purchased—Right of mortgagees to costs against promoters.] —*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 258, 263, Nos. 1678–1684, 1805, 1806.

SECT. 7.—COSTS OF RECOVERING DEBT.

4331. By action—Against mortgagor—Expenses properly incurred.] — Mtgee. is entitled to be allowed, in account against the mtgor., all expenses properly incurred for the recovery of the mtge. money.—ELLISON *v.* WRIGHT (1827), 3 Russ. 458; 38 E. R. 647.

Annotations:—**Distd.** Peers *v.* Ceeley (1852), 15 Beav. 209. **Consd.** Merriman *v.* Bonner (1864), 10 L. T. 88; National Provincial Bank of England *v.* Games (1886), 31 Ch. D. 582. **Refd.** Wilkes *v.* Saunion (1877), 7 Ch. D. 188.

4332. —— —— ——.]—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES, No. 4048, *ante*.

4333. —— —— Costs incidental to dishonour of bill or note.]—ABERDEEN *v.* CHITTY (1839), 3 Y. & C. Ex. 379; 8 L. J. Ex. Eq. 30; 160 E. R. 749.

4334. —— Against surety—Insolvency of surety immaterial.]—ELLISON *v.* WRIGHT (1827), 3 Russ. 458; 38 E. R. 647.

Annotations:—**Expld.** Peers *v.* Ceeley (1852), 15 Beav. 209. **Apprvd.** National Provincial Bank of England *v.* Games (1886), 31 Ch. D. 582. **Refd.** Merriman *v.* Bonner (1864), 10 L. T. 88; Wilkes *v.* Saunion (1877), 7 Ch. D. 188.

4335. —— —— Contract of suretyship subsequent to mortgage.]—A customer of a bank deposited certain shares with the bank as security for a loan, with a memorandum of deposit. The bank afterwards obtained judgment against her in respect of the debt, when an arrangement was made under which her husband guaranteed payment of part of it by instalments. The bank sued him on his guarantee & obtained judgment with costs; &, although the wife's debt to them had now been satisfied, they declined to retransfer the shares to her until these costs were paid. In an action by her against the bank to obtain a retransfer of the shares or their value:—*Held:* the action was in effect one of redemption; the costs of the action against the husband were properly incurred & the wife was bound to indemnify him against them; & the bank were entitled to the benefit of the indemnity & to retain the shares till payment of the costs of the action against him, on the principle laid down in *National Provincial Bank of England* v. *Games*, No. 4048, *ante*.—SACHS *v.* ASHBY & CO. (1903), 88 L. T. 393.

4336. —— Against executor of mortgagor.]—Mtgee. is not entitled, as against the devisees of the mtged. estate, to be paid the costs of an action on the mtgor.'s bond, brought by him against the extrix. of the mtgor.—LEWIS *v.* JOHN (1838), 9 Sim. 366; Coop. Pr. Cas. 8; 7 L. J. Ch. 242; 59 E. R. 398.

Annotation:—**Dbtd.** National Provincial Bank of England *v.* Games (1886), 31 Ch. D. 582.

4337. —— Combined with foreclosure action.]—FARRER *v.* LACY, HARTLAND & CO., No. 3702, *ante*.

4338. Costs of execution—Mortgagees of property having joint fiduciary character.]—There being two mtgees. having a joint fiduciary character, the costs of one solr. only will be allowed.

Bkpt. owed to one creditor £370, to another £267, & they had commenced proceedings against him. To induce them to stay proceedings, he gave them a second mtge. on property, at Torquay, already incumbered with a debt of £1,000, empowering them, "or either of them," to proceed to sale, in the event of the money not being forthcoming on a certain day, & to apply the proceeds in the payment of their debts & of the costs in the actions which had been begun, dividing it between them *pari passu*,

PART XVIII. SECT. 6.

l. *Summary reference.*]—Where a pltf. moves for a summary reference, & seeks to deprive the mtgee. of his costs, a case should be made for that relief upon the pleadings, & the question of costs should be included in the reference to the master.—LONG *v.* GLENN (1864), 5 Gr. 208.—**CAN.**

m. *Payment of money out of court.*]—Where deft. refused to consent to payment of the mtge. money out of ct., pltf. obtained an order for such payment, but at his own costs.—BERNARD *v.* ALLEN (1866), 2 Ch. Ch. 91.—**CAN.**

n. *Payment of money into court.*]—Where mtgees. had a surplus in their hands after a sale under their mtge., & S. claimed the surplus, but refused to give such proof as the mtgees. required of his title thereto:—*Held:* as the mtgees. had acted reasonably in requiring proper proof, &, failing to get it, had paid the surplus into ct., they were entitled to their costs of so doing.—*Re* KINGSLAND (1879), 8 P. R. 77.—**CAN.**

o. *Reference to obtain value of land.*]—ADVANCE RUMELY THRESHER CO. *v.* BAIN (1921), 59 D. L. R. 684.—**CAN.**

according to the amount of their respective claims. The money was not paid; judgment was entered up upon both actions, & an execution levied, which was rendered abortive by the issue of the fiat before the sale:—*Held:* the mtgees. were not entitled to their interest up to the date of the sale of the property, nor to the costs of the execution, on the ground that they had a right to avail themselves of every means to secure payment; & they had no right, as mtgees., to employ two solrs., upon the ground that the power of sale was to both or either of them, & that they were interested in different proportions.—*Re* LIGHTFOOT (1851), 18 L. T. O. S. 54.

4339. Administration—To deceased mortgagor.]—Mtgee. having been at great charges to defend a suit at law, brought by the heir of the mtgor., who endeavoured to defeat the mtge. by an entail, but could not prevail; upon a bill afterwards brought by the heir to redeem, the mtgee. allowed his full costs expended in that suit, & not tied down to the costs taxed. Allowed also costs in taking out administration to the mtgor., as principal creditor.—RAMSDEN *v.* LANGLEY (1705), 2 Vern. 536; 1 Eq. Cas. Abr. 328; 23 E. R. 947.

Annotation:—**Refd.** Hunt *v.* Fownes (1803), 9 Ves. 70.

4340. —— —— Importance of stating on bill fact of proceedings.]—WARD *v.* BARTON, No. 4053, *ante*.

4341. —— To incumbrancer under will of mortgagor.]—Mtgee. allowed the costs of procuring administration to an incumbrancer under the will of the mtgor., as a necessary party to the foreclosure.—HUNT *v.* FOWNES (1803), 9 Ves. 70; 32 E. R. 527.

Annotations:—**Distd.** Ward *v.* Barton (1841), 11 Sim. 534. **Mentd.** Russel *v.* Buchanan (1838), 9 Sim. 167.

4342. —— By mortgagor to perfect title to security—No request by mortgagee.]—Mtgor. who has taken out letters of administration which were necessary to perfect the title to the mtged. property, is not therefore entitled to be paid out of the mtged. property the expenses of so doing.—SAUNDERS *v.* DUNMAN (1878), 7 Ch. D. 825; 47 L. J. Ch. 338; 38 L. T. 416; 26 W. R. 397.

Annotations:—**Mentd.** *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552; Faicke *v.* Scottish Imperial Insce. (1886), 34 Ch. D. 234.

Partition actions.]—*See* PARTITION.

SECT. 8.—COSTS OF SUCCESSIVE INCUMBRANCERS.

4343. Priorities as to costs—Suit undertaken by incumbrancer—On behalf of himself & others.]—Under a bill by a second incumbrancer, a receiver being appointed, & the first incumbrancer taking the benefit of the suit, the costs are to be paid in the first instance, before the demand of the first incumbrancer.—WHITE *v.* PETERBOROUGH (BP.) (1821), Jac. 402; 37 E. R. 902.

Annotations:—**Consd.** Tipping *v.* Power (1842), 1 Hare, 405. **Apld.** Armstrong *v.* Storer (1852), 14 Beav. 535. **Consd.** Ford *v.* Chesterfield (1856), 21 Beav. 426.

4344. —— —— ——.]—(1) Generally, the costs of a mtgee. are added to his security, & in whatever rank or order the security stands, his costs are united to it & form part of it; but if he institute a suit for the administration of a deceased mtgor., his costs are those of a pltf. in an ordinary administration suit.

(2) When a puisne incumbrancer sues for & recovers a fund for the benefit of all, his costs are paid, in the first instance, out of the fund recovered.

An estate was greatly incumbered. The first charge was an annuity, &, in default of payment, the annuitant had a power to sell & invest the produce in the purchase of a similar annuity. The grantor reserved a power of repurchase. The annuitant having sold the estate, the fifth incumbrancer filed a bill to repurchase the annuity & distribute the produce:—*Held:* pltf.'s costs were the first charge on the fund, & the costs of the other incumbrancers must be added to their securities.—WRIGHT *v.* KIRBY (1857), 23 Beav. 463; 29 L. T. O. S. 46; 3 Jur. N. S. 851; 5 W. R. 391; 53 E. R. 182.

Annotation:—*As to* (2) **Apld.** Batten, Proffitt & Scott *v.* Dartmouth Harbour Comrs. (1890), 45 Ch. D. 612.

4345. —— Suit to determine priorities & for distribution.]—In an administration suit, all proper & necessary parties have their costs prior to the administration of the fund. But in suits by mtgees. to ascertain priorities upon an estate or upon a fund produced by it, after the proper costs of pltf. are paid, the costs of the other incumbrancers are added to their securities, & paid in the order of their priorities.—FORD *v.* CHESTERFIELD (EARL) (1856), 21 Beav. 426; 52 E. R. 924.

Annotations:—**Folld.** Wright *v.* Kirby (1857), 23 Beav. 463. **Refd.** Batten, Proffitt & Scott *v.* Dartmouth Harbour Comrs. (1890), 45 Ch. D. 612.

4346. —— ——.]—With regard to the costs, this being a question of priority, the usual rule in a case of this sort, where it is a mere question of priority, is for each party to add his costs to his security (CHITTY, J.).—POLLOCK *v.* LANDS IMPROVEMENT CO. (1888), 37 Ch. D. 661; 57 L. J. Ch. 853; 58 L. T. 374; 36 W. R. 617.

4347. —— —— —.]—A firm of solrs. who had recovered judgment against harbour comrs. for the amount of a bill of costs, brought an action against the comrs. in the Ch. Div. for a declaration that pltfs. were entitled to a charge on the property of the comrs., enforcement of the charge, an inquiry to ascertain & determine the other persons entitled to charges, & the rights of pltfs. & such persons, & for the appointment of a receiver of the comrs.' undertaking. A receiver was appointed, & judgment given, directing an inquiry as to incumbrancers & their priorities. The chief clerk, in answer to the inquiry, certified the priorities, & found that pltfs. were entitled to a charge subject to certain specified incumbrances & in priority to others. There was a fund in ct. consisting of moneys which had come to the hands of the receiver. Upon further consideration of the action:—*Held:* (1) Commissioners Clauses Act, 1847 (c. 16), s. 60, was applicable to the comrs., not only personally, but as a corporate body, & that, by virtue of the right of indemnity conferred by that sect., the Comrs., notwithstanding that they were in the position of mtgors., were entitled to their costs of the action as between solr. & client out of the fund in ct. in priority to all other parties; (2) according to the principles established in *Ford* v. *Chesterfield* (*Earl*), No. 4345, *ante*, & *Wright* v. *Kirby*, No. 4344, *ante*, pltfs. were entitled, in priority to the other parties except the comrs., to be paid out of the fund their costs of the action, so far as the other parties except the comrs. had had the benefit thereof in securing the fund in ct.

PART XVIII. SECT. 8.

p. Priorities as to costs—Suit for sale by puisne incumbrancer.]—In the absence of special circumstances a puisne mtgee. who institutes proceedings for sale is only entitled to costs with his demand, & in the event of a deficiency is not entitled to costs in priority to earlier incumbrancers.—O'MEAGHER *v.* DALY, [1917] 1 I. R. 341.—**IR.**

q. Costs of suit to determine priorities.] —HENRY *v.* KERR (1914), 30 O. L. R. 506; 19 D. L. R. 597; 5 O. W. N. 842.—**CAN.**

r. Costs of prior incumbrancer—Incurred in former suit.]—FARRER *v.* BRERETON (1828), 2 Mol. 93.—**IR.**

Sect. 8.—*Costs of successive incumbrancers.* *Sects.* 9, 10 & 11.]

& ascertaining & determining the rights of the parties to it.—BATTEN, PROFFITT & SCOTT *v.* DARTMOUTH HARBOUR COMRS. (1890), 45 Ch. D. 612; 59 L. J. Ch. 700; 62 L. T. 861; 38 W. R. 603.

4348. —— —— Discretion of court.]—As a general rule, the costs in a priority suit follow the mtges., but the ct. has a discretion to make a different order, & if on appeal the judgment of the ct. below is affirmed, the Ct. of Appeal will not vary the order as to costs.—HARPHAM *v.* SHACKLOCK (1881), 19 Ch. D. 207; 45 L. T. 569; 30 W. R. 49, C. A.

Annotations:—**Refd.** *Re* Cooper, Cooper *v.* Vesey (1882), 20 Ch. D. 611. **Mentd.** Garnham *v.* Skipper (1885), 53 L. T. 940: *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; Taylor *v.* Russell, [1892] A. C. 244; Powell *v.* London & Provincial Bank (1893), 62 L. J. Ch. 795; London & County Banking Co. *v.* Goddard (1897), 76 L. T. 277.

4349. —— —— Affirmation of order by Court of Appeal—Whether order as to costs varied.]—HARPHAM *v.* SHACKLOCK, No. 4348, *ante*.

4350. Suit against owner of legal estate—Acquired with notice of prior incumbrance.]—In a suit to establish an equitable charge against an owner, who had acquired the legal estate with actual notice of the existence of the charge, a decree was under the circumstances, made in favour of pltfs., with costs up to & inclusive of the hearing.—SHARPLES *v.* ADAMS (1863), 32 Beav. 213; 1 New Rep. 460; 8 L. T. 138; 11 W. R. 450; 55 E. R. 84.

Annotations:—**Mentd.** Maxfield *v.* Burton (1873), L. R. 17 Eq. 15; R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231.

SECT. 9.—EFFECT OF INSTITUTION OF ADMINISTRATION PROCEEDINGS.

See EXECUTORS, Vol. XXIV., pp. 842, 843, 857–860, Nos. 8761–8766, 8773, 8940–8942, 8958–8964.

SECT. 10.—ACTION TO REALISE SECURITY BY SALE.

4351. Priority of mortgagee's costs—Equitable mortgage by deposit—Security not completed through default of mortgagor.]—Equitable mtgee. not entitled to costs on application for sale of pledge, etc., though it was owing to bkpt. that no regular mtge. was made.—*Ex p.* —— (1817), 2 Madd. 281; 56 E. R. 339.

4352. —— —— Under written agreement.]—On a petition for the sale of mtged. premises by an equitable mtgee. under a written agreement for a mtge., petitioner is entitled to costs.—*Re* WELLS, *Ex p.* BRIGHTWEN (1818), 1 Swan. 3; 36 E. R. 274, L. C.

4353. —— —— Written memorandum.]—Equitable mtgee. by a deposit of deeds, with a writing expressing the terms of the deposit, is entitled, on a petition on bkpcy., for a sale, to have his costs out of the produce of the mtged. property.—*Ex p.* TREW (1818), 3 Madd. 372; 56 E. R. 542.

4354. —— —— ——.]—As it is not disputed that there has been a sufficient part performance to take this case out of the Statute of Frauds, I think the statute should be excluded from consideration, & that petitioners are entitled to have their costs out of the security, which happens to be the rule in the case of an equitable mtge. with a written memorandum (KNIGHT BRUCE, V.-C.).—*Re* TAYLOR, *Ex p.* COOPER (1844), 3 Mont. D. & De G. 717, Ct. of R.

4355. —— —— No writing at time of deposit—Subsequent memorandum.]—An equitable mtgee., by deposit of title deeds without writing, exempted from paying the costs of his petition, the mtgor. having subsequently written a letter directing him to hold the deeds, after payment of his own mtge., for the second mtgee.—*Re* LEEK, *Ex p.* REID (1828), Mont. & M. 114.

4356. —— —— No memorandum.]—Where deeds relating to freehold & leasehold property were deposited with an equitable mtgee., but the memorandum accompanying the deposit merely related to the leasehold property:—*Held:* the mtgee. might nevertheless pray a sale of the freehold as well as the leasehold property, subject however to the payment of the costs of the sale.—*Re* EVANS, *Ex p.* ROBINSON (1832), 1 Deac. & Ch. 119.

4357. —— —— ——.]—Upon a bill filed to enforce an equitable mtge. by deposit without memorandum, costs will be given to pltf. as against the personal representatives of the mtgor.—CONNELL *v.* HARDIE (1839), 3 Y. & C. Ex. 582; 160 E. R. 834.

4358. —— —— ——.]—In equity an equitable mtgee., though the mtge. be without memorandum, will be allowed his costs as against the assignees of the insolvent mtgor.—R. *v.* CHAMBERS (1840), 4 Y. & C. Ex. 54; 160 E. R. 917.

4359. —— —— —— Custom not to give memorandum.]—Equitable mtgee. by deposit of shares in a public co. without written memorandum:—*Held:* entitled to his costs, on evidence of custom not to give written memorandum.—*Re* DAVIES, *Ex p.* MOSS (1849), 3 De G. & Sm. 599; 18 L. J. Bcy. 17; 13 L. T. O. S. 364; 13 Jur. 866; 64 E. R. 623.

4360. —— —— Deficient security.]—In a suit by a simple contract creditor, whose debt was secured by a deposit of deeds by way of equitable mtge., against the exors. & devisees of debtor, the mtged. premises were sold, & were not sufficient to pay pltf.'s debt. The general assets of testator were insufficient to pay his debts & the costs of suit. The parties beneficially entitled under the devise by their answer disclaimed, but the bill was not dismissed against them:—*Held:* pltf. as equitable mtgee. was entitled to the proceeds of the sale of the mtged. premises, & the exors. of testator were entitled to retain in full out of the general assets the debts owing to them by testator, & the residue of the assets should be applied in the following order: in payment (*a*) of the costs of the exors., as between solr. & client; (*b*) of the costs of pltf., including those of the purchaser, which pltf. was ordered to pay; (*c*) of the costs of defts. beneficially entitled under the devise; & (*d*) of the debts remaining due to pltf. & the other creditors.—TIPPING *v.* POWER (1842), 1 Hare, 405; 11 L. J. Ch. 257; 6 Jur. 434; 66 E. R. 1090.

Annotations:—**Consd.** Hepworth *v.* Heslop (1844), 3 Hare, 485; Tuckley *v.* Thompson (1860), 1 John. & H. 126; Henderson *v.* Dodds (1866), L. R. 2 Eq. 532; *Re* Marine Mansions Co. (1867), L. R. 4 Eq. 601. **Refd.** Gaunt *v.* Taylor (1843), 2 Hare, 413; Silcock *v.* Roynon (1843), 2 Y. & C. Ch. Cas. 376; Ford *v.* Chesterfield (1856), 21 Beav. 426; Talbot *v.* Kemshead (1859), 32 L. T. O. S. 60; *Re* Griffith, Jones *v.* Owen, [1904] 1 Ch. 807. **Mentd.** *Re* Rhoades, *Ex p.* Rhoades, [1899] 1 Q. B. 905.

4361. —— —— ——.]—WADE *v.* WARD, No. 4163, *ante*.

4362. —— —— Costs of coming into court—To make security available.]—The practice of the comrs. of bkpts. in not allowing equitable mtgees.,

with written memorandum of deposit, to add to their security their costs of coming to the ct. to make their security available condemned.—*Re* GAWAN, *Ex p.* BARCLAY (1855), 5 De G. M. & G. 403; 26 L. T. O. S. 97; 19 J. P. 804; 1 Jur. N. S. 1145; 43 E. R. 926; *sub nom. Re* BARCLAY, *Ex p.* GAWAN, 25 L. J. Bcy. 1; *sub nom.* GAWAN *v.* BARCLAY, *Ex p.* BARCLAY, 4 W. R. 80, L. C. & L. JJ.

Annotations :—**Mentd.** Mather *v.* Fraser (1856), 2 K. & J. 536; Whitmore *v.* Empson (1857), 23 Beav. 313; *Re* Buller, *Ex p.* Wornald (1860), 2 L. T. 544; *Re* Walker, *Ex p.* Acton (1861), 4 L. T. 261; Boyd *v.* Shorrock (1867), L. R. 5 Eq. 72; Tebb *v.* Hodge (1869), 38 L. J. C. P. 217; Begbie *v.* Fenwick, Fenwick *v.* Begbie (1871), 8 Ch. App. 1075, n.; Gough *v.* Wood, [1894] 1 Q. B. 713; Reynolds *v.* Ashby, [1904] A. C. 466.

4363. —— Claim to prove in administration of mortgagor's estate.]—Mtgee., whether legal or equitable, is entitled after the death of the mtgor., to prove his whole debt in an administration suit, & realise the security for the balance which the general estate may be deficient to satisfy.

Where an equitable mtgee. filed his bill, praying, first to realise his security, & then to prove for the balance only against the general estate :—*Held* : he was asking less than his strict rights as mtgee., & his costs allowed out of the proceeds of the security in priority to those of the exors.—TUCKLEY *v.* THOMPSON (1860), 1 John. & H. 126; 29 L. J. Ch. 548; 2 L. T. 565; 8 W. R. 302; 70 E. R. 689; *on appeal*, 3 L. T. 257, L. JJ.

Annotation :—**Refd.** *Re* Oriental Hotels Co., Perry *v.* Oriental Hotels Co. (1871), L. R. 12 Eq. 126.

4364. —— Suit by first mortgagee with power of sale—Lost title deeds.]—A first incumbrancer having a power of sale, but having lost the title deeds, institutes a suit to have the estate sold, the subsequent incumbrancers are entitled to be paid their costs, although the proceeds of the sale are not sufficient to pay what is due to pltf.—WONTNER *v.* WRIGHT (1829), 2 Sim. 543; 57 E. R. 890.

Annotations :—**Consd.** Tipping *v.* Power (1842), 1 Hare, 405. **Apld.** Armstrong *v.* Storer (1852), 14 Beav. 535; Macrae *v.* Ellerton (1858), 27 L. J. Ch. 777.

4365. —— Mortgagee consenting to sale—In administration suit.]—The mtgee. or incumbrancer, consenting to a sale of the mtged. premises in an administration suit, does not thereby waive his right to be paid his principal, interest & costs out of the moneys produced by the sale, in priority to the costs of pltfs. in the cause.—HEPWORTH *v.* HESLOP (1844), 3 Hare, 485; 9 Jur. 796; 67 E. R. 472.

Annotations :—**Consd.** Armstrong *v.* Storer (1852), 14 Beav. 535; Ford *v.* Chesterfield (1856), 21 Beav. 426. **Refd.** *Re* Mackinlay (1864), 2 De G. J. & Sm. 358.

4366. —— —— ——.]—By an order made, with the consent of the mtgee., for the sale of mtged. property, the money to arise from the sale was directed to be applied, in the first place, in payment of the mtgee. :—*Held* : it was not competent for the ct., by an order made on subsequent further consideration, to direct the payment of the costs of the sale in priority to the mtge. debt. *Semble* : the payment of the costs of sale of a mtged. estate ought not to be ordered out of the proceeds in priority to the debt of a consenting mtgee., whether or not a party to the cause.—*Re* MACKINLAY, WARD *v.* MACKINLAY (1864), 2 De G. J. & Sm. 358; 5 New Rep. 28; 34 L. J. Ch. 52; 11 L. T. 326; 10 Jur. N. S. 1063; 13 W. R. 65; 46 E. R. 414, L. JJ.

Annotation :—**Refd.** *Re* Oriental Hotels Co., Perry *v.* Oriental Hotels Co. (1871), L. R. 12 Eq. 126.

4367. —— —— —— Deduction of costs of sale.]—In a suit to administer a mtgor.'s estate, the mtgee., who was not a party, came in & consented to a sale. The produce formed the whole assets, & was less than the mtge. :—*Held* : the mtgee. was entitled to the whole fund, after payment of the costs of sale.—DIGHTON *v.* WITHERS (1862), 31 Beav. 423; 54 E. R. 1202.

Annotations :—**Refd.** *Re* Mackinlay (1864), 2 De G. J. & Sm. 358; *Re* Oriental Hotels Co., Perry *v.* Oriental Hotels Co. (1871), L. R. 12 Eq. 126. **Mentd.** United Realization Co. *v.* I. R. Comrs. (1898), 79 L. T. 556.

4368. —— Mortgagee allowing his rights to be determined by suit.]—(1) A creditors' suit was instituted for the administration of an estate, pltf. being a puisne mtgee., the bill impeaching a first mtge. & asking for the realisation of the second security. The first mtgee., who was a party, by his answer insisted on his rights. A receiver was appointed by the ct., the first mtgee. not opposing, & he, the mtgee., took no part in, although he had notice of, the proceedings in the suit. Claims were set up by strangers against the estate paramount the mtges. & the mtgor.'s title, which were defeated in proceedings at law instituted by order of the ct.; & the receiver was ordered to pay the costs of these proceedings, without prejudice to the question how they were ultimately to be borne. The ct. ordered a sale of the estate, & directed that the first mtgee., whose title to priority had been established, should join therein. The income of the estate became insufficient to pay the interest on the incumbrances, whereupon the first mtgee. presented a petition, praying the discharge of the receiver & that he might be let into possession, but the petition was dismissed :—*Held* : the mtged. estate was not, as against the first mtgee., liable to the costs of the law proceedings of defending the estate, nor as against him to the general costs of the creditors' suit; he was entitled to have the receiver discharged, & to be let into possession without paying any of such costs.

(2) Whatever may be meant by the expression that deft. has adopted a suit, I think that there has been no adoption of the present suit by applts. It is one which, among other things, sought to impeach their security. . . . They defended it, & as it appears effectually (KNIGHT BRUCE, L.J.).—LANGTON *v.* LANGTON (1855), 7 De G. M. & G. 30; 3 Eq. Rep. 394; 24 L. J. Ch. 625; 24 L. T. O. S. 294; 1 Jur. N. S. 1078; 3 W. R. 222; 44 E. R. 12, L. JJ.

Annotation :—*Generally*, **Refd.** *Re* Pound & Hutchins (1889), 42 Ch. D. 402.

SECT. 11.—ACTION FOR ACCOUNT.

4369. Mortgagee selling under power of sale—Action for account of surplus proceeds.]—A., the

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PART XVIII. SECT. 10.

4365 i. *Priority of mortgagee's costs—Mortgagee consenting to sale—In administration suit.*]—*Re* JOHNSTON, MILLAR *v.* JOHNSTON (1888), 23 L. R. Ir. 50.—**IR.**

4365 ii. —— —— ——.]—ROSS *v.* ROSS (1892), 29 L. R. Ir. 318.—**IR.**

4365 iii. —— —— ——.]—HILLIARD *v.* MORIARTY, [1894] 1 I. R. 316.—**IR.**

t. *Sale in lieu of foreclosure—Costs of decree.*]—Where, on a bill praying foreclosure only, a decree for sale was drawn up, with a direction that the mtgor. should pay any deficiency, the ct., at the instance of the mtgor., four years afterwards, amended the decree by striking out this direction, but ordered him to pay the costs of the proceedings under the decree.—COCKENOUR *v.* BULLOCK (1865), 12 Gr. 138.—**CAN.**

s. *Purchaser with notice of incumbrance—Taking assignment of mortgagee's judgment for sale & mortgage—No right against mortgagor for costs.*]—KEMPT *v.* MACAULEY (1883), 9 P. R. 582.—**CAN.**

PART XVIII. SECT. 11.

4369 i. *Mortgagee selling under power of sale—Action for account of surplus proceeds.*]—MCGILLICUDDY *v.* GRIFFIN (1873), 20 Gr. 81.—**CAN.**

Sect. 11.—*Action for account.* *Sect.* 12: *Sub-sects.* 1 & 2.]

first mtgee. of a ship, with the sanction & authority of B., the second mtgee., sold it & received the proceeds, which exceeded the amount due to him: —*Held:* A. was accountable to B. in the character of trustee, & A. having insisted that there was a deficiency, & having neglected to account, & a balance having been found against A., in a suit by B., A. ought to pay the costs of the suit.—TANNER *v.* HEARD (1857), 23 Beav. 555; 29 L. T. O. S. 257; 3 Jur. N. S. 427; 5 W. R. 420; 53 E. R. 219.

Annotations:—**Expld.** Banner *v.* Berridge (1881), 18 Ch. D. 254. **Refd.** Charles *v.* Jones (1887), 35 Ch. D. 544; Williams *v.* Jones (1911), 55 Sol. Jo. 500.

4370. —— ——.]—Where a mtgee. sells under his power of sale &, after he has paid himself his debts & costs out of the purchase-money, a surplus remains in his hands, it is his duty, if he cannot ascertain who are the persons entitled to the surplus, to set it apart so as to be fruitful for their benefit, & if he fails to do so he will be charged with interest at 4 per cent. from the time of the completion of the sale.

A mtgee. in possession sold under his power of sale & retained surplus proceeds of sale. In an action against him for accounts he admitted that a sum was due from him, & paid such sum into ct. On the taking of the accounts it appeared that a considerably larger sum was due:—*Held:* he ought not to be allowed his costs of taking the accounts.—CHARLES *v.* JONES (1887), 35 Ch. D. 544; 56 L. J. Ch. 745; 56 L. T. 848; 35 W. R. 645.

Annotations:—**Consd.** Heath *v.* Chinn (1908), 98 L. T. 855; Williams *v.* Jones (1911), 55 Sol. Jo. 500. **Mentd.** Thorne *v.* Heard, [1894] 1 Ch. 599; Eley *v.* Read (1897), 76 L. T. 39; *Re* Thorne, [1914] 2 Ch. 438.

4371. —— ——.]—The rule that a mtgee. is entitled by contract to the costs properly incident to a redemption action does not apply to an action for account against the mtgee. after he has realised his security by sale.—WILLIAMS *v.* JONES (1911), 55 Sol. Jo. 500.

SECT. 12.—TAXATION.

SUB-SECT. 1.—IN GENERAL.

4372. Taxation of bill of mortgagee's solicitor—At instance of mortgagor.]—Upon a petition by a mtgor. to tax the bill of the mtgee.'s solr., after payment, the mtgee. must be served. A mtgor. seeking to tax the bill of the mtgee.'s solr. as against the solr., stands in the position of the mtgee. himself, & if the mtgee. cannot tax it, neither can the mtgor.; but the mtgor. may tax it as against the mtgee. for the purpose of diminishing the amount of his claim.—*Re* BAKER (1863), 32 Beav. 526; 2 New Rep. 151; 8 L. T. 566; 11 W. R. 792; 55 E. R. 207.

Annotations:—**Mentd.** *Re* Massey (1865), 34 Beav. 463; *Re* Foster, Barnato *v.* Foster, [1920] 3 K. B. 306.

4373. —— ——.]—On the taxation, under Solicitors Act, 1843 (c. 73), s. 38, of the bill of a mtgee.'s solr. at the instance of the mtgor., items which the mtgor. would not be liable to pay as between himself & the mtgee. must be disallowed, even though the solr. would be entitled to charge them as against his client, the mtgee.—*Re* LONGBOTHAM & SONS, [1904] 2 Ch. 152; 73 L. J. Ch. 681; 90 L. T. 801; 52 W. R. 660; 48 Sol. Jo. 546, C. A.

Annotations:—**Apld.** *Re* Cohen & Cohen, [1905] 2 Ch. 137. **Refd.** *Re* Lewis (1904), 49 Sol. Jo. 54. **Mentd.** Hirst & Capes & Elsworth *v.* Fox (1908), 99 L. T. 624.

4374. Solicitor mortgagee—Negotiation fee—Mortgagee's Legal Costs Act, 1895 (c. 25).]—*Re* NORRIS, No. 4065, *ante*.

SUB-SECT. 2.—FORECLOSURE, SALE AND REDEMPTION.

4375. What may be allowed—Costs of first mortgagee foreclosing mortgagor—Solicitor & client costs.]—The costs which the first mtgee. has been put to, shall not be taxed, as in case of an adversaries suit, but he shall be allowed all his costs & charges, as is done in case of a solr. who lays out money for his client; & the profits of the mtged. premises shall be first applied to pay off

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4369 ii. —— ——.]—Where a mtgee. sold under a power of sale in his mtge., & the mtgor. afterwards brought action against him for an account, & payment over to him, of the surplus which he alleged was in the mtgee.'s hands, & on taking the account it was found that a balance of $136 was payable to the mtgor.:—*Held:* the mtgees. must pay to the mtgor. his full costs of suit.—BOULTON *v.* ROWLAND (1883), 4 O. R. 720.—**CAN.**

4369 iii. —— ——.]—In an action for an account by a mtgor., against the exors. of a mtgee. who had sold the mtged. premises under the power of sale in the mtge., & who had also taken proceedings at law, a small balance of $10 was found in his favour. Plff. having made certain charges which he failed to substantiate, & not having proved that an account was demanded & withheld from him; & certain special matter pleaded by defts. being found against him:—*Held:* neither party entitled to costs.—BEATTY *v.* O'CONNOR (1884), 5 O. R. 747.—**CAN.**

4369 iv. —— ——.]—MORTON *v.* HAMILTON PROVIDENT & LOAN SOCIETY (1885), 10 P. R. 636.—**CAN.**

4369 v. —— ——.]—GILES *v.* HAMILTON PROVIDENT & LOAN SOCIETY (1895), 10 Man. L. R. 567.—**CAN.**

b. *Costs of redemption suit—Necessitated by unnecessary action for account.*]—A mtgee. in possession was ordered to pay the whole costs of a suit for redemption, which had been rendered necessary by his insisting upon his right to have the accounts taken by the ct., where on the accounts being taken it appeared that at the date of the filing of the statement of claim the mtge. debt had in fact been paid off in full.—BRANDT *v.* UTLEY (1903), 4 S. R. N. S. W. 42; 21 N. S. W. W. N. 10.—**AUS.**

PART XVIII. SECT. 12, SUB-SECT. 1.

4372 i. *Taxation of bill of mortgagee's solicitor—At instance of mortgagor.*]—The mtgees. of land having brought ejectment, & sold under the power of sale, their solr. sent the surplus purchase money to the mtgor., accompanied by a statement of the amount due, in which one item was for "solr.'s costs, $143." The particulars being asked for, he rendered two separate bills, one of the ejectment, the other of the sale:—*Held:* the mtgor. was clearly a person entitled to apply for taxation.—*Re* MACDONALD, *Ex p.* GLASS (1863), 3 P. R. 138.—**CAN.**

c. —— *Subsequent mortgagee.*]—Where a first mtgee. sells under the power of sale contained in his mtge., a subsequent mtgee. is entitled to an order to tax the first mtgee.'s costs of exercising the power of sale, such costs to be taxed as between solr. & client.—*Re* CRERAR & MUIR (1879), 8 P. R. 56.—**CAN.**

d. —— ——.]—*Re* MCDONALD, MCDONALD & MARSH (1879), 8 P. R. 88.—**CAN.**

e. —— ——.]—First mtgees. sold under power of sale, & paid their attorney's costs. A second mtgee. was held not to be entitled to the right of taxing these costs.—*Re* CRONYN, KEW & BETTS (1880), 8 P. R. 372.—**CAN.**

f. *Solicitor-mortgagee.*]—In a suit of foreclosure on a mtge. taken by a solr. from his client to secure advances & costs, the ct. refused to direct taxation, there being no overcharge pointed out, or any undue pressure shown.—SHAW *v.* DRUMMOND (1867), 13 Gr. 662.—**CAN.**

g. 42 *Vict. c.* 20—*Whether retrospective.*]—42 Vict. c. 20, s. 11 (O), authorising the taxation of a mtgee.'s costs by any party interested, without any order to tax, applies to mtgees. executed before the passing of the Act.—FERGUSON *v.* ENGLISH & SCOTTISH INVESTMENT CO. (1881), 8 P. R. 404.—**CAN.**

h. *What costs included.*]—FEDERAL LIFE ASSURANCE CO. *v.* SIDDALL (1910), 22 O. L. R. 96; 17 O. W. R. 63; 2 O. W. N. 104.—**CAN.**

PART XVIII. SECT. 12, SUB-SECT. 2.

4375 i. *What may be allowed—Costs of first mortgagee foreclosing mortgagor—Solicitor & client costs.*]—CONFEDERATION LIFE ASSOCN. *v.* LEIER (1908), 8 W. L. R. 343; 1 Sask. L. R. 131.—**CAN.**

those costs, before they go to sink the principal (*per* CUR.).—LOMAX *v.* HIDE (1690), 2 Vern. 185; 23 E. R. 721.

4376. —— Extra costs—Proceeding by bill instead of petition.]—Costs will not be given to an equitable mtgee. of a bkpt., who seeks by bill what might have been obtained upon petition.—SUART *v.* TOULMIN (1822), 1 L. J. O. S. Ch. 12.

4377. —— —— Proceeding by writ instead of summons.]—A mtgee. issued a writ asking for the usual order for foreclosure, & moved for the appointment of a receiver, & on the motion being heard, a receiver was appointed. A statement of claim was delivered, but the mtgor. having become bkpt., pltf. withdrew his claim for payment:—*Held:* pltf. should have proceeded by originating summons; the ct. made the usual foreclosure order, but directed the taxing master to allow such costs as pltf. would have been entitled to if he had proceeded by originating summons & no more.—BARR *v.* HARDING (1887), 58 L. T. 74; 36 W. R. 216.

4378. —— —— ——.]—A mtgee. in possession brought an action for foreclosure, & asked on motion for judgment for (*inter alia*) an order for personal payment by the mtgor. of the amount due, but this part of the order was refused:—*Held:* he was entitled to the costs of the action, & not simply to such costs as he would have received if he had proceeded by summons.—BROOKING *v.* SKEWIS (1887), 58 L. T. 73; 36 W. R. 215.

4379. —— —— ——.]—Pltf. obtained judgment in a redemption action where deft. denied the tender, & disputed pltf.'s title to redeem:—*Held:* pltf. was entitled to such costs only as he would have been entitled to on an originating summons contested by deft., & attended by counsel, such costs to include the costs of the witnesses examined in ct. to prove tender & pltf.'s title.—JOHNSON *v.* EVANS (1888), 60 L. T. 29.

4380. —— Costs of solicitor mortgagee—Taxation at instance of puisne incumbrancers.]—A., a solr., being one of three mtgees., arranged with another solr., B., to "act as his agent" in the matter of the mtge., on agency terms. B. accordingly acted, & sent in his bill prepared as between solr. & client, which was paid by the mtgees. B. allowed A. £100 as his share of the profits. After this, on the application of second incumbrancers the bill was taxed:—*Held:* the taxing master was right in taxing it on the principle of solr. & agent, for the agreement between A. & B. was valid, though it enured to the benefit of the mtgees., & the bill was properly taxable, at the instance of the second incumbrancers, as between them & B.—*Re* TAYLOR (1854), 18 Beav. 165; 23 L. J. Ch. 857; 23 L. T. O. S. 72; 18 Jur. 666; 2 W. R. 249; 52 E. R. 65.

Annotations:—**Distd.** *Re* Donaldson (1884), 27 Ch. D. 544. **Consd.** *Re* Doody, Fisher *v.* Doody, Hibbert *v.* Lloyd, [1893] 1 Ch. 129. **Mentd.** Stedman *v.* Collett (1854), 17 Beav. 608.

4381. —— —— Taxation at instance of mortgagor.]—(1) Where one of a body of mtgees. is a solr. & acts as such in enforcing the mtge. security, he is entitled to charge profit costs against the mtgor., whether the mtgees. are trustees or not.

(2) If in such a case the mtgor. in applying for an order to tax the bill of the solr. mtgee. desires to raise the objection to profit costs he should state his objection in the petition for taxation.—*Re* DONALDSON (1884), 27 Ch. D. 544; 54 L. J. Ch. 151; 51 L. T. 622.

Annotation:—*As to* (1) **N.F.** *Re* Doody, Fisher *v.* Doody, Hibbert *v.* Lloyd, [1893] 1 Ch. 129.

4382. —— Costs of separate defence—Separate relief claimed against one defendant—Separate relief abandoned.]—The original bill asked separate relief against one of defts., who therefore put in a separate defence. The bill was afterwards amended, & that relief was struck out:—*Held:* deft. was justified in continuing a separate defence, & was entitled to his costs on that footing.—SHAW *v.* JOHNSON (1861), 1 Drew. & Sm. 412; 30 L. J. Ch. 646; 4 L. T. 461; 7 Jur. N. S. 1005; 9 W. R. 629; 62 E. R. 437.

Annotations:—**Mentd.** *Re* Stead's Mortgaged Estates (1876), 2 Ch. D. 713; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385; *Re* Jordison, Raine *v.* Jordison, [1922] 1 Ch. 440.

4383. —— Profit costs—Solicitor mortgagee.]—*Qu.:* whether a solr. mtgee. who acts for himself in a redemption suit, is entitled to costs beyond those actually out of pocket.

The proper stage of the suit at which to raise the question is at the hearing; & a decree having been made in a redemption suit, containing no special direction as to costs, & ordering the usual account to be taken of what was due to the mtgees. for principal & interest & "for their costs of the suit to be taxed by the taxing master":—*Held:* the taxing master had properly allowed the mtgees., who were solrs., & had acted for themselves in the suit, their profit costs.—PRICE *v.* M'BETH (1864), 33 L. J. Ch. 460; 10 L. T. 521; 10 Jur. N. S. 579; 12 W. R. 818.

Annotations:—**Consd.** London Permanent Bldg. Soc. *v.* Chorley (1884), 32 W. R. 523; London Scottish Benefit Soc. *v.* Chorley (1884), 12 Q. B. D. 452. **N.F.** Stone *v.* Lickorish, [1891] 2 Ch. 363.

4384. —— —— ——.]—STONE *v.* LICKORISH, No. 4301, *ante*.

4385. —— —— ——.]—In Apr. 1893, upon a foreclosure summons by a solr. mtgee., an order was made directing an account of what was due to pltf. for principal, interest, & taxed costs of the action, followed by provisions for redemption by one of defts. on payment of what should be found due, & foreclosure in default of payment. On Feb. 19, 1898, on the further consideration of the action, an order was made referring it to the taxing master to tax pltf.'s costs of the action:—*Held:* the rights of the parties were ascertained by the first order, which must be construed by the then existing law, & pltf. was not entitled, by reason of Legal Mortgages Costs Act, 1895 (c. 25), to charge profit costs.—DAY *v.* KELLAND, [1900] 2 Ch. 745; 70 L. J. Ch. 3; 83 L. T. 447; 49 W. R. 66; 45 Sol. Jo. 10, C. A.

See Legal Mortgagees Costs Act, 1895 (c. 25).

4386. —— Party & party costs.]—Mtgees.' costs in a mtge. suit will be taxed as between party & party, in accordance with the practice of the Ct. of Ch., & not as between solrs. & clients, where a decree has been made by consent that pltfs. are to receive their "costs, charges, & expenses properly incurred."

On a motion by pltfs., mtgees., to review the

4386 i. —— *Party & party costs.*]—The costs which a mtgee. may tax as the costs of a mtge. action are limited to those properly taxable as between party & party, unless in the mtge. the mtgor. has expressly covenanted to pay additional charges; but the costs properly incurred by the mtgee. in preserving the mtged. property & protecting the mtge. security should be imposed on a mtgor. in default as a condition of allowing him to redeem.—FLECK *v.* WHITEHEAD, [1924] 4 D. L. R. 797; [1924] 3 W. W. R. 470; 19 Sask. L. R. 64.—**CAN.**

k. ——.]—PLENDERLEITH *v.* PARSONS (1907), 15 O. L. R. 397; 10 O. W. R. 387, 658.—**CAN.**

l. *Scale of costs allowed.*]—*Re* LYONS (1884), 10 P. R. 150.—**CAN.**

m. *Jurisdiction of master.*]—A special order directing the master to inquire as to the necessity of bringing two suits of foreclosure respecting two mtges. between the same parties, will not be granted, as the master has jurisdiction to make such inquiry &

Sect. 12.—*Taxation: Sub-sect.* 2. *Sect.* 13. *Part XIX.*]

registrar's taxation, disallowing: (*a*) charges by pltfs.' solrs. for attending to take particulars of other suits against the vessel to which pltfs. were not parties; (*b*) costs of negotiations between rival incumbrancers which led to nothing, & to which the owners of the vessel were not parties; & (*c*) costs of conference with counsel at a stage of the suit when it is not usual for a conference to be held; the ct. affirmed the registrar's taxation, & refused the motion with costs.—THE KESTREL (1866), L. R. 1 A. & E. 78; 16 L. T. 72; 12 Jur. N. S. 713; 2 Mar. L. C. 472.

4387. —— Costs of adducing unnecessary evidence.]—In a foreclosure action against a mtgor. & subsequent mtgees. the mtgor. made default of appearance & remaining defts. appeared but made default in pleading. Upon motion for judgment under R. S. C., Ord. 27, r. 11, pltfs. filed an affidavit in support of their claim:—*Held:* the costs of the affidavit must be disallowed against all defts.—JONES *v.* HARRIS (1887), 55 L. T. 884.

4388. Scale of costs allowed—Claim within jurisdiction of county court.]—The Acts conferring equitable jurisdiction on the county cts. do not in any way prohibit or restrict pltf. from instituting proceedings in the Ct. of Ch.; & pltf. who instituted such proceedings is entitled to his usual costs.

Where a suit was instituted in the Ct. of Ch. for foreclosure of a mtge. for £50:—*Held:* pltf. was entitled to the usual costs of a mtgee. who sued in that ct.—BROWN *v.* RYE (1874), L. R. 17 Eq. 343; 43 L. J. Ch. 228; 29 L. T. 872; 38 J. P. 645.

4389. —— —— Both parties residing in the same place.]—In a suit to foreclosure a mtge. for £40, where both pltf. & deft. lived at the same place:—*Held:* pltf. was entitled only to such costs as he would have obtained in the county ct.—SIMONS *v.* MCADAM (1868), L. R. 6 Eq. 324; 37 L. J. Ch. 751; 18 L. T. 678; 16 W. R. 963.

Annotations:—**Distd.** Brown *v.* Rye (1874), 43 L. J. Ch. 228. **Apld.** Crozier *v.* Dowsett (1885), 31 Ch. D. 67.

4390. —— —— ——.]—In an action to foreclose a mtge. for £65 18*s.* 10*d.*, where both pltf. & deft. lived at the same place:—*Held:* pltf. was entitled only to such costs as he would have obtained in the county ct.—CROZIER *v.* DOWSETT (1885), 31 Ch. D. 67; 55 L. J. Ch. 210; 53 L. T. 592; 34 W. R. 267.

4391. —— Sum due under one thousand pounds—Mortgage to secure larger amount.]—In a suit to redeem a mtge., where the amount due at time of filing the bill is under £1,000, notwithstanding that the mtge. was made to secure a larger amount, deft.'s costs must be taxed on the lower scale.—COTTERELL *v.* STRATTON (1874), L. R. 17 Eq. 543; *affd.*, 9 Ch. App. 514; 43 L. J. Ch. 573; 30 L. T. 589; 22 W. R. 607, L. J.

SECT. 13.—APPEALS.

4392. Whether appeal lies.]—The rule that no appeal for costs merely, not to be strictly adhered to, if a sound distinction can be made: as where a fair incumbrancer is decreed only his principal & interest.—OWEN *v.* GRIFFITH (1749), Amb. 520; 1 Ves. Sen. 250; 27 E. R. 336, L. C.

Annotations:—**Apld.** Cowper *v.* Scott (1757), 1 Eden. 17; Angell *v.* Davis (1839), 4 My. & Cr. 360. **Mentd.** Wirdman *v.* Kent (1782), 1 Bro. C. C. 140; Willis *v.* Yates (1834), Coop. *temp.* Brough. 498; Chappell *v.* Purday (1847), 16 L. J. Ch. 261; Menzies *v.* Connor (1851), 3 Mac. & G. 648.

4393. ——.]—A mtgee. will not be deprived of his costs in a redemption suit because he has overstated the amount due to him. The directors of a building society, in answer to one of their members & mtgors., stated that £736 was due to the society on the mtge., the society having been for some years in possession. Soon afterwards the directors informed the mtgor. that they intended to sell the mtged. property, they having power under the mtge. deed so to do. The mtgor. thereupon filed a bill to restrain the sale, & for redemption. The directors informed the mtgor. that they had no intention to press a sale. The mtgor. then proposed that a decree for the usual accounts should be taken, & a decree for an account was accordingly taken. The mtgor. carried in surcharges to the amount of £1,227, principally for fines & commission, which he claimed to have disallowed, but which were allowed to the mtgees.; the mtgees. were, however, charged for certain occupation rents, & were disallowed charges for repairs, so that the amount due at the filing of the bill was found to be £517 instead of £736:—*Held:* (1) there was nothing in the conduct of the mtgees. which would deprive them of the right to add their costs of the suit to their security.

The right of a mtgee. in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established (LORD SELBORNE, C.).

(2) In such a case an appeal as to costs might be maintained & the costs of the appeal might be included in the costs of the suit.—COTTERELL *v.* STRATTON (1872), 8 Ch. App. 295; 42 L. J. Ch. 417; 28 L. T. 218; 37 J. P. 4; 21 W. R. 234, L. C. & L. JJ.

Annotations:—*As to* (1) **Apld.** Cottrell *v.* Finney (1874), 43 L. J. Ch. 562; Turner *v.* Hancock (1882), 20 Ch. D. 303. **Consd.** Kinnaird *v.* Trollope (1889), 42 Ch. D. 610. **Apld.** Rourke *v.* Robinson, [1911] 1 Ch. 480. **Consd.** Graham *v.* Seal (1918), 88 L. J. Ch. 31. **Refd.** Credland *v.* Potter (1874), 31 L. T. 522; Williams *v.* Jones (1911), 55 Sol. Jo. 500. *Generally*, **Mentd.** *Re* Hoskin's Trusts (1877), 25 W. R. 779; Bank of New South Wales *v.* O'Connor (1889), 14 App. Cas. 273; *Re* Jones, Christmas *v.* Jones, [1897] 2 Ch. 190.

4394. ——.]—(1) The charges & expenses of a trustee directed to be paid out of a fund in ct. are not "costs of & incident to a proceeding in the High Ct.," within R. S. C. 1875, Ord. 55; neither is the order directing their payment an order "as to costs only" within Jud. Act, 1873 (c. 66), s. 49. Consequently, such an order is appealable without the consent of the judge who made it.

(2) Under a power to invest in "real securities," trust funds were invested on mtge. of long leaseholds. The mtgee. of one-sixth share of the trust fund commenced an action against the trustee to administer the trust estate, alleging that the investment was improper, & that the trust funds were in danger of being lost. Pending the action,

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disallow the whole bill without any special direction, under the common order to tax.—*Re* ATKINSON & PEGLEY (1862), 1 Ch. Ch. 193.—**CAN.**

n. *Necessity for taxation.*]—CREED *v.* BYRNE (1824), 1 Hog. 108.—**IR.**

PART XVIII. SECT. 13.

4392 i. *Whether appeal lies.*]—PURDY *v.* PARKS (1883), 9 P. R. 424.—**CAN.**

4392 ii. ——.]—No appeal lies from the taxation of a mtgee.'s costs of proceedings under the power of sale in a mtge., had under R. S. O., c. 121, s. 30.—*Re* VANLUVEN & WALKER (1900), 20 C. L. T. 388: 19 P. R. 216.—**CAN.**

4392 iii. ——.]—The disallowance of a mtgee.'s costs, incurred in a suit for redemption, is not within the discretion of a judge, but is a matter for his judgment, & must be based on sufficient facts to warrant such disallowance. Where costs were disallowed to a mtgee., though no misconduct was alleged against him:—*Held:* an appeal lay on the sole question of disallowance.—M'DONNELL *v.* M'MAHON (1889), 23 L. R. Ir. 283.—**IR.**

the trustee paid the remaining five-sixth shares to the other persons entitled, who had not been made parties to the action in any way, & paid pltf.'s share into ct.:—*Held:* under the circumstances, the action had been instituted unnecessarily, &, therefore, the trustee was justified in partly distributing the fund, & was entitled to be paid his costs of the action, & costs, charges & expenses as trustee out of the share in ct.—*Re* CHENNELL, JONES *v.* CHENNELL (1878), 8 Ch. D. 492; 47 L. J. Ch. 583; 26 W. R. 595; *sub nom. Re* CHANNELL, JONES *v.* CHANNELL, 38 L. T. 494, C. A.

Annotations:—Generally, **Mentd.** Butcher *v.* Pooler (1883), 52 L. J. Ch. 930; *Re* Beddoe, Downes *v.* Cottam, [1893] 1 Ch. 547; Paln *v.* Bowden, [1898] 2 Q. B. 301; Bew *v.* Bew, [1899] 2 Ch. 467.

4395. ——.]—On appeal as to costs of action which had been ordered to be paid out of the fund:—*Held:* an appeal would lie from the order as to costs, & the costs of each incumbrancer must be added to his debt. Applt.'s costs of appeal to be borne equally by resps.—JOHNSTONE *v.* COX (1881), 19 Ch. D. 17; 45 L. T. 657; 30 W. R. 114, C. A.

*Annotations:—***Distd.** Butcher *v.* Pooler (1883), 24 Ch. D. 273. **Mentd.** Marchant *v.* Morton, Down, [1901] 2 K. B. 829; *Re* Dallas, [1904] 2 Ch. 385.

4396. —— At suit of mortgagee deprived of costs for misconduct.]—Although a mtgee. who has been deprived of his costs on the ground of misconduct may appeal from the order of the judge, yet if the judge, notwithstanding charges of misconduct, allows a mtgee. his costs, the mtgor. has no right of appeal; because the fact of the misconduct, if proved, would bring the costs within the discretion of the judge.—CHARLES *v.* JONES (1886), 33 Ch. D. 80; 56 L. J. Ch. 161; 55 L. T. 331; 35 W. R. 88, C. A.

*Annotations:—***Expld.** *Re* Beddoe, Downes *v.* Cottam, [1893] 1 Ch. 547. **Consd.** Bew *v.* Bew, [1899] 2 Ch. 467.

4397. —— At suit of mortgagor—Mortgagee allowed costs notwithstanding misconduct.]—CHARLES *v.* JONES, No. 4396, *ante.*

4398. Costs of appeal—How borne.]—Where the costs of an unsuccessful appeal by some of defts. in a suit by a mtgee. against subsequent incumbrancers & a mtgor., to settle priorities, were ordered to be paid by defts. personally, & they were insolvent, the ct. below has no power to vary the order as to costs, by directing that pltf. should be allowed to add them to his security.—PERRY-HERRICK *v.* ATTWOOD (1859), 33 L. T. O. S. 232.

4399. —— ——.]—Where a mtgee. appeals from the decision of a ct. below, & the decision is reversed, he will be allowed to add his costs of the appeal to his mtge. charge.—ADDISON *v.* COX (1872), 8 Ch. App. 70; 42 L. J. Ch. 291; 28 L. T. 45; 21 W. R. 180, L. C.

*Annotations:—***Mentd.** Johnstone *v.* Cox (1880), 16 Ch. D. 571; Stephens *v.* Green, Green *v.* Knight, [1895] 2 Ch. 148; *Re* Dallas, [1904] 2 Ch. 385.

4400. —— ——.]—JOHNSTONE *v.* COX, No. 4395, *ante.*

4401. —— Included in costs of suit.]—COTTERELL *v.* STRATTON, No. 4393, *ante.*

Part XIX.—Rent and Mortgage Restriction Acts.

See Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), ss. 1, 4, 7, 12 (1), (*b*), (*h*), (4), (5), (6), 14, 19; Rent & Mortgage Interest (Restrictions) Act, 1923 (c. 32), ss. 1, 8 (2), 14; Rent & Mortgage Interest (Restrictions Continuation) Act, 1925 (c. 32).

4402. "Steps for exercising" remedies—Action for foreclosure before passing of Act—Attending on adjourned summons & giving notice of appeal after passing—Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (4).]—A mtgee., under a mtge. created in 1910, & to which above Act applied, before the Act *came* into operation issued a writ to enforce his security by foreclosure or sale, & applied by summons in chambers for an order *nisi*. It was admitted that all the conditions of above sub-sect. had been fulfilled by the mtgor. The summons was adjourned to EVE, J., after the Act had come into operation. He dismissed it on the ground that the Act was retrospective, & that by attending at the hearing of the summons the mtgee. was taking a step for exercising his right of foreclosure within the sect.:—*Held:* the Act did not take away any rights, but merely suspended a particular form of remedy; it related to a matter of procedure & therefore might operate retrospectively; both the attending on the summons & the giving of the notice of appeal were "steps" within above sect.—WELBY *v.* PARKER, [1916] 2 Ch. 1; 85 L. J. Ch. 564; 114 L. T. 870; 32 T. L. R. 403; 60 Sol. Jo. 417, C. A.

See, now, Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 19 (3), Sched. 2.

4403. Suspension of remedies on statutory conditions—Keeping property in "proper state of repair"—Possession by mortgagee does not absolve mortgagor.]—The proviso at the end of Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (4), under which the sect. does not affect the power of sale of a mtgee. in possession on Nov. 25, 1914, 1915, does not mean that in every case where a mtgee. was in possession his remedies are now limited to the exercising of his power of sale, but is only inserted *ex abundanti cautelâ*. It does not affect the obligation on the mtgor. to pay the interest & keep the property in repair as provided in the sect., so that, where this had not been done, the case is not within the Act, & foreclosure absolute can be ordered. The retention of rents by the mtgees. is not a payment of interest by the mtgors. within the sect.—WALTERS *v.* WHITE (1917), 116 L. T. 377; 33 T. L. R. 154; 61 Sol. Jo. 253.

4404. —— —— Not equivalent to "general" or "tenantable" repair—Measured by state of property at date of mortgage.]—The "proper state of repair" in which a mtgor. is required to maintain the mtged. premises in order to obtain the benefit

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PART XIX.

o. *"Steps for exercising" remedies.*]—A., the owner of a leasehold house, assigned it by way of mtge.; the interest of the mtgee. become vested in pltf. A. subsequently assigned his interest in the premises to B., who made a letting to C., which was void against the mtgee. Pltf. brought an action of ejectment on the title against A., B., & C.:—*Held:* (1) in bringing the action pltf. had taken a step for enforcing his security within the meaning of Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (4). (2) C. was a person deriving title under the mtgor. within

of Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 7, must be measured by the general condition of the property at the date of the mtge. & must not be extended beyond the preservation of the property in a state corresponding with what existed at that date.

The phrase [" proper state of repair "] cannot in my judgment be read as equivalent to keeping in " good " or in " tenantable " nor in a sense to compel a rebuilding of the whole or an integral part of the whole structure (SARGANT, J.).—WOODIFIELD *v.* BOND, [1922] 2 Ch. 40 ; 91 L. J. Ch. 561 ; 127 L. T. 205 ; 38 T. L. R. 494 ; *sub nom.* WORDIFIELD *v.* BOND, 66 Sol. Jo. 406.

4405. —— Payment of interest—Retention of rent by mortgagee in possession not sufficient.]—WALTERS *v.* WHITE, No. 4403, *ante*.

4406. —— —— Not later than twenty-one days after due.]—EVANS *v.* HORNER, No. 4407, *post*.

4407. —— Suspension lasts while conditions observed—Protection not revived by compliance after breach.]—(1) Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 7, suspends the rights of the mtgee. during one continuous period, which lasts as long as the conditions of the sect. are complied with. When those conditions are broken a subsequent compliance with them does not revive the protection given by the sect.

(2) Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 7 (*a*), means that a mtgee. cannot " take any step " so long as interest is paid not later than twenty-one days after it is due.—EVANS *v.* HORNER, [1925] Ch. 177 ; 94 L. J. Ch. 220 ; 132 L. T. 730 ; 69 Sol. Jo. 161.

4408. " Mortgage "—" Equitable charge "—Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), ss. 1 (4), 2 (4).]—A signed & dated document, stating as follows : " I, A. hereby charge in favour of C. all my estate & interest in X., Y., & Z., to secure all moneys due & to become due from me to him, & I agree to give him proper & formal charges thereon in such form as he may approve within a fortnight or as near thereto as may be," was attempted to be enforced by action for account, foreclosure or sale. On an application by deft. to stay the action on the ground that pltf. had not complied with the provisions of Courts (Emergency Powers) Acts, 1914–1916, & above Act :—*Held :* this charge was not a mtge. ; this charge was an equitable charge within the words of exception to the Acts, where above Act, sect. 2, sub-sect. 4, says that it " shall not apply to an equitable charge by deposit of deeds or otherwise."—JONES *v.* WOODWARD (1917), 116 L. T. 378 ; 61 Sol. Jo. 283.

Annotation :—**Consd.** London County & Westminster Bank *v.* Tompkins, [1918] 1 K. B. 515.

4409. —— —— ——.]—In 1912 deft. as security for a present or future overdraft, deposited with pltf. bank the title deed of certain houses, which came within the description of " small dwelling-houses " in above Act, & he executed a deed in which he stated that he undertook to pay on demand the moneys that should for the time being be due from him to the bank, & he thereby charged his interest in the property comprised in the deeds with payment of the said moneys on demand ; he declared that the bank should be deemed mtgees. under the deed of all the premises thereby charged ; he undertook on request to execute a further legal or other mtge. of the premises ; he gave the bank a power of sale on default in payment ; he declared that during the continuance of the security he would hold the property charged in trust for the bank, with power to the bank to remove him from being trustee & to appoint themselves or any persons to be trustees & to make a declaration vesting all his said estate & interest in such new trustees ; & he irrevocably appointed certain officials of the bank to be his attorneys for executing certain documents, including a conveyance of his estate & interest in the premises. In 1917 pltfs. sued to recover the amount then due on the overdraft. Deft. pleaded that the deed was a " mtge." within above Act, sect. 1, sub-sect. 4, & that the action was not maintainable :—*Held :* this was an " equitable charge " within above Act, sect. 2, sub-sect. 4 (*b*), & the action was maintainable.—LONDON COUNTY & WESTMINSTER BANK *v.* TOMPKINS, [1918] 1 K. B. 515 ; 87 L. J. K. B. 662 ; 118 L. T. 610 ; 34 T. L. R. 259 ; 62 Sol. Jo. 330, C. A.

Annotation :—**Reld.** National Provincial Bank of England *v.* Charnley (1923), 93 L. J. K. B. 241.

See, now, Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 19 (3), Sched. 2.

4410. Increase of interest—Valid under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (1) (v)—Application of Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), ss. 1, 4, 7, 12 (1) (b), 19.]—In 1909 a mtge. was executed in respect of certain premises, the rate of interest being 4½ per cent. *per annum*. In June, 1914, notice was given for repayment on Sept. 29, 1914. Part of the principal was paid off, but it was arranged that the remainder should remain unpaid, & that the interest should be increased to 6 per cent. The mtges. came within the scope of Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), & it was agreed that the increase was valid during the operation of that statute. After the passing of Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), the mtgor. objected to continue to pay interest at the rate of 6 per cent., but was willing to pay 5 per cent. from July, 1920, to July, 1921, & 5½ per cent. afterwards. The mtgee. issued a summons for foreclosure :—*Held :* as the Act of 1915 was repealed by sect. 19 (3) of the Act of 1920, the mtgee. was only entitled to such increases on the standard rate of 4½ per cent. as were sanctioned by sect. 4 of the Act of 1920, & as the mtgor. had paid, or offered to pay, the full rate of interest permitted under the Act of 1920 the summons must be dismissed.—HOLLANDS *v.* COOPER (1921), 91 L. J. Ch. 297 ; 125 L. T. 850 ; 66 Sol. Jo. (W. R.) 10, C. A.

Annotation :—**Mentd.** Sinclair *v.* Powell, [1922] 1 K. B. 393.

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the meaning of sect. 2 (1) (d), of that Act.—MARTIN *v.* WATSON & EGAN, [1919] 2 I. R. 534.—IR.

p. —— *Effect of institution of administration proceedings.*]—PARK *v.* WHITESIDE (1919), 53 I. L. T. 141.—IR.

q. " *Deriving title under mortgagor.*"]—MARTIN *v.* WATSON & EGAN, [1919] 2 I. R. 332.—IR.

r. *Application of Act—Where relation of landlord & tenant exists.*]—*Re* HEGAN, [1921] 1 I. R. 189.—IR.

t. —— ——.]—WALLACE *v.* FOGARTY, [1926] I. R. 255, 257.—IR.

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.

See 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.

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Part I.—Name.

SECT. 1.—IN GENERAL.

1. What may constitute.]—A vowel, which is in itself a word, & may be pronounced separately, may be a name; though a consonant, which is incapable of being pronounced without the addition of a vowel, cannot (MAULE, J.).—LOMAX *v.* LANDELLS (1848), 6 C. B. 577; 6 Dow. & L. 396; 18 L. J. C. P. 88; 12 L. T. O. S. 195; 13 Jur. 38; 136 E. R. 1374.

Annotation:—**Dbtd.** R. *v.* Dale (1851), 17 Q. B. 64.

2. ——.]—R. *v.* DALE, No. 4, *post.*

Name of building society.]—*See* Building Societies Act, 1874 (c. 42), s. 22.

Name of company.]—*See* COMPANIES, Vol. IX., pp. 63–72, Nos. 190–251.

Name of corporation.]—*See* CORPORATIONS, Vol. XIII., pp. 279–284, Nos. 90–158.

Name of friendly society.] — *See* FRIENDLY SOCIETIES, Vol. XXV., p. 295.

Name of street.]—*See* HIGHWAYS, Vol. XXVI., pp. 517, 567, Nos. 2199, 2200, 2604.

Name of industrial society.]—*See* INDUSTRIAL SOCIETIES, Vol. XXVIII., p. 119.

Trade name.]—*See* TRADE MARKS.

See, also, REGISTRATION OF BIRTHS, MARRIAGES & DEATHS.

SECT. 2.—FIRST OR CHRISTIAN NAME.

3. What constitutes Christian name — All baptismal names.]—This was a suit for nullity of marriage, by reason of publication of banns by a false name of one of the parties who was a minor.

The true name is William Peter, & strictly speaking all baptismal names should be set forth, for in strictness I conceive that all the names compose but one Christian name, & I understand that it is so held in cts. of common law (SIR WILLIAM SCOTT).—POUGETT *v.* TOMKYNS (1812), 3 M. & S. 262, n.; 2 Hag. Con. 142; 1 Phillim. 499; 105 E. R. 608.

Annotations:—**Consd.** Sullivan *v.* Sullivan (1818), 2 Hag. Con. 238. **Reld.** Heffer *v.* Heffer (1812), 3 M. & S. 265, n.; Ewing *v.* Wheatley (1814), 2 Hag. Con. 175; R. *v.* Tibshelf (1830), 1 B. & Ad. 190; Tongue *v.* Allen (1835), 1 Curt. 38; Wright *v.* Elwood (1837), 1 Curt. 662. **Mentd.** Allen *v.* Wood (1834), 3 L. J. C. P. 219; Holmes *v.* Simmons (1868), L. R. 1 P. & D. 523.

4. —— **Consonant or vowel.**]—A consonant may be assumed to be a name of baptism as well as a vowel (LORD CAMPBELL, C.J.).—R. *v.* DALE (1851), 17 Q. B. 64; 20 L. J. M. C. 240; 17 L. T. O. S. 91; 15 J. P. 628; 15 Jur. 657; 5 Cox, C. C. 171; 117 E. R. 1206.

5. Number of Christian names.]—A man can

Sect. 2.—First or Christian name. Sects. 3, 4, 5 & 6: *Sub-sects.* 1 & 2.]

have but one name of baptism; but he may have two surnames.—DISPLY *v.* SPRAT (1587), Cro. Eliz. 57; 78 E. R. 318.

Annotations:—**Refd.** Wray *v.* Thorn (1744), Willes, 488. **Mentd.** R. *v.* Mellor (1858), Dears. & B. 468.

6. ——.]—A person can have but one Christian name.—R. *v.* NEWMAN (1700), 1 Ld. Raym. 562; 91 E. R. 1275.

7. ——.]—A declaration on promises against John A., otherwise John James A., is bad, for a man cannot have two Christian names.—EVANS *v.* KING (1745), Willes, 554; 125 E. R. 1318.

Annotations:—**Refd.** Williams *v.* Bryant (1839), 5 M. & W. 447; R. *v.* Wooldale (1844), 1 New Sess. Cas. 377.

8. Use of wrong Christian name—Misnomer in bond.]—CLARKE *v.* ISTEAD (1686), 1 Lut. 894; 125 E. R. 492, Ex. Ch.

Annotations:—**Refd.** Evans *v.* King (1745), Willes, 554; Gould *v.* Barnes (1811), 3 Taunt. 504; R. *v.* Wooldale (1844), 14 L. J. M. C. 13.

—— ——.]—*See, also*, BONDS, Vol. VII., pp. 164, 165, Nos. 8–23.

SECT. 3.—**SURNAME.**

9. Right to two surnames.]—DISPLY *v.* SPRAT, No. 5, *ante*.

10. Right to any surname.]—JONES-HERBERT CASE (1862), Parliamentary Debates, Series 3, Vol. 167, Cols. 430–436.

11. Surname of father.]—If a man marries with a woman precontracted, & has issue by her, this issue bears the surname of the father, but if after, the husband & wife be divorced for precontract, the issue loses its surname, yet this is a good ground for reputation subsequent, & so in many other cases the name by repute is sufficient, & vulgar reputation is allowed in writs amicable, which are had by agreement & consent of parties, but not in adversary writs.—FINCH'S (SIR MOYLE) CASE (1606), 6 Co. Rep. 63 a; 77 E. R. 348.

Annotations:—**Refd.** Lynne Regis Corpn. Case (1612), 10 Co. Rep. 120 a; R. *v.* Chester (Bp.) (1697), 1 Ld. Raym. 292. **Mentd.** Duncombe *v.* Wingfield (1617), Hob. 254; Loftes *v.* Barker (1623), Palm. 375; Anon. (1641), March, 105; Beckman *v.* Maplesden (1662), O. Bridg. 60; Dixon *v.* Harrison (1670), Vaugh. 36; Witherhead *v.* Harrison (1670), T. Jo. 2; Rice *v.* Langford (1690), Carth. 140; Lloyd *v.* Say & Seal (1711), 1 Salk. 341; Birch *v.* Wright (1786), 1 Term Rep. 378; Doe d. Brune & Coode *v.* Martyn (1828), 2 Man. & Ry. K. B. 485; Delacherois *v.* Delacherois (1864), 11 H. L. Cas. 62; Howson *v.* Shelley, [1914] 2 Ch. 13.

Surname of husband.]—*See* Sect. 7, sub-sect. 2, B., *post*.

—— **Effect of divorce.**]—*See* HUSBAND & WIFE, Vol. XXVII., p. 553, Nos. 6074, 6075.

SECT. 4.—**TITLE.**

See, generally, PEERAGES & DIGNITIES.

12. Part of name.]—A title of dignity is part of the name of the person who has it, & he must be described by it even when deft. in a suit by bill.—LAPIERE *v.* GERMAIN (SIR JOHN) & NORFOLK (DUCHESS) (1703), 2 Ld. Raym. 859; 92 E. R. 74; *sub nom.* LEPARA *v.* GERMAINE (SIR JOHN), Holt, K. B. 493; 1 Salk. 50; 3 Salk. 234.

SECT. 5.—**PROPERTY IN NAME.**

13. No exclusive property in name.]—The mere intention & the declaration of intention to use a name will not create any property in that name (CAIRNS, L.J.).—MAXWELL *v.* HOGG, HOGG *v.* MAXWELL (1867), 2 Ch. App. 307; 36 L. J. Ch. 433; 16 L. T. 130; 31 J. P. 659; 15 W. R. 467, L. JJ.

Annotations:—**Consd.** Levy *v.* Walker (1879), 10 Ch. D. 436. **Refd.** Springhead Spinning Co. *v.* Riley (1868), L. R. 6 Eq. 551; Bradbury *v.* Beeton (1869), 18 W. R. 33; Weldon *v.* Dicks (1878), 10 Ch. D. 247; Civil Service Supply Assocn. *v.* Dean (1879), 13 Ch. D. 512; Licensed Victuallers' Newspaper Co. *v.* Bingham (1888), 38 Ch. D. 139. **Mentd.** Dixon *v.* Holden (1869), L. R. 7 Eq. 488; Kelly *v.* Byles (1880), 13 Ch. D. 682; Primrose Press Agency Co. *v.* Knowles (1886), 2 T. L. R. 404; Lee *v.* Gibbings (1892), 67 L. T. 263; Walter *v.* Ashton, [1902] 2 Ch. 282.

14. —— **Right of stranger to adopt.**]—LEVY *v.* WALKER, No. 17, *post*.

15. —— —— **Family patronymic.**]—In England the assumption of a name, the patronymic of a family, by a stranger, who had never before been called by that name, is not the subject of a civil action, as by the English law there is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another. *Aliter*, as to the exclusive use of a name in connection with a trade or business, which right is recognised, & a party assuming it colourably or otherwise, being an invasion of another's rights, is a fraud, for which a remedy lies either at law or equity.—DU BOULAY *v.* DU BOULAY (1869), L. R. 2 P. C. 430; 6 Moo. P. C. C. N. S. 31; 38 L. J. P. C. 35; 22 L. T. 228; 17 W. R. 594; 16 E. R. 638, P. C.

Annotation:—**Consd.** Cowley *v.* Cowley, [1901] A. C. 450.

—— **Injunction to restrain use of name.**]—*See* INJUNCTION, Vol. XXVIII., pp. 484–486, Nos. 896–905.

Copyright.]—*See* COPYRIGHT, Vol. XIII., pp. 162 *et seq*.

Trade names.]—*See* TRADE MARKS.

SECT. 6.—**ACQUISITION OF NAME.**

SUB-SECT. 1.—IN GENERAL.

16. Right to assume any name.]—Anciently people were called by their Christian names & the places of their births, as Thomas of D., etc., one may of himself & without an Act of Parliament, change his name & take a new one.—BARLOW *v.* BATEMAN (1730), 3 P. Wms. 64; 24 E. R. 971; *on appeal* (1735), 2 Bro. Parl. Cas. 272, H. L.

Annotations:—**Consd.** Wakefield *v.* Wakefield (1807), 1 Hag. Con. 394; Leigh *v.* Leigh (1808), 15 Ves. 92. **Refd.** Pyot *v.* Pyot (1749), 1 Ves. Sen. 335; *Re* Berens, *Re* Dowdeswell, Berens-Dowdeswell *v.* Holland-Martin, [1926] Ch. 596.

17. ——.]—With the exception of an unlucky dictum in *Maxwell* v. *Hogg*, No. 13, *ante*, which talks of the property in a name, is there any pretence for the notion that a man has such a right of property in his name that he can prevent another man taking it? I call it an unlucky dictum, because he did not think of the common law, which says that a man may take any name (JESSEL, M.R.).—LEVY *v.* WALKER (1879), 10 Ch. D. 436; 48 L. J. Ch. 273; 27 W. R. 370, C. A.

Annotations:—**Refd.** Chappell *v.* Griffith (1885), 53 L. T. 459; Chatteris *v.* Isaacson (1887), 57 L. T. 177; Gray *v.* Smith (1889), 43 Ch. D. 208; Thynne *v.* Shove (1890), 45 Ch. D. 577; *Re* David & Matthews, [1899] 1 Ch. 378; Burchell *v.* Wilde, [1900] 1 Ch. 551; Pomeroy *v.* Scalé (1906), 23 T. L. R. 170; Waring & Gillow *v.* Gillow & Gillow (1916), 32 T. L. R. 389. **Mentd.** Bodega Co. *v.* Owens (1889), 7 R. P. C. 31; Jennings *v.* Jennings, [1898] 1 Ch. 378.

18. —— Where no fraud intended.]—Where an estate is devised on condition of the devisee's changing his name, it is sufficient if he changes it within a reasonable time & it is not necessary that he should apply for the royal sign manual.

There is no necessity for any application for a royal sign manual to change the name. It is a mode which persons often have recourse to, because it gives a greater sanction to it, & makes it more notorious; but a man may, if he pleases, & it is not for any fraudulent purpose, take a name & work his way in the world with his new name as well as he can (TINDAL, C.J.).—DAVIES *v.* LOWNDES (1835), 1 Bing. N. C. 597; 1 Hodg. 125; 2 Scott, 71; 4 L. J. C. P. 214; 131 E. R. 1247.

Annotations:—**Apprvd.** Cowley *v.* Cowley, [1901] A. C. 450. **Reld.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198.

19. —— ——.]—Everybody has a right to assume another name; he may take a business name & trade under it (COLERIDGE, J.).—R. *v.* WHITMORE (1914), 10 Cr. App. Rep. 204, C. C. R.

—— —— Forgery.]—*See* CRIMINAL LAW, Vol. XV., pp. 1045–1049, Nos. 11,775–11,834.

20. —— —— Or pecuniary loss inflicted.]—Where the marriage of a commoner with a peer of the realm has been dissolved by decree at the instance of the wife, & she afterwards, on marrying a commoner, continues to use the title she acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her former husband, or so affect his enjoyment of the incorporeal hereditament he possesses in his title, as to entitle him, in the absence of malice, to an injunction to restrain her use of the title.

Speaking generally, the law of this country allows any person to assume & use any name, provided its use is not calculated to deceive & to inflict pecuniary loss. . . . LORD CHELMSFORD in *Du Boulay* v. *Du Boulay*, No. 15, *ante*, stated that "in this country we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger." Then, after alluding to trade names, the judgment continues: "The mere assumption of a name which is the patronymic of a family by a stranger who has never before been called by that name, whatever cause of annoyance it may be to a family, is a grievance for which our law affords no redress." If this is true of strangers, it is *a fortiori* true of persons who have once acquired the right to use a name which the usages of society allow them to retain (LORD LINDLEY).—COWLEY (EARL) *v.* COWLEY (COUNTESS), [1901] A. C. 450, 70 L. J. P. 83; 85 L. T. 254; 50 W. R. 81; 17 T. L. R. 725, H. L.

Annotations:—**Apld.** Pryce *v.* Pioneer Press (1925), 42 T. L. R. 29. **Reld.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198; *Re* Croxon (otherwise Croxton), Croxon (otherwise Croxton) *v.* Ferrers (1904), 89 L. T. 733.

Name given in baptism.]—*See* Nos. 3–5, *ante*.

21. Name acquired by confirmation.]—WALDEN *v.* HOLMAN (1704), 6 Mod. Rep. 115; 2 Ld. Raym. 1015; 87 E. R. 873; *sub nom.* HOLMAN *v.* WALDEN, Holt, K. B. 492; 1 Salk. 6.

Annotations:—**Distd.** Evans *v.* King (1745), Willes, 554. **Reld.** Read *v.* Matteur (1736), Lee *temp.* Hard. 286.

——.]—*See* No. 30, *post*.

Name acquired by marriage.]—*See* Sect. 7, subsect. 2, B., *post*.

Name acquired by repute.]—*See* Sect. 6, subsect. 2, *post*.

SUB-SECT. 2.—BY REPUTE.

22. General rule.]—FINCH'S (SIR MOYLE) CASE, No. 11, *ante*.

23. ——.]—Nor is it true to say that one baptised by the name of John cannot be known by another name (HOLT, C.J.).—WALDEN *v.* HOLMAN (1704), 2 Ld. Raym. 1015; 6 Mod. Rep. 115; 92 E. R. 175; *sub nom.* HOLMAN *v.* WALDEN, 1 Salk. 6; Holt, K. B. 492.

Annotations:—**Reld.** Read *v.* Matteur (1736), Lee *temp.* Hard. 286; Evans *v.* King (1745), Willes, 554.

24. ——.]—DOE d. LUSCOMBE *v.* YATES, No. 81, *post*.

25. ——.] — COWLEY (EARL) *v.* COWLEY (COUNTESS), No. 20, *ante*.

26. —— Double name.]—I think the presumption is, that the bkpt., having a double name, was usually known by the first; that is the way in which a double name is generally treated (SIR J. CROSS).—*Re* RICHARDS, *Ex p.* RICHARDS (1842), 6 Jur. 136.

27. Use acknowledged by person named.]—If a party will countenance another person in calling him by a name which is not his name of baptism, he is not to complain of it (BAYLEY, B.).—NEWTON *v.* MAXWELL (1832), 2 Cr. & J. 215; 1 Dowl. 315; 1 L. J. Ex. 78; 149 E. R. 93; *sub nom.* WESTON *v.* MAXWELL, 2 Tyr. 278.

28. More than one name.]—An action for false imprisonment can be maintained against a sheriff for arresting a person who is wrongly named in the process, though he be the person against whom it is issued. But the sheriff is entitled, & is bound to arrest the person, if he be as well known by the name in the process, as by his real name.—CARRIDGE *v.* LAUTOUR (1828), 7 L. J. O. S. K. B. 33.

——.]—*See* EVIDENCE, Vol. XXII., p. 64, No. 366.

29. Validity of reputed name—For marriage purposes.]—A person whose baptismal & surname was A. L. was married by banns by the name of G. S., having been known, in the parish where he resided & was married, by that name only, from his first coming into the parish till his marriage, which was about three years:—*Held*: the marriage was valid, & therefore the wife & children entitled to the husband's settlement.—R. *v.* BILLINGSHURST (INHABITANTS) (1814), 3 M. & S. 250; 105 E. R. 603.

Annotations:—**Reld.** R. *v.* Tibshelf (1830), 1 B. & Ad. 190; Allen *v.* Wood (1834), 1 Bing. N. C. 8.

30. —— ——.]—A man may change his surname by use & reputation.

In point of law a man cannot change his Christian name, without prejudice to the question, whether he can do so at his confirmation. With regard to surnames, however, the law is different, they can be changed in various ways, as, for instance, by royal licence, a person can also change his name by use & reputation. If a man has a name which displeases him, there is nothing in law to prevent his changing it to any other he likes better, provided he can get the public to adopt & use the name he prefers (WILLES, J.).—R. *v.* SMITH (1865), 4 F. & F. 1099.

31. —— For legal proceeding.]—Where the warrant of attorney & deed to lead the uses were

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PART I. SECT. 6, SUB-SECT. 1.

18 1. *Right to assume any name—Where no fraud intended.*]—No costs were given to deft. in an action to restrain him from using a certain designation of his college as he had sought by the use of the name to advantage himself in an unmeritorious way.—ROBINSON *v.* BOGLE (1889), 18 O. R. 387.—**CAN.**

Sect. 6.—Acquisition of name: Sub-sect. 2. Sect. 7: Sub-sects. 1 & 2, A., B. & C. (a).]

executed in a name by which the vouchee was commonly known, the ct. refused to amend the recovery by substituting a different name by which, as he afterwards discovered, he had been baptised. —ADDIS *v.* NORRIS (1831), 7 Bing. 455; 5 Moo. & P. 379; 9 L. J. O. S. C. P. 166; 131 E. R. 176.

32. —— ——.]—It is certain that a person may at this time sue, or be sued, not merely by his true name of baptism, but by any first name which he has acquired by usage or reputation. *Semble:* in the present day the Christian name of a party cannot be changed or added to at confirmation.—WILLIAMS *v.* BRYANT (1839), 7 Dowl. 502; 5 M. & W. 447; 9 L. J. Ex. 47; 3 Jur. 632; 151 E. R. 189.

Annotations:—**Reld.** R. *v.* Wooldale (1844), 6 Q. B. 549. **Mentd.** King *v.* R. (1845), 14 L. J. M. C. 172.

SECT. 7.—CHANGE OF NAME.

SUB-SECT. 1.—IN GENERAL.

33. Right to change.]—BARLOW *v.* BATEMAN, No. 16, *ante*.

34. ——.]—DAVIES *v.* LOWNDES, No. 18, *ante*.

35. —— **Christian name.**]—WILLIAMS *v.* BRYANT, No. 32, *ante*.

36. —— ——.]—R. *v.* SMITH, No. 30, *ante*.

SUB-SECT. 2.—IN PARTICULAR CASES.

A. Solicitors.

See, generally, SOLICITORS.

37. Alteration of name on the roll—Form of application — In court, not chambers.]— An attorney who desires to change his name should apply to the ct., & not to a judge at chambers.—*Re* AN ATTORNEY (1863), 11 W. R. 780.

38. —— **Name changed by royal licence.**]—Where an attorney had changed his name by royal licence, the ct. allowed the roll to be amended by substituting the new name for the old.—*Ex p.* BENTHALL (1843), 1 Dow. & L. 747; 6 Man. & G. 722; 7 Scott, N. R. 407; 134 E. R. 1083; *sub nom.* ANON., 2 L. T. O. S. 100.

Annotation:—**Folld.** *Re* Gimlet (1862), 11 W. R. 210.

39. —— **Name added to by royal licence—Matter of fancy.**]—An attorney having obtained the royal licence to assume an additional name, the ct. refused to alter the roll, holding it mere matter of fancy.—*Ex p.* HAYWARD (1838), 5 Scott. 712.

Annotation:—**N.F.** *Ex p.* Benthall (1843), 1 Dow. & L. 747.

40. —— **Addition for private reasons.**]—Where an attorney whose name is on the roll assumes an additional surname the latter may be added to that already on the roll.—*Ex p.* WARE (1838), 6 Dowl. 311.

41. —— **Change of name bonâ fide.**]—An attorney who, without royal licence, or any formal authority for the change, has assumed another name from that on the roll, for a specified reason, may have the roll altered to the assumed name, if it appear to the ct. that such name has been taken *bonâ fide* & without fraudulent intention. —*Ex p.* DAGGETT (1850), 1 L. M. & P. 1; *sub nom. Ex p.* DUGGETT, 14 L. T. O. S. 355.

Annotation:—**Reld.** *Ex p.* Moses (1850), 19 L. J. Q. B. 345.

42. —— ——.]—Upon the application of a solr., who had assumed the name of Chamberlain in addition to his own, the ct., being satisfied with the reasons, ordered an entry of the change of name to be made upon the roll of solrs.—*Re* MATTHEWS (1852), 16 Beav. 245; 51 E. R. 772; *sub nom. Ex p.* MATTHEWS, 22 L. J. Ch. 22; 17 Jur. 29; 1 W. R. 44; *sub nom. Ex p.* MATHEWS, 20 L. T. O. S. 136.

43. —— **Name changed for family reasons.**]—Where an attorney made affidavit that for family reasons, & no other, he was desirous of changing his name, the ct. directed the master to indorse the proposed alteration on the roll of attorneys, although no royal licence had been obtained.—*Re* GIMLET (AN ATTORNEY) (1862), 11 W. R. 210.

44. —— ——.]—*Re* AN ATTORNEY (1851), 17 L. T. O. S. 96.

45. —— ——.]—*Re* MEDEWE (1855), 25 L. T. O. S. 84.

46. —— **Where no proceedings apprehended in former name.**]—*Ex p.* JAMES (1850), 1 L. M. & P. 4; *sub nom. Ex p.* MOSES, 19 L. J. Q. B. 345; 15 L. T. O. S. 70; 15 Jur. 153.

Annotation:—**Folld.** *Ex p.* Matthews (1852), 20 L. T. O. S. 83.

47. —— **Indication of alteration — Necessity for.**]—*Ex p.* JAMES (1850), 1 L. M. & P. 4; *sub nom. Ex p.* MOSES, 19 L. J. Q. B. 345; 15 L. T. O. S. 70; 15 Jur. 153.

Annotation:—**Folld.** *Ex p.* Matthews (1852), 20 L. T. O. S. 83.

48. —— —— **Entry in margin of roll.**]—Upon an attorney's changing his name, the Ct. of Exch. refused to direct the master to alter the name on the roll of the ct.; but directed him to make a memorandum in the margin of the roll opposite to appct.'s name, stating that he is now known by the name of ——, & that the same has been done by rule of ct.—*Ex p.* DEARDEN (1850), 1 L. M. & P. 666.

49. Articled clerk—Name changed during articles —Application for admission—Notice in both names.] —Where an articled clerk to an attorney had legally changed his name shortly before the expiration of his articles, & in his notices of intention to apply for admission as an attorney, had described himself by his new name, without any notification of the change, the ct. upon motion on the first day of term, gave permission for him to be admitted on the last day of the same term, but required that a notice should be up till the end of the term, with both names.—*Re* RIDLEY (1836), 4 Ad. & El. 780; 6 Nev. & M. K. B. 436; 6 L. J. K. B. 258; 111 E. R. 977; *sub nom. Ex p.* RIDLEY, 2 Har. & W. 66.

B. Married Women.

50. General rule.]—Petitioner having obtained a decree dissolving her marriage with resp., subsequently re-married him. This second marriage was celebrated after publication of banns, in which petitioner was described by her name of marriage, she having in the interval between the decree dissolving her first marriage & the celebration of the second usually passed by her maiden name.

PART I. SECT. 7, SUB-SECT. 1.

33 i. *Right to change.*]—FORLONG PETITIONER (1880), 7 R. (Ct. of Sess.) 910; 17 Sc. L. R. 647.—**SCOT.**

33 ii. ——.]—As a person does not require the authority of the ct. to change his name, the ct. will not grant authority except on special cause shown.—JOHNSTON PETITIONER (1899), 2 F. (Ct. of Sess.) 75; 37 Sc. L. R. 57; 7 S. L. T. 343.—**SCOT.**

33 iii. ——.]—Petition by a chartered accountant, who held several offices to which he had been appointed by the ct., for authority to change his surname, & to ordain the petition & the ct.'s deliverance thereon to be recorded in the Books of Sederunt, refused as not necessary.—ROBERTSON PETITIONER (1899), 2 F. (Ct. of Sess.) 127; 37 Sc. L. R. 82; 7 S. L. T. 224.—**SCOT.**

On an application to annul such marriage by reason of an undue publication of banns:—*Held:* a name acquired by marriage can only be superseded by a reputed name in cases where the name had been so far acquired by repute as to obliterate the name acquired by marriage.

Marriage confers a name upon a woman, which becomes her actual name, & she can only obtain another by reputation (*per* CUR.).—FENDALL *v.* GOLDSMID (1877), 2 P. D. 263; 46 L. J. P. 70.

Annotation:—**Consd.** Cowley *v.* Cowley, [1901] A. C. 450.

51. Noblewoman — Married to commoner.]—HAWARD *v.* SUFFOLK (DUKE) (1553), 1 Dyer, 79 b; 73 E. R. 170.

Annotations:—**Consd.** Suffolk's Case (1565), Owen, 81; Cowley *v.* Cowley, [1900] P. 118. **Mentd.** Cave *v.* Holford (1798), 3 Ves. 650.

52. —— Name changed where husband a nobleman.]—SUFFOLK'S (DUCHESS) CASE (1565), Owen, 81; 4 Leon. 196; 74 E. R. 914.

Annotation:—**Refd.** Cowley *v.* Cowley, [1900] P. 118.

53. —— ——.]—The wife of a duke, earl, or baron, in all writings they shall be named ladies. But the wives of knights shall be named dames. If a wife of a duke, earl, or baron, takes a new husband of a more base degree, that she loses her name of dame or lady, & shall be named in every writ according to the degree of her husband (*per* CUR.).—ANON. (1628), Het. 88; 124 E. R. 364.

54. Effect of divorce.]—The name by which a divorced woman should be described, is the name by which she passed & was known after the dissolution of the marriage.—*In the Goods of* HAY (1865), L. R. 1 P. & D. 51; 35 L. J. P. & M. 3; 13 L. T. 335; 11 Jur. N. S. 936; 14 W. R. 147.

——.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 553, Nos. 6074, 6075.

C. Beneficiaries.

(*a*) *Name and Arms Clause.*

See, generally, SETTLEMENTS; WILLS.

55. Method of compliance—Addition of prescribed name—Before or after present name.]—Under a name & arms proviso requiring a devisee to take testator's surname:—*Held:* adding testator's surname before his own was not a compliance by the devisee, but adding testator's surname after his own was so.—D'EYNCOURT *v.* GREGORY (1876), 1 Ch. D. 441; 45 L. J. Ch. 205; 24 W. R. 424.

Annotations:—**Distd.** *Re* Eversley, Mildmay *v.* Mildmay, [1900] 1 Ch. 96. **Refd.** *Re* Berens, *Re* Dowdeswell, Berens-Dowdeswell *v.* Holland-Martin, [1926] Ch. 596.

56. —— —— ——.]—JOICEY-CECIL *v.* JOICEY-CECIL (1898), *Times*, June 11.

Annotation:—**Refd.** *Re* Croxon, Croxon *v.* Ferrers, [1904] 1 Ch. 252.

57. —— —— ——.]—Under a name & arms clause directing a devisee to assume & use the prescribed name "alone or together" with his own family name:—*Held:* the devisee had an option to use the prescribed name either before or after his own family name, & the use of the prescribed name before his own surname was a sufficient compliance with the terms of the devise.—*Re* EVERSLEY, MILDMAY *v.* MILDMAY, [1900] 1 Ch. 96; 69 L. J. Ch. 14; 81 L. T. 600; 48 W. R. 249; 16 T. L. R. 6; 44 Sol. Jo. 11.

Annotation:—**Refd.** *Re* Berens, *Re* Dowdeswell, Berens-Dowdeswell *v.* Holland-Martin, [1926] Ch. 596.

58. —— —— ——.]—Under a name & arms clause in a will:—*Held:* in order to comply with the clause the specified surname must be added after that of the devisee, & prefixing it to that of the devisee would not be a compliance.—*Re* LLANGATTOCK, SHELLEY *v.* HARDING (1917), 33 T. L. R. 250.

Annotation:—**Refd.** *Re* Berens, *Re* Dowdeswell, Berens-Dowdeswell *v.* Holland-Martin, [1926] Ch. 596.

59. —— —— ——.]—*Re* BERENS, *Re* DOWDESWELL, BERENS-DOWDESWELL *v.* HOLLAND-MARTIN, No. 94, *post.*

60. Adoption & subsequent discontinuance of changed name.]—A name & arms clause in a will provided in effect that the persons therein mentioned "as & when & within the space of twelve calendar months next after they should severally become entitled in possession" to the estates, should "assume & take upon themselves respectively the surname of Blagrove, they respectively not being of that name, & by such name only, & no other, thenceforth should style & describe themselves, etc., & also should bear the arms of testator's family alone, etc., & in case any of the persons aforesaid should refuse, decline, neglect or discontinue to take, assume & use such surname & arms respectively, etc., for the space of twelve calendar months after they should severally so become entitled as aforesaid, then" from & immediately after the expiration of the said space of twelve calendar months, their estate was to be determined, & go over to the persons next entitled in remainder. H. B., one of the persons referred to in the above clause, became entitled to the estates, subject to the condition, in 1844, having previously by royal licence duly assumed taken the name & arms of Blagrove. In 1856 he, by licence, assumed & still used the name & arms of "Bradshaw" only:—*Held:* the person next in remainder was entitled to the estates under the gift over in the name & arms clause.—BLAGROVE *v.* BRADSHAW (1858), 4 Drew. 230; 27 L. J. Ch. 440; 30 L. T. O. S. 363; 4 Jur. N. S. 107; 6 W. R. 266; 62 E. R. 89.

61. ——.]—Testatrix devised her real estate in strict settlement, the will containing an ordinary name & arms clause; & she bequeathed personal estate to trustees, in trust for the person or persons who for the time being should by virtue of the will be beneficially entitled to the real estate, for such or the like estates or interests, to the intent that the personal estate should go along with the real estate, so far as the nature of the personal estate & the rules of law & equity would permit, & testatrix directed that the name & arms clause relating to the real estate should not affect the personal estate, but in lieu thereof she directed (*inter alia*), that if any person, being a male, who should be entitled under any of the limitations of the will to an absolute beneficial interest in possession by purchase in the personal estate should refuse or neglect to assume, use, & bear the name & arms of C. within the period therein mentioned, provided such period should expire within twenty-one years next after the death of the survivor of three persons named, or should, after having assumed the name & arms, discontinue to use & bear the same, or either of them, for

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PART I. SECT. 7, SUB-SECT. 2.—C. (a).

55 i. *Method of compliance—Addition of prescribed name—Before or after present name.*]—Testator, by his trust-disposition & settlement, destined his estate of T. in life rent & fee to a series of heirs, under the condition that the heirs taking benefit under the destination should "assume & constantly thereafter use as their surname, arms, & designation the surname, arms, & designation of M. of T. as their proper surname, arms, & designation in addition to their own surname, arms, & designation"; with a clause of forfeiture in the event of a contravention of the condition:—*Held:* in the absence of express direction the assumed surname should be the last, a beneficiary was entitled to prefix the surname M. to his own surname of S.—MUNRO'S TRUSTEES *v.* SPENCER, [1912] S. C. 933.—**SCOT.**

Sect. 7.—Change of name: Sub-sect. 2, C. (a).]

six months at any time within the period of twenty-one years, then & in any of such cases, & from time to time, the estate & interest of the person so refusing, or neglecting, or discontinuing in the personal estate should absolutely cease, & the personal estate should from time to time go over to the person or persons who would have been entitled to the real estate under the limitations of the will in case the party whose estate should so cease, being tenant for life of the real estate, were dead, or, being tenant in tail of the real estate, were dead without issue, for such or the like estates or interests as such person or persons would have been entitled to in the real estate. Within the proper time after the death of testatrix the first tenant for life under the will assumed the name & arms of C. & continued to use them until his death. Pltf. was his first son & the first tenant in tail of the real estate under the will. After he had attained twenty-one he executed a disentailing deed of the real estate & limited it to himself in fee simple. He then claimed to be indefeasibly entitled in possession to the personal estate:—*Held:* (1) the forfeiture clause relating to the personal estate was valid, & the effect of it was to make the interest of the tenant in tail, in case it should be forfeited, go over to the person who would have been entitled to the real estate under the limitations of the will in case the tenant in tail had been dead without issue, & no disentailing deed had been executed; (2) pltf. was not indefeasibly entitled to the personal estate; but that his interest was liable to forfeiture in case within the period of twenty-one years he should discontinue to use the name & arms of C.—*Re* CORNWALLIS, CORNWALLIS *v.* WYKEHAM-MARTIN (1886), 32 Ch. D. 388; 55 L. J. Ch. 716; 54 L. T. 844.

Annotation:—**Mentd.** *Re* Whitburn, Whitburn *v.* Christie, [1923] 1 Ch. 332.

62. ——.]—Where a will requires that a person shall within a specified time after becoming entitled under the limitations of the will take & use a certain surname, & there is a condition of forfeiture if such person shall "refuse or neglect to take or use such surname as aforesaid & in manner aforesaid," a continued use of the surname after the period is to be implied.

Although such clause requires the surname to be used "in deeds & documents & on all other occasions," it imposes no obligation except on occasions when a surname is commonly used. There is no forfeiture for signing a family letter with a Christian name alone, nor, in the case of a peeress, for signing an ordinary business letter with the Christian name & title, or using these latter on her visiting-cards.—*Re* DRAX, DUNSANY *v.* SAWBRIDGE (1906), 75 L. J. Ch. 317; 94 L. T. 611; 54 W. R. 418; 22 T. L. R. 343; 50 Sol. Jo. 325.

63. Effect of non-compliance—Ignorance of clause.]—The terms "forfeiture" & "breach of condition" used in Real Property Limitation Act, 1833 (c. 27), ss. 3, 4, are to be read in the largest sense, & extend to forfeitures which operate to accelerate an estate under a conditional limitation, as well as to forfeitures of which the heir-at-law only can take advantage. Ignorance of a condition annexed to a gift by will does not protect the devisee or legatee from the consequences of not complying with the condition. An estate was devised in strict settlement, subject to a clause directing that every person who should become entitled in possession under the will should, on becoming so entitled, assume testator's name & arms; & it was provided, that in case any such person should fail or neglect so to do for twelve calendar months, after he should become so entitled in possession, his estate & interest should cease & the estate should go to the person who should be next in remainder & then *in esse*, as if the person so failing or neglecting were then dead. A tenant in tail, who did not comply with the clause, remained in possession of the estate for more than twenty years. At his death the next remainderman was in India, & being ignorant of his rights under the will, did not comply with the clause:—*Held:* (1) the tenant in tail had not acquired a title by adverse possession, but on his death, by virtue of Real Property Limitation Act, 1833 (c. 27), s. 4, the remainderman became entitled to the estate; (2) the remainderman's estate was forfeited by reason of his non-compliance with the name & arms clause.—ASTLEY *v.* ESSEX (EARL) (1874), L. R. 18 Eq. 290; 43 L. J. Ch. 817; 30 L. T. 485; 22 W. R. 620.

Annotations:—*As to* (2) **Distd.** *Re* Quintin Dick, Cloncurry *v.* Fenton, [1926] Ch. 992. **Reld.** Partridge *v.* Partridge (1893), 70 L. T. 261.

64. —— ——.]—Testator who died in 1858 by his will devised & bequeathed real & personal estate to persons in succession in strict settlement, & directed that every person who should become entitled thereto should take & use the surname & arms of D., & that if any such person so becoming entitled should refuse or neglect to take & use such surname & arms within three months of becoming so entitled, the limitations to him should cease determine & be utterly void, & the estate should go & devolve to the person or persons next entitled in remainder, in the same manner as if the person whose estate should so cease & determine were dead.

Upon the death of a tenant for life without issue in 1923, a period of over a year elapsed before the next tenant in tail could be discovered. Eventually it was found that he was living in Canada, & had never heard of the terms or existence of testator's will:—*Held:* being ignorant of the condition he could not be said either to have "refused" or "neglected" to comply with it. The expression "refuse or neglect" is not equivalent to "fail" or "omit," as it implies a conscious act of volition. The tenant in tail therefore had not forfeited the estate.—*Re* QUINTIN DICK, CLONCURRY (LORD) *v.* FENTON, [1926] Ch. 992; 42 T. L. R. 681; 70 Sol. Jo. 876.

65. —— **Gift absolute.**]—Testatrix, who died in 1832, settled her freehold estate upon her grandchildren, a share becoming vested in one of them, Lucy, in fee simple in possession; & the will contained a proviso that any person becoming entitled in possession to the estate, should within one year thereafter, take & use the name of "Jones," & that in case any such person should refuse or neglect to use the name of Jones within one year, then the estate limited to him or her should be void, & should first go to her niece, Catherine Jones, since deceased, for her life, & after her decease to the person or persons next in remainder under the trusts of the will, in the same manner as if the person so refusing were dead. Lucy was twice married, & neither she nor either of her husbands ever took the name of Jones:—*Held:* the gift being in fee simple, & there being necessarily no person entitled in remainder, the name clause was void, & that there had consequently been no forfeiture by Lucy.—MUSGRAVE *v.* BROOKE (1884), 26 Ch. D. 792; *sub nom. Re* BROOKE, MUSGRAVE *v.* BROOKE, 54 L. J. Ch. 102; 33 W. R. 211.

66. —— Only heir can take advantage of omission—Effect upon making title to property.]—After devising a freehold estate to trustees & giving his daughter & granddaughter & her husband successive equitable life interests therein, with remainder to the use of the granddaughter's first & other sons in tail male, with divers remainders over, testator provided & declared that every person becoming entitled to the estate as tenant for life or tenant in tail in possession, & the husband of every such person if female & married, should within twelve calendar months of becoming entitled in possession assume testator's surname & arms. There was no provision for continued user of the name & arms & no gift over on non-compliance with the proviso. Neither testator's daughter or granddaughter, both of whom succeeded to the estate, nor the husband of either, assumed his name & arms in compliance with the proviso. Objection to title was taken on a sale by the granddaughter under the powers of the Settled Land Acts, on the ground that she was not, & had not the powers of, a tenant for life, her estate, as the purchasers alleged, having ceased by reason of her non-compliance:—*Held:* the vendor could make good title, for even if the expression of testator's desire contained a condition it would be a common law condition of which testator's heir alone could take advantage by entry, which he had not done, nor was there anything in the will to show that it was the intention of testator that the estate should go over on non-compliance with his desire, so as by necessary implication to convert the expression of that desire into a conditional limitation.—*Re* EVANS'S CONTRACT, [1920] 2 Ch. 469; 89 L. J. Ch. 626; 124 L. T. 188.

67. Change by person entitled—When right accrues—Condition subsequent.]—MALLOON *v.* FITZGERALD (1683), 3 Mod. Rep. 29; Skin. 179; 2 Show. 315; 87 E. R. 17.

Annotations:—**Consd.** Doe d. Kenrick *v.* Beauclerk (1809), 11 East, 657. **Mentd.** Burleton *v.* Humfrey (1755), Amb. 256; Doe d. Taylor *v.* Crisp (1838), 1 Per. & Dav. 37.

68. —— —— ——.]—Devise to the heir at law in tail, with a proviso for taking testator's name, is not a conditional limitation.

This is not a condition precedent. It cannot be complied with instantly. It is "to take the name for themselves & their heirs." Now many acts are to be done, in order to oblige the heirs to take it; such as a grant from the King; or, an Act of Parliament. It is not, therefore, a condition precedent; but being penned as a condition, it must be a condition subsequent. It cannot be a limitation; for, the next proviso, against waste, shows that testator knew how to limit over, when he thought proper to do so, & in that case, he did think it proper to do it; & therefore that proviso is turned into a limitation (LORD MANSFIELD).—GULLIVER d. CORRIE *v.* ASHBY (1766), 4 Burr. 1929; 1 Wm. Bl. 607; 98 E. R. 4.

Annotations:—**Apld.** *Re* Evans' Contract, [1920] 2 Ch. 469. **Reld.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1.

69. —— —— ——.]—Testator directed his estate to be settled on G. R. for life, with remainder to his issue in tail male, in strict settlement; upon condition that all persons from time to time to come into possession of the estates, should take & use the name & arms of T.:—*Held:* the estates ought to be settled on G. R. for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in tail male, with cross remainders in tail male; & the proviso to be inserted in the settlement, as to taking the name & arms, & for giving over the estates on default, ought to be so expressed, as to take away the estates from the defaulting party, & his descendants only: that is, if a grandson of G. R. were the defaulting party, the consequence ought not to extend to the grandson's brothers.—TREVOR *v.* TREVOR (1842), 13 Sim. 108; 11 L. J. Ch. 417; 6 Jur. 863; 60 E. R. 42; *on appeal* (1847), 1 H. L. Cas. 239, H. L.

Annotations:—**Mentd.** Williams *v.* Teale (1847), 6 Hare, 239; Fowler *v.* Cohn (1856), 21 Beav. 360; Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Walmesley *v.* Gerard (1861), 29 Beav. 321; Forster *v.* Davies (1863), 32 Beav. 624; Surtees *v.* Surtees (1871), 25 L. T. 288; Pryse *v.* Pryse (1872), 42 L. J. Ch. 253.

70. —— —— ——.]—Devise of lands to all the children of A. & B. his wife, "already or hereafter to be born" of their bodies, whether male or female, for & during their joint lives & the life of the survivor, but all the sons to take the name & arms of W. in addition to their own name, remainder to the trustees to preserve, etc., & after their several deceases unto & equally between all their issue, male & female; & for want of such issue, over. After the death of A., B. joined with surviving children in executing a disentailing deed to themselves as tenants in common in fee, subject to the life estate of B.:—*Held:* the name & arms clause was a condition subsequent to the vesting of the estates in the sons, & was satisfied by their assuming the name & arms of the testator subsequently to the disentailing deed.—WOODHOUSE *v.* HERRICK (1855), 1 K. & J. 352; 3 Eq. Rep. 817; 24 L. J. Ch. 649; 3 W. R. 303; 69 E. R. 494.

Annotation:—**Consd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198.

71. —— —— ——.]—Testator was, under a deed of resettlement of his family estates, entitled to a reversion in fee, subject to an estate for life in his only son, who was a bachelor, & to remainders in tail to the first & other sons of that son. Testator soon afterwards devised all his real estates to his eldest daughter for her life, with remainder to her first & other sons in tail, with remainders to his other daughters for life & to their sons in like manner. The will contained a name & arms clause determining the estate of any person who should become "entitled to the possession or to the receipt of the rents & profits" of the estates, & not assume the family name & arms within a year after becoming so entitled. In several other parts of the will provisions were made respecting persons who, by virtue of the will, should be in the "actual possession" of the property or "entitled to the rents & profits thereof." The son died without issue two years after testator, & the first tenant for life under the will assumed the name & arms of H. within a year after her brother's death:—*Held:* there was no forfeiture, either as to the family estates, or as to property to which testator had become entitled in fee simple in possession after the date of the will.—LANGDALE (LADY) *v.* BRIGGS (1856), 8 De G. M. & G. 391; 26 L. J. Ch. 27; 28 L. T. O. S. 73; 2 Jur. N. S. 982; 4 W. R. 703; 44 E. R. 441, L. JJ.

Annotations:—**Apld.** *Re* Greenwood, Goodhart *v.* Woodhead, [1903] 1 Ch. 749. **Mentd.** Taylor *v.* Sparrow (1863), 4 Giff. 703; Carroll *v.* Graham (1865), 11 Jur. N. S. 1012; Castle *v.* Fox (1871), L. R. 11 Eq. 542; Juttendromohun Tagore *v.* Ganendromohun Tagore, Ganendromohun Tagore *v.* Juttendromohun Tagore (1872), L. R. Ind. App. 116.—IR.

67 i. *Change by person entitled—When right accrues—Condition subsequent.*]—Real estate was limited by a will to E. N. & her heirs male, "she & they & her husband taking the name & bearing the arms of N.":—*Held:* these words formed no portion of the limitation of the estate tail, but imported at most a condition subsequent.—VANDELEUR *v.* SLOANE, [1919] 1 I. R.

a. *Effect of clause not clear.*]—The devise was to one C., subject to a condition that he should within two years

Sect. 7.—Change of name: Sub-sect. 2, C. (a) & (b).]

Supp. Vol. p. 48; Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304; Kathama Natchiar *v.* Dorasinga Tever (1875), L. R. 2 Ind. App. 169; Hampton *v.* Holman (1877), 5 Ch. D. 183; Ram Lal Mookerjee *v.* Secretary of State for India (1881), L. R. 8 Ind. App. 46; Curtis *v.* Sheffield (1882), 30 W. R. 581; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; *Re* Bridger, Brompton Hospital *v.* Lewis (1893), 63 L. J. Ch. 186; Leslie *v.* Rothes, [1894] 2 Ch. 499; *Re* Hayes, Turnbull *v.* Hayes, [1900] 2 Ch. 332; *Re* Maddock, Llewelyn *v.* Washington, [1902] 2 Ch. 220; Mason *v.* Ogden (1902), 87 L. T. 622; *Re* Horton, Lloyd *v.* Hatchett, [1920] 2 Ch. 1.

72. —— —— ——.]—BENNETT *v.* BENNETT, No. 78, *post.*

73. —— —— ——.]—Testator devised & bequeathed real & personal estate to trustees upon trust to pay the income to his wife during her life, & after her decease, if H. was then living, to retain the rents of realty to their own use during his life, & to pay him the income of the personalty during his life, & after his death upon trust to convey & transfer the real & personal estate to such son of M. as should first attain the age of twenty-five years, upon condition that such son of M. as should become entitled to any property under the will should, within two years after he should so become entitled, take the name & arms of testator. At testator's decease M. was living & had no son who had attained twenty-five, but his eldest son attained that age during the lives of the widow & H. This son died in the lifetime of H. without having taken the name & arms of testator:—*Held:* although the limitation of the personal estate to the first son of M. who should attain the age of twenty-five was void for remoteness, the direction to convey the real estate to him gave him a contingent remainder which was not void for remoteness, although his estate was only equitable, the doctrine of contingent remainders being applicable to equitable as well as to legal estates; he was not bound to take the name & arms of testator until his estate came into possession, & the real estate devolved upon his heir.—ABBISS *v.* BURNEY, *Re* FINCH (1880), 17 Ch. D. 211; 49 L. J. Ch. 710; 43 L. T. 20; 28 W. R. 903; *on appeal* (1881), 17 Ch. D., p. 224, C. A.

Annotations:—**Mentd.** Marshall *v.* Gingell (1882), 47 L. T. 159; *Re* Middleton, Thompson *v.* Harris (1882), 19 Ch. D. 552; *Re* Frost, Frost *v.* Frost (1889), 43 Ch. D. 246; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1; *Re* Clarke's Settlmt. Trust, Wanklyn *v.* Streatfeild, [1916] 1 Ch. 467; *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365; *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491.

74. —— —— ——.]—Testator devised an estate to trustees on trust to allow his widow to reside in the mansion house during widowhood, rent free, with use of the furniture, plate, & stores, & subject thereto for his nephew, C., for life, with remainder to his issue in tail, with remainder for certain other nephews in tail male. Declaration that every person who, under those limitations, should become entitled as tenant for life or in tail male to the actual possession or receipt of the rents & profits of the estate should, within one year after becoming so entitled, take the name of V., & in case of neglect the limitations in his favour should determine, & the estate go to the person next in remainder as if the person so neglecting being tenant for life were dead, or being tenant in tail male were dead & there were a general failure of his issue inheritable thereunder; but such determination, in case of a tenant for life, was not to prejudice his issue, but the estate should remain in the trustees during his life, who should pay the rents to the person entitled to the next vested estate in remainder. Testator died in 1875. C., the tenant for life, died in 1889 without issue, & without having taken the name of V. T., the next tenant in tail, was now living & unmarried, but had not taken the name. R., the next tenant in tail, took the name of V. in 1891. Owing to a charge on the estate there had not been any profits therefrom for the persons entitled under the limitations in the will. The widow was still living:—*Held:* although the widow was entitled to occupy part of the estate rent free, she was not thereby tenant for life, & although there had not been any profits, C. had become on testator's death entitled to the actual possession or receipt of the rents & profits within the meaning of the will; C. had forfeited his interest in 1876 by not taking the name of V., but C. being tenant for life only, time did not run against T. until C.'s death in 1889; T. having failed to take the name of V. his interest was forfeited in 1890, & R., having taken the name within one year from T.'s forfeiture, was now tenant in tail of the estate.—*Re* VARLEY, THORNTON *v.* VARLEY (1893), 62 L. J. Ch. 652; 68 L. T. 665.

75. —— —— ——.]—Testator, who died in 1853, devised his real estate upon trust for his daughter for life, & after her death for her children; & if she should have no child he devised his real estate to N. in fee, on condition that in case testator's wife should be then living she should have the use for the then remainder of her life of testator's residence, & on further condition that N. should "take & use" testator's name only, but subject to the payment of certain legacies which testator bequeathed only if his daughter should have no child, & should be payable at her death exclusively out of the estates devised to N.

Testator's daughter & N. both survived testator, but his wife was dead. The daughter, who was now in her fifty-ninth year, was married, but had had no children. N. died in her lifetime intestate, without having taken testator's name:—*Held:* upon the construction of the will the condition requiring N. to take & use testator's name was a condition subsequent, that is, a condition to operate only upon N. becoming entitled to the possession of the estate by the death of the daughter without children, & not before; & as he had been prevented from performing it by the act of God, the estate would, on the death of the daughter without children, vest absolutely in his legal personal representative freed from the condition.—*Re* GREENWOOD, GOODHART *v.* WOODHEAD, [1903] 1 Ch. 749; 72 L. J. Ch. 281; 88 L. T. 212; 51 W. R. 358; 19 T. L. R. 180; 47 Sol. Jo. 238, C. A.

76. —— —— —— **Infant beneficiary.**]—A will contained a clause which directed every person who should become entitled under the will to the lands thereby appointed as tenant for life, or in tail in possession, who should not then bear the surname & arms of E., should within six months after becoming so entitled assume the surname & arms, & apply for a royal licence for the purpose; & that in case such person should "refuse or neglect" to take such surname & arms, then at the end of the six months, if the person should be tenant in tail, the limitation to him should determine & the hereditaments should go over to other persons.

take the name & arms of testator, in default of which, or in case of his death before testator, there was a devise over to one D., through whom pltf. claimed. The evidence of facts necessary to show the effect of this devise not being clear, a new trial was granted.—NICHOLSON *v.* BURKHOLDER (1861), 21 U. C. R. 108.—**CAN.**

F., who was still an infant of eighteen years of age, had, in one view of the true construction of the will, become entitled to the estates as tenant in tail in possession more than six months previously. F., who did not bear the surname or arms of E., had not assumed them or taken any steps for the purpose :—*Held :* F. being an infant, could not be said to have refused or neglected to assume the surname or arms ; no distinction could be drawn for the purpose between an infant of tender years & another infant ; & if F. had become entitled in possession, he nevertheless had not forfeited the estates.—*Re* EDWARDS, LLOYD *v.* BOYES, [1910] 1 Ch. 541 ; 79 L. J. Ch. 281 ; 102 L. T. 308 ; 26 T. L. R. 308 ; 54 Sol. Jo. 325.

Annotation :—**Folld.** *Re* Quintin Dick, Cloncurry *v.* Fenton, [1926] Ch. 992.

77. —— No time limit given—Within reasonable time.]—DAVIES *v.* LOWNDES, No. 18, *ante*.

78. —— —— Clause void.] — Testator, by codicil, after appointing two persons trustees, as also their heirs & assigns, to his will & codicil, desired that his sister A. should do what she pleased with his remaining property after payment of certain legacies, excepting a tenement at W., & a sum of stock, of which she should only receive the interest & rent during her natural life, & afterwards to his sister's eldest son, on his taking the name of M. ; but should he refuse to take the name of M., or his sister A. depart this life without a son, then the tenement at W. & stock should go to P., on his taking the name of M., & so on to his heirs, each taking the name of M., none of them being allowed to touch the principal, & no one should, after his sister A., inherit the said property or enjoy the interest who did not take or possess the name of M. :—*Held :* the trustees took an estate in fee by virtue of their appointment, & A. was entitled to an estate for life in the tenement & stock, with a remainder in fee in the tenement, & an absolute interest in stock to the first born of A. vested on his birth & baptism by the name of M.

The ct. will not necessarily hold a condition as to name & arms a condition subsequent, although it inclines to hold it so.

On the supposition that the shifting clause is valid, it has been contended, on the part of defts., that, in point of fact, the condition has been performed, inasmuch as the eldest son was baptised M. On the other hand, it is contended that that is not a compliance with the condition, because testator intended that the name M. must be taken as a surname. Now I do not see that that is to be concluded from the language of the codicil. Testator has, in the latter part, spoken of " taking or possessing " the name of M. ; & there is no gift to any family or individual bearing the surname of M. Moreover, this being a shifting clause, it must be construed strictly ; & when testator speaks of taking the name of M., without saying as a surname, it appears to me that the ct. cannot import such a requisition, & that the person who has taken the name, whether as a Christian name or as a surname, has complied with the condition imposed by testator.

The effect on the whole of the view I have taken of the case, & which, I think, presents less difficulty than any other, is this, that testator has expressed the intention, with regard to the realty, to give an estate for life to A., with remainder in fee to her first born son, to vest immediately on his coming into *esse ;* & that he intended to create a shifting clause in the event of such eldest son not taking the name of M., but without prescribing any time within which he must perform the condition ; for which reason the clause is void, & that, even if not void, the condition has been fulfilled, & I see no reason for coming to a different conclusion as to the personalty (KINDERSLEY, V.-C.).—BENNETT *v.* BENNETT (1864), 2 Drew. & Sm. 266 ; 34 L. J. Ch. 34 ; 11 L. T. 362 ; 10 Jur. N. S. 1170 ; 13 W. R. 66 ; 62 E. R. 623.

Annotation :—**Refd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198.

79. Clause included in marriage settlement—Conditions imposed on husband.]—The ct. sanctioned the insertion of a clause making it compulsory on successive owners or their husbands to assume the name & arms of the ancestor from whom settlor derived the estates.—*Re* WILLIAMS (1860), 3 L. T. 76 ; 6 Jur. N. S. 1064 ; 8 W. R. 678.

80. Change of surname not stipulated—Christian name changed.]—BENNETT *v.* BENNETT, No. 78, *ante*.

(b) Other Cases.

See, generally, SETTLEMENTS ; WILLS.

81. Name of class or stock specified in will—Assumption of name by stranger—Before testator's death.]—Devise of a mansion house & lands to trustees upon trust until John Luscombe Manning should attain the age of twenty-one years, & then to him for life, he taking & using testator's surname of Luscombe instead of his own surname, with limitations over to his first & other sons in strict settlement, they severally taking & using testator's surname instead of their own. There were other limitations over to other persons. The will then contained a proviso, that when any of the premises thereby devised should vest in any person not bearing the surname of Luscombe, that person should, as soon as he should be in possession of the estate, take upon himself the name of Luscombe, & use the same as for & instead of his own surname, & should, within three years then next after, procure his own name to be altered to testator's surname of Luscombe by Act of Parliament, or some other effectual way for that purpose, & in case any of the persons to whom the estate was limited, & who should be in possession of the same, should not take & use testator's surname, but should neglect to get an Act of Parliament, or some other authority as effectual for that purpose as aforesaid, for the space of three years next after he should be in possession, then the estate devised for the benefit of such person so neglecting to get such Act of Parliament, or other authority, should cease, & become void, as if no such use or estate had been thereby devised ; & the same should immediately, upon the expiration of the three years, go over to & vest in the person next in remainder or reversion, in the same manner as if such person so neglecting to change his surname was dead without issue, upon this express condition, that such person so to take did & should also take testator's surname, & get an Act of Parliament, or some other authority as effectual for that purpose, otherwise the estate was to go over again. J. L. Manning, before he came of age, or entered into possession of the premises demised, took upon himself, used, & bore the surname of Luscombe & no other. But no Act of Parliament had ever been obtained authorising him to change his name, nor was the King's licence for that purpose obtained within three years after he so entered into possession :—*Held :* inasmuch as he bore the surname of Luscombe at the time when the estate came to him, he had substantially complied with the directions of testator, & he did not incur a forfeiture of that estate by not obtaining an Act of Parliament, or other authority, the proviso

Sect. 7.—Change of name: Sub-sect. 2, C. (b), D., E. & F.; sub-sect. 3. Part II.]

only applying to persons not bearing the surname of Luscombe at the time when the estate vested in them.

A name assumed by the voluntary act of a young man at his outset into life, adopted by all who know him, & by which he is constantly called, becomes, for all purposes that occur to my mind, as much & effectually his name as if he had obtained an Act of Parliament to confer it upon him (ABBOTT, C.J.).—DOE d. LUSCOMBE *v.* YATES (1822), 5 B. & Ald. 544 ; 1 Dow. & Ry. K. B. 187 ; 106 E. R. 1289.

Annotation :—**Refd.** R. *v.* St. Faith's, Newton (1823), 3 Dow. & Ry. K. B. 348.

82. —— —— **After testator's death.**]—A. gives a legacy of £1,000 to B. payable at the day of her marriage, in case she should marry any person of the surname of S. but if she should not, he gave the legacy to W. B. married a person who assumed the surname of S. but it was held that this was not a performance of the condition, so as to entitle B. & her husband to the legacy.—BARLOW *v.* BATEMAN (1735), 2 Bro. Parl. Cas. 272 ; 1 E. R. 939, H. L.

Annotations :—**Consd.** Wakefield *v.* Wakefield (1807), 1 Hag. Con. 394 ; Leigh *v.* Leigh (1808), 15 Ves. 92. **Refd.** Pyot *v.* Pyot (1749), 1 Ves. Sen. 335 ; *Re* Berens, *Re* Dowdeswell, Berens-Dowdeswell *v.* Holland-Martin, [1926] Ch. 596.

83. —— **Name changed on marriage.**]—Devise of real & personal estate in trust for the nearest relation "of the Pyots." The latter held to be "*nomen collectivum*" & descriptive of that particular stock, & that this mixed fund should not go to the heir-at-law of that name. A change of the name of Pyot, by marriage, held not to exclude.—PYOT *v.* PYOT (1749), 1 Ves. Sen. 335 ; Belt's Sup. 161 ; 27 E. R. 1066, L. C.

Annotations :—**Consd.** Leigh *v.* Leigh (1808), 15 Ves. 92. **Apld.** Carpenter *v.* Bott (1847), 15 Sim. 606. **Consd.** *Re* Roberts, Repington *v.* Roberts (1881), 45 L. T. 450. **Refd.** Doe d. Thwaites *v.* Over (1808), 1 Taunt. 263 ; Wright *v.* Atkyns (1815), Coop. G. 111 ; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126. **Mentd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1 ; Liley *v.* Hey (1842), 11 L. J. Ch. 415 ; Boys *v.* Bradley (1853), 10 Hare, 389 ; Brigg *v.* Brigg (1885), 54 L. J. Ch. 464.

84. —— ——.]—By deed an estate was settled, after several preceding estates tail, to the use of all & every the nearest of kin, in equal degree, to D., at the time of her decease without issue of the name of Brewer :—*Held :* a person, who at the time of D.'s death was her nearest of kin, born with the name of Brewer, but who was not her nearest of kin, & who had, previous to D.'s death, married & assumed her husband's name, was not entitled to take under this clause in the deed.—DOE d. WRIGHT *v.* PLUMPTRE (1820), 3 B. & Ald. 474 ; 106 E. R. 736.

Annotations :—**Refd.** Boys *v.* Bradley (1853), 4 De G. M. & G. 58. **Mentd.** Doe d. Blight *v.* Pett (1840), 11 Ad. & El. 842.

85. —— ——.]—Testator bequeathed a fund in trust for his next of kin of the surname of Crump who should be living at the decease of B. A lady whose maiden name was Crump, was testator's sole next of kin at B.'s death ; but she married after testator's death, & then took & ever afterwards bore her husband's surname, which was Carpenter :—*Held :* nevertheless she was entitled to the fund.—CARPENTER *v.* BOTT (1847), 15 Sim. 606 ; 16 L. J. Ch. 433 ; 9 L. T. O. S. 333 ; 11 Jur. 723 ; 60 E. R. 755.

86. —— **Name & blood—Name assumed by royal licence.**]—Devise to devisor's sister A., then unmarried, for life ; with remainders to her first & other sons in tail male ; to her daughters in tail, as tenants in common ; to his sister B. then married, for life, & to her first & other sons in tail ; remainder to the first & nearest of his kindred being male & of his name & blood, that shall be living at the determination of the estates before devised, & to the heirs of his body.

A person, claiming under the last limitation, must be of the name, as well as the blood ; & the qualification as to the name is not satisfied by having the name, taken by the King's licence, previous to the determination of the preceding estates.—LEIGH *v.* LEIGH (1808), 15 Ves. 92 : 33 E. R. 690, L. C.

Annotations :—**Consd.** *Re* Roberts, Repington *v.* Roberts (1881), 45 L. T. 450. **Refd.** Carpenter *v.* Bott (1847), 15 Sim. 606 ; Boys *v.* Bradley (1853), 4 De G. M. & G. 58. **Mentd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1 ; Brigg *v.* Brigg (1885), 54 L. J. Ch. 464.

D. Building Societies.

See Building Societies Act, 1874 (c. 42), s. 22 &, *generally*, BUILDING SOCIETIES, Vol. VII., pp. 454 *et seq.*

E. Companies.

See COMPANIES, Vol. IX., p. 71, Nos. 244–247.

F. Corporations.

See CORPORATIONS, Vol. XIII., pp. 280, 281, Nos. 116–125.

SUB-SECT. 3.—FORMALITIES.

87. Whether necessary—Royal licence.]—JONES-HERBERT CASE (1862), Parliamentary Debates Series 3, Vol. 167, Cols. 430–436.

88. —— ——.]—R. *v.* SMITH, No. 30, *ante.*

—— ——.]—*See, also*, Nos. 38–40, 43, *ante.*

89. —— **Royal sign manual.**]—DAVIES *v.* LOWNDES, No. 18, *ante.*

90. —— **Act of Parliament.**]—BARLOW *v.* BATEMAN, No. 16, *ante.*

Part II.—Arms.

91. Assumption of arms—Jurisdiction of Court of Chivalry.]—The Ct. of Chivalry takes cognisance of questions relating to the right to use armorial ensigns & bearings.—SCROOP *v.* GROSVENOR (1389), Calendar of Close Rolls, Richard II., Vol. III., p. 586.

92. —— Method of assumption.]—A name & arms clause contained a proviso that in case the devisee should "refuse or neglect within one year to take, use, & bear the surname" of A., or should at any time afterwards "discontinue to use & bear such surname or arms," then, & in every such case, immediately after the expiration of a year, or immediately after such discontinuance, the devise should determine & become void. The devisee assumed the surname, & also used his best endeavours to comply with the direction as to the arms, but failed to obtain a grant from the Heralds' College of the right to use the identical arms used by A.:—*Held:* (1) the estate of the devisee had not been divested by the failure to obtain a grant of the identical arms used by A.

(2) *Semble:* a name & arms clause requires a taking of arms by a proper grant from a proper authority, namely the College of Arms, & is not satisfied by a mere voluntary assumption of a coat of arms.—AUSTEN *v.* COLLINS (1886), 54 L. T. 903.

Annotations:—As to (2) **Reld.** *Re* Croxon, Croxon *v.* Ferrers (1904), 48 Sol. Jo. 191. *Generally,* **Mentd.** Russian Commercial & Industrial Bank *v.* British Bank for Foreign Trade, [1921] 2 A. C. 438.

93. —— ——.]—A person cannot "lawfully assume" a coat of arms by mere user, or otherwise than by obtaining a grant of the arms in one or other of the ways recognised by the custom & usages of society with regard to arms—viz., by an Act of Parliament, a grant from the College of Heralds, or a Royal Licence.

Testator directed that every person becoming entitled under his will to his settled real estates should in certain events "lawfully assume" a coat of arms used by testator, but being in fact the arms of a certain ancient family with which testator could not be proved to be connected, & in default should, in effect, forfeit his estate. Upon evidence being given as to the impossibility of obtaining a grant of the arms from the Heralds' College to pltf., who was devisee of the settled estates:—*Held:* the direction in the will was void as a condition subsequent which was impossible of performance, & pltf.'s estate was not forfeited.—*Re* CROXON, CROXON *v.* FERRERS, [1904] 1 Ch. 252; 73 L. J. Ch. 170; 89 L. T. 733; 52 W. R. 343; 48 Sol. Jo. 191.

94. —— ——.]—Pltf., George Berens, in 1915 became tenant for life in possession of Pull Court under the will of W. Dowdeswell, which declared that unless within twelve months pltf. assumed & used under the sanction of an Act of Parliament or licence from the Crown the surname & arms of Dowdeswell his estate should cease & the subsequent limitations be accelerated. The arms which testator in fact used belonged to another family of the name of Dowdeswell. Pltf. obtained by patent a grant of the right to use the name of Dowdeswell after his own name of Berens & to bear the Dowdeswell arms with certain variations.

In 1924 pltf. became tenant for life in possession of the S. estate under the will of H. Berens, which provided that every person so becoming entitled who should not bear the surname & arms of Berens must within a stated period "bear & use exclusively the surname & arms of Berens," on the non-performance of which condition the will provided for the defeasance of the estate.

By the Berens arms testator meant a coat of arms used by his family for many years, but never granted or confirmed or recorded in the College of Arms, matriculated in the Lyon Register in Scotland, or confirmed in the Register of Arms in Ireland:—*Held:* (1) pltf. did not bear the surname of Berens but the composite name of Berens-Dowdeswell; (2) the obligation to assume the Berens arms would not be satisfied by a mere *de facto* user, but only by the authority of a royal licence through the College, & pltf., not having proved that he could not obtain a licence, was bound by the clause in the Berens will; (3) as regards the Dowdeswell will, as the College would refuse to grant the Dowdeswell arms, as having already been allowed to others, the Ct. would assume that Parliament would not authorise their assumption in violation of the rights of third parties & of the laws of arms; & therefore the condition requiring pltf. to assume those arms under the sanction of an Act or licence from the Crown was impossible & not binding.

The argument is that in so far as the name & arms clause requires him to bear the surname of Berens he bears it, & in so far as it requires him to assume & bear the Berens arms it requires an impossibility. As regards the first point, in my opinion he does not bear the surname of Berens. His surname is Berens-Dowdeswell; one composite name of which no doubt the word Berens forms part; but the surname which he bears is not Berens; it is Berens-Dowdeswell, & nothing else. The point is not susceptible of lengthy argument: but certain authorities were cited, none of which appear to me to be of real assistance in the matter. They seem to show that in the absence of special words, you will not comply with a requirement to take & use a particular surname by placing the required name in front of your existing surname, though special words in the clause may authorise this being done (RUSSELL, J.).—*Re* BERENS, *Re* DOWDESWELL, BERENS-DOWDESWELL *v.* HOLLAND-MARTIN, [1926] Ch. 596; 95 L. J. Ch. 370; 135 L. T. 298; 42 T. L. R. 267, 314; 70 Sol. Jo. 405.

95. Name & arms clause—Failure to comply—Grant of arms refused.]—AUSTEN *v.* COLLINS, No. 92, *ante.*

96. —— —— ——.]—JOICEY-CECIL *v.* JOICEY CECIL (1898), *Times*, June 11.

Annotation:—**Reld.** *Re* Croxon, Croxon *v.* Ferrers, [1904] 1 Ch. 252.

97. —— —— ——.]—*Re* CROXON, CROXON *v.* FERRERS, No. 93, *ante.*

PART II.

b. Name & arms clause—Failure to comply—Beneficiary applying for grant of arms after attaining twenty-one.]—BEVAN *v.* MAHON-HAGAN (1893), 31 L. R. Ir. 342.—**IR.**

e. Grant of arms—Challenge—Scottish heraldry.]—STEWART-MACKENZIE *v.* FRASER-MACKENZIE, [1922] S. C. 39, H. L.—**SCOT.**

98. —— —— ——.]—*Re* BERENS, *Re* DOWDESWELL, BERENS-DOWDESWELL *v.* HOLLAND-MARTIN, No. 94, *ante*.

99. Property in deed of grant of arms.]—A. obtained from the Heralds' College a grant of arms, to be borne by him & his descendants & the descendants of his brother. He died without issue, leaving two nephews, the sons of his brother: —*Held:* the nephews had not such an exclusive interest in the exemplification or instrument issued to A. by the College as to entitle them to maintain an action of detinue against his widow, who retained possession of it & to whom all the household effects were bequeathed.—STUBS *v.* STUBS (1862), 1 H. & C. 257; 31 L. J. Ex. 510; 158 E. R. 881.

Annotation:—**Mentd.** Hannay *v.* Smurthwaite, [1893] 2 Q. B. 412.

100. What may constitute arms.]—The impression of a thistle on a common pencil case, with the motto "dinna forget," are chargeable as armorial bearings when used.—ASSESSED TAXES CASE No. 1481 (1841), 7 J. P. 403.

Licence for armorial bearings.]—*See* REVENUE.

See, also, PEERAGES & DIGNITIES.

NATIONAL DEBT.

See REVENUE.

NATIONAL GALLERY.

See LITERARY AND SCIENTIFIC INSTITUTIONS.

NATIONAL INSURANCE.

See WORK AND LABOUR.

NATIONALITY.

See ALIENS; CONFLICT OF LAWS; CONSTITUTIONAL LAW.

NATURAL ALLEGIANCE.

See CONSTITUTIONAL LAW.

NATURALISATION AND DENISATION.

See ALIENS.

NAVAL COURTS-MARTIAL.

See ROYAL FORCES.

NAVIGABLE WATERS.

See SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

NAVIGATION.

See SHIPPING AND NAVIGATION.

NAVY.

See ROYAL FORCES.

NECESSARIES.

See ADMIRALTY; HUSBAND AND WIFE; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND; SHIPPING AND NAVIGATION.

NE EXEAT REGNO.

See EQUITY; PRACTICE AND PROCEDURE.

END OF VOL. XXXV.

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